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Constitutional Law -- Private Possession of Obscene Films Where There is no Intent to Sell, Circulate, or Distribute

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> tirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts "fritter away their time in the trial of petty controversies." A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.[23]

Strangely enough, Mr. Justice Black, who delivered the opinion of the Court in the decisions under consideration, once expressed his own apprehension that the Rules might be restrained from reaching their full workability and indeed prophesied the result of the instant decision. In a dissenting opinion he wrote:

> It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts.[24]

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CONSTITUTIONAL LAW—PRIVATE POSSESSION OF OBSCENE FILMS WHERE THERE IS NO INTENT TO SELL, CIRCULATE, OR DISTRIBUTE

After spending nearly an hour viewing three eight-millimeter films of "nude men and women engaged in sexual intercourse and sodomy,"[1] which had been unearthed during a search of the appellant's home for gambling paraphernalia under the aegis of a search warrant, police officers arrested the appellant for possession of material which he knew to be obscene, in violation of Georgia law.[2] Defendant's conviction by a jury

23. 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 569 (Supp. 1968) (Wright ed. 1961).

24. Ackermann v. United States, 340 U.S. 193, 205 (1950).

1. Stanley v. State, 224 Ga. 251, 252, 161 S.E.2d 309, 319 (1968).

2. 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 . . . . 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. (Emphasis added.)

GA. CODE ANN. § 26-6301 (Supp. 1968).

Under FLA. STAT. § 847.011(1)(a) (1967), it is a felony to possess obscene materials with the intent to sell, distribute, etc. However, under FLA. STAT. § 847.011(2) (1967), mere possession of obscene matter is a misdemeanor:

> A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine,

was affirmed by the Supreme Court of Georgia, which held that the element of intent to sell, distribute, or circulate obscene matter is not essential to an indictment and conviction for possession of obscene materials.[3] On certiorari to the United States Supreme Court, *held*,[4] reversed: assuming the films to be obscene under current tests,[5] the First and Fourteenth Amendments forbid making the mere private possession of obscene material a crime where there is no intent to sell, distribute, or circulate them. *Stanley v. Georgia*, 394 U.S. 557 (1969).

Roth v. United States[6] declared that obscenity would not be protected by the first amendment from governmental suppression.[7] The issue in subsequent cases then became whether or not the particular material in question was "obscene." The tests which have evolved are not clear-cut;[8] it appears that a majority of the Supreme Court has yet to agree upon a single definition of "obscenity."[9]

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periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, *without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise* the same, is guilty of a misdemeanor . . . . In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent. (Emphasis added.)

3. Stanley v. State, 224 Ga. 251, 161 S.E.2d 309 (1968).

4. Three concurring Justices would have reversed on the ground that the search was in violation of the fourth amendment, because the warrant was issued for the search and seizure of gambling devices rather than obscene materials. The Justices cited United States v. Rabinowitz, 339 U.S. 56, 62 (1949), wherein the Court held that "exploratory searches . . . cannot be undertaken by officers, with or without a warrant."

Cf. Marcus v. Search Warrant, 367 U.S. 717 (1961), where the Court indicated that obscenity cannot be treated in the same manner as contraband, such as gambling devices or liquor, for obscene matter cannot be recognized on sight. *See generally* Annot., 5 A.L.R.3d 1214 (1966).

5. In Roth v. United States, 354 U.S. 476, 489 (1957), the Court set forth the test for obscenity:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

Roth held that obscenity is not protected by the first amendment, because it is "without redeeming social importance." *Id.* at 484.

However, in Redrup v. N.Y., 386 U.S. 767 (1967), the Court indicated that the Justices had not themselves agreed upon a single test. Two members of the 1967 Court, according to *Redrup*, would not allow the States to suppress any material whatsoever on the ground of obscenity. One member would allow the States the power to suppress only a distinct, clearly identified class of obscene matter. Other members would not allow the States to suppress obscenity unless (1) the dominant theme of the material as a whole appeals to the prurient interest in sex, (2) it is patently offensive because it affronts contemporary community standards, and (3) it is utterly without redeeming social value. Of those members who adhere to the last test, some require all three elements to "coalesce," but at least one Justice regards social value as an independently significant element.

The three-pronged test for obscenity stated above was first articulated in the opinion by Justice Brennan in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

See generally Annot., 5 A.L.R.3d 1158 (1966).

6. 354 U.S. 476 (1957).

7. *Id.*

8. *See* note 5 *supra.*

9. Redrup v. United States, 386 U.S. 767 (1967); *see* note 5 *supra.*

The Court, in the instant case, assumed the films to be obscene;[10] yet, it extended first amendment protection to them. Although the Court recognized that the States possess broad power to regulate obscenity, the Court refused to extend that power to regulation of the mere private possession of such matter. It may seem that the extension of first amendment protection to the films in *Stanley* is inconsistent with the *Roth* case.[11] However, *Stanley* may be distinguished from prior obscenity cases[12] which have reached the United States Supreme Court, in that they have all dealt with "public actions taken . . . with respect to obscene matter,"[13] such as the use of the mails or interstate commerce, or the sale, distribution, or publication of such matter. The unique feature in the present case is that the State of Georgia sought to punish mere private possession.

Thus the Court, in distinguishing *Stanley* from *Roth* and other obscenity decisions, has redefined the constitutional requirements for making the possession of "obscenity" a crime. The matter can no longer be "obscene" for criminal conviction purposes unless it is publicly distributed, circulated, or sold. One element of the offense, therefore, is "public action." And what may be obscene if sold or distributed may be protected by the first amendment when kept for private use.

By this case, it appears that the court has taken another step in expanding and developing the "right of privacy," first clearly enun-

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FLA. STAT. § 847.011(10) (1967) utilizes the *Roth* test for obscenity:

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.

