Comments

PRIVATE MORALITY AND THE RIGHT TO BE FREE: THE THRUST OF *STANLEY v. GEORGIA*

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The propriety of governmental regulation of private morality is a complex and emotional issue, often discussed but seldom adjudicated. Treatment of the constitutional questions presented by such regulation has been facilitated by *Stanley v. Georgia*[1] in which the United States Supreme Court delineated some limitations on state regulatory power when it intrudes into the area of individual freedoms in matters of personal morality. The Court has at least in part answered the plaintive cry of commentators who, in their pursuit of identifiable constitutional standards, have demanded that the Court clarify the legal basis and scope of the state's power to regulate the private and personal lives of its citizenry.[2] The purpose of this comment will be to examine this answer and its probable ramifications in the context of the jurisprudential debate which preceded it.

STANLEY V. GEORGIA: A TALE OF TWO FREEDOMS

Armed with a warrant to search for bookmaking paraphernalia, federal and state officers entered the Atlanta, Georgia, home of Robert E. Stanley. Although failing to uncover the expected evidence of illegal wagering activities, the officers found three reels of 8-millimeter film which they proceeded to view on Stanley's home movie projector. After viewing the films for approximately 50 minutes the officers concluded that the movies were obscene. Stanley was arrested, charged, and subsequently convicted of violating a Georgia statute which made criminal the knowing possession of obscene materials.[3] The conviction was affirmed by the Georgia Supreme Court,[4] but on appeal, the United States Supreme Court reversed. "The First and Fourteenth Amendments," wrote Mr. Justice Marshall, "prohibit making mere private possession of obsecene material a crime."[5]

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1 394 U.S. 557 (1969).

2 *See, e.g.*, Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 414 (1963).

3 Ch. 26, § 6301, [1963] Ga. Laws 78-79 (repealed 1968).

4 Stanley v. State, 224 Ga. 259, 161 S.E.2d 309 (1968).

5 394 U.S. at 568. Mr. Justice Stewart, joined by Justices Brennan and White, concurred on the basis that the seizure of the films was without the authority of the warrant. *Id.* at 569.

The Court commenced its discussion by distinguishing prior decisions which intimated that obscenity was entirely without the scope of protection offered by the first amendment.[6] Therefore, reasoned the Court, this notion arising from dictum in the context of cases involving sale or distribution or possession with intent to sell or distribute would not control the disposition of this case. Rather, the question presented was whether the amorphous social interest in order and morality that has heretofore allowed governmental suppression of public obscenity[7] would also permit the legitimization of governmental regulation of mere private possession of such materials. To effect this determination the Court embarked upon an examination of individual rights as a source of constitutional restrictions upon the power of the government.

The Court was concerned with protection of two related principles of individual freedom. First, Justice Marshall indicated that the regulation in question may have constituted an abuse of Stanley's right to receive information.[8] This right to receive, couched in traditional first amendment terms, was said to be "now well established."[9] There can be little doubt that the case could have turned on this issue alone. The Court could have held that despite obscenity's lack of constitutional protection in "pandering" circumstances,[10] the right to receive information and ideas dictated that any attempt to regulate an individual's private possession be proscribed. Instead, Justice Marshall continued to define another "fundamental right" protected by the constitution—the right to be free, except in limited circumstances, from unwarranted governmental intrusions into one's privacy.[11]

Speaking for the Court, Mr. Justice Marshall adopted the words of Justice Brandeis in his now-famous dissent in *Olmstead v. United States*:[12]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.[13]

Stanley, the Court reasoned, was asserting not only the right, based on the first amendment, to receive information and ideas but also what the Court

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6 *See* Roth v. United States, 354 U.S. 476 (1957).
7 *Id.* at 485.
8 394 U.S. at 564.
9 *Id.*
10 *See* Ginzburg v. United States, 383 U.S. 463 (1966).
11 394 U.S. at 564.
12 277 U.S. 438 (1928).
13 394 U.S. at 564, *quoting* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

deemed an equally fundamental right, "the right to satisfy his intellectual and emotional needs in the privacy of his own home," free from governmental meddling in this essentially private affair.[14]

Thus arming the individual with both a freedom to consume information and ideas, and the right to be free from governmental intrusions while doing so, Justice Marshall proceeded to measure these rights against the societal interest the State of Georgia had contended would justify its interference with these rights. Weighing these conflicting interests, the Court did not find that Georgia's arguments were untenable, but rather that they were insufficient.[15] Significantly, the Court did not rule out the possibility that the reading of obscene materials could lead to performance of antisocial acts.[16] Rather it found that such a possibility was not sufficient to legitimatize Georgia's interference with Stanley's private behavior. Concerning itself with the broader problem of defining the legitimate methods by which a government in a free society may regulate its citizens' conduct, the Court indicated that standing alone, the goal of avoiding the possibility of acts harmful to society could not be reached by such an invasion of individual freedoms. Absent a much clearer and positive[17] demonstration of a causal connection between the private behavior and a social harm, there simply was no power to regulate the behavior.[18] The Court took the view that the proper methods to be utilized by the state to control feared misconduct of its citizens were education and punishment, *i.e.*, societal instructions with the goal of crime prevention, and negative sanctions on one who actually commits an act injurious to society.

