STANLEY V. GEORGIA: A FIRST AMENDMENT APPROACH TO OBSCENITY CONTROL

In 1957 in *Roth v. United States*[1] the Supreme Court declared that obscenity as a class of expression was without first amendment protection. While officially upholding the validity of *Roth*, the Court has quietly narrowed the application of this declaration through a series of modifying decisions.[2] The most recent of these modifying decisions is *Stanley v. Georgia*.[3]

Robert Eli Stanley was being investigated by federal and state agents for suspected bookmaking activities. On the basis of this investigation they secured a search warrant and entered his home. No evidence of bookmaking activities was found, but the officers did find three reels of movie film in an upstairs bedroom. The officers borrowed a projector from the same home and viewed the films. Concluding that the films were obscene and determing that Stanley occupied the bedroom in which they were seized, the state officers arrested Stanley. He was convicted for knowingly possessing obscene material in violation of Georgia law.[4] That conviction was affirmed by the Georgia Supreme Court.[5] Upon appeal, the United States Supreme Court reversed the conviction on the ground that the first and fourteenth amendments prohibited making mere private possession of obscene material a crime.[6]

The issue of private possession of obscene material was not a new one. It had been given thorough consideration by the Ohio Supreme Court in 1960 in the case of *State v. Mapp*.[7] The majority of court felt that the

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[1] 359 U.S. 476 (1957).

[2] *See* Redrup v. New York, 386 U.S. 767 (1967); Ginzburg v. United States, 383 U.S. 463 (1966).

[3] 394 U.S. 557 (1969).

[4] GEORGIA CODE ANN. § 26-6301 (Supp. 1969) provides:

> Any person . . . who shall knowingly have possession of . . . any obscene matter . . . shall . . . be guilty of a felony . . . .

Prior to *Stanley v. Georgia*, 394 U.S. 557 (1969), in addition to Georgia, the following states had provided that mere possession of obscene material was illegal:

(1) Arkansas (ARK. STAT. ANN. §§ 41-2707 & 41-2729 (Supp. 1967));
(2) Colorado (COLO. REV. STAT. ANN. § 40-9-17(4) (1963));
(3) Florida (FLA. ST. ANN. § 847.011(2) (1960));
(4) Indiana (IND. STAT. ANN. § 10-2803 (Supp. 1969));
(5) Maine (ME. REV. STAT. ANN. tit. 17 § 2901 (1964));
(6) New Mexico (N. M. STAT. ANN. § 14-17-14(1) (1953) (providing that municipalities may prohibit possession);
(7) Texas (TEX. PEN. ART. 527 (Supp. 1968-69) (that portion relating to possession was declared unconstitutional in *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969));
(8) Wisconsin (WIS. STAT. ANN. §§ 944.21(b) & 944.22 (1957));
(9) Wyoming (WYO. STAT. ANN. § 6-103 (Supp. 1969)).

[5] Stanley v. State, 229 Ga. 259, 161 S.E. 2d 309 (1968).

[6] 394 U.S. 557, 568 (1969).

[7] 170 Ohio St. 427, 166 N.E.2d 387 (1960).

Ohio statute which made possession of obscene material illegal was "a clear infringement of the constitutional rights of the individual" and was inconsistent with the "basic liberties of the individual."[8] This case (*Mapp v. Ohio*)[9] was appealed to the United States Supreme Court where the issue of private possession was extensively briefed and argued.[10] However, the Court chose to disregard that issue in favor of the illegal search and seizure issue present in the case. Since the issue of illegal search and seizure was present in *Stanley* and had been briefed before the Court,[11] one wonders why the Court did not follow the *Mapp* precedent in *Stanley*. Certainly the Court was aware of the far-reaching implications of its extension of protection, albeit in the private context, to obscene material. Since these implications could have been avoided while still accomplishing a reversal of Stanley's conviction, one must conclude that the Court intended these implications to emanate from *Stanley*.

