A NEW STRATEGY FOR CENSORSHIP: PROSECUTING PORNOGRAPHERS AS PANDERERS

I. INTRODUCTION

In 1987, the California Court of Appeals, in *People v. Freeman*,[1] affirmed the conviction of a producer of "adult" movies for encouraging prostitution. Freeman was convicted under the appellate court's 1976[2] interpretation of the state's "anti-pandering" law, which prohibits the procurement of another person for prostitution.[3] Under that interpretation, actors and actresses who receive compensation for engaging in sex during the making of a movie are deemed to be prostitutes, and the producers who hire them are therefore considered panderers.

California's anti-pandering law was enacted in 1911 to control the prostitution industry.[4] Applying the law to the creators of "adult" materials represents an attempt to extend the law to control the pornography industry by inhibiting the production of sexually oriented materials. This raises the issue of whether the law's new application involves nothing more than a valid exercise of the state's police power, which only incidentally infringes on constitutional rights, or whether this application is simply an attempt to circumvent the first amendment.

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[1] 188 Cal. App. 3d 618, 233 Cal. Rptr. 510 (Ct. App. 1987).

[2] People v. Fixler, 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (Ct. App. 1976).

[3] CAL. PENAL CODE § 266i (West Supp. 1988) provides:
Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years.

[4] *See infra* notes 69-75 and accompanying text.

Part II of this Note overviews historical attempts at censorship. Parts III and IV trace the legislative history of the California pandering law, and its enforcement during the last seventy years and then conclude that the law is not being properly applied.[5] In Part V, this Note will examine the law's extension to creators of pornography in the context of the first amendment. Part VI will conclude that the state interest involved does not outweigh first amendment concerns,[6] and that, as interpreted, the law is unconstitutionally vague and overbroad.[7]

II. ATTEMPTS AT CENSORSHIP: AN HISTORICAL OVERVIEW

Suppressing sexually explicit words and images has concerned Americans for over 100 years. States began enacting anti-obscenity measures during the early 1800's,[8] and by the final quarter of that century "the abhorrence of any overt expression having to do with sex, extant in elements of the American society since colonial days . . . crystallized into an organized censorship movement."[9]

It was not until 1947, in *Doubleday & Co. v. New York*,[10] that the United States Supreme Court agreed to consider the claim that literature, attacked as obscene under state law, might be entitled to constitutional protection.[11] Due to a split Court, however, the justices did not get an opportunity to rule on this issue.[12]

Ten years later, *Roth v. United States*[13] finally elicited an explicit ruling from the Court. *Roth* was consolidated with another case, *Alberts v. California*.[14] In *Roth*, a publisher of erotica was con-

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5 *See infra* notes 26-104 and accompanying text.

6 *See infra* notes 105-45 and accompanying text.

7 *See infra* notes 146-61 and accompanying text.

8 Vermont, in 1821, was the first state to enact restrictive legislation. F. F. LEWIS, LITERATURE, OBSCENITY & LAW 7 (1976).

9 *Id.* at 9.

10 335 U.S. 848 (1948).

11 The Court had, in earlier cases dealing with a variety of free speech issues, intimated that obscenity might not be constitutionally protected. None of these previous cases, however, had reached the Court on the issue of the constitutionality of obscenity laws; *see, e.g.*, Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Near v. Minnesota, 283 U.S. 697, 716 (1931); Hoke v. United States, 227 U.S. 308, 322 (1913); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904); Robertson v. Baldwin, 165 U.S. 275, 281 (1897); United States v. Chase, 135 U.S. 255, 261 (1890); *Ex Parte* Jackson, 96 U.S. 727, 736-37 (1877).

12 The Court was divided on the merits, four to four (Justice Frankfurter did not participate in the case), and so did not rule on that question. The state court's conviction was thus allowed to stand. *See Doubleday*, 335 U.S. at 848.

13 354 U.S. 476 (1957).

14 138 Cal. App. 2d 909, 292 P.2d 90 (1955).

victed of mailing obscene materials in contravention of a federal obscenity statute.[15] In *Alberts*, the defendant, who conducted a mail-order business, was convicted of selling obscene literature and publishing an obscene advertisement in violation of California's obscenity statute.[16] The Court squarely faced the question of "whether obscenity is utterance within the area of protected speech and press."[17] Obscenity was held to be outside first amendment protection. Material was deemed obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal[ed] to prurient interest."[18] Thereafter, the Court fine-tuned its definition, giving it three prongs,[19] narrowing the range of protected material in *Miller v. California*,[20] and, most recently, expanding that range somewhat in *Pope v. Illinois*.[21]

From the Court's persistent willingness to grapple with this definition of obscenity, it would appear that a majority of the justices have believed that the effort to limit the dissemination of obscene materials is a worthwhile exercise of governmental power. However, if this has been the view of the Court, development of America's mores over the last three decades must have been something of a disappointment.

The labor of generations of justices on this point has had little apparent impact, one way or the other, on the world outside. Even as the fine points of obscenity law were being defined and refined within the Court's chambers, the habits of Americans, with regard to sexual expression, were undergoing sweeping changes. As recently as the 1950's, couples in films could not be shown sharing a bed, and *Playboy* magazine's semi-

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[15] Act of June 25, 1948, ch. 645, 62 Stat. 768 (current version at 18 U.S.C. § 1461 (1982)).

[16] CAL. PENAL CODE § 311 (West Supp. 1955) (current version at CAL. PENAL CODE § 311 (West Supp. 1988)).

[17] *Roth*, 354 U.S. at 481.

[18] *Id.* at 489.

[19] Memoirs v. Massachusetts, 383 U.S. 413 (1966). In the three prong test, clarified in *Memoirs*, material is deemed obscene if:

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. at 418.

[20] 413 U.S. 15 (1973) (The third prong was replaced with the stipulation that material must be without "serious literary, artistic, political, or scientific value."). *Id.* at 24.

[21] 107 S. Ct. 1918 (1987). The third prong of the test is to be determined by "whether a reasonable person would find such value in the material, taken as a whole." *Id.* at 1921. Prior to *Pope*, a jury applied the "contemporary community standards" of *Roth* to all three prongs. *Id.* at 1920.

nude females were thought shocking. Today, "adult" theaters and bookstores, and video cassette rental stores throughout the country provide movies and magazines that explicitly portray sexual acts. Thirty years after *Roth*, our nation is not any noticeably closer to a meaningful understanding of what is legally "obscene." However, we have moved far from the conservative sexual attitudes of the Eisenhower era, when books like Lawrence's *Lady Chatterley's Lover*[22] were kept off the shelves.[23]

The apparent failure of the United States Supreme Court[24] and the criminal obscenity laws[25] to curb dissemination of sexual materials has led prosecutors to find other ways to intimidate the producers and distributors of sexually explicit works. Prosecutors must now try to proceed in ways that circumvent the rigorous Constitutional standards of "obscenity" articulated by the Supreme Court.