This articulation of freedoms and restrictions may have immense ramifications on that body of law through which the state seeks to regulate private morality. The decision places in doubt the state's power to prohibit any individual act occurring within the privacy of one's own home in pursuit of one's intellectual and emotional needs and representing no perceivable societal injury. This conclusion would be inescapable were it not for Justice Marshall's inclusion of restricting dicta in a footnote:

> What we have said in no way infringes upon the power of the state or Federal Government to make possession of other items, such as narcotics, firearms or stolen goods, a crime. Our

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14 394 U.S. at 565.

15 *Id.*

16 A finding that such a causal relationship does not exist would be consistent with the direction of current information from the behaviorial sciences. *See, e.g.*, Falk, *The Roth Decision in the Light of Sociological Knowledge*, 54 A.B.A.J. 288 (1968).

17 The Court itself made reference to the *clear and present danger* standard. 394 U.S. at 567.

18 Georgia's contention that allowing possession of obscene materials would hamper enforcement of anti-distribution laws was rejected, as was the argument that the state had the power to protect its citizens from the "mind poisoning" effect of pornography. "We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment." 394 U.S. at 565-66.

> holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.[19]

However, considering the constitutional doctrine enunciated in the text plus the overall thrust of the opinion, civil libertarians need not despair. The footnote states that the case turns on violations of the first and fourteenth amendments; but the opinion goes beyond a disposition of the case merely on traditional first amendment grounds. Instead, the Court defines a more broadly based constitutional standard of privacy which gives rise to limitations of the scope of governmental power to proscribe private behavior. Evidence that the right to privacy is based on more than first amendment freedoms alone, is found not only in Justice Marshall's reference to the right as "also fundamental," but in the context of its original definition by Justice Brandeis in *Olmstead.* In that dissent the freedom was grounded on a broad interpretation of the fourth and fifth amendments.[20] The *Stanley* Court also relied on *Griswold v. Connecticut*[21] where the constitutional right to privacy was characterized as a guarantee formed by the "penumbras" of the first, third, fourth, and fifth amendments. Private acts of immorality, having to do with possession of noncommunicative materials may thus be without the scope of the first amendment protection; however, there would appear to be nothing in footnote 11 to prevent application of the other delineated right to analogous situations involving private acts of unconventional morality.

It is therefore necessary to investigate the meaning of *Stanley* in relation to the spectrum of governmental control of private behavior. At the outset, however, it will aid understanding if the *Stanley* doctrine is restated in terms synthesizing the above stated concepts of individual privacy and limited governmental power.

The right to privacy—the right to be free announced in *Stanley*—prohibits certain governmental methods of regulating its citizens' conduct. The people, in private acts not inimical to society's legitimate interests, have a right to be let alone. Therefore the state must refrain from intrusion into the realm of the personal affair, even though society in general may regard the activity as immoral (*e.g.*, watching obscene movies). This prohibition on the state is grounded not only in traditional notions of privacy, but also in terms of the very nature of constitutional government as well. "*[A]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .*"[22] Thus, absent recognizable societal harm, the individual

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[19] *Id.* at 568 n.11.
[20] 277 U.S. 438, 478, 479 (1928) (Brandeis, J., dissenting).
[21] 381 U.S. 479 (1965).
[22] 394 U.S. at 566-67 (emphasis added), *quoting* Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).

must be left free to develop his own identity, utilizing his own judgment in the selection of his own sensual experiences. Or put another way, this combination of prohibitions on the state, based on individual privacy and limited constitutional government, leaves the citizen free to expose himself to whatever stimulus in the environment he may find attractive. Of course, such freedom is not absolute, and the *Stanley* decision provides an indication of the kind of justification the government must show to infringe upon this individual right to develop the life-style of one's own choosing.

The quantum and quality of such justification becomes more apparent when it is noted that the *Stanley* Court prohibited the State of Georgia from proscribing the particular input of pornographic stimuli even though the Court did not reject the state's theory that use of obscenity may have some detrimental effects on society in general.[23] It seems reasonable, therefore, to conclude that in the area of governmental regulation of private morality, the doctrines of privacy and a government limited in its power to control private behaviors demand that state action in this area be justified by more than a commonly accepted hypothesis or theory. Rather, the decision seems to be calling for a demonstration by the state of a perceivable, direct, and substantial societal harm that is a function of the target behavior. Absent such a showing, the right to be free should override any state attempt to regulate the private acts of its citizenry.

However, such a requirement on the state has not always been thought necessary and the proper basis for regulation of private acts deemed immoral by the societal norm has been the subject of ancient and modern controversy. In an attempt to understand the impact of *Stanley* upon the various viewpoints expressed in this debate, a brief overview of the controversy itself is in order.

THE SUPREME COURT TAKES SIDES IN AN ANCIENT DEBATE

Asserting that societal self-protection was the only valid principle upon which mankind may base regulation of an individual's "liberty of action," John Stuart Mill stated:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns

[23] 394 U.S. at 566.

> himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[24]

Philosophers, commentators, and courts have disagreed. The opposing view argues that society is justified in invading the sovereignty of the individual to compel personal behavior to accord with society's idea of how its citizens ought to act. Note that, like Mill, those who would force the majority's standards upon the minority, also presuppose a necessity to justify the state's exercise of such power.[25] Yet despite their mutual notion that the regulation be justified by societal interest, examination of the substance of the justifications suggested by commentators and courts in the area of personal morality reveals that tenuous rationales often have been readily accepted.

