
D. C. H.

Defendant Rabe, manager of a Richland, Washington, drive-in theater, was convicted under the state obscenity statute for exhibiting the film "Carmen Baby," a somewhat updated version of the Bizet opera, on a screen visible from an adjacent highway and from neighboring houses. On appeal, the Washington Supreme Court expressed doubt that the film was obscene on its face under prior holdings of the United States Supreme Court but declared that a right of privacy was "enshrined" in the United States Constitution. Asserting that exhibition of the film in an open-air theater from which it could be viewed by noncustomers constituted "an assault upon individual privacy" of nearby motorists and residents, the majority concluded that the film was constitutionally obscene as shown in this context and that the statute was constitutional as applied. State v. Rabe, 79 Wn. 2d 254, 484 P.2d 917 (1971).

The United States Supreme Court reversed on the narrow ground that the statute did not give fair notice that the context of the exhibition was an element of the offense, i.e., that the unlawfully obscene nature of the film would be determined by its exposure to the nonconsenting general public at the place it was shown. Rabe v. Washington, 405 U.S. 313 (1972).

In reversing on procedural grounds, the Supreme Court did not decide whether a state constitutionally could make the context in which material is displayed a determinative element of an obscenity conviction. Nevertheless, the reasoning which led the Washington court to uphold the constitutionality of such a construction is questionable, and is not likely to be endorsed by the Court. Chief Justice Burger, although concurring in the reversal, suggested that the state

2. To reach this conclusion, the majority relied on dictum in Redrup v. New York, 386 U.S. 767 (1967). See text accompanying note 13 infra.
4. The Court held in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), that a criminal statute must be tested by determining "whether it gives a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." A Hornbook to the Code: Disorderly Conduct, 48 Wash. L. Rev. 259, 271 (1972). But "Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating." Rabe v. Washington, 405 U.S. 313, 315 (1972).
might have accomplished its goal through enactment of an "offensive display" statute, restricting specified sexual materials to private viewing.

Such a statute would reflect a recognition by the legislature that some communicative content, although not obscene, is highly offensive to many citizens. Even fervent free speech advocates concede that in some situations the state may further legitimate interests by prescribing appropriate conditions for the exercise of first amendment rights. Protection of the citizen's right to individual privacy would seem to serve as an appropriate state concern to balance against rights of communication, especially in view of the increasing protection given privacy in tort law and in other constitutional contexts, thus justifying legislation which restricts display of offensive material to locations where only willing and forewarned viewers would encounter it.

This note examines the conflict between free expression and privacy, focusing on the effect of privacy interests on the definition of obscenity and on the possibility of regulating nonobscene, sex-related expression through legislation designed to protect the individual's right to privacy from offensive contact. It is submitted that the Washington Supreme Court erred in *Rabe* in deducing that the public context in which the sexually-explicit film was exhibited altered the constitutional definition of obscenity by eliminating the requirement that it meet the three *Roth-Memoirs* criteria. It will be demonstrated, however, that the display of even constitutionally nonobscene expression may be regulated to protect those members of the public who are unable reasonably to escape affront to their privacy by exposure to its offensive content.

I. SPEECH AND PRIVACY: THE EMERGING CONFLICT

The waning of the nineteenth century in America saw technology develop ever more effective tools to expose personal lives to public view; alleged rights of the public to know and of the individual to remain unknown came into increasing conflict. Brandeis and Warren wrote their famous law review article at this time to protest the growing encroachments of a vigorously asserted freedom of the press upon the individual’s "right to be let alone." 5 The courts responded;
by the 1930's invasion of privacy had become a generally recognized tort.\(^6\)

In recent years, the friction between privacy and free speech interests has erupted in another area. Since World War I, the nation has experienced a "sexual revolution."\(^7\) Because the abandonment of sexual taboos has proceeded unevenly among different segments of the population, sex-related words, pictures, and ideas taken for granted by some are, at least when publicly expressed, profoundly shocking and disturbing to others.

While the "sexual revolution" has accelerated, the Supreme Court has shown increased sensitivity to governmental abridgements of first amendment freedoms. Although the Court has recognized that obscenity is not protected by the first amendment, it has fashioned a very strict standard of obscenity—the Roth-Memoirs test.\(^8\) "Obscenity" has become a term of art, divorced from and far more restricted than the layman’s understanding of the term. Under the Roth-Memoirs test, very few obscenity convictions have withstood appeal.\(^9\)

The reluctance of courts to uphold obscenity convictions has resulted in a flood of sexually-explicit materials which has precipitated a host of bruised sensibilities, widespread criticism of the Court, and a demand for increased state controls.\(^10\) The Court, it has been observed, follows the election returns,\(^11\) and in Redrup v. New York\(^12\) the Court, although reversing the convictions of several defendants charged with selling certain questionable men’s magazines, in dictum hinted at possible bases for future prosecution. According to the Redrup Court, the magazines were not obscene under the Roth-Memoirs test, nor did the statute in question reflect\(^13\)

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\(^7\) See M. Lerner, America as a Civilization 666-88 (paperback ed. 1967).