Because the alleged obscenity of the films was not contested, the Court assumed that they were obscene.[12] Relying on the declaration in *Roth*, Georgia contended that since the films were obscene, they were unprotected and could be dealt with in any way the states deemed necessary.[13] However, the Court declined to follow *Roth* because *Roth* involved public distribution while *Stanley* involved only private possession.[14]

Distinguishing *Roth* on this contextual ground was unsatisfactory because it did not indicate why the rationale for denial of first amendment protection used in *Roth* did not apply in *Stanley*. In *Roth* the material was precluded from first amendment protection because the films were utterly without redeeming social value.[15] The films in *Stanley* were

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[8] *Id.* at 437. Four of the seven Ohio Justices in *Ohio v. Mapp* felt that the Ohio Statute (OHIO REV. CODE ANN. § 2905.34 (Page 1954)) was unconstitutional. However, because at that time the Ohio Constitution required that all but one of the justices concur before there could be a declaration of unconstitutionality, it was not so declared. Shortly thereafter, the Ohio Supreme Court interpreted the Ohio Statute to require proof of "possession and control for the purpose of circulation or exhibition." State v. Jacobellis, 173 Ohio St. 22, 27-28, 179 N.E.2d 772, 781 (1962) *rev'd on other grounds*, 378 U.S. 184 (1964).

[9] Mapp v. Ohio, 367 U.S. 643 (1961), was the federal counterpart of *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960).

[10] 367 U.S. 643, 673 (1961) (dissenting opinion of Justice Harlan).

[11] Brief for Appellant at 16-23, Stanley v. Georgia, 394 U.S. 557 (1969).

[12] 394 U.S. 557 n.2 (1969).

[13] *Id.* at 560.

[14] *Id.* at 560-63. The Court stated that:

> None of the statements cited by the Court in *Roth* for the proposition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press" were made in the context of a statute punishing mere private possession. . . .
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> In this context, we do not believe that this case can be decided simply by citing *Roth*.

[15] 354 U.S. 476, 484-85 (1957). In Jacobellis v. Ohio, 378 U.S. 184 (1964), the Court reiterated the *Roth* rationale as follows:

> "We would reiterate . . . our recognition in *Roth* that obscenity is excluded from constitutional protection only because it is 'utterly without redeeming social importance' . . . ."

obscene and thus by definition without redeeming social value.[16] Why did this utter lack of redeeming social value not justify denial of first amendment protection in *Stanley*? Certainly the films did not gain redeeming social value by their presence in the private home of Stanley. In fact this private context would have lessened any social value that the films might have had because the public would have had no access. A better basis for a distinction would have been to indicate the different issues in the two cases. In *Roth* the Court was interested in an analysis of the nature of obscene utterances. In *Stanley* the main consideration was an evaluation of the states' interests justifying obscenity control.

Since the Court was able to dismiss the *Roth* argument, the stage was set for an evaluation of the competing interests of the parties. Stanley's most important right was his first amendment right to "receive information and ideas."[17] The Court found this right to be so "fundamental" and "well established" that a mere categorization of the films as obscene was insufficient justification for invasion of that right.[18] Further, that right was protected "regardless of the social worth of the material being received."[19] In addition to the reception right was Stanley's right to be free from unwarranted governmental intrusion into the privacy of his home.[20] When the privacy right was joined with the right to receive information and ideas regardless of their social value, the latter took on an added dimension.[21] In essence, Stanley was performing a constitutionally protected act (possession) in a constitutionally protected place (his home).

Against these rights Georgia asserted several traditional state justifications for prohibition of possession of obscene material. The Court made short work of rejecting these. Georgia first contended that it had a right to protect the individual's mind from the effects of obscenity. The Court characterized this contention as "hardly more than an assertion that the state had the right to control the moral content of a person's thoughts."[22] Characterized as such, this right was "wholly inconsistent with the philosophy of the First Amendment."[23] Next Georgia contended that exposure to obscene material might lead to deviant sexual behavior or sexual crimes of violence.[24] This argument fared no better than the previous one. The Court noted the lack of empirical evidence linking the reading or viewing

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[16] Part of the definition of obscenity as established by *Roth* and elaborated in subsequent cases is that the material be utterly without redeeming social value. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1965).

[17] 394 U.S. 557, 564 (1969).

[18] *Id.* at 565.

[19] *Id.* at 564.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 565.

[23] *Id.* at 566.