Justifications for allowing the government to regulate individual "morality" can be divided into two general categories. Such regulation is either (1) good for the individual, hence good for the state, or (2) necessary to protect the state. The first viewpoint is advocated by Charles Rice, in *The Vanishing Right to Live*,[26] to be an overriding consideration that would validate such governmental regulation. The state, argues Rice, should compel each individual to be accountable for his actions in the sense that one should pay the natural price for engaging in self-indulgence. Thus, voluntary sterilization should be illegal as the subject is "condemned . . . to a life of irresponsible sexual adolescence and . . . has deprived that very act of its intrinsic meaning."[27] Like "unrestrained contraception," voluntary sterilization "involves an assumption of sexual

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[24] J. MILL, ON LIBERTY 17-18 (The Walter Scott Publishing Co. 1901).

[25] Such an assumption is perhaps in recognition that "[use of coercion is] *prima facie* objectionable to be tolerated only for the sake of some countervailing good." H.L.A. HART, LAW LIBERTY AND MORALITY 20 (1963).

Note that declaring a statute unconstitutional as a deprivation of individual liberty not justified by establishing a clear indication of societal harm that the law is reasonably calculated to prevent, is highly reminiscent of old substantive due process methods. *See* Lochner v. New York, 198 U.S. 45 (1905), *overruled*, Bunting v. Oregon, 243 U.S. 426 (1917); Muller v. Oregon, 208 U.S. 412 (1908), and Adkins v. Children's Hospital, 261 U.S. 525 (1923), *overruled*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937). More recently, *see* Sniadach v. Family Finance Corp., 395 U.S. 337, 345 (1969), where Justice Black accuses the majority of stepping "back into the due process philosophy which brought on President Roosevelt's Court fight." *But see* Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

Perhaps *Stanley* represents the old formula with more emphasis on defining the societal harm than upon passing on the governmental action's efficacy in diminishing that social ill. The latter function was the determinative factor in the older cases.

[26] C. RICE, THE VANISHING RIGHT TO LIVE (1969). The so-called right to life formulated by Professor Rice is a natural law concept that specifies certain moral postures to be imposed on all citizens to guarantee a reverence for life itself. As shall be discussed, Rice uses the word "life" with a restricted meaning, so that the right to life is used to justify capital punishment while suppressing sex acts practiced without intention of procreation. Professor Rice's "right to life" is, then, not so much a *right*, but rather a *duty*—a duty to live life in accordance with historical norms of moral behavior.

While the work does not direct itself to the explicit problems of justifying governmental actions in the areas under discussion, it is useful to understand this point of view.

[27] *Id.* at 10.

rights without accepting at least the possibility of attendant responsibilities of parenthood."[28] Rice relates the presence of unchecked personal immorality to a "right to life" in this manner: personal irresponsibility has a negative effect on life in that it encompasses such "anti-life" acts as suicide, abortion, and euthanasia. Sterilization, contraception, homosexuality, and artificial insemination are likewise anti-life in that they are offensive to the "origins of life."[29]

While Rice speaks of the "survival of an orderly, free society" being conditioned on "a reversal of the manifold trend toward personal irresponsibility,"[30] his argument is not so much an emphasis grounded in society's own self-interest as it is based on the necessity of structuring the environment to produce a certain type of individual. It is a religiously oriented approach that assumes that it is the "natural law" that immoral acts should have negative consequences. The state shall insure that those who sin shall, indeed, repent or be punished. Thus, the majority's notions or morality and retribution are codified and enforced by the state.

It is paradoxical that the Rice type of justification, which is perhaps the real basis for most morality legislation, is the least likely to be accepted as a legitimate state consideration. A rejection of the validity of such a justification is evident in the recent adjudication of the constitutionality of motorcycle helmet statutes. These statutes—requiring the wearing of a protective helmet by motorcyclists—have been attacked as unconstitutional infringements on individual rights. What is relevant to this inquiry is that the crucial determination made in these cases was whether or not the state could demonstrate "a relationship to the public health, safety and welfare [that would validate the] statute."[31] A New York decision upheld the statute on the grounds that a motorcyclist with an unprotected head, if hit in the skull by a rock or hard-shelled beetle, could lose control of his vehicle and create a hazard for other motorists.[32] On the other hand the Court of Appeals of Michigan reasoned that a similar statute "has a relationship to the protection of the individual motorcyclist from himself, but not to the public health, safety and welfare."[33] The law was therefore an unjustified exercise of state power infringing upon the individual's right not to have his repertoire of potential behaviors restricted without the requisite demonstration of potential harm to others. Where

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[28] *Id.* at 9.
[29] *Id.* at 14.
[30] *Id.* at 6.
[31] American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968).
[32] People v. Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290 (1967). In People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797 (1967), the court was not willing to positively delineate the limits of a state's power, but did find "a real danger to other citizens when a motorcyclist fails to use protective helmet." *Id.* at 469, 282 N.Y.S.2d at 800.
[33] American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968).

the statutes have been considered, no court has presumed to uphold them on the mere showing that they were beneficial for the individuals forced to comply with their provisions.[34] Thus, as strongly as it may be insisted that the laws of the secular state must reflect the virtues of responsibility for one's own acts the nature of limited government prevents such legislation. "*Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.*"[35]

Finally, it is doubtful that the Rice approach would pass constitutional muster after *Stanley*. As has been seen, to regulate the private moral lives of citizens, justification must have its emphasis on societal harm, rather than be aimed merely at producing better citizens.[36] Indeed, in calling for substantial justification, *Stanley* seems to point out the illegitimacy of laws regulating private behavior to produce conformity with traditional religious notions of personal morality. An observation made by Justice Connor of the Supreme Court of Alaska is in accordance with this crystalization of the role of the state and the proper foundation of its laws:

> If natural law is merely a camouflage for some imprecise notion of religious law or moral law derived from religion, then we ought to abstain from uncritically importing religious beliefs into a secular legal system which is to apply to all classes of society.[37]

The second category—regulation in prevention of some societal harm—remains viable after *Stanley*. The determination to be made is what type of societal harm is required to justify intrusion into the rights litigated in *Stanley*?