\(^8\) See Roth v. United States, 354 U.S. 476, 489-90 (1957); A Book Named John Cleland’s Memoirs of a Woman of Pleasure v. Attorney General, 383 U.S. 413, 418 (1966). To be judged obscene, a work must satisfy three criteria: (1) The dominant theme of the material taken as a whole must appeal to prurient interest; (2) the material must be patently offensive in its affront to contemporary community standards; and (3) the material must be utterly without redeeming social value.


\(^12\) 386 U.S. 767 (1967).

\(^13\) Id. at 769 (emphasis added).
a specific and limited state concern for juveniles. . . . In none [of
the convictions] was there any suggestion of an assault upon indi-
vidual privacy by publication in a manner so obtrusive as to make it
impossible for an unwilling individual to avoid exposure to it . . . .
And in none was there evidence of the sort of "pandering" which the
Court found significant in Ginzburg v. United States.

The ears of a profession usually alert to subtle nuances of shifting
doctrine failed at first to perk up at this apparently off-hand observa-
tion;\textsuperscript{14} it was a negative replete with implications, however, and be-
cause of it Redrup marks a watershed in the law of obscenity.

II. RA\textsuperscript{B}E'S CONTEXTUAL APPROACH TO THE
DEFINITION OF OBSCENITY

The Redrup dictum did not pass totally unnoticed by state judges,
many of whom, unsympathetic to emerging mores, have been chafing
under the constitutional restrictions imposed by the Supreme Court.\textsuperscript{15}
The Washington court's response in Rabe was surprising not because
it took the Redrup dictum at face value, but because it relied on an
unexpected interpretation of that dictum. It interpreted Redrup as
having replaced or extended the Roth-Memoirs test's emphasis on the
character of the material with a contextual test which stressed the ef-
effect of the material upon its audience. The Washington Supreme
Court adopted this stratagem in order to uphold the obscenity convic-
tion of a defendant who had exhibited material which was not obscene
under Roth-Memoirs.

The Washington court noted that Redrup identified three excep-
tions to a strict application of Roth-Memoirs. Two of these excep-
tions, a specific state interest in juveniles and "pandering" in the sale
of sexual materials, seemed to broaden the Roth-Memoirs definition
of obscenity by considering the context in which the materials were

\textsuperscript{14}. Teeter & Pember, The Retreat from Obscenity: Redrup v. New York, 21 HAST-

\textsuperscript{15}. I think the U.S. Supreme Court] has no jurisdiction whatever under the
constitution—except perhaps for the District of Columbia—to prescribe moral,
literary or social standards for the country at large. The judicial duty to protect
freedom of speech and press in the nation at large imports no correlative power to
preserve obscenity and pornography in the states.

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presented. In dealing with sales to minors, the Supreme Court has adjusted the definition of obscenity by assessing the material's effect upon the sexual psychology of minors, rather than on that of the general population.\textsuperscript{16} What is not obscene when sold to adults may be deemed obscene when sold or intended for sale to juveniles. The Court also has held that if a seller exploits his wares by pandering, evidence of such treatment "may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."\textsuperscript{17}

The state court's holding in \textit{Rabe} was premised on the third \textit{Redrup} exception, an assault upon individual privacy. Generalizing from the first two exceptions, the Washington court apparently concluded that \textit{Redrup} intended all three as contextual expansions of the definition of obscenity. Therefore, it decided that when individual privacy was assaulted by offensive expression, as the privacy of homeowners and motorists might have been by scenes from "Carmen Baby,"\textsuperscript{18} the expression became obscene in that context, and constitutionally could be banned under a state obscenity statute.\textsuperscript{19}

The state court strained mightily to justify application of the obscenity statute, but its logic fails to persuade. It is true that the Supreme Court has adapted the \textit{Roth-Memoirs} test contextually to juveniles. But the test's basic requirements were not dispensed with, but merely adapted to the susceptibilities peculiar to young people. The pandering exception, as set forth in \textit{Ginzburg v. United States},\textsuperscript{20} provided less an alteration of the test than a conclusive presumption used in applying it.\textsuperscript{21} Even after \textit{Ginzburg}, the \textit{Roth-Memoirs} test must be satisfied; in close cases, the seller's salacious advertising may contribute to a finding that the book viewed as a whole appeals to pru-


\textsuperscript{17} Ginzburg v. United States, 383 U.S. 463, 476 (1966).

