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PEOPLE V. FREEMAN—NO END RUNS ON THE OBSCENITY FIELD OR YOU CAN'T CATCH ME FROM BEHIND

What is pornography? From the proverbial man-in-the-street the answer may be, "I don't know, but I know it when I see it." On the other hand, his answer might be, "I don't know, but I know what I like," since the pornography industry has grown in the last three decades into a multibillion dollar business.¹ "Adult" motion pictures, videotapes, cable and satellite television programs, "dial-a-porn," X-rated computer networks, paperback books and peep shows are all part of this huge enterprise.²

Still, politicians, behavioral and social scientists, and law enforcement officials have argued that the mass distribution of such materials is causally related to increased violence and lawlessness.³ For the health of our society, they urge, sexually-related materials must be regulated and in their more extreme versions banned.⁴ Although some scientists and sociologists disagree,⁵ all states and the federal government have tried to limit the spread of sexual materials by the enactment of obscenity statutes.⁶

Easing, let alone stopping, this wave of written and visual sexual stimulants has been easier to do in theory than in practice. The First Amendment of the United States Constitution protects free expression.⁷ If an expression is deemed "obscene," however, it is beyond the amendment's haven.⁸ Still, enforcement of the federal and the states' obscenity standards can be arbitrary and problematic. The obscenity laws contain

1. See *Final Report of the Attorney General's Commission on Pornography*, at 341, 346-77 (1986) [hereinafter *Final Report*]. In 1985 the estimated box office receipts for "adult only" motion picture theaters were five hundred million dollars and estimated sales of "adult" video tapes were three hundred fifteen million dollars. *Id.* at 352-54. In 1982 the estimated monthly sales in the United States of thirteen "mainstream" sexually explicit magazines were approximately thirty-eight and a half million dollars. *Id.* at 360. The magazines were CHERI, CHIC, CLUB MAGAZINE, CLUB INTERNATIONAL, FORUM, GALLERY MAGAZINE, GENESIS, HIGH SOCIETY, HUSTLER, OUI, PENTHOUSE, PLAYBOY and PLAYGIRL.

2. See *Final Report* at 346-77.

3. *Id.* at 271-89.

4. *Id.* at 31-48.

5. *Id.* at 49-50.

6. See *The Report of the Commission on Obscenity and Pornography*, at 37 (1970).

7. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;" U.S. CONST. amend. I, § 1.

8. See *Roth v. United States*, 354 U.S. 476 (1957). The Supreme Court in *Roth* held that

such amorphous terms that police officers are practically left to their own judgment in arresting violators. In addition, a jury may have a good deal of trouble in deciding whether any given piece of sexually-related material passes the necessary constitutional standards.⁹ In a diverse community, such as Los Angeles, a consensus on a phrase like "prurient interest" can be quite difficult and a criminal conviction for violating an obscenity statute even more so. What is "smut" to one person may be "beauty" to another. Accordingly, law enforcement officials have attempted different approaches in seeking to stem the tide of pornographic materials.¹⁰

One such approach is the use of a state's pandering laws, which make it illegal to hire someone for the purposes of prostitution. In California, a photographer and a distributor of sexually explicit material were successfully prosecuted¹¹ under that state's pandering laws.¹² Similarly, a New York court held that a producer of a sexually explicit motion picture could also be prosecuted under a pandering statute.¹³ Consequently, while pandering laws were originally enacted to halt the

an expression is obscene if it "deals with sex in a manner appealing to prurient interest." This is judged by the average person "applying contemporary community standards."

9. *Miller v. California*, 413 U.S. 15 (1973), set out the United States Supreme Court's standard for obscenity: (1) whether the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest, (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

10. See Bronson, *Obscenity: Prosecutorial Techniques*, 21 U.C.L.A. L. REV. 181 (1973).

11. See *People v. Fixler*, 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (1976); *People ex rel. Van De Kamp v. American Art Enter., Inc.*, 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (1977).

12. CAL. PENAL CODE § 266i (Deering 1985), states that

[a]ny 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 an 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.

13. *People v. Kovner*, 96 Misc. 2d 414, 409 N.Y.S.2d 349 (Sup. Ct. 1978).

spread of prostitution, it was only a matter of time before a filmmaker in California was prosecuted under the pandering statute.

Harold Freeman was that filmmaker. After producing a sexually explicit motion picture, he was convicted of five counts of pandering. His conviction was affirmed by the state court of appeal.¹⁴ But in a somewhat surprising decision,¹⁵ the California Supreme Court reversed. The court held that the pandering statute was not intended to apply to Freeman's conduct as a filmmaker and that "such a conviction would rather obviously place a substantial burden on the exercise of protected First Amendment rights."¹⁶ Thus, this new approach to the problem of pornography was foreclosed and the payment of wages to a consenting adult to engage in sexual activities in a motion picture, which is not obscene, will not support a conviction under the California pandering statute.

FACTS OF THE CASE

In 1983, Harold Freeman, a producer of over one hundred sexually-oriented motion pictures, hired male and female actors to perform explicit sexual acts in the filming of a motion picture entitled *Caught From Behind, Part II*.¹⁷ Freeman paid a fee to the World Modeling Agency for casting the talent and paid for the use of a house as the production's locale.¹⁸

Freeman was charged with five counts of pandering for the hiring of five actresses for the film¹⁹ and was found guilty on all five counts. The court of appeal, in a split decision, affirmed Freeman's conviction.²⁰ The California Supreme Court granted review on appeal.²¹

Pursuant to the pandering law, Penal Code section 266i, the trial court was required to sentence the defendant to a minimum of three

14. *People v. Freeman*, 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1987), *rev'd*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

15. *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

16. *Id.* at 422, 758 P.2d at 1132, 250 Cal. Rptr. at 601.

17. These acts included sexual intercourse, oral copulation and sodomy.

18. Besides being paid as the owner of the house in which the movie was filmed, Nancy Conger was also permitted to appear in the picture.

19. He was not charged with pandering for the hiring of the male performers, nor was he charged with violating the California obscenity law, CAL. PENAL CODE §§ 311-311.2 (*Deering* 1985 & Supp. 1988).

20. *People v. Freeman*, 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1987), *rev'd*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

21. *People v. Freeman*, 734 P.2d 562, 236 Cal. Rptr. 1 (1987).

years in prison.²² However, the trial court found that imposition of a three year prison term in this case would constitute cruel and unusual punishment. The court therefore granted Freeman probation. The court of appeal affirmed this sentence.²³

On August 25, 1988, the California Supreme Court unanimously declared that "the prosecution of defendant under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws."²⁴ Accordingly, the court overturned Freeman's conviction. The California Supreme Court's reasoning paralleled the position of the dissenting justice and contrasted strongly with the majority and concurring opinions in the court of appeal.

DECISION OF THE CALIFORNIA COURT OF APPEAL FOR THE SECOND DISTRICT

Majority and Concurring Opinions

In this first appeal of the trial court decision²⁵ (hereinafter "*Freeman I*"), Justice Kingsley, in affirming Freeman's conviction,²⁶ stated that although movies and books are protected by the first amendment,

22. See *supra* note 12. A 1982 amendment to the statute substituted terms of "three, four, or six years" for the previous terms of "two, three, or four years."

A 1983 amendment to Penal Code § 1203.065 provides that "[n]otwithstanding 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." CAL. PENAL CODE § 1203.065 (Deering 1985).

23. *People v. Freeman*, 201 Cal. App. 3d 1081, 234 Cal. Rptr. 245 (1987). In the sentencing of Freeman, the court of appeal was persuaded that a mandatory jail term was uncalled for in these circumstances. The court cited *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972), a case in which the California Supreme Court held the provisions of Penal Code § 314, making a second offense of indecent exposure a felony punishable by imprisonment for not less than one year, were barred by the prohibition against cruel and unusual punishment in the California Constitution. Likewise, the court found that, since the harm to the public was minimal, imposing the same sentence upon Freeman as on a defendant who was convicted of armed robbery would be cruel and unusual punishment.

24. *People v. Freeman*, 46 Cal. 3d 419, 423, 758 P.2d 1128, 1130, 250 Cal. Rptr. 598, 599 (1988).