III. California's Innovation: Pornographers as Panderers

One method for circumventing the "obscenity" standard was first tried in California in 1976 when prosecutors realized that the state's "anti-pandering" law[26] might apply to creators of pornography. The California Court of Appeals, in *People v. Fixler*,[27] affirmed the conviction for pandering of a photographer and a photo editor who had produced sexually explicit photographs. The court reasoned that women who posed for sexually explicit photographs had engaged in sex for money and could therefore be said to be prostitutes.[28] Guided by what it considered the logical next step, the state proceeded, under California's Red Light Abatement Law,[29] against the publishing "house" that

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22 D.H. Lawrence, Lady Chatterly's Lover (Grove Press Inc. 1959).

23 *See* F. F. Lewis, *supra* note 8, at 200-01.

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> If it was true in 1968 that the effort to separate unprotected obscenity from other sexually oriented but constitutionally protected speech had "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication," then certainly nothing in the intervening years has occurred to support a different verdict; the Supreme Court's bare majority in 1973 for yet another definition of the obscene and yet another set of rationales for its suppression has produced a formula likely to be as unstable as it is unintelligible.

L. Tribe, American Constitutional Law § 12-16, at 656 (1978) (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-05 (1968) (separate opinion of Harlan, J.)).

25 *See* U.S. Attorney General's Commission on Pornography, Final Report 364 (July 1986).

26 Cal. Penal Code § 266i (West Supp. 1988). *See supra* note 20.

27 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (Ct. App. 1976).

28 *Id.* at 325, 128 Cal. Rptr. at 365.

29 Cal. Penal Code § 11225 (West Supp. 1988) provides:

had published the photographs in a magazine in *People ex rel. Van De Kamp v. American Art Enterprises*.[30] California prosecutors next moved against producers of sexually explicit motion pictures. In both *People v. Souter*[31] and *People v. Freeman*,[32] the defendants were convicted of pandering. *Freeman* is currently under appeal before the California Supreme Court.[33] If that court upholds this interpretation of the pandering law,[34] the law could be used to purge California of all producers of sexually explicit literature and films, regardless of whether their products are constitutionally protected forms of expression.[35]

A. *The Pandering Law as Applied to Producers of Sexually Explicit Magazines*

The series of events which led to *Fixler*, and consequently to *American Art Enterprises*, began in 1972, when a member of the Los Angeles Police Department arrested a burglar making a getaway from premises in North Hollywood. As part of his booty, the burglar held issues of two magazines, *Sexscope* and *Sex Today*. Spurred by his discovery of what looked like "obscene" publications, the officer made a search of the burgled premises, which turned out to belong to an adult book and magazine publishing concern, American Art Enterprises, headquartered in Chatsworth, California. The police next searched the company's Chatsworth headquarters, and came away with numerous copies of 173 different magazines, all of which the officers regarded as

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> Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

30 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (Ct. App. 1978), *aff'd*, 124 Cal. App. 3d 1023, 177 Cal. Rptr. 776 (Ct. App. 1981), *rev'd*, 33 Cal. 3d 328, 656 P.2d 1170, 188 Cal. Rptr. 740 (1983).

31 125 Cal. App. 3d 563, 178 Cal. Rptr. 111 (Ct. App. 1981). *See infra* notes 56-61 and accompanying text.

32 188 Cal. App. 3d 618, 233 Cal. Rptr. 510 (Ct. App. 1987). *See infra* notes 62-68 and accompanying text.

33 *See infra* note 68 and accompanying text.

34 CAL. PENAL CODE § 266i (West Supp. 1988).

35 It was conceded by the prosecution in People v. Fixler that the photographs were not legally obscene. 56 Cal. App. 3d 321, 326, 128 Cal. Rptr. 363, 365-66 (Ct. App. 1976). *See also* People *ex rel.* Van De Kamp v. American Art Enter., 75 Cal. App. 3d 523, 528, 142 Cal. Rptr. 338, 340 (Ct. App. 1978), *aff'd*, 124 Cal. App. 3d 1023, 177 Cal. Rptr. 776 (Ct. App. 1981), *rev'd*, 33 Cal. 3d 328, 656 P.2d 1170, 188 Cal. Rptr. 740 (1983). Obscenity was not an issue in *Freeman*, 188 Cal. App. 3d 618, 233 Cal. Rptr. 510.

obscene.[36]

American Art Enterprises was, and continues to be, the umbrella entity for a number of corporations which publish and distribute sexually oriented books and magazines. In 1972, its Chatsworth operation employed over 100 men and women to produce these materials.[37] Approximately one-third of the materials published were hard-core magazines, explicitly portraying sexual activity; one-third were soft-core, portraying simulated sex; the rest were printed materials without photographs.[38]

Although the confiscated materials were considered obscene by the police, no criminal proceedings against the publishers or any employees were brought under the California obscenity law.[39] Instead, in July 1972, Harry Lee Utterback, a photographer employed by American Art Enterprises, and Fred Fixler, the company's photo editor, were indicted for violating the state's pandering statute. This law provides, *inter alia*, that anyone who "procures another person for the purpose of prostitution . . . is guilty of pandering, a felony. . . ."[40] The prosecution reasoned that compensation in the form of wages, for posing for sexually explicit photographs fell under the definition of prostitution[41] and that, accordingly, the photographer and editor who procured the models were panderers. Within a month, the state, pursuant to California's Red Light Abatement Law,[42] took action against American Art Enterprises to close the Chatsworth premises on the ground that the premises were used for the purpose of prostitution. The theory that the building was being used for prostitution depended upon a finding that posing for pornographic photographs amounted to prostitution. Thus, this action depended on the conviction of Fixler and Utterback for pandering.

In 1975, three years after their indictment, Fixler and Ut-

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[36] Fixler v. Superior Ct., 38 Cal. App. 3d 475, 479-80, 113 Cal. Rptr. 285 (Ct. App. 1974).

[37] *American Art Enter.*, 75 Cal. App. 3d at 527, 142 Cal. Rptr. at 339-40.

[38] *Id.*

[39] At the time, the California Penal Code defined "obscene matter" as matter which "taken as a whole is utterly without redeeming social importance." This made proceedings against pornography practically impossible "because almost anything has some social value" (telephone interview with Dirk L. Hudson, Deputy District Attorney of Los Angeles County, November 1986). *See also* Miller v. California, 413 U.S. 15, 22 (1973).

Effective January, 1987, the California legislature amended section 311 to bring it in line with the *Miller* standard of "obscenity." The section now reads that obscene matter "lacks significant literary, artistic, political, educational or scientific value." CAL. PENAL CODE § 311 (West Supp. 1988).

[40] For the textual provisions of section 266i, see *supra* note 3.

[41] *See* Brief for Respondent at 19, People v. Fixler, 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (Ct. App. 1976) (No. Cr-27157).