[24] *Id.*

of obscene material with deviant behavior.[25] However, this lack of empirical evidence was not the main reason for the rejection of this contention. The Court indicated that at least in the context of private consumption of information and ideas, education and punishment of deviant behavior rather than prohibition of obscene material, were the proper deterrents.[26] Georgia's last contention was that prohibition of possession of obscene material was necessary to the states' statutory schemes of prohibiting public distribution. Georgia argued that intent to distribute would be too difficult to prove.[27] The Court was not convinced that such difficulties existed; and even if they did, they did not justify infringement of the first amendment.[28]

Except for this last contention, the Georgia contentions are the ones most frequently cited by commentators in justification of obscenity legislation in general.[29] There is little indication in the majority opinion that the reasoning used to reject these contentions in the private context would not apply to the public context as well. In fact, in regard to Georgia's first contention (the right to protect the individual's mind from the effects of obscenity) the Court specifically states:

> Whatever the power of the state to control the *public* dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.[30] (emphasis added)

Further, in regard to Georgia's second contention (exposure to obscenity may lead to deviant sexual behavior) the same criticisms found in the private context of *Stanley* should also apply to the public context. Certainly there is no more empirical evidence linking public distribution of obscenity with deviant sexual behavior than there is linking private possession of obscenity with such behavior. Also, would not education and punishment be just as proper a deterrent to deviant sexual behavior as it was declared to be in the private context of *Stanley?* In view of the above, *Stanley* may be read to raise the question of whether obscenity law in general can be justified by these state interests. This is one of the most significant implications of *Stanley.*

Another interesting implication of *Stanley* is its moderating effect upon *Roth.* No longer is the declaration that "obscenity is not within the area of constitutionally protected speech or press"[31] completely true. It is pro-

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[25] *Id.*

[26] *Id.* at 566-67.

[27] *Id.* at 567.

[28] *Id.* at 567-68.

[29] Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 COLUM. L. REV. 391, 392-95 (1963). Other commentators have broken down these two interests into several categories. *See, e.g.,* Kalven, *The Metaphysics of the Law of Obscenity,* 1960 SUP. CT. REV. 1, 3-4.

[30] 394 U.S. 557, 566 (1969).

[31] 354 U.S. 476, 485 (1957).

tected speech at least within the privacy context of *Stanley*. However, the Court explicitly stated that this modifying effect did not impair *Roth* or the broad state power to regulate obscenity in the public context.[32] Thus *Roth* and *Stanley* must coexist within the same system of obscenity law. For them to function effectively it will become necessary for the Court to determine exactly what public distribution and private possession entail.

The importance of the privacy aspect of private possession of obscene material will be a key factor in determining how broadly *Stanley* applies. The Court has previously indicated that the privacy of one's home has great significance.[33] Perhaps, in view of these indications, the Court considered the privacy of Stanley's home to be so sacred that it was willing to extend constitutional protection to material that otherwise would have been unprotected. If this is the case, then a *Roth*-type prohibition would apply to obscene material prior to its arrival in a private home and after its removal from a private home. This is the narrowest reading of *Stanley* and would cause the least conflict with *Roth*.[34]

A broader reading of *Stanley* is justified. The language used in the majority opinion indicates that the right to receive information and ideas regardless of their social value (the reception right) and not the privacy right was the principal foundation of the decision. The Court indicated that the reception right was a fundamental and well established part of the first amendment.[35] The privacy right was simply an additional right that gave added dimension to the reception right. The existance of this fundamental reception right as established in *Stanley* has implications for other obscenity contexts. Arguably, this right would protect production and some types of public distribution of obscene material. In the obscenity context, for a person to fully enjoy his reception right, some form of acquisition of obscene material is necessary. Such acquisition would depend upon production of obscene material. As a practical matter, it also would depend upon public distribution of that material. If all production and distribution of obscene material were banned, in the obscenity context, the reception right would also be effectively banned. Since *Stanley*

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[32] 394 U.S. 557, 568 (1969).

[33] Alderman v. United States, 394 U.S. 165 (1969) (holding that a homeowner has standing to object to an unlawful surveillance of conversations taking place in his home although he was not a conversant); Griswold v. Connecticut, 381 U.S. 476 (1965) (where the right of privacy was first identified as an independent constitutional right).