25. *People v. Freeman*, 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1987), *rev'd*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988). Harold Freeman was originally charged, along with several other defendants in companion cases, with the identical crime of felony pandering after a 1979 arrest. At that time conviction under the statute carried no mandatory sentence. The charges against Freeman were later dropped.

When rearrested, Freeman filed a pre-trial motion to have the charges dropped. The motion was denied and Freeman was convicted in the subsequent trial. Telephone conversation with Stuart Goldfarb, Counsel for Defendant (September 1988).

26. *People v. Freeman*, 198 Cal. App. 3d at 294, 233 Cal. Rptr. at 511, *rev'd*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

that constitutional protection was not applicable in this case since "a criminal act is not protected under the First Amendment merely because it occurs within the context of a motion picture production."²⁷ Since Freeman hired the actresses to engage in "acts or [sic] prostitution, which is defined in numerous California cases as the engaging in sexual conduct for money"²⁸ and the actresses did perform sexual acts for money, the defendant was guilty.²⁹

Justice Arguelles based his concurring opinion, for the most part, on two cases, *People v. Fixler*³⁰ and *People ex rel. Van De Kamp v. American Art Enterprises, Inc.*³¹ In *Fixler*, a photographer and a photo editor who hired a young girl to be photographed while engaging in lewd and sexual acts were convicted of violating the pandering statute. In *American Art Enterprises*, a building used for both hiring people to engage in sex acts which were photographed and the production and distribution of sexually explicit magazines was held to be a place where prostitution occurred and thus subject to the provisions of the Red Light Abatement Law.³² Justice Arguelles cited these cases for the proposition that being paid to have sexual intercourse while being photographed is prostitution.³³ In addition, Penal Code section 266i can be used, according to *Fixler*, to prosecute a photographer and a film editor for hiring a woman to engage in lewd acts.³⁴ Justice Arguelles reasoned that since there is no essential difference between still photographs and motion pictures, the statute was applicable to Freeman.³⁵

As to first amendment considerations, Justice Arguelles stated that the prosecution here, like that in *Fixler*, was based on conduct and not on a communication of ideas.³⁶ Although the film was protected under the first amendment, Freeman was not shielded from prosecution for the illegal acts committed while producing the film.³⁷ Those acts of hiring actresses to have sex on camera were not protected expression, but rather criminal conduct, according to Justice Arguelles, which fell within the

27. *Id.*

28. *Id.*

29. *Id.*

30. 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (1976).

31. 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (1977).

32. CAL. PENAL CODE § 11225 (Deering 1985).

33. *People v. Freeman*, 198 Cal. App. 3d 292, 294, 233 Cal. Rptr. 510, 511 (1987), *rev'd*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

34. *Id.*

35. *Id.*

36. *Id.* at 295, 233 Cal. Rptr. at 511.

37. *Id.*

confines of section 266i.³⁸

Dissenting Opinion

In his dissenting opinion, Justice McClosky cited *Burton v. Municipal Court*,³⁹ in which the California Supreme Court referred to *Joseph Burstyn, Inc. v. Wilson*⁴⁰ in discussing the relationship between movies and the bill of rights.⁴¹ According to Justice McClosky, there was no doubt that expression by means of motion pictures was included within the protection of the first and fourteenth amendments.⁴² *Barrows v. Municipal Court*,⁴³ a case involving alleged illegal activities performed on a stage, was cited for the proposition that conduct which would be prohibited in the streets may be protected within the context of a theatrical production.⁴⁴ That is, a theatrical production would lose first amendment protection only if found to be obscene, while the identical conduct on the street does not have such protection, whether obscene or not. Further, Justice McClosky, quoting *Barrows*, stated that "any more restrictive rule could annihilate in a stroke much of the modern theater and cinema."⁴⁵

The movie *Caught From Behind, Part II* was never declared obscene by any judicial authority. Nor was there evidence that the California Legislature intended Penal Code section 266i to prevent the production or distribution of motion pictures depicting sex acts between consenting adults. Freeman's purpose was to profit from the making of a motion

38. *Id.*

39. 68 Cal. 2d 684, 441 P.2d 281, 68 Cal. Rptr. 721 (1968). In *Burton* the court held that a motion picture licensing ordinance in Los Angeles vested practically unlimited discretionary powers upon city officials in granting permits. The ordinance was declared unconstitutional by the court as a prior restraint on first amendment rights.

40. 343 U.S. 495 (1952). In *Burstyn* the Supreme Court examined provisions of a New York law which authorized the denial of a motion picture exhibition license upon a censor's finding that the movie in question was "sacreligious." The Court declared the statute void as a prior restraint on freedom of speech and of the press under the first amendment as it applied to the states through the fourteenth amendment.

41. *People v. Freeman*, 198 Cal. App. 3d 292, 295, 233 Cal. Rptr. 510, 512 (1987), *rev'd*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

42. *Id.*

43. 1 Cal. 3d 821, 464 P.2d 483, 83 Cal. Rptr. 819 (1970). *Barrows* was a California case in which actors in a play entitled "The Beard" were charged with violations of the California Penal Code for disorderly conduct and speaking obscene words in public. The California Supreme Court held that the statutes in question were not intended to apply to theatrical performances.

44. *People v. Freeman*, 198 Cal. App. 3d 292, 296, 233 Cal. Rptr. 510, 512 (1987), *rev'd*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

45. *Id.* (quoting *Barrows v. Municipal Court*, 1 Cal. 3d at 831, 464 P.2d at 489, 83 Cal. Rptr. at 825 (1970)).

picture and not from hiring someone for the purpose of prostitution. Therefore, Justice McClosky stated he would reverse the defendant's conviction.⁴⁶

CALIFORNIA SUPREME COURT'S REASONING

On appeal to the supreme court, the defendant contended that the lower courts had erred in applying the pandering statute to Freeman's activities, asserting that the statute was never intended to be used as a trap to ensnare filmmakers creating nonobscene materials. In addition, the defendant argued that the lower courts had erred in stating that the first amendment did not shelter Freeman's activities. The California Supreme Court reversed the decision of the court of appeals⁴⁷ (hereinafter *Freeman II*), deciding this case on statutory language and on first amendment grounds.

Statutory Language

The court stated that the interpretation of Penal Code section 266i depends on the definition of prostitution.⁴⁸ This definition is derived from California Penal Code section 647(b), which states that prostitution "includes any lewd act between persons for money. . . ."⁴⁹ For the definition of "lewd act" the court referred to *Pryor v. Municipal Court*.⁵⁰ In *Pryor*, the term was defined as "touching of the genitals, buttocks or female breast for the purpose of sexual arousal. . . ."⁵¹ The court then quoted *People v. Hill*⁵² for the proposition that for a lewd act to constitute prostitution, the "touching" must be done for the purpose of sexual

46. *Freeman*, 198 Cal. App. 3d at 298, 233 Cal. Rptr. at 514.

47. *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988).

48. *Id.* at 424, 758 P.2d at 1130, 250 Cal. Rptr. at 600.

49. CAL. PENAL CODE § 647(b) (Deering 1985). Section 647(b) states in part: "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(b) Who solicits or who engages in any act of prostitution. As used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration." CAL. PENAL CODE § 647(b) (Deering 1985).

50. 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979). In *Pryor* the defendant sought a writ of prohibition to bar a retrial on charges of violating Penal Code § 647(a). The California Supreme Court, in denying the writ, adopted a new construction of the statute and stated that, as so construed, it was not unconstitutionally vague.

51. *Id.* at 256, 599 P.2d at 647, 158 Cal. Rptr. at 340.

