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OBSCENITY: A QUICK LOOK AT STANLEY v. GEORGIA

Prior to Mr. Justice Marshall's majority opinion in *Stanley v. Georgia*,¹ the United States Supreme Court had consistently ruled that obscenity was unprotected by the first amendment's unconditional coverage of speech and press.² *Stanley* enervates this dogma by stretching the first amendment beyond its traditional proportions to insulate the individual's right to possess obscenity.³

Federal and state agents entered Stanley's home armed with a valid search warrant particularly describing certain

¹ 394 U.S. 557 (1969).

² The leading case is *Roth v. United States*, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press."). The exclusion doctrine was reaffirmed in *Ginsberg v. New York*, 390 U.S. 629, 641 (1968) ("[O]bscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected speech.") (Citation omitted.). In addition to obscenity, the exclusion doctrine has also been applied to "fighting words" [*Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) ("Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.")]. and libelous utterances [*Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) ("Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'")].

³ As applied to speech, the traditional purpose of the first amendment is "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957) (Emphasis added.). Seemingly, the holding in *Stanley* expands the purpose of the first amendment to embrace the dignity of man purely in his capacity as an individual. T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4 (1st ed. 1963).

paraphernalia used in the bookmaking profession. The search revealed three reels of obscene film. Stanley was arrested for and subsequently convicted of "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia law.⁴ Affirming,⁵ the Supreme Court of Georgia held that "it [was] not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same'."⁶ The United States Supreme Court reversed, holding that the first and fourteenth amendments prohibit making private possession of obscenity a crime.⁷

The United States Supreme Court, in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,⁸ held that ribaldry is vulnerable to censorship if "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description

⁴ GA. CODE ANN. § 26-6301 (1953), as amended, (Supp. 1968), which reads in relevant part:

Any person who shall . . . knowingly have possession of . . . any obscene matter . . . shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years. . . .

⁵ *Stanley v. State*, 224 Ga. 259, 161 S.E.2d 309 (1968), *rev'd sub nom. Stanley v. Georgia*, 394 U.S. 557 (1969).

⁶ *Id.* at 261, 161 S.E.2d at 311.

⁷ 394 U.S. at 568. Mr. Justice Black, citing his concurrence in *Smith v. California*, 361 U.S. 147, 155 (1959) and his dissent in *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) as examples of his position, concurred on his usual ground that all anti-obscenity legislation violates the first amendment. Relying on *Marron v. United States*, 275 U.S. 192, 196 (1927), Justices Stewart, Brennan and White concurred, reasoning that the *Stanley* search violated the particularity requirement of the fourth amendment.

⁸ 383 U.S. 413 (1966).

or representation of sexual matters; and (c) the material is utterly without redeeming social value."⁹ At present, the *Memoirs* formula remains the prevailing definition of obscenity.¹⁰ However, two recent decisions, *Redrup v New York*¹¹ and *Stanley v. Georgia*,¹² indicate that the Court is experimenting with a replacement for the traditional definitional approach to obscenity analysis.

⁹ *Id.* at 418. Basically, the *Memoirs* formula combines the *Roth* definition with subsequent decisions. In addition, *Memoirs* clarified the question of whether the lack of social value is an independent element of obscenity. See *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 486 (1962) (Obscene material must be both "patently offensive" and appealing to a "prurient interest" before it can be constitutionally proscribed.); *Jacobellis v. Ohio*, 378 U.S. 184, 193 (1964) (The phrase "contemporary community standards" implies a national rather than a local test.); *Mishkin v. New York*, 383 U.S. 502, 509 (1966) (When material is intended for a "clearly defined deviant sexual group," the prurient appeal element is measured by the standards of that group.). The *Memoirs* formula was reiterated in *Redrup v. New York*, 386 U.S. 767, 770-71 (1967).