[34] While this would be the narrowest reading as far as obscenity is concerned, it would be a very broad interpretation of the right of privacy. Given this reading *Stanley* would have a great potential for application in such controversial areas as private consensual adult deviant sexual behavior and private possession of marijuana. *See* Wallenstein, *Marijuana Possession as an Aspect of the Right of Privacy*, 5 CRIM. L. BULL. 59 (March, 1969); Evans, *The Crimes Against Nature*, 16 J. PUB. L. 159, 177-78 (1967). These two articles provide excellent discussions of the relationship between the right of privacy and these two types of criminal actions.

[35] 394 U.S. 557, 565 (1969).

prohibits banning of the latter, does it not prohibit total banning of the former also?

However, in light of the Court's reaffirmation of the broad state power to regulate obscenity in the public context, it would be foolish to suggest that all public distribution is protected by *Stanley*. If such were the case, *Roth* would be meaningless. Therefore, the key question is where the line between *Stanley* protection and *Roth* prohibition will be drawn. The Supreme Court did not draw this line, but fortunately other federal courts in their interpretations of *Stanley* have provided us with some clues to its location. The District Court for the Northern District of Texas in *Stein v. Batchelor*[36] interpreted *Stanley* to involve broader protection than mere private possession. The *Stein* court said that in its opinion *Stanley* suggested that obscene material could be deprived of protection only in the context of "public actions taken or intended to be taken with respect to obscene matter."[37] This interpretation allowed the District Court to invalidate not only the provision of Texas obscenity law prohibiting the knowing possession of obscene material but also those provisions prohibiting the knowing photography of, acting in, posing for and printing of obscene material. This follows from the fact that there was no limitation in the Texas law that such activities be engaged in publicly or with intent to publicly distribute the materials involved.[38] The D.C. Circuit Court in *Williams v. District of Columbia*,[39] in order to preserve the constitutionality of a disorderly conduct statute punishing the use of obscene language in any public place, read into that statute the requirement that a member of the public actually have heard the obscene words.[40] The D.C. Court spoke of *Stanley* requiring the presence of this "verbal assault." In view of this language the D.C. Court must have read *Stanley* to require more than just the presence of obscene material in a public context to justify prohibition of that material. Some type of offensive public action had to be taken in regard to that obscene material. This is an even broader interpretation of *Stanley* than that given in *Stein*. *Williams* required an actual act whereas intent to act would have been sufficient in *Stein*.[41]

As more federal courts and state courts interpret *Stanley*, the line be-

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[36] 300 F. Supp. 602 (N.D. Tex. 1969) (rev. granted, 38 L.W. 3265).

[37] *Id.* at 606.

[38] TEX. PEN. CODE ART. 527 (Supp. 1968-69).

[39] No. 20, 927 (D.C. Cir., June 20, 1969) (en banc).

[40] *Id.* at 11.

[41] Only a year before *Stanley*, the Supreme Court indicated the types of action which were necessary in order to justify the prohibition of obscene material. The Court indicated that the fact of (1) an availability of obscene material to children; or (2) intrusion into the privacy of the public by that obscene material; or (3) the type of pandering found objectionable in *Ginzburg v. United States*, 383 U.S. 463 (1966), was necessary before the material in question could be prohibited. *Redrup v. New York*, 386 U.S. 767, 769 (1967).

tween *Roth* prohibition and *Stanley* protection will become more clear. However, these two areas of protection will never become exactly defined because the subject of obscenity depends so much upon the particular facts of the situation. For instance, a supposedly private possession case might call for different treatment if the obscene material were readily accessible to children or if the possessor had a past record of selling obscene material. Also the number of items of obscene material possessed might change the nature of the case. If the possessor had numerous copies of the same film or magazine, a presumption of possession with intent to distribute might arise.[42] These few examples indicate that no hard or fast rules can be drawn in regard to the regulation of obscenity. The only certain thing concerning the future controversy over obscenity control is that there will continue to be a struggle between the libertarian impulses to protect freedom of speech and press and the realistic needs for some obscenity regulation. At least after *Stanley*, there is hope that these two conflicting forces can be more consistently reconciled.

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[42] Currently three states, although not statutorily prohibiting possession of obscene material, provide that possession of a specified amount of obscene material either creates a presumption that such material was intended for sale or is *prima facia* evidence of intent to distribute. S.D. COMPILED LAWS ANN. § 23-18-26 (1967); MICH. COMPILED LAWS ANN. § 750.343(a) (1969); N.H. REV. STAT. ANN. § 571:15 (1955).