52. 103 Cal. App. 3d 525, 163 Cal. Rptr. 99 (1980). In *Hill* the court reversed the trial court's conviction of the defendant on pimping and pandering charges, holding that it was reversible error to fail to explain to the jury what was included in the terms "lewd and dissolute acts."

arousal or gratification of the customer or prostitute.⁵³

In *Freeman II* the actresses were paid for their performances in a film not adjudged obscene and not for the purpose of either Freeman's or the actresses' sexual arousal or gratification.⁵⁴ Therefore, Freeman "did not engage in the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution."⁵⁵

First Amendment

In discussing the constitutional considerations, the court's starting point was that the rights of free expression set out in the first amendment protects a nonobscene motion picture.⁵⁶ Subjecting a producer and director of a nonobscene motion picture to prosecution for pandering would substantially burden the exercise of first amendment rights.⁵⁷ If Penal Code section 266i was extended in this manner, producers of "films of unquestioned artistic and social merit, as well as films made for medical or educational purposes"⁵⁸ would be subject to criminal sanctions.⁵⁹

The court also found that the lower court's distinction between "speech" and "conduct" was untenable.⁶⁰ To determine the permissibility of governmental regulation of conduct which contains elements of speech, the court examined the standards set forth in *United States v. O'Brien*.⁶¹ The court found that the prosecution of a filmmaker, like Freeman, under section 266i violated the *O'Brien* requirement that the government interest be unrelated to the suppression of free speech.⁶² The governmental interests here were the prevention of profiteering from prostitution and the prevention of the spread of sexually transmitted dis-

53. *Freeman*, 46 Cal. 3d at 424, 758 P.2d at 1130, 250 Cal. Rptr. at 600 (quoting *Hill*, 103 Cal. App. 3d at 534-35, 163 Cal. Rptr. at 105).

54. *Freeman*, 46 Cal. 3d at 424-25, 758 P.2d at 1131, 250 Cal. Rptr. at 600 (1988).

55. *Id.* at 425, 758 P.2d at 1131, 250 Cal. Rptr. at 600.

56. *Id.*

57. *Id.* at 426, 758 P.2d at 1132, 250 Cal. Rptr. at 601.

58. *Freeman*, 46 Cal. 3d at 426, 758 P.2d at 1132, 250 Cal. Rptr. at 600.

59. *Id.*

60. *Id.* at 427, 758 P.2d at 1132, 250 Cal. Rptr. at 602.

61. 391 U.S. 367 (1968). In this well-known "draft card burning" case, the United States Supreme Court set out a four part test to determine whether a governmental regulation of conduct which also contained elements of speech was constitutional:

(1) Is the regulation within the constitutional powers of the government? (2) Is the governmental interest important or substantial? (3) Is the governmental interest unrelated to the suppression of free speech? (4) Are the incidental restrictions on first amendment interests no greater than necessary to further the governmental interest?

62. *Freeman*, 46 Cal. 3d at 427, 758 P.2d at 1132, 250 Cal. Rptr. at 602 (1988).

eases.⁶³ Neither interest was valid when "the self-evident purpose of the prosecuting authority in bringing these charges was to prevent profiteering from pornography without the necessity of proving obscenity."⁶⁴ The alleged governmental interests directly suppress free expression and, "in the context of a pandering prosecution for the making of a nonobscene motion picture, [are] not credible."⁶⁵

The supreme court considered the lower court's reliance on *Fixler*⁶⁶ and *American Art Enterprises*⁶⁷ misplaced. The alleged acts of "prostitution" procured by Freeman were not crimes independent from the payment for the right to photograph the performance.⁶⁸ Since the sexual acts here were completely lawful, occurring between consenting adults and not in a public place, no crime was committed.⁶⁹

The court distinguished the *Fixler* decision as involving aiding and abetting unlawful sexual intercourse with a minor in violation of Penal Code section 261.5⁷⁰ and criticized both *Fixler* and *American Art Enterprises* for relying on the crime of hiring a photographic model to perform sex acts as being an act of prostitution.⁷¹ In a footnote, the court stated that to the extent *Fixler*, *American Art Enterprises* and a third case, *People v. Zeihm*,⁷² held that the payment of wages to an actor or model who performs a sexual act in filming or photography for publication constitutes prostitution and therefore can support a pandering conviction, whether or not the film or photograph is obscene, these cases are disapproved.⁷³

63. *Id.*

64. *Id.*

65. *Id.*

66. 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (1976). In *Fixler* the Court of Appeal in the Second District of California found the defendants guilty of violating the pandering statute. The defendants had paid a fourteen year old girl to be photographed while engaging in sexual activity. The photos were later published.

67. 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (1977). In *American Art Enterprises* the Court of Appeal in the Second District held that the Red Light Abatement Law, Penal Code § 11225, was applicable to the buildings of the defendant, American Art Enterprises, Inc. Models were paid to engage in sexual acts in these buildings and this activity was photographed for later publication. The court found this to constitute prostitution and, therefore, susceptible to an injunction under the above-stated law.

68. *People v. Freeman*, 46 Cal. 3d 419, 429, 758 P.2d 1128, 1134, 250 Cal. Rptr. 598, 603 (1988).

69. *Id.*

70. "[Statutory Rape]

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." CAL. PENAL CODE § 261.5 (Deering 1985, Supp. 1988).

71. *Freeman*, 46 Cal. 3d at 428, 758 P.2d at 1133, 250 Cal. Rptr. at 602-03 (1988).

72. 40 Cal. App. 3d 1085, 115 Cal. Rptr. 528 (1974).

73. *Freeman*, 46 Cal. 3d at 428, 758 P.2d at 1133, 250 Cal. Rptr. at 603 n.6 (1988).

The court also distinguished a number of other cases relied upon by the prosecution. In the New York case of *People v. Kovner*,⁷⁴ the defendant, a producer of sexually-oriented films, was charged with promoting prostitution under New York Penal Law section 230.00. He moved to have the charges dismissed. The court denied the motion, holding that neither the statute in question nor any court interpretations of the statute excluded sexual conduct by a paid performer from the definition of prostitution. According to the court in *Freeman II*, the New York court in *Kovner* based its decision on the New York Legislature's intent to include engaging in explicit sex for pay in a film within the definition of prostitution.⁷⁵

In *People v. Maita*,⁷⁶ the defendant, an owner and manager of a theater specializing in "on-stage sex acts," was convicted for pimping and pandering. In affirming the convictions, the court of appeal in California held that any indirect infringement on constitutionally protected expression was justified, as the infringement was narrowly tailored to further an important government interest, controlling prostitution. In turn, controlling prostitution was unrelated to the suppression of free speech. The California Supreme Court in *Freeman II* stated that *Maita* mistakenly relied upon *Fixler*.⁷⁷ In addition, the court stated that *Maita* was distinguishable as the theater owner there actually paid his stage performers to have sex with paying customers.⁷⁸ Thus, his conviction for procuring persons for the purposes of prostitution was correct.⁷⁹

Similarly, *State v. Kravitz*,⁸⁰ an Oregon case in which a theater owner was convicted of promoting prostitution, also involved sexual relations between audience members and a paid performer in the defendant's nightclub.⁸¹ Finally, *United States v. Roeder*,⁸² a district court case in Kansas in which the defendant paid a young woman to be filmed while

74. 96 Misc. 2d 414, 409 N.Y.S.2d 349 (Sup. Ct. 1978).

75. *Freeman*, 46 Cal. 3d at 429, 758 P.2d at 1134, 250 Cal. Rptr. at 603 (1988).

76. 157 Cal. App. 3d 309, 203 Cal. Rptr. 685 (1984).

77. *Freeman*, 46 Cal. 3d at 429, 758 P.2d at 1134, 250 Cal. Rptr. at 604 (1988).

78. *Id.* at 430, 758 P.2d at 1134, 250 Cal. Rptr. at 604.

79. *Id.*

80. 14 Or. App. 243, 511 P.2d 844 (1973). The defendant in *Kravitz*, a theater owner who paid a man to have real and simulated sex on stage with a woman, was convicted of promoting prostitution. The Oregon Court of Appeals affirmed his conviction.

81. *Freeman*, 46 Cal. 3d at 430, 758 P.2d at 1134, 250 Cal. Rptr. at 604 (1988).