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[34] The following cases upheld helmet statutes on the justifications indicated: Everhardt v. City of New Orleans, 253 La. 285, 217 So. 2d 400 (1968) (prevention of injured motorcyclist from becoming public charge and protection of other motorists from hazard created by cyclist injured by flying debris or insects); Commonwealth v. Howie, 68 Mass. A.S. 937, 238 N.E.2d 373 (1967), *cert. denied*, 393 U.S. 999 (1968) (citing the public interests listed in *State v. Lombardi, infra*); State v. Krammes, 105 N.J. Super. 345, 252 A.2d 223 (1969) (protection of other motorists); State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (1968) (protection of other motorists); People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (1968) (state interest in healthy citizens, "capable of self-support, of bearing arms, and of adding to the resources of the country." 288 N.Y.S.2d at 935); State v. Anderson, 3 N.C. App. 124, 164 S.E.2d 48 (1968) (high death toll as public disaster, protection of other motorists, and reduction of liability insurance premiums), *aff'd*, 275 N.C. 168, 166 S.E.2d 49 (1969) (protection of other motorists); State v. Odegaard, 165 N.W.2d 677 (N.D. 1969) (protection of other motorists); State v. Craig, 19 Ohio App. 2d 29, 249 N.E.2d 75 (1969) (protection of other motorists, and avoidance of public charge); State v. Lombardi, 241 A.2d 625 (R.I. 1968) (protection of other motorists and avoidance of public charge); *Ex parte* Smith, 441 S.W.2d 544 (Tex. Crim. App. 1969) (high death toll as public disaster); Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377 (1969) (protection of other motorists).

[35] Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (emphasis added). *See also* Shapiro v. Thompson, 394 U.S. 618, 634 (1969); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[36] *See* note 18 *supra* and accompanying text.

[37] Harris v. State, 457 P.2d 638, 645 (Alas. 1969).

Does society have a right to protect itself from being wronged by private acts of immorality performed by adult members of that society? The key issue in this question is what is the nature of the harm? The Supreme Court itself has failed in previous attempts to set forth clearly the nature of the social interest which may be of legitimate concern to the state: "[the state may be concerned with] social interest in order and morality."[38] Such a general expression of course is inadequate in light of the type of state justification required by *Stanley*.

A more sophisticated rationale is offered by Lord Devlin[39] in his reaction to the recommendation of the *Wolfenden Report* that criminal laws aimed at adult homosexual behavior be repealed.[40] Basically, Devlin's argument is that the society has a right to preserve itself. Private immorality exists as a threat to the common morality that binds the society together, and therefore may be suppressed.

> [T]he Law must protect . . . the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.[41]

Devlin's position is seemingly qualified and refined so that in practice the majority would not be allowed complete freedom to run roughshod over the private behavior of an immoral minority.[42] The society has a right to prohibit private acts where careful investigation coupled with public disgust would give rise to a conclusion that society cannot endure and yet continue to tolerate the immoral behavior in question. Stated in the abstract Devlin's formula might reasonably protect individual rights. As this formula is applied by Devlin, in his attempt to justify state regulation of moral aberrations, it becomes apparent that "careful investigation" is no more than the majority's allegation that the society's existence is predicated upon its citizenry's adherence to certain moral standards. Such a criticism was expressed by H.L.A. Hart in his reply to Devlin's arguments.[43] The assumption that private immorality threatens the existing society is attacked as not supported by any facts or data. Indeed,

> no evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it. As a proposition of fact it is entitled to no

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38 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
39 P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).
40 GR. BRIT. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION ¶ 62, at 48. (American ed. 1963) [hereinafter cited as WOLFENDEN REPORT].
41 P. DEVLIN, *supra* note 39, at 22.
42 See the explanatory restatement of the Devlin theory in Rostow, *The Enforcement of Morals*, 1960 CAMBRIDGE L.J. 174.
43 H.L.A. HART, LAW LIBERTY AND MORALITY (1963).

more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes.[44]

If there is merit to the conclusions previously drawn relating to the nature of the state interest that *Stanley* requires to be demonstrated in order to justify the invasion of the individual right to unregulated stimulus input, Devlin's hypothesis would fail to legitimatize such state action. The Court itself noted that "the present state of knowledge"[45] was not sufficient to prove the state's theory that use of obscenity would lead to sex crimes. It is logical to conclude that Devlin's theory, similarly unsupported, should be an unacceptable consideration in any attempt to weigh state interest against the rights of the individual.