\textsuperscript{18} However, the record mentions no complaints from the putative victims. This failure to allege specific injured parties is not determinative, however. \textit{See} Breard v. Alexandria, 341 U.S. 622 (1951).

\textsuperscript{19} 79 Wn. 2d at 268, 484 P.2d at 925. However, this argument, even if valid, would serve only to remove the first amendment protection from defendant's showing of the film. It does not meet the United States Supreme Court's due process objection as to lack of notice.

\textsuperscript{20} 383 U.S. at 476.

\textsuperscript{21} Speaking loosely, if the defendant advertised his wares as obscene, he would be estopped from denying their obscene nature in court if the determination of obscenity was otherwise a close question.
rient interest, but it does not dispose of a need for that finding. Under the facts of *Rabe*, the presumed shock to a driver viewing a sexual act depicted on a large screen as he sped past on the freeway would not establish the obscene nature of the picture, for the *Roth-Memoirs* criteria still require that the motion picture as a whole appeal to the prurient interest. Chief Justice Burger, concurring in the *Rabe* reversal, apparently sought to finesse this issue by arguing that "where the very method of display may thrust isolated scenes on the public, the *Roth* . . . requirement that the materials be ‘taken as a whole’ has little relevance."22 But this assertion betrays a misunderstanding of the “taken as a whole” requirement. Its object is not to require or enable every viewer to sit through the entire film in order to dilute, as it were, the impact of isolated prurient sequences; its purpose is to ensure that material dealing legitimately with sex will not be banned because of the effect of these sequences on susceptible persons.23

By allowing certain contextual qualifications of the *Roth-Memoirs* requirements, the *Redrup* Court showed no intent to eliminate those requirements. The Court indicated in *Redrup* that an offensive display of nonobscene sexual material which assaults privacy might be regulated, but such an assault does not, as the Washington court inferred, constitute a context which eliminates the *Roth-Memoirs* requirements.

### III. OFFENSIVE DISPLAY STATUTES: REGULATION OF NONOBSCENE COMMUNICATION

#### A. Compelling Interest Test

Citing *Redrup*, Chief Justice Burger declared his belief that the first amendment could not prevent24

a State from prohibiting such a public display of scenes depicting explicit sexual activities if the State undertook to do so under a statute narrowly drawn to protect the public from potential exposure to such offensive materials.

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24. *Rabe*, 405 U.S. at 317. Such displays “are not significantly different from any noxious public nuisance traditionally within the power of the states to regulate and prohibit . . . .” *Id.*
Recent "offensive display" statutes enacted in Arizona and New York were cited by the Chief Justice as examples. Through such statutes, legislatures attempt to reconcile the conflicting claims of the first amendment and the desire to protect outraged sensibilities of constituents. Such statutes purport not to prohibit protected speech, but merely to regulate the place and manner of expression. The Supreme Court has yet to pass on the constitutionality of such statutes. However, several lower court decisions since Redrup have held statutes which apparently satisfied the Redrup dictum to be invalid circumventions of the Roth-Memoirs test. Other courts have upheld

   § 245.10 Public display of offensive sexual material; definitions of terms
   The following definitions are applicable to section 245.11:
   1. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
   2. "Sexual conduct" means an act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.
   3. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
   4. "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.

   § 245.11 Public display of offensive sexual material
   A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, display board, viewing screen, moving picture screen, marquee or similar place, in such manner that the display is easily visible from or in any public street, sidewalk or thoroughfare or transportation facility, any pictorial, three-dimensional or other visual representation of a person or a portion of the human body that predominately appeals to prurient interest in sex, and that:
   (a) depicts nudity, or actual or simulated sexual conduct or sado-masochistic abuse; or
   (b) depicts or appears to depict nudity, or actual or simulated sexual conduct or sado-masochistic abuse, with the area of the male or female subject's unclothed or apparently unclothed genitals, pubic area or buttocks, or of the female subject's unclothed or apparently unclothed breast, obscured by a covering or mark placed or printed on or in front of the material displayed, or obscured or altered in any other manner.

   Public display of offensive sexual material is a Class A misdemeanor.

similar statutes on the basis of the Redrup dictum, reasoning that even protected speech is not immune from certain restricted forms of regulation.