82. 526 F.2d 736 (10th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). The defendant in *Roeder* travelled with a young woman from Missouri to Kansas, where he paid her to be filmed while having sex. The United States District Court for the District of Kansas convicted the defendant on a violation of the Mann Act, which proscribes transporting a female across state lines for the purpose of prostitution. The court of appeals affirmed the conviction.

having sex, was distinguished as being a violation of the Mann Act.⁸³ The court stated that the identical conduct would not be criminal if done within one state.⁸⁴

Accordingly, the court found that Freeman's conduct was not criminal as charged and, therefore, reversed Freeman's pandering conviction which was "based solely on the payment of wages to the actresses in his film."⁸⁵

SIGNIFICANCE AND IMPLICATIONS

In order to understand the California Supreme Court's decision in *Freeman II*, it is necessary to analyze the history of the California pandering statute to see whether Freeman's conduct was intended to be prohibited. In addition, it is necessary to analyze the cases that preceded *Freeman II* in order to understand the groundwork upon which the prosecutor based his case. Finally, it is helpful to examine other jurisdictions' case law to see if a pandering law has ever been used to convict a producer of adult films and whether such a conviction was relevant to *Freeman II*.

Legislative History of Penal Code Section 266i

The present pandering statute is derived from the original statute passed in 1911 by the California Legislature.⁸⁶ The original pandering law was intended to prevent the spread of prostitution by making it a

83. The Mann Act, 18 U.S.C. §§ 2421-2424 (West 1970 & Supp. 1988), makes it a crime to transport a woman across state lines for immoral purposes.

84. *Freeman*, 46 Cal. 3d at 430, 758 P.2d at 1134, 250 Cal. Rptr. at 604 (1988).

85. *Id.*

86. 1911 Cal. Stat. ch. 14 § 1. The original statute read:

Any person who shall procure a female inmate for a house of prostitution, or who, by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure for a female person a place as inmate in house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state, or any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade or encourage an inmate of a house of prostitution or any other place in which prostitution is encouraged or allowed to remain therein as such inmate, or any person who shall, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procure any female person to become an inmate of a house of ill-fame, 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 who shall receive or give, or agree to receive or give, any money or thing of value for procuring, or attempting to procure, any female person to become an inmate of a house of ill-fame within this state, or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, to wit: pandering, and upon conviction for an offense under this act shall be punished by imprisonment in the state prison for a period of not less than one year nor more than ten years.

felony to "cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or . . . (to) procure for a female person a place as inmate in a house of prostitution."⁸⁷ As in all other states, except for Nevada, prostitution was and is illegal in California,⁸⁸ and the pandering law was intended to attach penalties to those who would gain by it.⁸⁹ The 1911 statute focused only on preventing the proliferation of houses of prostitution.⁹⁰

In 1953 the California Legislature passed the present statute,⁹¹ which was similar in intent to the 1911 law and still specifically referred to "procur[ing] another person for the purpose of prostitution."⁹²

In 1969, the legislature passed an amendment to the 1953 act.⁹³ The statute was made gender neutral and applied to all forms of prostitution and not just to "houses of ill-repute."

Penal Code section 266i was also amended in 1976, 1981, 1982 and 1983; each amendment changing the sentencing requirements.⁹⁴ The

87. *Id.*

88. CAL. PENAL CODE § 647(b) (Deering 1985).

89. 1911 Cal. Stat. ch. 14 § 1.

90. *Id.*

91. 1953 Cal. Stat. ch. 32 § 4.

92. *Id.*

93. The 1969 amendment to § 266i:

(1) Substituted "another person for the purpose" for "a female inmate for a house" after "(a) procures"; (2) substituted "another" for "a female" after "encourages"; (3) substituted "a prostitute" for "an inmate of a house of prostitution" after "to become"; (4) substituted "another" for "a female" after "procures for"; (5) substituted "another" for "any female" after "procures"; (6) substituted "for the purpose of prostitution" for "to become an inmate of a house of ill-fame" before "or to enter any place"; (7) substituted "another" for "any female" after "attempting to procure"; (8) substituted "for the purpose of prostitution" for "to become an inmate of a house of ill-fame within this State" before "or to come into this state"; and (9) deleted the former second paragraph which concerned the ability of a person referred to in this section to be a competent witness for the prosecution, notwithstanding the fact that they were married to the accused.

CAL. PENAL CODE § 266i (Deering 1985).

94. The 1976 amendment substituted "two, three, or four years" for "not less than one year nor more than 10 years" at the end of the section.

The 1981 amendment substituted "or four years, or, where the other person is under 14 years of age, is punishable by imprisonment in the state prison for three, six, or eight years" for "or four years" at the end of the section.

The 1982 amendment 1) amended the first paragraph by substituting (a) "three, four, or six years" for "two, three, or four years;" and (b) "16 years" for "14 years;" and 2) added the second paragraph (*see* 1983 amendment below).

The 1983 amendment deleted the former second paragraph which read: "Except as provided in Section 1203.065 and 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 under this section unless the person is required to serve a term of imprisonment in the state prison for three years as a condition of probation or suspension." (Deering 1985).

statute's application to "procuring another person for the purposes of prostitution" remained unchanged.

Analysis of Section 266i

It is unlikely that the legislature intended to extend the breadth of Penal Code section 266i to include activities such as Freeman's adult filmmaking, Fixler's sexual photography or American Art Enterprises' hiring of models and publishing of adult magazines. If otherwise, there would be some mention of that intent in either the language of the statute or in the legislative history.

The 1911 law was intended to halt the spread of prostitution by making it illegal for someone to gain by procuring a woman for a house of prostitution.⁹⁵ There is nothing in the statute that forbids profiting by hiring actors or models, even if those actors or models are engaging in sexual acts.⁹⁶ It is impossible to include Freeman's activities within the language "or who shall receive or give, or agree to receive or give, any money or thing of value for procuring, or attempting to procure, any female person to become an inmate of a house of ill-fame within this state"⁹⁷ In hiring actresses to appear in his film, Freeman was assuredly not hiring them to take up residence in a "house of ill-fame." And outside of preventing the spread of houses of prostitution, there is nothing in the 1911 pandering statute that indicates any additional or alternate purpose.⁹⁸

In 1911 book and magazine publishing was a fraction of the giant industry it is today and the motion picture industry was in its infancy. There was no need for the legislators of that era to prohibit the photographing or filming of sexual activity for profit when it was a minor or even nonexistent problem. The legislature did not have the foresight, or more truthfully the clairvoyance, to see the future of "adult entertainment."

The same might be said concerning the 1953 California Legislature which passed the present statute.⁹⁹ Although motion picture and publishing had grown to be multimillion dollar industries, the adult filmmaking business was small. The marketing for such films and photographs was done surreptitiously through advertisements containing obscure lan-

95. 1911 Cal. Stat. ch. 14 § 1.

96. Although there have been laws in the Northern Hemisphere regulating "wicked" material as far back as 1711. See *Final Report*, *supra* note 1, at 304, quoting Tribe, *Technical Report of the Commission on Obscenity and Pornography* (1970).

97. 1911 Cal. Stat. ch. 14 § 1.

98. *Id.*

99. 1953 Cal. Stat. ch. 32 § 4.

guage or through "under the counter" sales in mainstream businesses.¹⁰⁰ The 1953 statute still referred to "procur[ing] another person for the purpose of prostitution,"¹⁰¹ and contained no language prohibiting the conduct in which Freeman was engaging.

By 1969, the adult filmmaking industry had grown considerably. Yet the California Legislature's purpose in passing the 1969 amendment to section 266i, as described by the Legislative Counsel's Digest, was to provide

that [the] crime of pandering is committed when [a] person procures another person for purpose of prostitution, rather than [a] female person for [a] house of prostitution, or induces another person to become [a] prostitute, rather than [a] female person to become [an] inmate of [a] house of prostitution, or receives money or [a] thing of value for procuring another person for [the] purpose of prostitution, rather than [a] female person for [a] house of prostitution.¹⁰²

The statute was made to apply to both sexes and all forms of prostitution. Neither Assemblymen Beverly or Gonsalves, who introduced this amendment, nor any other legislator, intended to broaden the sweep of this law to include producers of "adult" material, even though they were more than likely aware of the growth of the industry.¹⁰³

The entire history of the pandering statute reveals that the legislature intended to regulate the proliferation of, initially, houses of prostitution and, later, all types of prostitution in section 266i, and not speech, such as the production of a motion picture. Therefore, any broader interpretation of Penal Code section 266i would have to depend on the definition of "prostitution." That is, if "prostitution" encompassed being paid while being filmed or photographed performing sexual acts, then anyone paying for this act could also be guilty of pandering. California Penal Code section 647(b) defines "prostitution" as "any lewd act between persons for money or other consideration."¹⁰⁴ The California Supreme Court in *Freeman II* stated that, "the definition of 'prostitution' (and ultimately, therefore, the definition of 'pandering') depends on the definition of a 'lewd act.'"¹⁰⁵ The court went on to conclude that for a "lewd act" to constitute prostitution, certain "touching" for the purposes

100. See *Final Report*, *supra* note 1, at 13.

101. 1953 Cal. Stat. ch. 32 § 4.