[42] *See supra* note 29.

terback were convicted.[43] In 1976, their conviction was upheld by the California Court of Appeals in *People v. Fixler*.[44] The appellate court reasoned that prostitution involved the performance of sex for money, and that since the models were paid for engaging in sexual acts, they had engaged in prostitution. The court dismissed the defendants' first amendment considerations as irrelevant since "[t]he manner of obtaining the photographs and the ultimate use to which those photographs might be put are separate and unrelated issues."[45] Although the prosecution conceded that the photographs were not obscene[46] and thus could be disseminated freely, the defendants could not in the process of producing them, commit a crime and then use the first amendment to shield themselves from criminal liability:

> The fact that a motion picture of an actual murder, rape or robbery in progress may be exhibited as a news film or a full length movie without violating the law does not mean that one could with impunity hire another to commit such a crime simply because the primary motivation was to capture the crime on film.[47]

Fixler was appealed to the California Supreme Court, but the court denied hearing.

In the "red light abatement" case, *People ex rel. Van De Kamp v. American Art Enterprises*,[48] which reached the appellate level a year later, the California Court of Appeals reversed the trial court's finding that the Chatsworth premises had not been used for the purpose of prostitution as that term is employed in the Red Light Abatement Law.[49] The appeals court reasoned that, since the photographic sessions involving "prostitution" had been arranged from that location, the building was the "nerve center" of prostitution.[50] The court admitted that some "tension" was generated in applying the Red Light Abatement Law, which provides for the closure of a

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[43] People v. Fixler, 56 Cal. App. 3d 321, 324, 128 Cal. Rptr. 363, 364 (Ct. App. 1976).

[44] 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (Ct. App. 1976).

[45] *Id.* at 325, 128 Cal. Rptr. at 365.

[46] *See supra* note 35.

[47] *Fixler*, 56 Cal. App. 3d at 326, 128 Cal. Rptr. at 365-66.

[48] 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (Ct. App. 1977), *aff'd*, 124 Cal. App. 3d 1023, 177 Cal. Rptr. 776 (Ct. App. 1981), *rev'd*, 33 Cal. 3d 328, 656 P.2d 1170, 188 Cal. Rptr. 740 (1983).

[49] Although the trial court had concluded that the premises were used as the "nerve center" of prostitution, the court ruled that this did not in fact constitute use "for the purpose of prostitution" as that term is employed in section 11225 of the California Penal Code.

[50] *American Art Enter.*, 75 Cal. App. 3d at 528, 142 Cal. Rptr. at 340-41.

premises for one year, to a building used for the publication of concededly constitutionally protected materials. However, "[r]esolution of that tension depends upon the extent to which the application restrains speech or press itself as contrasted with restraining conduct related to speech."[51] Here, the court concluded, application of the law would only pose an "incidental" restriction on first amendment freedoms[52] while at the same time furthering important government interests.[53]

The court nevertheless recognized that closing down the building might be too drastic a measure in view of the publishing activities taking place there,[54] and sent the case back to the trial court with instructions that the injunctive relief be limited so as not to infringe on first amendment rights any more than was necessary to stop the premises from being used to promote prostitution.[55]

B. *The Pandering Law as Applied to Producers of Sexually Explicit Films*

In 1981, in *People v. Souter*,[56] the court of appeals extended the scope of the holding of *Fixler*[57] by upholding convictions for pandering of two pornographic movie producers and the proprietor of an "adult" acting agency.[58] The court of appeals rejected the defendants' argument that "the First Amendment prohibits the use of the pandering statute where sexual activity is filmed for inclusion in a motion picture."[59] Thus, the court reiterated its *Fixler* holding that "the procurement of a person to commit an act of sexual intercourse or oral copulation for compensation is a

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51 *Id.*

52 *Id.* at 530, 142 Cal. Rptr. at 341.

53 *Id.* at 531, 142 Cal. Rptr. at 342.

54 *Id.* ("Because the publishing activity conducted at the Lassen Street building constitutes virtually the sole purpose for which the building is used and it is conceded that obscenity is not involved, closure of the building and removal of property from it is an unconstitutional prior restraint upon protected speech and press itself.").

55 *Id.* In fact, before the trial court could take any action American Art Enterprises moved out and leased the premises to the Fisher Corporation. Rather than evict the innocent new tenant, the trial court imposed damages amounting to one year's rent on American Art Enterprises.

56 178 Cal. Rptr. 111 (1981) (rehearing denied and ordered not be officially published (Jan. 27, 1982); *see infra* note 58).

57 *See supra* notes 45-47 and accompanying text.

58 However, on appeal the California Supreme Court ordered that the appellate decision officially be "depublished," thus stripping it of its precedential value. In California only those opinions which are published in the official state reporter can be used as precedent. CAL. RULES OF COURT 976(c)(2), 977(a) (West 1987).

When the California Supreme Court orders an opinion depublished it means that the case stands only as far as those particular parties are concerned.

59 *Souter*, 178 Cal. Rptr. at 114.

violation of the pandering statute."[60] Furthermore, the court of appeals continued, "[t]here is no essential difference between the shooting of photographs for publications and filming for production of movies."[61]

In 1987, the court of appeals had a fresh opportunity to apply *Fixler* to producers of adult movies. In *People v. Freeman*[62] ("*Freeman I*"), the court affirmed the conviction of another film producer, Harold Freeman, for pandering, arguing that "[t]he actors and actresses herein involved were employed to engage in acts [of] prostitution, which is defined in numerous California cases as the engaging in sexual acts for money."[63]

One month later, in *People v. Freeman* ("*Freeman II*"),[64] the same appellate panel affirmed Freeman's sentence of five years probation, with the first ninety days to be served in county jail, and a $10,000 fine. The trial judge had granted Freeman probation despite the fact that in 1983 the California Penal Code had been amended to mandate a minimum term of three years imprisonment without possibility of probation or suspension of sentence for any person found to be violating, *inter alia*, section 266i.[65] The prosecutor appealed, but the appellate court refused to apply the legislative mandate because a three year sentence "for hiring adult actors to appear in a pornographic film"[66] would be cruel and unusual punishment, and "the actual danger this crime poses to the public is minimal."[67] In this regard, the court distinguished the "danger" presented by pornographic film producers from that of "street" panderers. In a vigorous dissent, appellate Judge Arguelles argued that there was no reason to believe that the Legislature intended the minimum three-year jail sentence requirement to apply only to street panderers. Judge Arguelles dissented that while there was a difference between a panderer who employed violence and threats to procure prostitutes and one who operated out of a penthouse office suite, the Legislature had provided alternative sentences of three, four or six years for just that purpose, intending that *all* convicted

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60 *Id.* at 115.
61 *Id.* at 116.
62 188 Cal. App. 3d 618, 233 Cal. Rptr. 510 (Ct. App. 1987).
63 233 Cal. Rptr. at 511.
64 190 Cal. App. 3d 180, 234 Cal. Rptr. 245 (Ct. App. 1987).
65 CAL. PENAL CODE § 1203.065 (West Supp. 1988) provides that:
Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person convicted of violating . . . Section 266i. . . .
66 *Freeman II*, 234 Cal. Rptr. at 246.
67 *Id.*

panderers would spend at least three years in jail.[68] Both the defendant and the prosecutor have appealed. The cases are now before the California Supreme Court.