Where speech is combined with conduct, the Court has held that a "compelling state interest" in regulation of the conduct will justify an incidental limitation on freedom of speech. All oral "speech" can be viewed as noise, all written "speech" as litter. Since noise and litter are subject to state regulation, under this analysis the mere projection of a film could be interpreted as conduct sufficient to subject the exhibitor to state regulation. Although courts sometimes utilize this reasoning to by-pass first amendment considerations and attack expression which they find undesirable, preservation of the distinction between speech and conduct—between message and medium—is crucial to the protection of first amendment freedoms.

Thus, in determining whether speech in a given instance is "pure" or intermingled with conduct, the Supreme Court has adopted an operational definition, which examines whether the individual's speech-related activities bring about a result which is properly viewed.

Both cases involved ordinances prohibiting the display of any nude pictures in any public places except art galleries. The ordinances were held unconstitutionally broad since not limited to obscene nudity.


30. See, e.g., United States v. O'Brien, 391 U.S. 367, 376 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 446 (1958). The Court in Police Dept. v. Mosley, 408 U.S. 92, 95 (1972), stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its esteem, its subject matter, or its content." But where regulation of conduct on the basis of content is necessary to the achievement of a compelling state interest, as it would be in controlling offense displays, this objection would not stand. Id. at 98-99. A compelling state interest will not justify regulation of "pure" speech—expression not tainted with "conduct." Id.


32. E.g., Cactus Corp. v. State ex rel. Murphy, 14 Ariz. App. 38, 480 P.2d 375 (1971). In this outdoor theater case, similar on its facts to Rabe, the showing of a film was treated as a business activity; the showing of the film "Lysistrata," which contained sexually explicit scenes, was held to be subject to abatement as a public nuisance. "If the owner of land can be prohibited from polluting the community with noxious smoke and unpleasant odors, we conceive of no reason why he cannot be prohibited from polluting the neighborhood with visual material harmful to children." Id. at 379. Compare Rabe, 405 U.S. at 317 (Burger, C.J., concurring): "Public displays of explicit materials such as are described in this record are not significantly different from any noxious public nuisance."

as conduct and hence within the state's power to regulate or prohibit. Proponents of offensive display legislation argue that such statutes mitigate certain undesirable consequences flowing from sexually-explicit displays, frequently citing harm to public morals, corruption of minors, and offensive invasion of privacy interests. It is true that each is within the state's constitutional power to control by appropriate legislation, and insofar as legislation attacks these undesirable results, the state is legitimately regulating conduct.

Harm to morals, to minors, and to privacy may each constitute conduct, and offensive displays thus contain combined elements of speech and conduct, but in regulating such displays the state must comply with strict guidelines enunciated by the Supreme Court: (1) The regulation must be otherwise within the government's constitutional power; (2) it must further a substantial governmental interest; (3) this interest must be unrelated to the suppression of free expression; and (4) the regulation must restrict free expression no more than necessary to protect the state interest.

"Public morals" cannot serve as a compelling interest, since it fails to comply with the third guideline. So far as the harm to morals con-

34. For example, suppose an individual is convicted under a city ordinance which prohibits the distribution of leaflets on public sidewalks. A citizen has a conceded right to stand on the sidewalk. Schneider v. New Jersey, 308 U.S. 147, 163 (1939). If, in such a situation, he effects distribution of his literature by casting it to the winds with a prayer that it end in receptive hands, he is engaged in conduct; the state may exercise its police powers to prevent littering. Or if by standing in one location the citizen blocks vehicle or pedestrian traffic, he is likewise subject to regulation. But insofar as picketing results only in the communication of ideas, it lies outside the scope of the police power. Police Dept. v. Mosley, 408 U.S. 92 (1972); Cox v. Louisiana. 379 U.S. 536 (1965).


36. These guidelines were set forth in United States v. O'Brien, 391 U.S. 367, 376-77 (1968).


38. See, e.g., Smith v. California, 361 U.S. 147 (1959), in which an ordinance which prohibited possession of obscene books by a book-seller regardless of mens rea was held invalid. The Court held that the ordinance effectively required the seller to read every book in his store, and thus burdening the sale of nonobscene material. See generally Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844 (1970).
sists of a change in public attitudes the speech is protected by the very rationale of the first amendment. If the harm consists of undesirable resulting acts, the state should legislate against the acts, not the speech, unless the speech presents a clear and present danger of a serious substantive evil; although a change in public attitudes may also ultimately result in the evil, the precipitating speech is not a sufficiently proximate cause of those acts to justify its regulation. Regulations to protect minors are held in less disfavor by the Court, but it has proven difficult to write laws which shelter minors without restricting free communication among adults.

B. Privacy: The Right to be Let Alone

Neither protection of public morals nor a concern for juveniles provides a satisfactory state interest to justify regulation of nonobscene material. However, over the past half-century a concern for the privacy of the individual has evolved as an interest of legal and constitutional significance. The permissible impact of this privacy interest on first amendment rights requires further analysis.