¹⁰ Mr. Justice Stewart, however, subscribes to a more stringent definition, *i.e.*, "hard core pornography." *Ginzburg v. United States*, 383 U.S. 463, 499 (1966) (dissenting opinion). The most graphic definition of "hard core pornography" was given by Judge Fuld in *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 587, 175 N.E.2d 681, 686, 216 N.Y.S. 2d 369, 376 (1961) (Citation omitted.):

It [hard core pornography] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' . . . , it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the course, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents . . . 'a debauchery of the sexual faculty.'

¹¹ 386 U.S. 767 (1967).

¹² 394 U.S. 557 (1969).

The law of obscenity has matured in three barely visible phases. In the initial phase, the question was whether the challenged material satisfied the elements of obscenity, not whether the speech in question jeopardized a valid community interest. Under the baneful influence of *Roth v. United States*,¹³ the Court utilized a definitional or *per se* methodology to detect the presence of obscenity in noxious literature.¹⁴ While earlier decisions, *Chaplinsky v. New Hampshire*¹⁵ and *Beauharnais v. Illinois*,¹⁶ concocted the egregious doctrine that only ideas of social importance are eligible for first amendment immunity, *Roth* applied this exclusion doctrine directly to obscenity.¹⁷ The *Roth* Court concluded that obscenity is utterly devoid of ideological content and therefore unqualified for constitutional protection under the aberrant *Chaplinsky-Beauharnais* exclusion doctrine. This enabled the Court to fashion a definitional approach to the problem of obscen-

¹³ 354 U.S. 476 (1957).

¹⁴ Monaghan, *Obscenity*, 1966: *The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127 (1966).

¹⁵ 315 U.S. 568, 571-72 (1942) (Footnotes omitted.) (fighting words) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

¹⁶ 343 U.S. 250, 266 (1952) (libelous utterances).

¹⁷ 354 U.S. at 484 (Footnote omitted.) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

ity rather than adopt the more conventional "clear and present danger"¹⁸ or balancing¹⁹ approach.

Ginzburg v. United States,²⁰ *Mishkin v. New York*²¹ and *Ginsberg v. New York*²² introduced the second phase in the evolution of obscenity law. Here, a new rubric emerged to supplement the traditional *per se* methodology in cases where social value *vel non* was marginal. The new approach — variously labeled "obscenity *per quod*,"²³ "contextual obscenity"²⁴ and "variable obscenity"²⁵ — imputes a finding of obscenity to nonobscene material if it is marketed in an obtrusive and offensive manner.²⁶ Under this approach, obscenity becomes a variable, dependent on the book's content and the defend-

¹⁸ *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."). See also *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis & Holmes, JJ., concurring) (Added the requirement that the danger be "imminent."); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Overruling *Whitney*).

¹⁹ *Dennis v. United States*, 341 U.S. 494, 510 (1951), quoting, *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'").

²⁰ 383 U.S. 463 (1966).

²¹ 383 U.S. 502 (1966).

²² 390 U.S. 629 (1968).

²³ Monaghan, *supra* note 14.

²⁴ Semonche, *Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation*, 13 U.C.L.A. REV. 1173 (1966).

²⁵ Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

²⁶ See Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 WIS. L. REV. 421.

ant's conduct. Such aggressive marketing of pornography is referred to as "pandering." Mr. Justice Brennan, speaking for the Court in *Ginzburg*, defined pandering as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."²⁷ Thus, in this phase, the Court did not strictly adhere to a *per se* methodology, but also considered *per quod* factors as relevant.

*Redrup v. New York*²⁸ introduces the third phase in the development of obscenity law. This phase deadens the influence of the *Roth* exclusion doctrine by extending limited constitutional protection to material assumed to be obscene. In *Redrup*, the Court, apparently disenchanted with definitions, inflated the pandering theory to protect the commercial transfer of obscenity. In a brief *per curiam* opinion, the Court ruled that the traffic of erotica in public commerce is protected by the first and fourteenth amendments in the absence of "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."²⁹ *Redrup* is an important decision because it indicates that the presence or absence of pandering, rather than a definitional finding of obscenity, will control the issue of censorship.³⁰ The Court, in *Redrup*, treated an obscene book as nonobscene

²⁷ 383 U.S. at 467 (Footnote omitted.), *quoting*, *Roth v. United States*, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring). In *Memoirs*, the Court opined that "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value." 383 U.S. at 420.