That Devlin's argument fails when measured by the standards extrapolated from *Stanley* is a manifestation of the underlying assumption the Court seems to have made about the nature of government. The Devlin argument is grounded in the unidentifiable and imprecise impact each individual has on the whole. Of course what a person is and does has an effect upon society, because society is composed of people. The danger in this observation is that the majority can proceed to make the extension that for the good of the whole they must dictate what life style the individual may choose. *Stanley*, in calling for substantial justification for any such stimulus input regulation, suggests that a logical division can be drawn between issues of individual morality that affect the public sphere (*e.g.*, public nudity) and private acts whose deleterious effect is, at best, theoretical. A balance is reached as that behavior having a perceivable impact on society is regulated but outside those parapets the individual is free to chart his own course.

Against this background—the continuum from the rights of expression and privacy articulated in *Stanley* to society's interest in self preservation and normative morality—it becomes relevant to consider the various areas of governmental regulation of private morality for the purpose of determining whether these bodies of law can fit within the theory of restricted government, or whether, despite rationalizations to the contrary, the puritan ethic prevails as an orderly influence in American law.

THE IMPACT OF STANLEY ON OBSCENITY REGULATION

At first blush the *Stanley* decision is not difficult to reconcile with the existing case law in the area of obscenity. The Court itself distinguishes the *Stanley* circumstances from those of previous obscenity decisions by focusing on the intent of the possessor: "[t]hose cases dealt with the power of the State and Federal Government to prohibit or regulate certain *public actions* taken or intended to be taken with respect to obscene

[44] *Id.* at 50. A similar criticism is made in Ison, *The Enforcement of Morals*, 3 U.B.C.L. REV. 263, 266 (1967).
[45] 394 U.S. at 567.

matter."[46] The notion that the *Roth* line of obscenity cases was actually grounded in the right of the Government to suppress the public distribution of obscenity is given support in *Ginzburg v. United States.*[47] Disregarding the question of whether the materials would have been obscene in another context, the Court concerned itself with the lurid nature of the materials when coupled with the defendant's methods of public advertising.

> [T]here was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'[48]

The *Stanley* Court avoids the old saw that "obscenity is not within the area of constitutionally protected speech or press"[49] when it proclaims that the right to private possession and use of obscene material is not defeated by their lack of social worth. It is reasonable, therefore, to conclude that in *Stanley* the protection of the obscene input attached as a function of the private circumstances in which it was possessed.[50] Moreover, after *Stanley*, the conclusion follows that while the state may not legislate against private possession of obscenity without requiring an intent to distribute, the government may suppress public distribution of pornography, especially when coupled with pandering techniques. Incidentally, such a division is in conformity with the *Model Penal Code*,[51] and at least one pre-*Stanley* commentator is also comfortable with the *public/private* dichotomy.[52]

One need not dwell on this thesis, however, to recognize its inherent and fatal inconsistency. Obviously, it is futile to protect a person's right to receive certain information if the furnishing of that information is

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[46] *Id.* at 561.

[47] 383 U. S. 463 (1966).

[48] *Id.* at 467, *quoting in part*, Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring).

[49] Roth v. United States, 354 U.S. 476, 485 (1957).

[50] The *Stanley* Court stated that the constitutionality of prohibition of pornography in private circumstances had never "been fully considered," 394 U.S. at 562. Although the issue was presented in Mapp v. Ohio, 367 U.S. 643 (1961), that case, of course, was decided on fourth amendment grounds.

The constitutionality of private obscenity possession was considered by the Supreme Court of California in 1966, although this case was not cited by the *Stanley* Court. In *In re* Klor, 64 Cal. 2d 818, 415 P.2d 791, 51 Cal. Rptr. 903 (1966), the court reversed a conviction under a California obscenity statute where the jury was allowed to find the defendant quilty even if obscene materials were solely for his own use. The court said that, based on *Griswold*, a statute that made such use criminal would "approach an interdiction of individual expression in violation of the First and Fourteenth Amendments." Indeed, "[n]o constitutionally punishable conduct appears in the case of an individual who prepares material for his own use or for such personal satisfaction as its creation affords him." *Id.* at 821, 415 P.2d at 794, 51 Cal. Rptr. at 906.

[51] MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1957).

[52] Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

illegal.[53] More importantly, analysis reveals that the major portion of public obscenity regulation is, in fact, grounded in the same concerns that were rejected as inadequate justification for the Georgia statute.

To understand the basis for regulation, it is first necessary to examine what specifically is being regulated. The *Roth*[54] test is aimed at suppressing material that (a) the dominant theme of which is an appeal to the prurient interest in sex; (b) is patently offensive to "contemporary community standards"; and (c) is "utterly without redeeming social value."[55] Thus, according to pre-*Stanley* decisions, the government may validly regulate stimulus input by public dissemination if that input is directed to the exploitation of "the widespread weakness for titillation by pornography."[56] In the absence of explanation by the Court to the contrary,[57] one is tempted to accept the conclusion drawn by Erwin A. Elias[58] that the target of the test is material which will sexually arouse its observer. In that case the state interest would be suppression of sexual excitement. Elias poses the natural inquiry, "one must ask what interest the state has in preventing its citizens from being sexually aroused?"[59]

The *Stanley* Court meets this inquiry in a negative sense by first defining, and then rejecting, what it clearly believes is *not* legitimate state activity. The definition is provided by a quotation from Louis Henkin's *Morals and the Constitution: The Sin of Obscenity*.[60]

> Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the

[53] Two recent cases have read *Stanley* to require that this right be protected. A Texas obscenity statute was declared unconstitutional by a three-judge federal district court in Stein v. Batchelor, 300 F. Supp. 602 (N.D. Texas 1969). Judge Hughes, writing for the court, stated that *Stanley* has significantly modified the *Roth* dictum so that in non-public circumstances obscenity is protected by the first amendment. "Of course, the First Amendment does not confer absolute immunity from regulation. The state may regulate even non-obscene expression if there is a legitimate state interest." *Id.* at 606.