1. Legal Trefoil: Tort, Constitutional Right, and Protected Interest

The concept of individual privacy is inherent in a democracy. American government adopts as a fundamental axiom the belief that no certain road to happiness has been revealed, that each man's life is a laboratory in which a unique experiment in living is performed, and that the entire society benefits from the diversity and originality of these experiments. The relevance of this axiom to the fundamental


41. Butler v. Michigan, 352 U.S. 380 (1957). A statute which prohibited the distribution of books and magazines likely to corrupt the morals of youth was held unconstitutional under the first amendment because its effect was "to reduce the adult population of Michigan to reading only what is fit for children." Id. at 383.

importance of first amendment freedoms has long been recognized. It is equally relevant to the high value which must be placed on "privacy" as understood in its most basic sense: "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited." The first amendment allows us to learn of his achievements; the right to privacy, in this basic sense, grants him the psychological breathing room in which to achieve.

As this note observed at the outset, invasion of privacy first attained recognition as a tort. In *Griswold v. Connecticut*, while striking down a state statute which prohibited the use of contraceptives, the

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43. As the Court said in *Roth*, 354 U.S. at 484:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.


45. Dean Prosser observes, in fact, the development of four torts, based on four common usages of the word "privacy":

1. Appropriation of the name or likeness of one person for the advantage of another.

2. Intrusion on a person's solitude, such as by wiretapping.

3. Objectionable publicity given to private information about a person.

4. Publicity about a person which places him in a false light in the public eye.


The Washington Supreme Court has never expressly decided whether privacy constitutes a basis for recovery in tort. *Brink v. Griffith*, 65 Wn. 2d 253, 257-58, 396 P.2d 793, 796 (1964) ("we have not expressly rejected such an invasion as a basis for a tort claim . . ."); *Almy v. Kvanme*, 63 Wn. 2d 326, 329, 387 P.2d 372, 374 (1963) ("Under the facts of this case, their right of privacy was voluntarily waived."); *Lewis v. Physicians and Dentists Credit Bureau*, 27 Wn. 2d 267, 272, 177 P.2d 896, 899 (1947). In *Rabe* the court observed that:

Although this court has never declared whether there is an independent right of privacy [presumably tort] in this state . . . there can be little doubt after *Griswold v. Connecticut* . . . that the right of privacy is enshrined as a constitutional doctrine.

79 Wn. 2d at 267, 484 P.2d at 924.

46. 381 U.S. 479 (1965). Each of several of the guarantees of the Bill of Rights was seen as surrounded by a penumbra of privacy created by that guarantee. Thus a "privacy of association" is inferred from the first amendment. *Id.* at 484. Each guarantee could also be viewed as a different facet of an underlying constitutional dedication to privacy of the individual. Justice Douglas' logic in *Griswold* has been sharply criticized by *Gross, supra*, note 44, at 42-43, as blurring the distinction between privacy in its basic sense and other uses of the word.
Supreme Court recognized that the right to privacy also is a *constitutio-
nal right* against governmental intrusion. The reasoning in several
well known cases, together with the Court's dictum in *Redrup*, indi-
cate, as a third legal expression of the privacy concept, that the gov-
ernment also has a *compelling interest* in regulating conduct of one
individual which invades the privacy interests of another, even at inci-
dental expense to first amendment freedoms.47

2. Privacy as a Compelling Interest

These cases dealing with the right to privacy suggest several conclu-
sions. *First*, the government has a compelling interest in preserving
privacy in the home. To achieve this aim, *Rowan v. Post Office
Department*48 indicates that government may at the homeowner's re-
quest bar "trespass" by mail as well as in person. Furthermore, fol-
lowing *Breard v. Alexandria*,49 the state may reverse the common law
presumption that a door-to-door salesman has the consent of the
homeowner,50 and presume him to be a trespasser. *Kovacs v. Cooper*51
permits the state to forbid loud noises in the streets as intrusions on
domestic privacy, despite incidental restraints on first amendment
freedoms. *Second*, *Kovacs* indicates that the government may protect
citizens in public places and public vehicles from raucous noises; con-
versely, it may interfere with their privacy by authorizing noises,
*Public Utilities Commission v. Pollak*,52 so long as the noise does not

47. Although some courts (e.g., People v. Doorley, 338 F. Supp. 574 (D.R.I. 1972))
speak of balancing conflicting constitutional rights of speech and privacy in cases in-
volving offensive expression, this is a faulty analysis. The privacy interest as a constitutio-
nal right serves only as a negative bar to governmental acts; it does not sanction af-
firmative governmental protections against private acts. Recognition of the state's in-
terest in protecting the privacy of citizens antedates by many years the constitutional
right declared in *Griswold*.