102. Assembly Bill 818, CALIFORNIA LEGISLATURE-1969 REGULAR SESSION.

103. *Id.*

104. CAL. PENAL CODE § 647(b) (Deering 1985).

105. *People v. Freeman*, 46 Cal. 3d 419, 424, 758 P.2d 1128, 1130, 250 Cal. Rptr. 598, 600 (1988).

of sexual arousal or gratification of the customer or the prostitute must occur.¹⁰⁶ Therefore, there must be touching between a customer and a prostitute for the purpose of the sexual gratification of either for there to be an act of prostitution.

The activities Freeman paid for do not come within this definition. Freeman was the "customer" in the transaction, in that he paid for the alleged illegal acts. Yet there was no evidence presented that the actresses and Freeman ever touched. Further, even if they had touched, it was not for the purposes of either's sexual gratification, but rather for the purpose of setting up the shot for inclusion as part of the motion picture.¹⁰⁷

The statute defining "prostitution" was also never intended to include paid for acts performed before either a still or motion picture camera. As the California Supreme Court said in writing about section 647, "nothing in the legislative history of the section indicates that it was meant to apply to activities, such as theatrical performances, which are prima facie within the ambit of First Amendment protection."¹⁰⁸ If the statute does not apply to theatrical performances or other first amendment protected activities, like motion pictures, then hiring someone to appear in such a protected activity cannot be pandering. Section 266i, therefore, does not have the scope necessary to catch Freeman and other producers of sexually-oriented materials within its ambit. Freeman hired actresses for the purpose of appearing in his motion picture, not for the purpose of profiting from acts of prostitution.

From Fixler to Freeman

*People v. Fixler*¹⁰⁹ was the first case in which a defendant who was engaged in expressive activities, namely photography, was convicted

106. *Id.*

107. A more prosaic definition of "prostitution" can be found in WEBSTER'S NEW WORLD DICTIONARY at 597 (Concise ed. 1962), which defines the term "prostitute" as meaning "to sell the services of (oneself or another) for purposes of sexual intercourse." The question arises whether the performers were hired to appear in Freeman's film or whether they were hired to have sexual intercourse. Would the actresses have been hired if they had agreed to appear in the film, but refused to have sexual relations? This may not be a truly relevant question. If any actor in a motion picture refused to do an act in a film (including such acts as cursing or acting viciously) when required by the role, it is doubtful whether he or she would be permitted to remain on the production set. An act, whether it be shouting or sexually caressing, written into the script of a motion picture must be performed by the actor. If it is not performed, the value of the performance is lessened, as is the value of the movie.

108. *Barrows v. Municipal Court*, 1 Cal. 3d 821, 826, 464 P.2d 483, 486, 83 Cal. Rptr. 819, 822 (1970).

109. 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (1976).

under a pandering statute. As such, it formed the basis for the conviction in *Freeman I*.

In *Fixler*, the Second District California Court of Appeal affirmed the convictions of two individuals, Fred Fixler and Harry Lee Utterback, Jr., who had allegedly violated Penal Code section 266i. Utterback was a photographer and Fixler was a photo editor. Both men worked for American Art Enterprises, Inc., a publisher of "magazines devoted to the depiction of sexual activity."¹¹⁰ They were prosecuted for hiring a fourteen year old girl named Patricia to perform various sexual activities on approximately eight to fifteen different occasions.¹¹¹

The court found that Patricia engaged in prostitution because she engaged in sexual intercourse for money. Thus, the defendants were guilty of pandering under the statute.¹¹² Fixler and Utterback had argued that since they had hired Patricia to be photographed, they could not be convicted of pandering without proof that the photos violated the obscenity laws.¹¹³ The court stated that the defendants' basic argument was "somewhat clothed with First Amendment protection,"¹¹⁴ but found this fact irrelevant. The court distinguished between "[t]he manner of obtaining the photographs and the ultimate use to which those photographs might be put. . . ."¹¹⁵ In other words, the criminal act of hiring an individual to engage in sex for money was distinct from the right of free expression exercised by publishing a nonobscene photograph. The latter is expression protected by the first amendment, while the former is conduct and open to state regulation. The court cited *O'Brien*¹¹⁶ to bolster the distinction between conduct and speech.

The court's decision in *Fixler* rested on two points: 1) that although publishing the magazine was permissible as free speech, the conduct of hiring someone to engage in sex, which acts were photographed, was not; and 2) hiring someone to have sex while being photographed was engaging in pandering because, by definition, to be paid to perform in sexual activity is to be a prostitute.¹¹⁷ That is, since a person is a prostitute when paid to have sex, the person who hires the "prostitute" is guilty of pandering, no matter where the sex act occurs. On this basis, the court

110. *Id.* at 324, 128 Cal. Rptr. at 364.

111. *Id.*

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

113. *Id.*

114. *Id.*

115. *Id.*

116. 391 U.S. 367 (1968).

117. *People v. Fixler*, 56 Cal. App. 3d 321, 325, 128 Cal. Rptr. 363, 365 (1976).

have considered the *Autry* analysis as it was an earlier Ninth Circuit Court of Appeals opinion.

Finally, the decisions in *Rooney* and *Platinum* provide examples of how other courts have dealt with the issue of whether television exhibition rights should extend to videocassette display. While both the *Rooney* and *Platinum* licenses contained broader language than the *Cohen* license, the factual similarities demand a consistent application of the rules. *Platinum* adopted the *Rooney* conclusion equating exhibition by means of television with exhibition by means of videocassette reproduction. In so concluding, *Rooney* applied the rule set forth in *Bartsch* where that court expressly adopted Nimmer's "ambiguous penumbra" analysis. It follows then, that the *Cohen* court could have applied the rules adopted in *Platinum* and *Rooney* because both cases explicitly referred to the factual situation at issue in the *Cohen* case, whether television exhibition rights ought to extend to videocassette display. In failing to address the issue, the *Cohen* court inadequately analyzed the case.

Consequently, *Cohen* should be in line with the earlier cases because of the factual similarities. The Ninth Circuit's conflicting opinion in *Cohen* is thus inconsistent with those cases and Nimmer's accepted approach.

The Ninth Circuit Failed To Address The Public Performance Issue

In its consideration of whether Paramount infringed Cohen's rights as copyright owner, the Ninth Circuit Court of Appeals neglected to consider that home videocassette display has already been determined not to be a public performance. Without a public performance there can be no violation of the Copyright Act. Paramount addressed the public performance issue because the *Cohen* court differentiated between videocassette exhibition and exhibition by means of television by comparing the amount of control viewers possessed with each type of display. The *Cohen* license granted Paramount the "authority . . . to record, in any manner, medium, form or language . . . and to make copies of such recordings . . . and to perform said musical composition everywhere, *all in accordance* with the terms, conditions, and limitations hereinafter set forth . . ." ¹⁰⁷ One of the limitations restricted the exhibition of *Medium Cool* "by means of television." Thus, the restriction on the television exhibition rights applied only to the right to perform the musical composition. The court's holding, however, combined public performances by broadcast or cable transmissions to the consumer with private perform-

107. *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 853 (9th Cir. 1988).

ances entirely within the control of the consumer, thereby misconstruing the Act.¹⁰⁸

Contrary to the *Cohen* court's opinion, many courts and the House and Senate Committee Reports on section 101 have concluded that home videocassette display does not constitute a public performance.¹⁰⁹ As a result, there can be no copyright infringement. The legislative history on section 101 states that:

Under the definitions of "perform," "display," "publicly," and "transmit" in Section 101, . . . any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in Section 101.¹¹⁰

Thus, the legislative intent behind section 101 implies that home videocassette display is not included in the public performance definition in section 106 of the Act.