In United States v. Thirty-Seven Photographs, 6 CRIM. L. RPTR. 2343 (C.D. Cal. Jan. 27, 1970) a three-judge federal district court enjoined the enforcement of 19 U.S.C. § 1305 (1964) as it authorized federal agents to seize obscene materials upon their importation into this country. The court held, *inter alia*, that under the "narrowest construction of *Stanley*" the statute would have to fall since banning the importation of pornography effectively denies the adult citizen his right to obtain such materials for private use.

[54] Roth v. United States, 354 U.S. 476 (1957).

[55] This is a restatement of the *Roth* test as stated in Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966).

[56] Ginzburg v. United States, 383 U.S. 463, 471 (1966) (quoting Schwartz, *supra* note 52, at 677).

[57] *See* note 38 *supra* and accompanying text.

[58] Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302 (1967).

[59] *Id.* at 313.

[60] 63 COLUM. L. REV. 391 (1963).

> salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin.[61]

Thus is identified the principle upon which the majority of the society bases its desire to suppress obscenity—it is vulgar and its use is immoral. This popular opinion is consistent with the constitutional tests designed to identify moral rot. But it is also clear that *Stanley* prevents regulation of input, be it rot or righteous, without definable societal harm. If an obscenity law is based on the majority's ambition to prevent private immorality then absent some showing of societal harm, such a law cannot be consistent with the precepts of *Stanley* and is unconstitutional.

This conclusion is made clear by reference to the *Model Penal Code* section on possession of obscenity. Investigation reveals that the Code tried to avoid the infirmity of grounding the provision on private sin concepts, and why, in certain aspects, it failed. Section 207.10(1)[62] makes public dissemination of obscenity a misdemeanor. Its test of obscenity is "defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression. . . ."[63] Because "criminal law is not, and cannot be, a code defining right behavior,"[64] the purpose of the anti-distribution law is framed in terms of protection—the Code is going to protect one segment of society (consumers) from another (smut peddlers).

> '[A]ppeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters. Psychiatrists and anthropologists see the ordinary person in our society as caught between normal sex drives and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behavior. *The principal objective of Section 207.10 is to prevent commercial exploitation of this psychosexual tension.*[65] (emphasis added)

The associate reporter, Louis B. Schultz, notes that the *Model Penal Code* disapproved not the *sin* of obscenity, but *use* of obscenity in economic activities.[66] The unfortunate individual, trapped with his tension, is protected from "exploitation" by those who would prey on his infirmity. In *Stanley* terms, this impediment of free stimulus flow is justified by the necessity to protect the citizen from having his "psychosexual tension" exploited. It is suggested that such a theory is but a mere camouflage for

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[61] *Id.* at 395. Noting that community regulation of obscenity is often based on "'quasi-religious' views," rather then valid social purposes, Professor Ratner proposes that any actual harm to society caused by the availability of pornography be confirmed, and that narrow obscenity legislation should be based on this knowledge so that regulation "less intrusive" into "thought-privacy" be realized. Ratner, *The Social Importance of Prurient Interest—Obscenity Regulation v. Thought-Privacy*, 42 S. CAL. L. REV. 587 (1969).

[62] MODEL PENAL CODE § 207.10(1) (Tent. Draft No. 6, 1957).

[63] *Id.*, Comment 2, at 10.

[64] *Id.*, Comment 1, at 8.

[65] *Id.*, Comment 2, at 10.

[66] Schwartz, *supra* note 53, at 677.

the familiar underlying purpose we have discussed—the promotion of the puritan-ethic. Furthermore, despite the argument made in the *Model Penal Code* comment, the provision is really aimed not at the seller, but at the consumer.

The goal of this provision is to prevent, whether framed in terms of "psychosexual tension" or sensual stimulation, individual use of material to satsify one's own prurient curiosity; *i.e.*, to prevent the individual act of receiving and using erotic materials. The *Model Penal Code* frames the act in terms of exploitation of psychosexual tension, thus attempting to give rise to the implication that the provision is aimed at protecting one class from another. What this amounts to, in reality, is an argument that some individuals have a desire to engage in certain behaviors that the majority considers shameful (*e.g.*, titillation by pornography) and that giving into this motivation is wicked and ought to be prevented. Laws suppressing these behaviors are, therefore, for the protection of those who would succumb to this sinful motivation. Indeed, what this provision accomplishes, then, is the protection of the individual from himself.

It would seem that if a statute were aimed at the distributor, and not concerned about the acts of a private citizen, it would focus on the acts of distribution that give rise to a perceivable societal harm, for instance, public pandering utilizing lurid and distasteful methods.[67] If the promulgators of the Code believed section 207.10 to be desirable to insure that there "would be no public display to shock people . . . and to tempt youngsters,"[68] it would seem logical to make such offensive public displays criminal. But the measure making criminal all public dissemination of "obscenity," without limiting this dissemination to those not in good taste, reveals the Code's broad purpose. The section not only insures lack of vulgar displays, but it also has the collateral effect of preventing private sin by shutting off all methods by which the individual may exercise his "right to receive." It would appear that such a statute would have to fail to the extent that it prevents the exercises of the private rights.[69]

In *Stanley* the Court reiterated that "the States retain broad power to regulate obscenity,"[70] and thus it has not been suggested here that the

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[67] For example, see alternative one, MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1957), which emphasizes pandering as the illicit activity.