IV. THE ANTI-PANDERING STATUTE: ITS HISTORY AND ITS INTERPRETERS

If one considers only the strict denotative meaning of the statute's words, the phrase "sex in return for money" is applicable to the act of compensating actors for appearing in sexually explicit films. However, it is another matter to consider whether the California pandering law can be correctly and fairly applied to producers of sexually explicit materials when looked at in the context of its history and commonly understood meaning.

A. *The Legislative History of Section 266i*

Section 266i of the California Penal Code, which criminalizes pandering, was enacted in 1911.[69] Acts of prostitution were not *per se* illegal at the time[70] and section 266i was an attempt by the state to control the traffic in prostitution by criminalizing "the vicious practice of supplying and maintaining the supply of females for houses of prostitution."[71] Although the statute was directed at crippling the business of brothels by restricting the means by which they obtained their wares, the term "house of prostitution" was gradually expanded by the courts to include any place where the prostitute engaged in an act of prostitution.[72] In 1969, the Legislature amended the section to be gender neutral and punish one who "procures another person for the purpose of prostitution"[73] rather than one who "procure[s]

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68 *Id.* at 248-49 (Arguelles, J., dissenting).

69 People v. Mitchell, 91 Cal. App. 2d 214, 216 n.1, 205 P.2d 101, 103 n.1 (1949) (citing Deering's California General Laws, Act 1906, page 855, Vol. 1).

70 Prostitution and solicitation were not outlawed in California until 1961 when the California legislature amended section 647 of the California Penal Code (formerly a section prohibiting vagrancy). The amended section states that a person is guilty of disorderly conduct if he or she "solicits or . . . engages in any act of prostitution." CAL. PENAL CODE § 647(b) (West Supp. 1988). Jennings, *The Victim as Criminal: a Consideration of California's Prostitution Law*, 64 CALIF. L. REV. 1235, 1240 [hereinafter *The Victim as Criminal*]. *See also* J. F. DECKER, PROSTITUTION: REGULATION AND CONTROL 67 (1979) (movement to control prostitution, particularly in brothels, did not begin until the beginning of the twentieth century).

71 People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437, 447 (Ct. App. 1941).

72 *See, e.g.*, People v. Schultz, 238 Cal. App. 2d 804, 48 Cal. Rptr. 328 (Ct. App. 1965) (a hotel room, although other rooms in the hotel were not used for that purpose); People v. Nasworthy, 94 Cal. App. 2d 85, 210 P.2d 83 (Ct. App. 1949) (back seat of a taxicab).

73 CAL. PENAL CODE § 266i (West Supp. 1988).

any female person to become an inmate of a house of ill fame."[74] A reading of the reported cases up to 1970 reveals that the statute was, without exception, applied to the activities of men or women who delivered prostitutes to customers for the sole purpose of satisfying the customers' sexual desires.[75]

B. *The "Plain Meaning" of Prostitution*

Fixler and its progeny are based on the seemingly simple proposition that prostitution means engaging in sexual conduct in return for money or other compensation.[76] Professional actors and actresses are generally paid for their work. If, in the course of their performance, they are led to engage in sexual acts, they will be deemed to have engaged in the crime of prostitution.

On one level, it is difficult to fault this reasoning. As commonly understood, and as defined in the California criminal code, prostitution requires only an exchange of sex for money.[77] In their appellate brief in *Fixler*, the prosecution stated that "[c]onsistent with established rules governing the statutory interpretation of penal statutes, courts are obliged to first examine [the statutes'] language to determine if the words are unequivocal or ambiguous. If there is no ambiguity, then the statute must be applied in accordance with its plain meaning without resort to judicial construction."[78]

No statute, however "plainly" worded, exists in a vacuum. Each statute is imbued with a social history which has a specific and well understood meaning. In *Keeler v. Superior Court of Amador*

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[74] *Mitchell*, 91 Cal. App. 2d 214, 216 n.1, 205 P.2d 101, 103 n.1.

[75] *See, e.g.*, People v. Bradshaw, 31 Cal. App. 3d 421, 107 Cal. Rptr. 256 (Ct. App. 1973) (police officer contacted defendant and discussed the possibility of working as a prostitute for him); People v. Evans, 249 Cal. App. 2d 764, 57 Cal. Rptr. 836 (Ct. App. 1967) (defendant persuaded two minors to work in her brothel); People v. Charles, 218 Cal. App. 2d 812, 32 Cal. Rptr. 653 (Ct. App. 1963) (defendants tried to encourage cocktail waitresses to enter their brothel); People v. Wilkins, 135 Cal. App. 2d 371, 287 P.2d 555 (Ct. App. 1955) (husband and wife ran a call-girl business); People v. Phillips, 70 Cal. App. 2d 449, 160 P.2d 872 (Ct. App. 1945) (defendant drove prostitute around in his car to pick up clients); People v. Wright, 26 Cal. App. 2d 197, 79 P.2d 102 (Ct. App. 1938) (defendant encouraged girl to go into a brothel and took the money she earned as a prostitute); People v. Pappens, 5 Cal. App. 2d 544, 43 P.2d 371 (Ct. App. 1935) (defendant ran brothels).

[76] The *Fixler* court defined prostitution as 1) "[c]ommon lewdness of a woman for gain" 2) an "act or practice of engaging in sexual intercourse for money" and 3) "any lewd act between persons for money or other consideration." People v. Fixler, 56 Cal. App. 3d 321, 325, 128 Cal. Rptr. 363, 365 (Ct. App. 1976) (citations omitted).

[77] CAL. PENAL CODE § 647(b) (West Supp. 1988) defines prostitution as "any lewd act between persons for money or other consideration."

[78] Brief for Respondent at 19-20, People v. Fixler, 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (Ct. App. 1976) (No. Cr-27157).

County,[79] for example, the California Supreme Court refused to apply the term "human being" to a 28-week-old viable fetus.[80] The court stated that the section of the Penal Code in question, "bears a plain, common sense meaning, well settled in the common law and fortified by its legislative history in California."[81]

Likewise, prostitution, "the world's oldest profession," has commonly been understood as involving a person, most often thought of as a woman,[82] who engages in sexual activity with anyone who will pay her to do so, solely for the purpose of satisfying that person's sexual desires. This definition embraces the prostitute who solicits on a street corner, as well as the call-girl operating from an exclusive escort service. Until *Fixler*, the word "prostitution" had never been associated with the production of pornographic materials. Indeed, with one short-lived exception,[83] no reported case outside of California has defined engaging in sexual behavior for purposes of making a movie, or publishing a magazine, as prostitution.