48. 397 U.S. 728 (1970) This case upheld a federal statute which allowed house-
holders to avoid receiving advertising through the mail for any "matter which the ad-
dresssee in his sole discretion believes to be erotically arousing or sexually provocative." 39 U.S.C. § 4009(a) (Supp. IV, 1964). The statute provided that "the Postmaster Gen-
eral shall issue an order, if requested by the addresssee, . . . directing the sender . . . to
refrain from further mailings to the named addressees." *Id.* § 4009(b).

49. 341 U.S. 622 (1951) (upholding municipal Green River ordinances as applied to
door-to-door solicitors of magazine subscriptions).


51. 336 U.S. 77 (1949) (upholding a city ordinance prohibiting sound trucks emit-
ting "loud and raucous" noises on city streets).

52. 343 U.S. 451 (1952) (permitting a District of Columbia transit company under
exclusive franchise from Congress to broadcast music in its buses, despite complaints
interfere with their right to communicate among themselves. Third, a citizen has a much greater interest in privacy in his home than in public.\(^{53}\) It is not certain from the cases, however, whether this interest is a constitutional right which secures the home against governmental as well as nongovernmental invasions of privacy.\(^{54}\)

These cases provide a framework for the suggestion in Redrup that an offensive display can be regulated if it is presented "in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."\(^{55}\)

3. Captive Audience Test

The Court has established that the state has a compelling interest in protecting some degree of privacy. Since every word spoken or written constitutes some slight invasion of another's peace and repose, knowledge of the quantum of intrusion required to justify state regulation is critical to the legislator who drafts an offensive display statute. Several decisions demonstrate that, in general, the state's compelling interest extends only to protection of captive audiences.

In Close v. Lederle,\(^{56}\) cited by the Washington court in Rabe, a state university barred a student art exhibit from a corridor of the student union. The First Circuit cited Redrup's reference to "assault upon individual privacy," and upheld the university's finding that the

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\(^{53}\) Pollak, 343 U.S. at 464 n.10.

\(^{54}\) Id. at 464. But see Griswold v. Connecticut, 381 U.S. 479 (1965); cf. Stanley v. Georgia, 394 U.S. 557 (1969), holding that a citizen in his own home has a constitutional right to read obscene material. The government ordinarily has the power to search the home for contraband material under the authority of a valid warrant. Obscenity is not protected by the first amendment, but apparently obtains a semi-protected aura activated by the right to privacy in the home. This situation, where the whole is greater than the sum of its parts, has been denominated "privacy-plus." See the interesting analysis in Comment, Karalexis v. Byrne and the Regulation of Obscenity: "I Am Curious (Stanley)," 56 Va. L. Rev. 1205 (1970).

\(^{55}\) See note 13 and accompanying text supra.

exhibition of nudity was inappropriate when exposed before an essentially captive audience in a public passageway.

However, the Close decision has been overshadowed by the recent Supreme Court decision in Cohen v. California. Cohen was convicted under a state "offensive conduct" statute—which the state courts had construed to apply only to "fighting words" constituting a clear and present danger of precipitating violence—for having entered a Los Angeles courtroom with a jacket bearing the slogan "Fuck the Draft." After concluding that this slogan was not obscene and did not present a clear and present danger, the Court reversed the conviction. The reversal seemed to be required on fair notice grounds, as in Rabe. But in Cohen, the Court went beyond such a narrow holding in questioning whether the state had any compelling interest in suppressing such speech-related conduct:

"The issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse [on the assertion] that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The Court concluded that the state had demonstrated no such compelling interest; the state could not constitutionally protect the sensitive from exposure to this word unless a showing was made that "substantial privacy interests are being invaded in an essentially intolerable manner." The Court suggested that the statute would have been properly limited to a compelling state interest if, on its face or as construed, it had evinced a concern "with the special plight of the captive auditor." Nevertheless, the Court concluded that the facts in

59. 403 U.S. at 22-23. The Court's assertion that Cohen's behavior amounted to pure speech, devoid of conduct, id. at 18, is inconsistent with the analysis presented in the text accompanying notes 31-36 supra, but the Court itself ignores its own assertion in examining the impact of the display on the privacy interests of others, id. at 21-22. And in conclusion the Court, implicitly adopting the O'Brien analysis, states that, "absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make [this display] . . . a criminal offense." Id. at 26 (emphasis added).
60. Id. at 21.
61. Id. at 22.
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*Cohen* would not have justified application of such a statute. Unlike the pedestrians annoyed by raucous noises in *Kovacs*, "those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."62 *Cohen* recognized, as did the appeals court in *Close*, that a citizen walking down a corridor, temporarily subjected to a degree of visual "captivity," might have a more substantial claim to protection of privacy than would one in a less enclosed area, but held that even that interest was not comparable to the interests of a person in his own home.63

