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Constitutional Law—Obscenity: A Return to the First Amendment? *Stanley v. Georgia*, 394 U.S. 557 (1969)

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CASENOTE

CONSTITUTIONAL LAW—OBSCENITY: A RETURN TO THE FIRST AMENDMENT? *Stanley v. Georgia*, 394 U. S. 557 (1969).

I. INTRODUCTION

The narrow holding of *Stanley v. Georgia*[1] is simply that: "[T]he First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[2] However, as at least one federal district court has recognized: "It is impossible . . . to ignore the broader implications of the opinion which appears to reject or at least modify the proposition stated in *Roth v. United States*, 354 U.S. 476, 485 (1957) that 'obscenity is not within the area of constitutionally protected speech or press.' "[3] This note will examine these "broader implications" and consider the constitutionality of state repression of obscenity in light of the opinion in *Stanley*.[4]

Under authority of a search warrant issued by a United States Commissioner, state and federal officers entered the defendant's house in Atlanta, Georgia. The warrant described with particularity the place to be searched, which was Stanley's home, and the things to be seized, book-making materials. While looking through a desk drawer the officers found three reels of eight-millimeter film.[5] Using a projector and screen found in an upstairs bedroom, the agents spent some fifty minutes exhibiting the films. The state officer concluded that the films were obscene, and after determining that Stanley occupied the bedroom, arrested Stanley and charged him with possession of obscene matter. He was indicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia

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1 394 U.S. 557 (1969).

2 *Id.* at 568.

3 Stein v. Batchelor, 300 F. Supp. 602, 606 (N.D. Tex. 1969).

4 It is interesting to note that there need not have been any obscenity question. As the dissenting opinion points out, there was an obvious fourth amendment infringement. Stanley v. Georgia, 394 U.S. at 569-72. However, the dissenters do not object to the rationale of the majority. Peripherally, the Court may also have been concerned with strengthening its privacy decisions. *Cf.* 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); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 147, 151 (1969).

5 It should be assumed that the films were prepared by someone other than Stanley and either given or sold to him.

law.[6] Stanley was tried before a jury and convicted, and the Supreme Court of Georgia affirmed his conviction.[7] The defendant then appealed to the United States Supreme Court.

It is important to note that the defendant made no argument that the films involved were not obscene; and the Court assumed that they were obscene under any of the tests of the members of the Court.[8] Therefore, the issue of the constitutionality of the Georgia obscenity statute was clearly presented.

II. THE FIRST AMENDMENT AND GOVERNMENTAL POWER TO REPRESS SPEECH

Although no constitutional right is absolute, as a general rule those guaranteed under the first amendment are preferred.[9] Any governmental interest in repression of speech, therefore, requires a clear showing that the government has a legitimate and compelling interest before the shelter of the first amendment gives way.[10]

Such a compelling governmental interest has traditionally been recognized in suppression of profane, libelous, insulting, and "fighting words."[11] These classes of speech by their very nature provide a clear and present danger of harm since they are "inseparably locked with action."[12] In *Dennis v. United States*[13] the court held

[6] "Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, 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: Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion." GA. CODE ANN. § 26-6301 (Supp. 1968).

[7] Stanley v. State, 224 Ga. 259, 161 S.E.2d 309 (1968).

[8] Stanley v. Georgia, 394 U.S. at 559 n.2.

[9] Dombrowski v. Pfister, 380 U.S. 479 (1965).

[10] Dennis v. United States, 341 U.S. 494, 505-08 (1951).

[11] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[12] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 932 (1963).

[13] 341 U.S. 494 (1951).

that the first amendment is not controlled by legislative determination of resulting harm.[14] Consequently, the general principle is established that speech may be suppressed only upon a judicial determination that there is a clear and present danger of the speech resulting in conduct which may be legitimately prohibited by the government.