In light of the history of the pandering law, and its application for sixty years to "traditional" cases of prostitution, it is unlikely that the legislature ever intended the law to combat the production of sexually explicit materials. Until the *Fixler* court so held, the payment of compensation to models or actors to engage in sexual activity in front of a camera was never considered to be prostitution. This extension of the law, is historically questionable. Moreover, it deprives those convicted under it of the fair notice required by due process of law.[84]

C. *"Fair Notice" Considerations*

A statute can deprive a defendant of the fair notice required by due process in two ways. First, a statute which insufficiently

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[79] 2 Cal. 3d 619, 87 Cal. Rptr. 481 (1970).

[80] A viable fetus is a "child which has developed in its mother's womb to [the] point that it is capable of independent existence outside its mother's womb." BLACK'S LAW DICTIONARY (5th ed. 1981).

[81] *Keeler*, 2 Cal. 3d at 365, 87 Cal. Rptr. at 491.

[82] *See The Victim as Criminal*, *supra* note 70, at 1238, n.8. ("[w]omen account for perhaps 90 percent of the prostitute population").

[83] People v. Kovner, 96 Misc. 2d 414, 409 N.Y.S.2d 349 (N.Y. Sup. Ct. 1978). The Supreme Court of New York County denied defendant's motion to dismiss and held that hiring actors to perform in a sexually explicit movie constituted prostitution. At trial, however, the court dismissed this part of the charges as having no basis in the law. Telephone Conversation with Herbert S. Kassner, Counsel for Defendant (November, 1986).

[84] "The first essential of due process is fair warning of the act which is made punishable as a crime . . . [the] requirement of fair warning is reflected in the constitutional prohibition against the enactment of ex post facto laws." *Keeler*, 2 Cal. 3d at 633-34, 87 Cal. Rptr. at 490.

states what conduct renders someone liable to its penalties may be void for vagueness.[85] Second, although a statute may appear clear on its face, it may violate the fair notice requirement of due process if it is unforeseeably expanded by judicial construction.[86]

Paying photographic models' wages to engage in sexual activity in front of a still camera is conceptually not very different from paying actors and actresses to engage in similar conduct in front of a movie camera. For this reason, once the law was extended to the former activity in *Fixler*, Harold Freeman could not convincingly complain that he had received inadequate warning.[87] However, he might have had a first amendment right to engage in such expressive activities.[88] In applying the pandering law in the first instance to Fred Fixler and Harry Lee Utterback, the court deprived the defendants of the fair notice required by due process of law.

D. *The Sentencing of Harold Freeman*

The court of appeals' refusal to sentence Harold Freeman to the statutorily mandated minimum of three years in prison was interpreted by some California lawyers as a sign that the court thought the pandering law was being inappropriately applied by law enforcement officials.[89] It appeared to suggest a lack of conviction on the court's part that Harold Freeman was a panderer.

The 1983 amendment of Section 1203.065 of the California Penal Code[90] prohibits the granting of probation or suspension of sentence to anyone convicted of violating, *inter alia*, the pandering law, section 266i. The constitutionality of that restriction has unsuccessfully been challenged in two recent decisions. In *People v. O'Connor*[91] and *People v. Jeffers*,[92] the court of appeals held that denying probation to all persons convicted of violating section 266i was not cruel and unusual punishment because of the seriousness of the crime. The defendant in *Jeffers* had lured a minor into prostitution and had physically threatened another prostitute to force her to continue working for him. The defendant in

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85 For discussion of vagueness in the context of the first amendment see *infra* notes 146-61 and accompanying text.

86 "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto law*, such as Art. I, § 10, of the Constitution forbids." Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (emphasis in original).

87 *See supra* notes 62-68 and accompanying text.

88 *See infra* notes 105-45 and accompanying text.

89 Los Angeles Daily Journal, Feb. 3, 1987, at 1, col. 4.

90 *See supra* note 65.

91 188 Cal. App. 3d 645, 233 Cal. Rptr. 529 (Ct. App. 1987).

92 188 Cal. App. 3d 840, 233 Cal. Rptr. 692 (Ct. App. 1987).

O'Connor ran an answering service which referred customers to prostitutes. The service was advertised in the local paper. The court recognized the difference in Jeffers' and O'Connor's operations and sentenced Jeffers to six years in jail and O'Connor to the minimum three year term. However, in both cases, the court rejected the defendant's contention that their crimes were not serious ones.[93] Panderers, said the court, commonly prey on very young women, many of whom are drop-outs or junkies and are vulnerable to the panderer's lure. Prostitutes, they further postulated, are on a socially downward spiral and have difficulty finding legitimate employment later; and prostitution also adversely affects the community.[94] In contrast, the court in *Freeman II* emphasized that the defendant's activities posed little danger to the public.[95] The only danger that the court suggested was that "gullible actors and actresses" who were persuaded to perform in adult movies with the hope that such performances would lead to stardom, would be embarassed by this later in life. The court noted that this "danger" would be present even if the actors had instead engaged in simulated intercourse, or in "hard-core" sex without pay[96]—conditions which would take their activities outside the scope of section 266i.[97]

The court concluded that so long as the defendant's conduct poses minimal danger to the public, he deserves minimal punishment. However logical this conclusion may appear to be, it reveals a certain lack of consistency in the court's reasoning. If pandering (i.e., hiring prostitutes to render sexual services), regardless of its form, is inherently harmful to both the prostitute and society, but paying actresses and actors to perform sexual

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[93] To determine whether a penalty is cruel or unusual, the court used the following three-part analysis adopted in *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972):

> (1) evaluation of the dangerousness of the offense and the offender to society . . . (2) comparison of "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which, by the same test must be deemed more serious" . . . and (3) comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision. . . .

188 Cal. App. 3d at 648, 233 Cal. Rptr. at 530 (citations omitted).

[94] *See The Victim as Prostitute*, *supra* note 70; *see also* 188 Cal. App. 3d at 648, 233 Cal. Rptr. at 530.

[95] 190 Cal. App. 3d 618, 234 Cal. Rptr. 245, 246 (Ct. App. 1987).

[96] 234 Cal. Rptr. at 246 n.3.

[97] *See also* Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 HARV. J.L. & PUB. POL'Y 429 (1986). The author contends that, assuming that models in pornography are competent adults, no other person should have the right to tell them what is or is not good for them, "[b]ecause each citizen's conception is presumed to be equally worthy." He calls this the "equality principle." *Id.* at 446-67.

conduct before cameras is not harmful, it is difficult to see how the latter can be pandering. Stated mathematically, if A equals B, but B *does not* equal C, how can A equal C?

In holding that the imposition of a mandatory three-year jail sentence would constitute cruel and unusual punishment, the *Freeman II* court relied on *In re Lynch*.[98] *Lynch* was the first case in which the California Supreme Court held a "statutory penalty unconstitutional on the ground it [was] disproportionate to the crime committed."[99] The Court struck down a provision of section 314 of the Penal Code which threatened an indeterminate sentence of one year to life in prison[100] for all persons convicted of exhibitionism for the second time.[101]

Lynch does not stand for the proposition that a statute otherwise constitutional is cruel and unusual when applied to an individual defendant. The *Lynch* court struck down the provision entirely.[102] The *Freeman II* court, on the other hand, reiterated the constitutionality of the sentencing provision, but found that the application of a minimum three-year prison sentence to the defendant in this case constitutes cruel and unusual punishment.[103] It is curious that although the court chose to leave open the possibility that other creators of sexually explicit materials could be sentenced to jail,[104] it refused to apply the minimum sentence to Freeman, a veteran producer of more than 100 full-length sex films. It is difficult to imagine a candidate whose credentials are so much more impressive that he might merit a jail sentence more than Freeman.