The Supreme Court's recent memorandum decision in *Rosenfeld v. New Jersey*64 merely reiterated that a state has no compelling interest in preventing simple contact between offensive speech and unsuspecting hearers; the element of captivity must be present. The defendant had attended a public meeting of the school board. In the presence of 150 men, women, and children, he referred to the teachers, the school board, the town, and the nation on four occasions as "m- - - - f- - - - [sic]."65 He was convicted under a statute construed to prohibit loud public speech likely to incite breaches of the peace, or "in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of the hearer."66 The Court vacated the conviction and remanded for consideration in light of *Cohen*.

4. Degree of Captivity Required

These decisions indicate that whether the state may regulate offensive, nonobscene speech—and presumably other offensive expression—turns upon the meaning attributed *Cohen'*s phrase, "the special plight of the captive auditor." If the state possesses a compelling interest in protecting privacy only to the extent that the audience is held captive, the degree of "captivity" necessary to permit such state pro-

62. Id. at 21. Contrast State v. Rabe, 79 Wn. 2d at 267, 484 P.2d at 924: "To argue that the adjoining homeowners and motorists in the vicinity of the outdoor theater could have preserved their freedom to view what they pleaded by drawing their curtains or averting their eyes is specious."
63. Id. at 21. See also *Rowan*, 397 U.S. at 738.
64. 408 U.S. 901 (1972).
65. Id. at 904.
tection must be ascertained. Any stimulus will hold some portion of the mind "captive" for an instant before it is consciously or unconsciously rejected. Chief Justice Burger suggested in Rabe that even this instantaneous perception of an unwanted message may be an intolerable affront to one's privacy; the New York and Arizona statutes which he praised attempt to protect the unwilling public from any contact with certain expressive content.

This degree of concern with sensibilities seems unwarranted. Human beings cannot be sheltered like hothouse flowers from every chill in their moral environment. The measure of an individual's privacy should consist not in his total protection from stimuli, but rather in his ability to avoid further contact with stimuli which the individual has tasted and found unpalatable.67 The government thus has an interest in protecting its citizenry from those who wish to compel continued contact with ideas already rejected, but not in providing a protective cocoon against initial exposure. To the extent that the individual is protected from this initial contact with offensive material, he "doesn't know what he's missing." For his own peace of mind, the government will have ensured that he never be aware of the message contained in the material, thus subverting the purposes of the first amendment.68 As Cohen and Rosenfeld suggest, so long as the unwilling listener can avoid the communication by reasonable effort, by averting his eyes or leaving the room, he may not justifiably demand that the speaker and his willing listeners avoid him. This priority of speaker over unwilling listener results from the fundamental standing of the right to communicate, as opposed to the more attenuated interests of the individual who seeks to avoid the message. This analysis encompasses more than "X"-rated films. Offensiveness is not confined to sexually-oriented material;69 many citizens are equally disturbed by "unpatriotic" demonstrations.

68. That the message may appear socially valueless is irrelevant for first amendment purposes. Winters v. New York, 333 U.S. 507 (1948). But see Justice Rehnquist's statement in California v. LaRue, 93 S. Ct. 390, 397 (1972): "[W]e would poorly serve [first amendment interests] were we to insist that the sort of Bacchanalian revelries [here present] were the constitutional equivalent of a performance by a scantily clad ballet troupe."
69. To argue otherwise requires the assertion that in our society sex is a subject peculiarly related to privacy interests which may be dealt with sui generis.
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On the other hand, *Breard, Rowan, Kovacs, and Redrup* demonstrate that once an individual rejects a message, the government may protect him from further exposure by insisting that some avenue of escape be held open.\(^{70}\) Thus the state court in *Rabe* emphasized the right of homeowners to be free from the sight of offensive films, observing that "individual privacy is nowhere more entitled to protection than in the home."\(^{71}\) *Pollak* also suggested that one enjoys more privacy protection in his own home than in public places. This is perhaps because the alternatives to listening are drastically limited in the home. As with the common law of self-defense, when the person assaulted has retreated to his own house he can retreat no farther, and more aggressive measures then are justified.\(^{72}\) In *Kovacs*, the intrusion could not be avoided after an initial rejection; the only alternative to total surrender of homeowners' privacy was to bar noisy sound trucks altogether, and require their users to employ fewer decibels or alternative media. In *Rowan*, the statute enabled the homeowner to escape the flow of mail from a given mailer, after initial inspection.