²⁸ 386 U.S. 767 (1967).

²⁹ *Id.*, at 769.

³⁰ *But see* *Milky Way Prods., Inc. v. Leary*, 305 F. Supp. 288, 294 (S.D.N.Y. 1969), *aff'd per curiam, sub nom.* *New York Feed Co. v. Leary*, 397 U.S. 98 (1970), where a lower federal court held that pandering is not to be considered as a fourth element in the *Memoirs* formula.

because of the absence of pandering, while the Court in *Ginzburg, Mishkin and Ginsberg* treated a nonobscene book as obscene because of the presence of pandering. In other words, *Redrup*, by creating a conditional privilege to sell obscene publications, enervates the *Roth* exclusion doctrine. *Stanley* continues the trend established in *Redrup*.

In *Stanley*, the State, citing *Roth*, argued that, since obscenity is not within the area of constitutionally protected speech or press because of its paltry characteristics, the states are free to deal with the subject in any way they deem necessary.³¹ Rejecting this contention, the Court ruled that *Roth* and its progeny were not dispositive of the *Stanley* case. *Stanley* was not asserting the right to profit from the sale or distribution of obscenity, as in previous obscenity cases,³² but "the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."³³ The Court reasoned that the right to receive information,³⁴ buttressed by a peripheral right to privacy,³⁵ erased any similarity between *Roth* and *Stanley*.

³¹ 394 U.S. at 565.

³² *Id.* at 561 nn.5 & 6.

³³ *Id.* at 565.

³⁴ The right to receive information was drawn directly from the first amendment as interpreted in *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); accord, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."). See also *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Winters v. New York*, 333 U.S. 507, 510 (1948) (The right to receive information attaches to information regardless of social value.).

³⁵ Privacy was characterized by *Stanley* merely as an "added dimension," intimating that privacy is not an independent constitutional right. 394 U.S. at 564. But see *Griswold v. Connecticut*, 381 U.S. 479, 483-85 (1965) (Mr. Justice Douglas seemed to imply a general right to privacy from five provisions of the Bill of Rights: the first amendment protection of the privacy of association [*NAACP v. Alabama*

The doctrine that obscenity is denied first amendment immunization was the product of cases involving public distribution of obscene matter; and, according to *Stanley*, this rule is tolerated only because commercial dissemination presents the ubiquitous danger that "obscene material might fall into the hands of children, . . . or that it might intrude upon the sensibilities or privacy of the general public."³⁶ However, the *Stanley* films were possessed for private entertainment not for public exploitation. Thus, the possibility that the mere private possession of obscenity will threaten the morality of children or offend the sensibilities of an unwilling general public is remote.

Stanley, like *Redrup*, avoided a definitional approach by assuming the challenged speech to be obscene and reasoned that obscenity "cannot, in every context, be insulated from all constitutional protections."³⁷ This statement, despite the Court's protestations to the contrary,³⁸ inundates the *Roth* exclusion doctrine which unequivocally requires suppression once the material is branded obscene. This holding allowed the Court for the first time to examine the social justifications behind the censorship of obscenity.³⁹

ex rel. Patterson, 357 U.S. 449 (1958).]; the third amendment prohibition against quartering soldiers; the fourth amendment prohibition against illegal searches and seizures; the fifth amendment privilege against self-incrimination; and the ninth amendment protection of unenumerated rights.); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[T]he right to be left alone [is] the most comprehensive of rights and the right most valued by civilized men.").

³⁶ 394 U.S. at 567 (Citations and footnote omitted.).