The *Freeman II* court effectively precludes the application of section 1203.065 to producers of sexually explicit films, while at the same time upholds the constitutionality of the three year minimum jail sentence for panderers. The logical implication of all this is that producers of sexually explicit films are not panderers.

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98 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

99 *Id.* at 420, 503 P.2d at 927, 105 Cal. Rptr. at 223.

100 *See id.* at 415-16, 503 P.2d at 922, 105 Cal. Rptr. at 220. An indeterminate sentence is one where the Legislature prescribes both the minimum and the maximum sentence for the offense. The trial court then simply sentences the defendant for the term "prescribed by law." The Adult Authority, a state administrative agency, later determines the length of the defendants imprisonment.

101 First conviction for indecent exposure is a misdemeanor, and warrants only a short jail term or a small fine. *Id.* at 413, 503 P.2d at 933, 105 Cal. Rptr. at 218.

102 *Id.* at 439, 503 P.2d at 940, 105 Cal. Rptr. at 236.

103 *Freeman II*, 190 Cal. App. 3d 618, 234 Cal. Rptr. 245, 246 (Ct. App. 1987).

104 "[S]ince the majority opinion left it to the discretion of the trial judge, in light of the particular facts of the case, whether or not to hand down the mandatory minimum sentence, a three-year term still could be imposed on a filmmaker." Los Angeles Daily J., Feb. 3, 1987, at 1, col. 4.

V. First Amendment Considerations

Thus far, this Note has considered the pandering law in light of its legislative history and interpretation by the California courts, to see whether the California Court of Appeals correctly interpreted that law in holding it applicable to creators of pornographic materials. This Note concludes that this interpretation exceeds both the clear intent of the legislature and the common sense meaning of the terms employed in the statute. Additionally, this Note raises serious doubts regarding the constitutional validity of the court's interpretation of section 266i. In concluding that paying actors to perform sexual activity during the making of a film constitutes the criminal act of pandering, the Court has effectively banned the production of sexually explicit films—a form of expression presumptively protected by the first amendment.[105]

Traditionally, the Supreme Court and commentators of the Court's free speech analyses have placed governmental regulation of expression into two categories.[106] The first category includes regulation which is aimed at speech or expression directly. The Supreme Court has labelled such regulation as "content-based"[107] and has "held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment."[108] For example, a prohibition against discussing a political candidate on the last day of an election[109] falls into the first category. The second category includes regulation which is aimed at conduct or non-speech elements, but which incidentally regulates speech. The Court has called this regulation, "content-neutral"[110] since it is not the content of the speech which is the target of the regulation, or is even of any significance. For example, a law forbidding all leafletting in order to prevent littering[111] falls into the second category. In such a situation, the content of the leaflet is unimportant. It is the conduct of handing out leaflets which is illegal.

Legislation which regulates speech is invalid "unless the

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105 *See supra* notes 56-68 and accompanying text.

106 *See, e.g.*, L. Tribe, *supra* note 24, at §§ 12-2 to 12-7, 12-20; Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975).

107 City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

108 *Id.* at 46-47.

109 Mills v. Alabama, 384 U.S. 214 (1966).

110 *Renton*, 475 U.S. at 47.

111 Schneider v. State, 308 U.S. 147 (1939).

government shows that the message being suppressed poses a 'clear and present danger,' constitutes a defamatory falsehood," or is otherwise unprotected.[112] Legislation which regulates conduct, however, may incidentally infringe on first amendment freedoms if the government has a strong enough interest in regulating the conduct.[113]

> [G]overnment[al] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[114]

A. *Deciding Whether a Regulation is Aimed at Speech or Conduct*

It is difficult to decide whether a particular law is aimed at regulating speech or whether it only incidentally infringes upon it.[115] California's pandering law, as applied to creators of sexually explicit materials, "does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category."[116] In *American Art Enterprises*, the court dismissed the defendant's first amendment concerns as minimal and concluded that conduct, not speech, was being regulated.[117] However, the Court has held "that the inevitable effect of a statute on its face may render it unconstitutional."[118] If the suppression of speech is a sufficiently foreseeable effect of a statute, this may suggest that speech is the target of the regulation.[119]

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112 L. TRIBE, *supra* note 24, § 12-2, at 582.

113 *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[A] sufficiently important governmental interest in regulating . . . nonspeech . . . can justify incidental limitations or First Amendment freedoms.").

114 *Id.* at 377.

115 *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (Is a city's ordinance limiting the location of adult films, or is its primary purpose a concern with preserving the community?); *O'Brien*, 391 U.S. 367 (Is a statute which prohibits a man from burning his draft card interfering with his freedom of expression, or merely regulating his conduct?)

For criticism of the distinction between regulation and infringement, see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981). The author calls it "theoretically questionable and difficult to apply."

116 *Renton*, 475 U.S. at 47.

117 People *ex rel.* Van De Kamp v. American Art Enter., 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (Ct. App. 1977), *aff'd*, 124 Cal. App. 3d 1023, 177 Cal. Rptr. 776 (Ct. App. 1981), *rev'd*, 33 Cal. 3d 328, 656 P.2d 1170, 188 Cal. Rptr. 740 (1983).

118 *O'Brien*, 391 U.S. at 384.

119 "Where governmental action results in the suppression of expression and that suppression was foreseeable, it is always possible that the suppression was a motivating

B. *Analysis Based on the Assumption That the Pandering Law is Aimed at Speech*

If it may reasonably be concluded that the court's intention in applying the pandering law to creators of adult materials was to suppress the materials, then the court's construction of the statute directly regulates speech, or content, and is unconstitutional unless: (1) the speech is not "protected" speech; or (2) the state has "a compelling . . . interest justifying the removal of such speech from First Amendment protections."[120]

It was conceded by the State that the content of the materials in at least two of the cases discussed in this Note is speech protected by the first amendment. The prosecution in *Fixler* and *American Art Enterprises* agreed that the materials involved were not obscene, and thus could be disseminated freely.[121] Nor is there any evidence in the reported case that the state claim that Freeman's film production had crossed the obscenity threshold.

Additionally, the state's interest in enforcing its laws must be so compelling as to be fundamental[122] before any law which directly regulates protected speech can survive constitutional scrutiny. For example, in *New York v. Ferber*,[123] the United States Supreme Court upheld legislation which prohibited the dissemination of materials portraying children engaging in sexual conduct. Although the materials in question were not obscene under the *Miller* standard,[124] they could be suppressed on the ground that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[125]

There appears to be no such "objective of surpassing importance" present here. If the models or actors had performed the same acts without pay, Fixler, Utterback and Freeman would not have been liable as panderers.[126] The exchange of money, however, is not a constitutionally valid reason for suppressing speech. In *Spiritual Psychic Science Church of Truth, Inc. v. City of*

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factor in causing the action to be taken." Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 681 (1978).