Until 1968 the Court did not attempt to reconcile this general principle with governmental suppression of obscenity. Instead, obscenity cases were decided by defining what was obscene and, as in *Roth v. United States*,[15] once the elusive concept was defined, the purpose of the legislation involved was apparently not relevant.

There were those who questioned whether such a procedure of deciding by definition could be reconciled with the first amendment. When *Roth* was in the court of appeals[16] Judge Frank noticed the lack of evidence that obscenity caused antisocial conduct. Mr. Justice Douglas, dissenting in *Roth*, also doubted the analysis: "By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment."[17]

Nevertheless, the Court reasoned that obscenity was unprotected by the first amendment not because it was harmful, but because it was worthless: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[18] Although *Roth* supplied an apparently liberal definition of obscenity, the Court seemed destined to continue deciding by definition rather than attempting to fit obscenity within any general principle of the first amendment.[19]

In 1968, *Ginsberg v. New York*[20] began the process of reconciling the first amendment and obscenity when it held that New York was constitutionally allowed to impose a more restrictive standard as to the sex material minors could read and see. The law was upheld on the basis of New York's right to legislate in the interests of

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[14] *Id.* at 505-08.

[15] 354 U.S. 476 (1957).

[16] 237 F.2d 796, 801-27 (2d Cir. 1956).

[17] Roth v. United States, 354 U.S. at 509. *But see* United States v. Klaw, 350 F.2d 155, 163 (2d Cir. 1964): "We do not doubt that 'obscenity' may be regulated because it is thought to incite antisocial sexual behavior and crime."

[18] Roth v. United States, 354 U.S. at 484.

[19] Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 128-35 (1966).

[20] 390 U.S. 629 (1968).

parents and the state's independent interest in the welfare of its children, rather than by defining the materials involved as obscene.[21]

Apparently there was a judicial determination of a clear and present danger which may result in harm to a legitimate governmental interest. Nevertheless, the Court did not appear ready to begin an all out effort to reconcile repression of obscenity and the first amendment: "But obscenity 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."[22]

III. THE OLD ARGUMENTS AND THE *STANLEY* RATIONALE

In *Stanley*, the obscenity of the films was not questioned. The Court was consequently faced directly with the issue of whether the first and fourteenth amendments prohibit the application of criminal sanctions to mere private possession of obscene material. The majority answered the immediate issue affirmatively,[23] but more importantly, indicated an attempt to reconcile obscenity and the general principle of the first amendment. An analysis of the *Stanley* rationale beyond its narrow holding[24] must consider the governmental interests which states have historically and traditionally asserted (as did Georgia) to justify the repression of obscenity.[25] Each ground will be set out below, followed by an examination of its validity in light of the opinion in *Stanley*.

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21 *Id.* at 637-43.

22 *Id.* at 641.

23 There are few prosecutions for private possession of obscene material in Nebraska, and both case and statute law seem harmonious with the narrow *Stanley* holding. *See* State v. Jungclaus, 176 Neb. 641, 126 N.W.2d 858 (1964); NEB. REV. STAT. §§ 28-920 to -926.08 (Reissue 1964); NEB. REV. STAT. §§ 28-926.09, -926.10 (Supp. 1967); LINCOLN, NEB. CODE §§ 9.52.130 to .52.140 (1958); OMAHA, NEB. CODE §§ 25.69.01 to .69.02 (1967).

24 Several prior cases discussed the narrow problem of private possession of obscene matter which was the seed of *Stanley*. *See In re* Klor, 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966) (criminal sanction cannot reach mere preparation of obscene material); People v. Samuels, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1967) (knowing private use of obscene material not constitutionally punishable); State v. Mapp, 170 Ohio St. 427, 166 N.W.2d 387 (1960), *rev'd on other grounds*, 367 U.S. 643, 673 (1961).