[68] MODEL PENAL CODE § 207.10, Comment 4, at 13 (Tent. Draft No. 6, 1957).

[69] As the private and discrete obtaining of pornography would fit logically within the *Stanley* protections of privacy and the right to receive information, a provision that makes such an act criminal would be an unconstitutionally overbroad law in that *citizens could be prosecuted for mere exercise of protected rights. Cf.* Street v. New York, 394 U.S. 576 (1969).

The *Model Penal Code* definition of obscenity was referred to by the Supreme Court in Roth v. United States, 354 U.S. 476, 487 (1957), indicating that such a definition was acceptable constitutionally. Such dicta is distinguishable on the same basis as *Stanley* was distinguished from *Roth*; whether or not the materials are "obscene," they may not be suppressed if they are being privately obtained and used with no intent to pursue offensive public pandering.

[70] 394 U.S. at 568.

decision compels the conclusion that the majority of the court is reconsidering the adoption of an absolutist position. Rather it appears that the "broad power" has been limited by *Stanley*. As statutes regulate obscenity as a public nuisance, they may continue to be valid. Statutes that attempt, even indirectly, to prevent private sin have overstepped the limits of legitimate state power.

THE EFFECT OF STANLEY ON THE UNSPEAKABLE CRIME

> [W]here that crime is found, which it is unfit even to know, we command the law to arise armed with an avenging sword, that the infamous men who are, or shall in future be guilty of it, may undergo the most severe punishments.[71]

The crime unfit to know—the crime against nature—is like other private crimes, affected by the *Stanley* decision. Several *Stanley* principles are involved: exercise of the right to be let alone, limitations on governmental controlling of private sexual acts without justification, and a rejection of the puritan theory for justification.

Recent commentators have called for a reexamination of laws making homosexual acts criminal. Such comments usually contain in-depth analysis of the homosexual, and the fallacies of the social and governmental attitudes toward this minority.[72] One such study concludes that the laws in this area are based on a cultural attitude that "ultimately . . . rests on the irrational—on a level where the origins of society's persecution of other minority groups are found."[73] The British *Wolfenden Report* characterized anti-homosexual laws as without the scope of valid governmental activity.[74]

Indeed, that there is little justification in terms of evidence of perceivable societal harm is best expressed in the scholarly opinion of Justice Connor of the Supreme Court of Alaska in *Harris v. State*.[75] In *Harris*, the court declared the term "crime against nature" void for vagueness, but upheld the conviction of the defendant for an assaultive nonconsensual act as "sodomy." The crime, clearly delineated in the indictment, was "within the prohibitory ambit of the statute . . . ."[76] In reaching these conclusions, Justice Connor indicated that a sodomy prosecution for an act by a consenting adult would raise constitutional questions. He emphasized a movement towards more personal freedom less restricted by institutionalized religious notions of normative morality.

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71 4 W. BLACKSTONE, COMMENTARIES *216.

72 *See, e.g.*, Ford, *Homosexuals and the Law: Why the Status Quo*, 5 CALIF. W. L. REV. 232 (1969). *See also* an informative overview, *Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A.L. REV. 643 (1966).

73 Ford, *supra* note 72, at 250.

74 WOLFENDEN REPORT, *supra* note 40, ¶ 61, at 48.

75 457 P.2d 638 (Alas. 1969).

76 *Id.* at 649.

> With the expansion of the concept of individual freedom in our society, as exemplified in the exercise of government and the trends of our constitutional law, there has been a corresponding decrease of religious beliefs as determinants of social and legal principles. The emphasis today is on religous freedom, not on a tyranny of religious ideas over persons to whom they are unacceptable.[77]

The court then reviewed the ambiguity and diversity of definitions of the term "crime against nature," and the "fallacy that a rule of morality is necessarily a rule of law . . . ."[78] Justice Connor further stated that

> [i]f the case at bar concerned private, consensual conduct with no visible impact upon other persons, at least some of us might perceive a right to privacy claim as one of the penumbral emanations of the Bill of Rights and the 14th Amendment due process clause,[79] or simply as one of the unenumerated rights guaranteed by the 9th Amendment.[80]

As has been discussed, *Stanley* has significantly expanded the right to privacy as defined in *Griswold v. Connecticut*.[81] *Griswold* undoubtedly could have been distinguished on the fact that it protected a private and sacred social institution—marriage. It was arguable that as the first amendment allegedly did not protect obscenity, the right to privacy did not protect an immoral act. This is especially true when the act sought to be protected is the antithesis of the normal male-female relationship.[82] *Stanley*, however, makes it clear that the privacy protection is not a function of the worth of the private act but rather, the showing of a compelling state interest is the crucial factor that defeats the right to be let alone. As *Harris* indicates, and the authorities earlier reflect, such a direct societal harm is not involved.[83] Rather various theories, such as those of Rice

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[77] *Id.* at 644.
[78] *Id.* at 645.
[79] *Id.* at 648, *citing* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).
[80] 457 P.2d at 648, *citing* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).
[81] 381 U.S. 479 (1965). *See* note 21 *supra* and accompanying text.
[82] Such a distinction was made by Justice Harlan in a pre-*Stanley* case, Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting).
[83] Unlike its provisions on obscenity, MODEL PENAL CODE art. 207 (Tent. Draft No. 4, 1955) achieves consistency with its provisions on sexual deviancy and illicit intercourse. The provisions are aimed at prohibiting either nonconsensual or open behavior that is offensive to the public. Private acts are not made criminal. According to Schwartz, this position is grounded not only on recognition of the illegitimacy of governmental regulation of private morality, but is also aimed at avoiding some practical problems.