Many decisions have supported the idea that home videocassette display does not constitute a public performance.¹¹¹ The basic premise underlying this rationale was best summed up by the court in *Jerome H. Remick & Co. v. American Automobile Accessories*.¹¹² The court stated that "[w]hile statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries."¹¹³

Various courts have relied on the *J.H. Remick* decision to define what is and what is not a public performance under section 101 of the Copyright Act. Courts adopting the *J.H. Remick* rationale to encompass newly developed technological advances imply that this rationale should extend to the argument that home videocassette display does not constitute a public performance. The United States Supreme Court in *Fortnightly Corp. v. United Artists Television, Inc.*¹¹⁴ accepted the *J.H.*

108. Brief for Appellee at 8, *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988).

109. See *infra* notes 109-20 and accompanying text.

110. S. REP. NO. 94-473, 94th Cong., 1st Sess. 59-60 (1975); H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. at 63 (1976).

111. See *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984); *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986).

112. 5 F.2d 411 (6th Cir. 1925).

113. *Id.*

114. 392 U.S. 390 (1968). The Court held that "[b]roadcasters perform. Viewers do not perform." *Id.* at 398.

affirmed the defendants' convictions.¹¹⁸

In *American Art Enterprises*,¹¹⁹ the Los Angeles District Attorney sought to close American Art Enterprises, Inc. (hereinafter "American"), "a corporate empire engaged in the publication and distribution of pornographic materials"¹²⁰ under the Red Light Abatement Law.¹²¹ American's headquarters in Chatsworth, California was used for the photographing of "men and women who perform sexual intercourse in every conceivable variant,"¹²² who were hired for that purpose. The trial court found that the building in Chatsworth was not used for the purpose of prostitution as that term is used in Penal Code section 11225 and that the law was not applicable to a building used for publishing and distributing books and magazines.¹²³ Since the Red Light Abatement Law was not applicable to American, the court determined that an injunction forcing the closing of American was not permissible.¹²⁴

The California Second District Court of Appeal reversed the trial court decision.¹²⁵ Quoting *Fixler*, the court stated that "sexual intercourse for hire by the models whose activity is photographed for the publications of the American Art empire is prostitution."¹²⁶ Thus, absent a constitutional restriction,¹²⁷ the court held applicable the Red Light Abatement Law, which states that "[e]very building or place used for the purpose of . . . prostitution . . . is a nuisance which shall be enjoined"¹²⁸

In considering the possible constitutional restrictions on the statute's application to American, the court of appeal cited *O'Brien* for the proposition that conduct which contains elements of speech may be regu-

118. *Id.* at 327, 128 Cal. Rptr. at 366.

119. 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (1977).

120. *Id.* at 527, 142 Cal. Rptr. at 339-40.

121. CAL. PENAL CODE § 11225 (Deering 1985), which reads:

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, whether it is a public or private nuisance.

Nothing in this section shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.

122. *People ex rel. Van De Kamp v. American Art Enter., Inc.*, 75 Cal. App. 3d 523, 527, 142 Cal. Rptr. 338, 340 (1977).

123. *Id.* at 528, 142 Cal. Rptr. at 340.

124. *Id.*

125. *Id.* at 527, 142 Cal. Rptr. at 339.

126. *American Art Enter., Inc.*, 75 Cal. App. 3d at 529, 142 Cal. Rptr. at 341.

127. *Id.*

128. See CAL. PENAL CODE § 11225.

lated if the regulation furthers an important governmental interest and if any incidental restriction on speech is no greater than necessary.¹²⁹ As the prohibition of pandering and prostitution is a substantial government interest and the premises in question were used for prostitution, the court found that applying Penal Code section 11225 was appropriate.¹³⁰

In *People v. Maita*,¹³¹ the trial court had found the owner of a theater, who hired women to perform sex acts with members of the paying audience, guilty of pimping under Penal Code section 266h, pandering per Penal Code section 266i and keeping a house of ill fame and house for prostitution under Penal Code sections 315 and 316.¹³² On appeal the defendant argued that, since the conduct in his theater was declared not obscene, it was protected expression under the First Amendment of the United States Constitution.¹³³ As the Second District Court of Appeal did in *Fixler* and *American Art Enterprises*, the First District Court of Appeal stated that, pursuant to *O'Brien*, "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."¹³⁴ The court stated that the state had the authority to prosecute the defendant under the pimping and pandering statutes as "the pimping and pandering laws do not prohibit the presentation of live, nude entertainment—they merely direct that the entertainer cannot have sexual relations with the audience."¹³⁵ The court further relied upon *Fixler* and *American Art Enterprises* in rejecting the defendant's contention that the statutes were not applicable unless the on-stage performances were obscene.¹³⁶

FROM *FIXLER* TO *FREEMAN*: A STEP FORWARD OR BACKWARD? AN ANALYSIS

To affirm the convictions of the defendants in *Fixler*, *American Art Enterprises* and *Maita*, the courts relied upon two key factors: 1) the definition of prostitution, as used in the pandering statute in *Fixler* and *Maita* and in the Red Light Abatement Law in *American Art Enterprises*,

129. *People ex rel. Van De Kamp v. American Art Enter., Inc.*, 75 Cal. App. 3d 523, 530, 142 Cal. Rptr. 338, 341 (1977).

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

131. 157 Cal. App. 3d 309, 203 Cal. Rptr. 685 (1984).

132. *Id.* at 313, 203 Cal. Rptr. at 686.

133. *Id.* at 315, 203 Cal. Rptr. at 687.

134. *Id.*

135. *Id.* at 316, 203 Cal. Rptr. at 688.

136. *Maita*, 157 Cal. App. 3d at 316-17, 203 Cal. Rptr. at 688-89.

included being hired to be photographed while performing sexual activities; and 2) the distinction between conduct and speech. The California Supreme Court in *Freeman II* differed from the courts of appeal in its analysis of both factors.

The Definition of Prostitution

The lower courts' decisions in *Fixler*, *American Art Enterprises*, *Maita* and *Freeman I* depended partially on the definition of "prostitution," which in turn depended upon definitions of the terms "lewd act" and "customer" and payment for the lewd act.¹³⁷ The supreme court in *Freeman II* stated that statutory and case law set forth that "for a 'lewd'. . . act to constitute 'prostitution,' " there must be some intimate touching between the prostitute and customer "for the purpose of sexual arousal or gratification of the customer or of the prostitute."¹³⁸ If the actresses could somehow be defined as "prostitutes," the defendant in *Freeman II* was still not involved in any intimate touching of the women and thus was not a "customer" as that term is understood in the context of the statutes and case law.

Even if a nontouching party who pays for a sexual "transaction" between two other people could be termed a "customer," the defendant in *Freeman II* did not participate in a "lewd" act constituting prostitution, because he did not derive "sexual arousal or gratification" from the act.¹³⁹

Finally, the court in *Freeman II* stated that the payment by the defendant was not for sexual arousal, but for the actors' performances.¹⁴⁰ Therefore, the defendant in *Freeman II* did not engage in pandering, because the people he hired did not engage in prostitution.¹⁴¹

The expansion of the term "prostitute" to include the acts of the performers in *Fixler*, *American Art Enterprises* and *Freeman I*, and, therefore, the expansion of the pandering statute to include the activities of the defendants, was correctly dismissed by the California Supreme Court in *Freeman II*.¹⁴² In none of these cases were the defendants paying to participate in the sexual acts. Further, "prostitution" is not an accurate reflection of the activity for which the performers in *Fixler*,

137. *People v. Freeman*, 46 Cal. 3d 419, 424, 758 P.2d 1128, 1130, 250 Cal. Rptr. 598, 600 (1988).