25 *See, e.g.*, Emerson, note 12 *supra;* Monaghan, note 18 *supra;* Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 WIS. L. REV. 421 (1969); Rogge, *The High Court of Obscenity*, 41 COLO. L. REV. 1, 201 (1969); Comment, *Obscenity Control: A Search for Validity*, 4 LAND & WATER L. REV. 575 (1969). The writer of this note particularly recommends Mr. Morreale's article, and would suggest that if the Court is to stand behind *Stanley* it should, when the occasion arises, make a similar analysis and reach the same result.

1. OBSCENITY IS SIMPLY NOT CONSTITUTIONALLY PROTECTED, AND THE STATE IS FREE TO DEAL WITH IT IN ANY MANNER.

In *Roth v. United States*,[26] the Court declared that since obscenity is worthless and "utterly without redeeming social importance,"[27] it is not protected by the first and fourteenth amendments. However, upon closer analysis, neither *Roth* nor any subsequent case reached such a broad and absolute conclusion. Rather, *Roth* and its progeny primarily centered upon the use of the mails or some other form of public distribution, and the holdings therefore are limited to defining the scope of state and federal regulations in such circumstances.[28]

Roth did recognize, of course, a valid state interest in dealing with problems of obscenity, but, as stated in *Stanley*: "[T]he assertion of that interest cannot, in every context, be insulated from all constitutional protections."[29] This recalls the warning in *Roth*:

> [C]easeless vigilance is the watchword to prevent . . . erosion [of first amendment rights] by Congress or by the States. 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.[30]

Most importantly, the *Roth* premise, that obscenity is not an "essential part of any exposition of ideas,"[31] appears to have been expressly overruled in *Stanley*.

> Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.[32]

It therefore does not appear logical to reason that obscenity is per se outside the scope of first amendment protection.

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[26] 354 U.S. 476 (1957).

[27] *Id.* at 484.

[28] *See* Redrup v. New York, 386 U.S. 767 (1967); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Smith v. California, 361 U.S. 147 (1959); Winters v. New York, 333 U.S. 507 (1948); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931); Hoke v. United States, 227 U.S. 308 (1913); Public Clearing House v. Coyne, 194 U.S. 497 (1904); Robertson v. Baldwin, 165 U.S. 275 (1897); United States v. Chase, 135 U.S. 255 (1890); *Ex parte* Jackson, 96 U.S. 727 (1877).

[29] 394 U.S. at 563.

[30] 354 U.S. at 488.

[31] *Id.* at 484-85.

[32] 394 U.S. at 566.

2. THE STATE MAY REPRESS OBSCENE EXPRESSION TO PROTECT MORAL STANDARDS.

It has been argued that the real target of the censors is not obscenity, but sin;[33] yet if anything is protected by the first amendment it is the freedom to choose individually what is virtuous and moral. In *Kingsley Int'l Pictures Corp. v. Regents*,[34] the Court found that a film had been denied a license because it advocated adultery as acceptable behavior. It reversed, holding that obscenity could not be suppressed on ideological grounds.

In *Stanley*, the Court summarily rejects the validity of any governmental interest in programmed morality. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.... [I]t is wholly inconsistent with the philosophy of the First Amendment."[35]

Stanley clearly protects the right of the individual to "corrupt and deprave" himself in the privacy of his home, and the lack of extended discussion on privacy would seem to indicate that the intrusion into Stanley's home only added insult to injury. Wherever the cloak of "privacy" can be drawn, the first and fourteenth amendments ward off the arm of the state and protect the *reception* of obscene matter. The reception notion raises significant questions, but in the Court's opinion it is clear that the right to "receive"[36] information and ideas regardless of their worth is fundamental to a free society.

To control the moral contents of a person's thoughts may be a noble idea to some, but it is wholly inconsistent with the guarantee of the first amendment, and cannot legitimize governmental repression of obscenity.

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[33] Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963). If sin is the censors target, then the Establishment Clause might also be an issue. It is interesting that cookbooks (gluttony) and get-rich-quick books (greed) escape the fires of damnation.