In contrast, *Breard* permitted governmental action to bar even initial contact, despite the ease with which continued contact could have been avoided. The decision thus indicated that the government's concern for privacy of the home extends beyond the limits required by the captive auditor rationale. Yet obviously *Breard* cannot betoken an absolutist "my home is my castle" approach to communication. A distinction must be drawn, for example, between the itinerant book peddler and the anti-war demonstration passing outside the window. The former is directed to homeowners *qua* homeowners, whom the city can protect collectively from the presumed annoyance. But a demonstration, or other occurrence in the street, is not directed exclusively, or even primarily, at residents behind their windows. If the city should ban a demonstration in order to protect the sensibilities of neighboring homeowners, it would also prevent the demonstrators from communicating with a large street audience. The state's interest in protecting the homeowner from avoidable annoyances is not so com-

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71. 79 Wn. 2d at 268, 484 P.2d at 925.

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pelling as to justify such severe restrictions on first amendment rights.\textsuperscript{73}

The factual situation in \textit{Rabe} occupied an intermediate position. The state was not furthering a \textit{Rowan-Breard} interest in protecting the homeowners from communication directed at them, but neither did the drive-in operator have an interest in communicating with those outside its fence. By requiring the theater to raise its fence, the state would not interfere with the exhibitor's first amendment rights, since he had no interest in communicating with those outside his property. Such a regulation would be permissible only if it would not practically preclude communication with the intended audience. The state thus would be justified in enacting a statute requiring drive-in theaters to shield their screens from outside viewers before showing films of specified content.

The Court in \textit{Pollak} and \textit{Cohen} indicated that outside the home the captive audience test will be applied rigorously. The offensive display statutes lauded by the Chief Justice either do not pretend to limit themselves to captive audiences or implicitly define "captive" so broadly as to permit the state to bar even initial contacts with offensive material. Such an enforced sequestration of material offensive to a majority, although members of that majority have ample opportunity to escape further contact, strikes at the distinctly antimajoritarian rationale of the first amendment. It exalts the comfortable but unstimulated mind over the free play of often discomforting ideas which a democracy demands.

\textbf{CONCLUSION}

The Washington Supreme Court incorrectly interpreted the obscenity cases in upholding Rabé's conviction, but although its opinion was analytically weak it did reflect a recognition that interests of privacy and speech were in conflict. In the future, rather than attempt an expansion of the definition of obscenity, states may be tempted to follow Chief Justice Burger's suggestion, enacting offensive display statutes and justifying them by an appeal to protection of privacy interests.

Before the bills begin dropping into legislative hoppers, however,

\textsuperscript{73} If the message content of the picketing rather than the conduct itself constitutes an invasion of privacy, the remedy should be in tort, not prior governmental restraints.
legislators would do well to observe the paramount importance which the Court accords to freedom of speech. It is submitted that privacy interests will outweigh this first amendment primacy under only two conditions: (1) where the speech offends the privacy of a person who is not part of the intended audience, or (2) where a member of the intended audience is unable to escape contact with the message by reasonable effort.

Application of these principles easily can be illustrated. As in Rabe, if the protected expression is not directed at those whom it offends, the state may require the speaker or exhibitor to limit its display to locations where only the intended audience will view it, provided the regulation does not practically preclude communication with the intended audience.

However, the first amendment right to free expression exerts greater pressure when the state seeks to protect those who are the intended recipients of the communication. In this situation, legislation must be narrowly drawn to protect only those who cannot reasonably escape the intrusion upon their privacy.

In ascertaining the reasonableness of the available opportunities for escape, the court must consider (1) whether the individual seeks avoidance of initial contact or escape from continuing exposure, and (2) whether the degree of physical confinement to which the individual is subjected precludes the individual from avoiding the distasteful expression once it has been encountered. Only in rare cases can the state show sufficient interest to protect the citizen from initial exposure with nonobscene material. Breard presented such a case, reflecting the special interests of the home. Such decisions as those in Cohen, Pollak, and Rosenfeld, however, demonstrate that in most contexts the state may not protect its citizens from initial contact with offensive content. But in situations where the physical confinement of the unwilling audience prevents avoidance of continued exposure, the state may legitimately enact statutes to preserve the privacy of its citizens.

The offensive display statutes enacted in Arizona and New York are not restricted to the captive audience rationale and, if the Court follows its recent precedents, will be struck down as facially overbroad. However, valid statutes can be narrowly drafted which will protect adequately the legitimate privacy interests of captive audiences.

D.C.H.