138. *Id.* (quoting *People v. Hill*, 103 Cal. App. 3d 525, 534-35, 163 Cal. Rptr. 99, 105 (1980)).

139. *Freeman*, 46 Cal. 3d 419, 424-25, 758 P.2d 1128, 1131, 250 Cal. Rptr. 598, 600 (1988).

140. *Id.* at 424-25, 758 P.2d at 1131, 250 Cal. Rptr. at 600.

141. *Id.* at 425, 758 P.2d at 1131, 250 Cal. Rptr. at 600.

142. *Id.* at 423-25, 758 P.2d at 1130-31, 250 Cal. Rptr. at 599-600.

American Art Enterprises and *Freeman II* were paid. They received money, not for having sex, but for being photographed. Their sexual conduct would have been useless to the defendants in these cases if they were not photographed. Since the models and actresses were being paid to be photographed, not to have sex, and the sexual activities engaged in were legal,¹⁴³ there was no prostitution involved in *Freeman II*, *Fixler* or in *American Art Enterprises* and that basis of the lower courts' rulings in those cases was declared infirm.¹⁴⁴

On the other hand, the women in *Maita* were actually paid by the theater owner to perform sexual activities with paying customers.¹⁴⁵ The court in *Freeman II* stated that that activity was prostitution and, therefore, the defendant's conviction for pandering was properly affirmed and distinguishable from the other cases.¹⁴⁶

Besides the above definitional difficulties, in order to apply the pandering statute to the activities in *Freeman II*, *Fixler* and *American Art Enterprises*, the parameters of the pandering statute would have to be so broad as to place even "legitimate" photographers and movie makers in danger of violating the law. "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."¹⁴⁷ Although the prosecutors in *Freeman II* would no doubt deny such an intention, if the term "prostitution" included the activity of actors performing any sexual activity on film, such a broad sweep would ensnare not only makers of "pornographic" films, but producers of other, less graphic, but surely "adult" films, which to date have been protected by the guarantees of the first amendment.¹⁴⁸

In addition, a photographer would have no way of knowing whether the picture taken of an intimate caress between models was permissible or whether in paying the models a crime had been committed. As such, the statute would be void for vagueness, since no one could be sure whether or not the activity they were engaged in was prohibited.¹⁴⁹

143. *Id.* at 429, 758 P.2d at 1134, 250 Cal. Rptr. at 603.

144. *Id.* at 428, 758 P.2d at 1133, 250 Cal. Rptr. at 603 n.6.

145. *People v. Maita*, 157 Cal. App. 3d 309, 319, 203 Cal. Rptr. 685, 690 (1984).

146. *People v. Freeman*, 46 Cal. 3d 419, 429-30, 758 P.2d 1128, 1134, 250 Cal. Rptr. 598, 604 (1988).

147. *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964).

148. *See Jenkins v. Georgia*, 418 U.S. 153 (1974), in which the motion picture *Carnal Knowledge* was declared obscene by local authorities, yet deemed worthy of constitutional protection by the Supreme Court.

149. *See Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Finally, interpreting section 266i to include Freeman's activities would have made all obscenity statutes irrelevant and redundant. No prosecutor would bother going through the laborious and difficult process of convincing a jury that a given work did not have some redeeming value if all he had to prove was that the performers engaged in a sexual act and that the producer paid for that performance. As the court stated in *Freeman II*, such an "end run" around the obscenity statute must be rejected.¹⁵⁰

The Distinction Between "Conduct" and "Speech"

The second factor in *Freeman II*, *Fixler*, *American Art Enterprises* and *Maita* was the courts' distinguishing between "conduct" and "speech." In *O'Brien*, the defendant was convicted in the district court in Massachusetts for burning his draft card.¹⁵¹ After the First Circuit Court of Appeals reversed on the grounds that the defendant's activity was an exercise of free speech, the United States Supreme Court reinstated the conviction.¹⁵² The Court found that the conviction was justified as the regulation: 1) was within the constitutional power of the government; 2) furthers a substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) any incidental restriction on alleged first amendment freedoms is no greater than is essential to further that interest.¹⁵³

The California Supreme Court in *Freeman II* found that the suppression of free expression was untenable because the "self-evident purpose of the prosecuting authority in bringing these charges was to prevent profiteering in *pornography* without the necessity of proving obscenity"¹⁵⁴ and that "[p]unishment of a motion picture producer for the making of a nonobscene film . . . has little if anything to do with the purpose of combatting prostitution,"¹⁵⁵ the alleged reason for Freeman's prosecution.

In applying the *O'Brien* test to the activity in *Freeman II*, as well as in *Fixler*, *American Art Enterprises* and *Maita*, Penal Code section 266i passes the first part of the *O'Brien* test. Such a pandering statute is within the constitutional power of the California legislature, since the

150. *People v. Freeman*, 46 Cal. 3d 419, 423, 758 P.2d 1128, 1130, 250 Cal. Rptr. 598, 599 (1988).

151. 391 U.S. 367, 369 (1968).

152. *Id.* at 372.

153. *Id.* at 376-82.

154. *People v. Freeman*, 46 Cal. 3d 419, 427, 758 P.2d 1128, 1132-33, 250 Cal. Rptr. 598, 602 (1988).

155. *Id.*

legislature has the power to enact laws which regulate the activities of the citizenry. The second part of the test, whether the regulation in question furthers a substantial government interest, raises the question of what is the real government interest. Either combatting prostitution or halting people from profiteering from others' sexual activities may be a valid government interest. If, however, the real reason for this statute is to prohibit the production of sexual, yet nonobscene, materials, this is not a truly substantial government interest. There may, in fact, be a substantial benefit to society from the dissemination of nonobscene sexual materials, such as greater awareness of the health hazards of sexual promiscuity and of unwanted pregnancy.

Part three of the *O'Brien* test, that the governmental interest be unrelated to the suppression of free expression, is even more problematic. If Freeman, Fixler and American were selling tickets so people could have sex with their paid performers, as in *Maita*, there would be no relation between the interest asserted and any rights of free expression. The defendants would then be engaging in profiting from others' sexual activities and not from the production and sale of films and photographs. This was not the case. The defendants made their profit from the sale of materials which were never found to be legally obscene.¹⁵⁶ Since the materials were not obscene, these magazines, photographs and movies are all protected expression under the First Amendment of the United States Constitution. It is hard to seriously consider, therefore, the proposition that there would be no suppression of free expression under this statute.

The fourth part of the *O'Brien* test also does not stand up to scrutiny. The application of the statute in order to halt Freeman's, Fixler's and American's activities is not a mere "incidental" infringement on free expression rights. Declaring that producing such materials subjects the producer to criminal sanctions, without the necessity of proving that the materials are legally obscene, would result in a total ban, and not an incidental infringement, on previously protected expression. In addition, there are other methods of preventing people from profiting from others' sexual activities, if that is the purpose behind the statute. More narrowly tailored laws can specifically prohibit certain undesirable conduct. More exact obscenity laws that are capable of being enforced can be enacted. To apply the pandering statute in the manner requested by the prosecutors in *Freeman II* is like throwing the baby out with the bathwater.

156. See *Miller v. California*, 413 U.S. 15 (1972), *supra* note 9, for the United States Supreme Court's definition of obscenity.

Pandering Statutes and their Applications in Other Jurisdictions

Pandering statutes have rarely been applied to activities associated with free speech. In 1973, the Oregon Court of Appeals in *State v. Kravitz*¹⁵⁷ upheld the conviction of a theater owner for violating a statute which proscribed the promotion of prostitution.¹⁵⁸ This case was factually similar to the later California case of *Maita*, in that the defendant paid someone to appear on stage before a paying audience and engage in real and simulated sex with another person.¹⁵⁹ The court found that the activities of the performers were proscribed by the relevant prostitution statute.¹⁶⁰ The court had no trouble finding the defendant guilty of promoting prostitution.¹⁶¹ The court did not even address the issue of whether certain sexual activities performed in a theater may be protected by the first amendment and therefore exempt from prosecution under the Oregon statute. Since the performers were both paid to have sex on stage and their activities did not include anything but sex, that is, there was no "speech" involved, the court did not hesitate in finding the defendant guilty.¹⁶²

People v. Kovner,¹⁶³ a New York case, was closer to the facts in *Freeman II*. The defendant, Harold Kovner, was a producer, director and distributor of pornographic films. He was charged with two counts of promoting prostitution and nine counts of obscenity.¹⁶⁴ The question before the court was whether Kovner promoted prostitution by hiring actors and actresses to engage in filmed sexual conduct.¹⁶⁵ The defendant asserted that actors taking money to participate in a motion picture, in which they performed sexual acts, did not constitute prostitution

157. 14 Or. App. 243, 511 P.2d 844 (1973).