[34] 360 U.S. 684 (1959).

[35] Stanley v. Georgia, 394 U.S. at 565-66. Richard Kuh, well known for his prosecution of obscenity cases in New York City, and his book, *Foolish Figleaves?*, argues that the libertarians who protest against censorship on the ground that morals may not be legislated, are the same individuals who oppose segregation and the death penalty on moral grounds. KUH, FOOLISH FIGLEAVES? 280-82 (1967). The writer would suggest that it is unconstitutional force which is offensive. Force is, of course, also a political and moral issue.

[36] 360 U.S. at 564. At this point "receive" is expressly used three times by the Court.

3. THE STATE MAY SUPPRESS OBSCENITY IN AN ATTEMPT TO CONTROL DEVIANT SEXUAL BEHAVIOR OR CRIMES OF SEXUAL VIOLENCE.

This rationale for repression of obscenity, if valid, would tend to fit within the general principle of the first amendment.[37] However, the argument fails to meet the state's burden of proof. The Court in *Stanley* expressly stated that current evidence was insufficient, and that without emperical evidence the proposition could not be upheld.[38]

> 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.[39]

Furthermore, the *Stanley* opinion recognizes that: "[A]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law."[40]

4. THE STATE MAY REGULATE IN THE INTEREST OF PREVENTING UNWILLING EXPOSURE TO OBSCENITY.

Few, if any, scholars and authorities have questioned the validity of the state's interest in preventing obtrusive obscene expression. The harm is clear and present; it cannot be prevented by subsequent sanction. The state may defend its citizens' right of privacy.[41] Such regulation would fall within general first amendment principles, regulating the "how" and "where" of speech.[42] This is the last state interest which has been historically and traditionally asserted as sufficient to counterbalance the first amendment.[43] It may be the only legitimate state interest.

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37 Professor Emerson would reject even this argument as repugnant to the principle that illegal acts must be dealt with directly rather than by suppression of expression. Emerson, note 11 *supra*, at 938.

38 394 U.S. at 566 & n.9. *See, e.g.*, Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1034 (1962); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 850 & n.55; Henkin, note 33 *supra*, at 393 & n.127; Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960); Morreale, note 25 *supra*, at 444-48 & nn.137-57.

39 394 U.S. at 567.

40 *Id.* at 566-67.

41 *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965).

42 *See* Kovacs v. Cooper, 336 U.S. 77 (1949).

43 Obviously obtrusiveness was not an issue in *Stanley*. Thus, it was the only interest not argued by Georgia, nor refuted and held invalid.

III. THE IMPLICATIONS OF THE *STANLEY* RATIONALE

Until *Stanley*, the Court seemed content to decide by defining, a process which invariably neglected placing any burden on the state to show why its interest should supercede the guarantees of the first and fourteenth amendments. *Stanley* would seem to exclude such reasoning in the future.[44] An analysis of *Stanley* concludes that (1) obscenity is protected speech and is not *per se* outside the scope of constitutional protection; (2) the state has no legitimate interest in controlling the moral contents of thought; (3) there is not sufficient evidence to establish a causal relationship between obscenity and antisocial or criminal behavior; and (4) the only historical and traditional state interest in obscenity which has not been invalidated by the Court is the regulation of obtrusiveness.[45] Where does this analysis leave obscenity and the law?[46]

The only case to have considered *Stanley* at this time is *Stein v. Batchelor*.[47] There a three-judge district court held the Texas obscenity statute unconstitutionally broad and enjoined enforcement of the statute.[48] In doing so, the district court had occasion to consider the implications of the *Stanley* opinion, and reasoned:

> [O]bscenity is deprived of . . . protection only in the context of *'public actions* taken or intended to be taken with respect to obscene matter.' . . . *Stanley* also indicates that in the context of *'private' expression* there is unlikely to be any legitimate state interest justifying regulation (with the possible exception of the State's interest in protecting children.)[49]

The question is now what is "public action" and what is "private expression" in the light of a *Stanley* analysis which leaves obtrusiveness the only legitimate state interest.