120 American Booksellers Association, Inc. v. Hudnut, 598 F. Supp 1316, 1330 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

121 *See American Art Enter.*, 75 Cal. App. 3d 523, 142 Cal. Rptr. 338; People v. Fixler, 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (Ct. App. 1976).

122 *American Booksellers*, 598 F. Supp at 1330.

123 458 U.S. 747 (1982).

124 *See supra* notes 13-20 and accompanying text.

125 *Ferber*, 458 U.S. at 757.

126 *See Freeman I*, 188 Cal. App. 3d 618, 233 Cal. Rptr. 510, 511 (Ct. App. 1987).

Azusa,[127] the city argued that an ordinance which prohibited fortune-telling in return for money or other consideration was constitutional since it did not prohibit fortune-telling *per se*, but only if money exchanged hands.[128] The California Supreme Court rejected this argument on ground that "speech does not lose its protected character when it is engaged in for profit."[129] Likewise, if the material produced by American Art Enterprises or Freeman is protected speech, it does not lose its protection merely because money exchanged hands.

C. *Analysis Based on the Assumption that the Pandering Law is Aimed at Conduct*

If, on the other hand, one accepts the contention that the pandering law, as applied to producers of sexually explicit materials, regulates conduct,[130] then a balancing approach must be adopted. This approach involves weighing "on the one hand, the extent to which communicative activity is in fact inhibited; and, on the other hand, the values, interests, or rights served by enforcing the inhibition."[131]

1. Calculating the Impact on Protected Speech

Prohibiting the hiring of actors and actresses to perform in sexually explicit films, forces film producers who wish to make such films to find actors and actresses who will perform for free. The practical impact of such a restriction is that no sexually explicit films would be made. Just as the speaker has to speak, the filmmaker has to make films.

In his dissent in *Freeman II*, Judge Arguelles contended that enforcement of the pandering law would not chill free expression since actors appearing in pornographic movies might still simu-

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127 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985).

128 *Id.* at 507, 703 P.2d at 1121, 217 Cal. Rptr. at 227.

129 *Id.* at 509, 703 P.2d at 1122, 217 Cal. Rptr. at 228 (*citing* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976); Time, Inc. v. Hill, 385 U.S. 374, 397 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); People v. Glaze, 27 Cal. 3d 841, 846, 614 P.2d 291, 166 Cal. Rptr. 859 (1980)).

130 People v. Fixler, 56 Cal. App. 3d 321, 325, 128 Cal. Rptr. 363, 365 (Ct. App. 1976) ("The prosecution here was based on conduct and was not aimed at prohibiting any communication of ideas."); People *ex rel.* Van De Kamp v. American Art Enter., 75 Cal. App. 3d 523, 530, 142 Cal. Rptr. 338, 341 (Ct. App. 1978), *aff'd*, 124 Cal. App. 3d 1023, 177 Cal. Rptr. 776 (Ct. App. 1981), *rev'd*, 33 Cal. 3d 328, 656 P.2d 1170, 188 Cal. Rptr. 740 (1983) (the government restriction regulates socially evil conduct, not speech); *Freeman I*, 188 Cal. App. 3d 618, 233 Cal. Rptr. 510, 511 (Ct. App. 1987) (discussion of first amendment is misplaced since the regulation prohibits a criminal act).

131 L. TRIBE, *supra* note 24, at 683.

late sex.[132] A rejoinder to Judge Arguelles' argument was suggested by Justice Brennan thirty years ago, in *Roth v. United States*:[133]

> The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[134]

The portrayal of simulated sex is not the same as portrayal of sex. Here, where the choice of expression is between two protected expressions, a court should not justify the suppression by pointing out that other avenues are available.

In *City of Renton v. Playtime Theatres, Inc.*,[135] the Court reiterated its holding in *Young v. American Mini Theatres, Inc.*,[136] that regulating the location of adult theatres by means of zoning was permissible, provided it did not have "the effect of suppressing, or greatly restricting access to, lawful speech."[137] Detroit, the city involved in *Young*, could disperse adult theatres and Renton could concentrate them into one area, as long as the cities did not prohibit them altogether. California, on the other hand, has, in effect, entirely prohibited adult filmmaking by criminalizing the payment of wages to actors who perform sexually explicit acts. Unless actors agree to perform for free—and there is little reason to suppose that they will—no adult movies would be produced.

2. Weighing the State Interests Served By Enforcement of Section 266i

A regulation which significantly interferes with protected speech must be invalidated unless it "can be justified as furthering a substantial governmental interest."[138] California's pandering law was enacted to discourage the trade plied by brothels,[139]

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132 190 Cal. App. 3d 180, 234 Cal. Rptr. 245, 249 (Ct. App. 1987) (Arguelles J., dissenting) ("If people performing sex acts before cameras are truly 'actors' and 'actresses,' then let them *act*. Sex has been simulated effectively in the theatre and on the screen for years. . . .").

133 354 U.S. 476 (1956).

134 *Id.* at 487.

135 *Renton*, 475 U.S. at 54 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.35 (1976)).

136 427 U.S. 50 (1976).

137 475 U.S. at 54 (quoting *Young*, 427 U.S. at 71 n.35).

138 Yen, *Judicial Review of the Zoning of Adult Entertainment: A Search for the Purposeful Suppression of Protected Speech*, 12 PEPPERDINE L. REV. 651, 661 (1985).

139 *See supra* notes 69-71 and accompanying text.

an industry traditionally associated with a number of social problems, such as drug abuse, robberies, assaults on prostitutes by customers and pimps, public lewd acts and the increase of criminal activity in a neighborhood and its consequent deterioration.[140] Thus, the governmental interest in halting these problems, through anti-pandering laws, is arguably substantial. However, photographing sexual acts or producing sexually explicit movies in the privacy of a studio or residence, poses none of these dangers to the community. Indeed, the *Freeman II* court recognized this when it refused to sentence the defendant to three years in jail because "the actual danger this crime poses to the public is minimal."[141]

The *dissemination* of sexually explicit materials has been linked with crime and neighborhood decay,[142] but these negative consequences have not been held to justify the complete suppression of such materials, though some degree of regulation has been permitted.[143] Under these circumstances, it is difficult to see how a state can validly claim a compelling interest in suppressing the production of sexually explicit materials (an activity held to pose minimal danger to the public), when the state is precluded by the first amendment from suppressing their dissemination (a more publicly disturbing activity). In both cases, first amendment freedoms are at stake. If we are unwilling to compromise our liberties when the gain for the community might appear to be substantial, it is unclear why we should choose to make this sacrifice when the potential benefits are negligible.