158. OR. REV. STAT. § 167.012(1)(d) (1987), which reads:

"(1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, the person knowingly: . . .

(d) Engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution."

159. *Kravitz*, 14 Or. App. 243, 244, 511 P.2d 844, 845 (1973).

160. OR. REV. STAT. § 167.007 (1987), which reads:

"(1) A person commits the crime of prostitution if (a) the person engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee; or

(b) the person pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.

(2) Prostitution is a Class A misdemeanor."

161. *Kravitz*, 14 Or. App. 243, 246, 511 P.2d 844, 846 (1973).

162. *Id.*

163. 96 Misc. 2d 414, 409 N.Y.S.2d 349 (Sup. Ct. 1978).

164. *Id.* at 415, 409 N.Y.S.2d at 350.

165. *Id.*

within the meaning of the statute.¹⁶⁶ In examining New York's prostitution statute,¹⁶⁷ the court stated "[t]he legislature, by enacting section 230.00, intended to prohibit certain sexual conduct of a commercial nature,"¹⁶⁸ and that "[n]either the statute itself (Penal Code 230.00), nor any decisions interpreting it, exclude sexual conduct by a paid performer from the definition of prostitution."¹⁶⁹

Although the court in *Kovner* admitted that the use of the "promoting prostitution" statute¹⁷⁰ had not been used by New York authorities before "for the purpose of regulating pornography,"¹⁷¹ it found this new approach acceptable both because the relevant statutes did not prohibit it, and because another jurisdiction had applied its parallel statute in the same manner.¹⁷²

Analysis of Kovner

The New York court in *Kovner* stated that since the use of the relevant statute in the manner desired by the prosecutor was not specifically prohibited, its use is permissible.¹⁷³ In other words, since the New York State Legislature had not prohibited using the "promoting prostitution" statute for the purpose of regulating pornography, this new use was permissible. This is questionable. Problems of due process arise when a statute is applied in a new and unique fashion. Someone cannot avoid violating a statute when it is applied by the courts in this new manner. However, even if such an application of the statute was permissible, one of the pillars that supported the court's conclusion in *Kovner* was the California courts' use of Penal Code section 266i in *Fixler* and *American Art Enterprises*. After *Freeman II* such support crumbles, and it is un-

166. *Id.* at 416, 409 N.Y.S.2d at 351.

167. N.Y. PENAL LAW § 230.00 (McKinney 1980), which reads:

"A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee. Prostitution is a Class B Misdemeanor."

168. *Kovner*, 96 Misc. 2d at 416, 409 N.Y.S.2d at 351.

169. *Id.*

170. N.Y. PENAL LAW § 230.25 (McKinney 1980 & Supp. 1988), which reads:

A person is guilty of promoting prostitution in the third degree when he knowingly:

1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; or

2. Advances or profits from prostitution of a person less than nineteen years old.

Promoting prostitution in the third degree is a class D felony.

171. *Kovner*, 96 Misc. 2d at 417, 409 N.Y.S.2d at 351.

172. *Id.* That state was California and the cited cases were *Fixler* and *American Art Enterprises*.

173. *Kovner* at 417, 409 N.Y.S.2d at 351.

certain whether the New York court would decide *Kovner* identically today. The only basis of the *Kovner* decision left is the fact that the New York legislature did not prohibit the statute's use in such a manner. As it stands now, the New York Court of Appeal never granted review to the appellant in *Kovner*, so there is no certainty on how New York's highest court would decide this issue.

COMMENTS AND OBSERVATIONS

The California Supreme Court has taken away a new and potentially powerful weapon from those who seek to halt the spread of pornographic materials, whether in films, books or photographs. The pandering statute has been relegated to its original use of halting the spread of prostitution by making it illegal for anyone to profit from this crime. In *Freeman II*, the court declared that the first amendment rights of filmmakers, as well as, by implication, photographers and publishers of books and magazines, prohibits the use of this statute to halt their activities.¹⁷⁴

What can be done then in order to stop the spread of magazines and films that, as some allege, cause both antisocial and sometimes unlawful acts of sexual violence?¹⁷⁵

A more carefully thought out and worded definition of obscenity is needed. The creators of all the arts need to know and understand what the standards of acceptable sexual depiction are and not be left subject to the vagaries of prosecutorial or judicial discretion. If there is specific behavior that the legislature of either a state or the federal government wishes to stop people from viewing, let the legislatures draft legislation to that effect. In that way, producers of the arts would know what the scope of the law entails and prosecutors could go after those who go beyond the law with confidence and without the need to stretch its boundaries.¹⁷⁶

If such an enforceable obscenity law is not enacted and prosecutors are forced into creative applications of other laws, such as occurred in

174. "SAN DIEGO-Pandering charges against a Hollywood film producer were dismissed yesterday because of a recent state Supreme Court ruling banning such prosecutions for adult films that aren't obscene." *Daily Variety*, Sept. 29, 1988.

175. See *Final Report*, *supra* note 1, at 40.

176. As this article was being written, the California legislature passed an amendment to §§ 311 and 313 of the Penal Code, which are the state obscenity statutes. This act, entitled the Deddeh-Polcano Anti-Obscenity Act of 1988, conforms California law to the current federal standards.

In addition, the United States Senate recently passed a new antiobscenity statute, entitled "Child Protection and Obscenity Enforcement Act of 1988," which addresses primarily, but not exclusively, child pornography. A companion bill in the House of Representatives is pending.

Freeman II, the entire media, arts and entertainment industries are thrown into a quandry. While the authorities might protest that only the production of truly "pornographic" material would be subject to prosecution, the line between acceptable and unacceptable would often be too fine to detect. In the past thirty years there have been many "legitimate" stage and screen productions in which the hired performers engaged in simulated and real sexual conduct.¹⁷⁷ No doubt the statutes would be applied most often to "fringe" film and photography producers, those not in the mainstream of art and commerce. But this selective prosecution is an unacceptable method of enforcing our criminal statutes. Specifically, the rights guaranteed by the Constitution are meant for all members of society, especially those not in the mainstream.

To leave the decision of which films and, therefore which producers, are "acceptable" in the hands of prosecuting authorities, no matter how well meaning, is to ask for a shrinking of creative forces in our society. Without the freedom to fully express themselves, the greatest artists may be left with only a hollow mandate to create. Surely few would be bold enough to depict people in passionate embrace if the threat of prison constantly loomed over their heads. In addition, the acceptable, and therefore the nonacceptable, is a constantly changing norm in our society. What may be permissible under one authority may change with the next election. It follows that the arts, even the "adult only" sector of the arts, is able to perform its function of entertaining and enlightening only when the laws are not applied so artfully.

Philip M. Cohen

177. Some of the more mainstream films which have included such scenes are *The Lovers* with Jeanne Moreau and Jean-Marc Bory (1959), *Coming Home* with Jon Voight and Jane Fonda (1978), *100 Rifles* with Jim Brown and Raquel Welch (1968), *Two Women* with Sophia Loren (1961), *Deliverance* with Burt Reynolds and Ned Beatty (1972), *Last Tango in Paris* with Marlon Brando and Maria Schneider (1972), *The Devils* with Oliver Reed (1971), *Risky Business* with Tom Cruise and Rebecca de Mornay (1983), *Shampoo* with Warren Beatty and Julie Christie (1975), *Stripes* with Bill Murray and P.J. Soles (1981), and *Rosemary's Baby* with John Cassavetes and Mia Farrow (1968). *Sex in the Movies*, PREMIERE MAGAZINE, Sept. 1988.