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[44] The argument would run, as in *Stanley*, that this is obscene, but is there any valid state interest which can transcend the guarantees of the first and fourteenth amendments?

[45] This note does not consider the status of the "pandering test" after *Stanley*. Ginzburg v. United States, 383 U.S. 463 (1966). But, after Memoirs v. Massachusetts, 383 U.S. 413 (1966), and Mishkin v. New York, 383 U.S. 502 (1966), it can be argued that only Mr. Justice Clark puts any decisive merit in its application. He has been replaced by Mr. Justice Marshall who wrote the majority opinion in *Stanley*.

[46] The writer of this note must again refer the reader to the article of Mr. Morreale, note 25 *supra*. Mr. Morreale's analysis seems most accurate in light of *Stanley*, and his statutory proposal a valid and reasonable approach to obscenity under our Constitution.

[47] 300 F. Supp. 602 (N.D. Tex. 1969).

[48] TEX. PEN. CODE ANN. art. 527, §§ 1 to 3 (1952).

[49] 300 F. Supp. at 606-07 (emphasis added).

The writer believes that a wise and preferable rationale would lead to the conclusion that protection against unwilling exposure to or confrontation with obscenity are the only clearly valid state interests in repressing obscenity among adults. It would seem incongruous to say that a person may use and possess obscenity as a constitutional right, yet the state may make such use and possession impossible by prohibiting the movement of vehicles of such protected sensory perception. One can hardly get the message if there is not a medium.[50] Such a future may be forecast in *Stanley* when the court says:

> It is now well established that the Constitution protects the *right to receive* information and ideas. 'This freedom [of speech and press] necessarily protects the *right to receive*. . . .' This *right to receive* information and ideas, regardless of their social worth, . . . is fundamental to our free society.[51]

IV. CONCLUSION

Only the court can determine the future of the *Stanley* rationale, if indeed there is one beneath the narrow holding. It would seem that obscenity has been recognized as within the general principle of the first amendment, and that of the historical and traditional state interests which have been advanced to legitimize repression of obscenity, only obtrusiveness remains tenable after *Stanley*. But, whatever is recognized in the future as a legitimate state interest,

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[50] "The most controversial consequences of this approach are that booksellers would be able to sell hard core pornographic books and pictures to willing adults, and stag movies could be shown at the local theatre. However, neither a book displayed in the bookshop window nor the theatre billboards could portray anything nearly as pornographic. A more general and far-reaching implication may be that it questions the validity of all morals legislation, even in areas outside of the first amendment, for which it is difficult to articulate a rational, utilitarian purpose." Morreale, note 25 *supra*.

[51] Stanley v. Georgia, 394 U.S. at 564 (emphasis added). *See* Karalexis v. Byrne, 38 U.S.L.W. 1090 (D. Mass. Nov. 28, 1969), *motion for stay of temporary injunction granted,* 38 U.S.L.W. 3221 (D. Mass. Dec. 15, 1969). A three judge federal court for the District of Massachusetts held that *Stanley* protected a commercial showing of a concededly obscene movie. The district court's language should be of particular interest. "[W]e think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution adequately controlled is no longer to be condemned. . . . A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. If a rich Stanley can view a film, or read a book in his home, a poorer Stanley should be free to visit a protected theater or library." 38 U.S.L.W. at 2328 (citations omitted).

the next case will be harder. Intuitive and definitional recognition of obscenity[52] does not put an end to the issue. The Court has indicated its intention to discern why the state's interest should be allowed to pierce first amendment protection, and it can no longer be said of the court that:

> I have no other but a woman's reason;
>
> I think him so, because I think him so.[53]

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[52] Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring), "I know it when I see it . . . ."

[53] "Two Gentlemen of Verona" (Act I, sc. ii).