A further possible state interest, mentioned by the court in *Freeman II*, and discussed at length in the dissent, is the "valid societal interest" of protecting from exploitation actresses and actors who have appeared in sexually explicit movies. This same claim, that women appearing in pornography are victims in need of protection, was made, unsuccessfully, by the City of Indianapolis in *American Booksellers Association, Inc. v. Hudnut*.[144] The federal district court in *Hudnut* held that "[a]dult women generally have the capacity to protect themselves from participating in and

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140 J.F. DECKER, *supra* note 70, at 20-21.

141 *Freeman II*, 190 Cal. App. 3d 180, 234 Cal. Rptr. 245, 246 (Ct. App. 1987).

142 *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 55 (1976) ("the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere").

143 *See supra* notes 135-37 and accompanying text.

144 598 F. Supp 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

being personally victimized by pornography, which makes the State's interest . . . not so compelling as to sacrifice the guarantees of the First Amendment."[145]

When the state's interest in applying section 266i to the creators of pornography is balanced against rights protected by the first amendment, it seems clear that the pandering law does not pass muster under the first amendment. This is so even if we accept the contention that the law regulates conduct and not speech, for, as applied, the law obliterates an entire avenue of expression, while appearing to serve only minimal governmental interest.

VI. Issues Relating to Overbreadth and Vagueness

Even if California was found to have a compelling interest for applying its pandering law to the creators of pornography which outweighed first amendment rights, the inquiry concerning the law's validity would not end there. A statute, even one which legitimately serves an important governmental interest, should be struck down if it is overbroad or unconstitutionally vague.[146]

The overbreadth and vagueness doctrines are conceptually distinct—overbreadth is mainly a first amendment doctrine, while "vagueness embodies the fifth and fourteenth amendment notions of notice and fair play."[147] The two constructs, though, are almost indistinguishable "when statutes covering first amendment activities are at issue."[148]

A law is void for overbreadth "if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that . . . constitute an exercise' of protected expressive or associational rights."[149] By comparison, a statute is void as vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application."[150] An essential distinction between the two is that a statute need not be vague to be overbroad since a statute can be drafted with the utmost clarity, and yet "sweeps within its ambit"

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145 598 F. Supp at 1334.

146 *Id.* at 1337.

147 Note, *State Regulation of Obscene Motion Pictures: Red Light Nuisance Statute*, 31 Ala. L. Rev. 274, 300 (1980). Vagueness is determined from the face of the statute, while overbreadth is ascertained by comparing less restrictive means of achieving the desired result. *Id.* at 301.

148 Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 873 (1970).

149 L. Tribe, *supra* note 24, at 710 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)).

150 Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

rights protected by the first amendment.[151] Generally, however, "the vices of vagueness and overbreadth are not wholly separable, in the area of the first amendment."[152]

California's pandering law proscribes the procurement of "another person for the purpose of prostitution."[153] Section 647(b) of California's penal code defines prostitution as "any lewd act between persons for money or other consideration."[154] The California Court of Appeals, in defining the term "prostitution" as used in section 266i, has held that "for a 'lewd' or 'dissolute' act to constitute 'prostitution,' the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification. . . ."[155]

This definition does not require that actual sexual intercourse take place and thus, puts in question Judge Arguelles' contention that actors can legally simulate sex[156]—unless they can somehow convincingly simulate sex without touching one another.

It is difficult to imagine a pornographic film in which actors and actresses do not "come in contact"[157] with each other's genitals, buttocks or breasts. However, this definition can also be construed to criminalize much of the mainstream cinema fare which comes out of Hollywood and Europe. Presumably, all films which feature nude or semi-nude actors in an embrace—and this would include many distinguished motion pictures[158]—could conceivably be regarded as involving "prostitution" as that term is understood in the California Penal Code. This leaves

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151 *See Thornhill*, 310 U.S. 88 (1970) (statute prohibiting all picketing was voided for overbreadth, since it included a ban on peaceful picketing which was protected by the first amendment).

152 Note, *supra* note 148, at 873.

153 CAL. PENAL CODE § 266i (West Supp. 1988).

154 CAL. PENAL CODE § 647(b) (West Supp. 1988).

155 People v. Hill, 103 Cal. App. 3d 525, 534, 163 Cal. Rptr. 99, 105 (Ct. App. 1980).

156 *See supra* note 132 and accompanying text.

157 Just determining whether a body part "came in contact" with another body part, or merely hovered, permissably, in the vicinity, can be a difficult task. *See, e.g.*, E. DE GRAZIA & R. K. NEWMAN, BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT 124 (1982). Vilgot Sjoman, director of the movie *I Am Curious — Yellow*, testified at the film's New York trial that he did not know whether the female star's lips touched her lover's penis. "I can't answer that because I wasn't that close, and I can't tell from the image either. I have a feeling it was possible for her just to have her lips a couple of millimeters above the penis." One wonders whether two millimeters would be considered "contact?"

158 *See, e.g., The Killing of Sister George* (Cinerama Releasing Corp. 1968) (lesbian nipple stimulation scene).

mainstream filmmakers in the position of having to speculate as to what limitations should be placed on the mildest love scenes.

The pandering law, as extended by the California Court of Appeals, is presently being used only against producers of "adult" materials[159], and law enforcement officials in California say that they have no plans to go after the major film studios, although they do not preclude the possibility altogether.[160] While this may be reassuring in the short run to mainstream film producers, it does not irrevocably narrow the construction of the law. Regardless of how a statute is presently being interpreted, it remains vague and overbroad, if it could, as written, be applied broadly, and is unclear as to its scope. "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement. . . ."[161]

VII. Conclusion

In the cases discussed above, the California courts have attempted, in effect, to create a new category of prostitution, and a new category of panderer. The motive of those involved is clear— to enable the suppression of materials that would otherwise be entitled to full constitutional protection.

In order to reinstate their ability to deter the production of sexually explicit materials, California's courts have taken a statute clearly aimed at the control of one industry and, without any warrant in law or precedent, applied it to the control of another. Ignoring the millenia-old understanding of what is encompassed by "the oldest profession," the courts have taken it upon themselves to formulate a new definition, which amounts to little more than a play on words.

Problematic as this interpretation of the statute is, its greatest significance lies in its direct attack on our first amendment rights. It attempts to drive a wedge between the original creation of a piece of communication and its eventual transmission to the public. This amounts to arguing that, while you are not allowed to bake your cake, you are allowed to eat it later.

Opposition to this interpretation should not be construed solely as a defense of pornography—although, as a form of pro-

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159 At least five pandering cases involving movie producers are currently under way in California. Heilman, *Pornography Prosecutions: New Skirmishes in An Age-old War*, 10 L.A. Law. 18, 20 (May 1987).

160 *Id.*

161 NAACP v. Button, 371 U.S. 415, 435 (1963).

tected speech, pornography has every right to be defended. The real stakes involve the necessity of defending our first amendment rights against all challengers—even from the subtle encroachments of learned jurists.

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