> Capricious selection of a few cases for prosecution, among millions of infractions, is unfair and chiefly benefits extortioners and seekers of private vengeance. The existence of the criminal law prevents some deviates from seeking psychiatric aid. Furthermore, the pursuit of homosexuals involves policemen in degrading entrapment practices, and diverts attention and effort that could be employed more usefully against the crimes of violent aggression, fraud and government corruption, which are the overriding concerns of our metropolitan civilization. Schwartz, *supra* note 53, at 676.

This is not to say that the Code is not concerned with the fact that certain sexual practices are punished without showing of social harm. "No harm to the secular interests of the community is involved in atypical sex practices in private between

and Devlin, have been offered, none of which seem strong enough to defeat "the right to be let alone" as announced in *Stanley*.

Again the impact of *Stanley* seems to compel a reexamination of the status of these state intrusions into personal private behavior, with emphasis on determining whether any substantial state interest of constitutional significance is involved.

Indeed, *Stanley* compels a reexamination of the underlying rationales for all laws aimed toward suppression of acts of private immorality. Prostitution, abortion, suicide, and voluntary euthanasia are examples of private sin long suppressed on the assumption that the states had the power to do so. *Stanley* also serves as a timely signal to prod a reinvestigation of laws regulating private drug abuse.[84] Further research and public debate on this complex and emotional issue are needed to either legitimatize present legislation in light of the *Stanley* doctrine, or to modify those laws in accordance with notions of privacy and limited government.

The *Stanley* doctrine seems to be symbolic as a repudiation of the fraud perpetrated on the American public by Anthony Comstock whose "exposure" of the alleged evils of obscenity had an influence upon the promulgation of anti-pornography legislation.[85] The *Stanley* Court, more sophisticated in its assumptions about human behavior, was not convinced by claims of obscenity's rotting effect upon society. Perhaps, in the future, the legal system will undergo a similar experience as the horrors of marijuana, as "revealed" by H.J. Anslinger,[86] are likewise debunked. If the data indicates that marijuana suppression laws are built on a foundation of myth and fable,[87] the *Stanley* doctrine could serve as the vehicle with which such laws could be attacked.

It is easy to argue that the government must be restrained from exercising its power in violation of the individual's traditional constitutional rights of free speech, assembly, and religion. It is more difficult to es-

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consenting adult partners." MODEL PENAL CODE § 207.5, Comment 1, at 277 (Tent. Draft No. 4, 1955).

[84] *See* Weis & Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat Your Own Way*, 54 IOWA L.J. 709 (1969), where it is argued that the right to privacy should prohibit governmental regulation of private drug use, when such use is characterized as a first amendment act of expression.

An overview of constitutional arguments is found in Comment, *The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights?*, 19 HASTINGS L.J. 758, 775 (1968). *See also* Boyko & Rotberg, *Constitutional Objections to California Marijuana Possession Statute*, 14 U.C.L.A.L. REV. 773 (1967).

[85] *See generally*, P. BOYER, PURITY IN PRINT (1968).

[86] H.J. Anslinger as Commissioner of Narcotics in 1937, undertook a campaign to "inform" the public about the tragic, violent and criminal results of use of marijuana. Murder, rape, and juvenile violence were attributed to marijuana use in this massive media assault. *See generally* THE MARIHUANA PAPERS (D. Solomon ed. 1966).

[87] The logic and scientific basis for making criminal the private possession and use of marijuana are attacked in A. Lindesmith, *The Marihuana Problem: Myth or Reality*, in THE MARIHUANA PAPERS 18 (D. Solomon ed. 1966). *See also* Fort, *Social Problems of Drug Use and Drug Policies*, 56 CALIF. L. REV. 17 (1968).

tablish that the state also has no authority to suppress private immorality. The most articulate libertarian would be hard pressed to extol the virtues of acts of sexual deviancy or use of obscene materials for self-stimulation. Yet, as distasteful as these activities may be to the majority, the thrust of *Stanley* indicates that they are indeed "not the law's business."[88] The law does not condone these activities; it merely prevents the government from doing anything about them.

For those who perceive the Constitution as only protecting "worthy" activities, this thought should be considered: The thrust of *Stanley* puts emphasis on a government restrained from determining the life style of its citizens. Thus, the state, in this area at least, exists to serve and protect the individual's rights, rather than to dictate to the citizen that he must develop behavior patterns in accordance with the normative values of the society. There may be some practical benefits of such a movement. Perhaps some greater respect for the state will result from repeal of often unenforceable statutes, and police would be free to combat more serious evils. But most importantly, every member of the society could take individual pride in the accomplishment of creating a society that not only offers its citizenry the physical advantages of a fruitful technology, but does so in the context of a government that exists to serve its citizens and where the citizen possesses that right most precious in a complex society—the right to be an individual, the right to be free, the *right to be let alone.*

[88] To iterate the oft-quoted statement from the WOLFENDEN REPORT, *supra* note 40, ¶ 61, at 48.