³⁷ *Id.* at 563.

³⁸ *Id.* at 568 ("Roth and the cases following that decision are not impaired by today's holding.").

³⁹ Comment, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1403 (1966). *Roth* and *Stanley* are possibly inconsistent for an additional reason. *Roth*, discounting the *Redrup* decision, proscribes the sale of obscenity, while *Stanley* acknowl-

Georgia advanced, and the Court scotched, three traditional arguments in support of sweeping anti-obscenity legislation.⁴⁰ First, Georgia asserted the power to maintain the moral purity of the community from the corrupting influence of mildly salacious literature, independent of whether it stimulates immoral behavior.⁴¹ The Court responded to this contention by asserting that a person's private thoughts are not the licit subject matter for regulatory legislation.

Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the disirability of controlling a person's private thoughts.⁴²

This statement and other references⁴³ to the privacy of one's thought process raise an interesting proposition. If the privacy

edges the individual's right to possess obscenity. If the right to possess obscenity can be construed to include the right to receive obscenity, it would seem to follow that statutes proscribing the sale of obscenity would indirectly burden the right to receive information and therefore be unconstitutional.

⁴⁰ See generally Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 373-387; Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 937 (1963); Slough & McAnany, *Obscenity and Constitutional Freedom*, 8 ST. LOUIS U.L.J. 279 (1964); Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7.

⁴¹ 394 U.S. at 565.

⁴² *Id.* at 566.

⁴³ "We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts." 394 U.S. at 565 (Footnote omitted.). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*

aspect of *Stanley* is interpreted to attach not to some constitutionally protected locus but to an individual's thoughts, then seemingly legislation drafted around the concept of "prurient appeal" must be abandoned as an unconstitutional invasion of privacy.⁴⁴

Next Georgia contended that there is some rational relation between anti-obscenity legislation and crime prevention, admittedly a legitimate subject of state concern.⁴⁵ The Court noted the paucity of empirical evidence supporting a connection between the exposure to obscenity and subsequent illegal conduct⁴⁶ and stated:

Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.⁴⁷

Finally, Georgia drolled that the prohibition of possession of obscene material is an indispensable element in statutory schemes prohibiting distribution.⁴⁸ The Court tersely replied that, "[b]ecause [the] right [to read] is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."⁴⁹

Standing alone, *Stanley* does not leave the institution of censorship in smoking ruin. Theoretically, two valid governmental interests remain. First, the state may protect adoles-

⁴⁴ *Contra*, *State v. Reese*, 222 So. 2d 732, 736 (Fla. 1969).

⁴⁵ 394 U.S. at 566.

⁴⁶ Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1032, 1034 (1962) is the leading critical analysis of empirical studies on this subject.

⁴⁷ 394 U.S. at 567.

⁴⁸ *Id.* at 567.

⁴⁹ *Id.* at 568.

cents from erotica, since obscenity may reasonably be more harmful to children because of their intellectual and emotional immaturity.⁵⁰ And, second, the state may protect unwilling adults from the chagrin and revulsion that usually accompanies exposure to obscenity.⁵¹ However, in the absence of these two dangers, the power of a state to censor obscenity is of questionable validity. In other words, the state may *regulate* but not prohibit the flow of obscenity in the community.

Hopefully, *Stanley* indicates the Court is mustering the courage it will take to lift the dead and heavy hand of *Roth* from the first amendment. However, those who sincerely mourn the possible demise of *Roth* should be reminded that the real issue behind anti-obscenity legislation is not the social importance of the speech in question but the proper relationship between man and state. "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."⁵² In the final analysis, the only effective censor is the individual himself.

Van N. Eden

⁵⁰ *Ginsberg v. New York*, 390 U.S. 629 (1968).

⁵¹ *Redrup v. New York*, 386 U.S. 767 (1967).

⁵² 394 U.S. at 563, *quoting*, *Roth v. United States*, 354 U.S. 476, 488 (1957).