In Fort v. City of Miami, 195 So.2d 53 (Fla. 3d Dist. 1967), *cert. denied*, 389 U.S. 918 (1967), *reh. denied*, 389 U.S. 997 (1967), the petitioner was convicted for violating a city ordinance incorporating FLA. STAT. § 847.011(1)(a) (1967), which makes it a felony to possess obscene matter with the intent to sell, distribute, and so on. Petitioner had created and offered for sale in his back yard six fiberglass statues, which were, apparently, adjudged obscene. Justices Stewart, Black, and Douglas, dissenting from the denial of certiorari, commented:

> It is clear that the ordinance under which [the petitioner] was convicted is unconstitutional on its face. That ordinance adopts the definition of obscenity embodied in a Florida Statute [§ 847.011(10) (1967)].
>
> . . . .
>
> Members of this Court have expressed differing views as to the extent of a State's power to suppress "obscene" material through criminal or civil proceedings. But it is at least established that a State is without power to do so upon the sole ground that the material "appeals to the prurient interest."
>
> The petitioner in this case was charged, tried, and convicted under a statutory provision which contains no other criterion of "obscenity." This conviction therefore rests upon a law incompatible with the guarantees of the First and Fourteenth Amendments. *Id.* at 919-20.

See State *ex rel.* Hallowes v. Reeves, 224 So.2d 285 (Fla. 1969), where the court reversed the trial court decisions holding FLA. STAT. § 847.011(10) (1967) unconstitutional, on the authority of State v. Reese, 222 So.2d 732 (Fla. 1969).

10. Stanley v. Georgia, 394 U.S. 557, —, 89 S. Ct. 1243, 1244n.2 (1969).

11. Roth v. United States, 354 U.S. 476, 484 (1957).

12. The issue of mere private possession of obscene materials was before the Court once before in Mapp v. Ohio, 367 U.S. 643 (1961); however, the case was decided on fourth amendment search and seizure grounds. *See* Stanley v. Georgia, 89 S.Ct. at 1245-46 n.n. 5 & 6.

13. Stanley v. Georgia, 89 S.Ct. at 1246.

ciated in *Griswold v. Connecticut*.[14] In *Griswold*, the Court struck down a Connecticut statute making the *use* of contraceptives a criminal offense. The Court said that a statute forbidding the use rather than circumscribing the manufacture or sale of contraceptives invaded a "zone of privacy" protected by the Constitution.[15] In *Stanley*, the Court cited *Griswold* and said:

> [F]undamental is the right to be free . . . from unwanted governmental intrusions into one's *privacy*.
>
> . . . .
>
> [The appellant] is asserting the right to read or observe what he pleases—the right to satisfy his intellectual or emotional needs in the *privacy of his own home*.
>
> . . . .
>
> Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the *privacy of one's home*.[16]

It may appear that, since this decision forbids the States from making mere possession of obscene material a crime, the Court is moving in a new direction and may hold other "possession" laws unconstitutional. However, the Court stated that statutes making criminal the possession of other items, such as narcotics, firearms, or stolen goods, will not be impaired by the instant decision because ordinarily no first amendment rights are involved.[17] On the other hand, the case may nulify state statutes, such as Florida Statute § 847.011(2) (1967),[18]

14. 381 U.S. 479 (1965); *see* Olmstead v. United States, 277 U.S. 438 (1928); Boyd v. United States, 116 U.S. 616, 630 (1886); Warran & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Beaney, *The Griswold Case and the Expanding Right to Privacy*, 166 WISC. L. REV. 979 (1966).

15. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

The Court described these "zones of privacy" or "penumbras" thus:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 484.

16. Stanley v. Georgia, 89 S.Ct. at 1247-48 (emphasis added).

17. *Id.* at 1249-50n.11.

18. *See* note 2 *supra*. *But see* State v. Reese, 222 So.2d 732, 736 (Fla. 1969) (citing *Stanley*, holding statute not void on its face.)

It may be that the test used in FLA. STAT. § 847.011(1)(b) (1967) to determine the presence of the necessary element of intent to distribute, sell, or circulate, may also be nullified by the case noted herein. The statute provides:

> The knowing *possession* by any person of six or more identical or *similar* materials, matters, articles, or things coming within the provisions of [§ 847.011 (1)(a)] is presumptive evidence of the violation of said paragraph. (Emphasis added.)

which make mere possession of obscenity a crime. It should be noted that prior to the *Stanley* case, some states had already construed their obscenity statutes as unconstitutional when utilized to punish mere possession of obscene matter.[19]

It remains to be seen how narrowly or broadly this decision will be construed. Whether the courts will protect only that material which is found in one's home, or whether the businessman who carries an otherwise obscene film or book home in his briefcase or the individual who carries such matter in his automobile will also be protected are undecided questions. Future cases may turn on whether the word "home" means only one's abode or whether it also means one's car or office. This writer believes that the Court meant to protect all private possession of what may otherwise be obscene material from governmental inquiry and suppression. It is the individual's freedom to read, enjoy, and think what he pleases that the Court is seeking to shelter, and this freedom will not be narrowed merely because the individual is reading a book in his car or viewing a movie in his office rather than in his home. The Court said that Georgia sought to control its citizens' thoughts and to protect their minds from the alleged adverse effects of exposure to obscenity.[20] But the Court answered:

> [W]e 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. To some this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.[21]

"If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."[22]

SHERRYLL M. DUNAJ

19. State v. Strutt, 4 Conn. 501, 236 A.2d 357 (1967); State v. Von Cleef, 102 N.J. Super. 102, 245 A.2d 495 (1968); People v. Marzana, 31 App. Div. 2d 52, 295 N.Y.S.2d 228 (Sup. Ct. 1968); People v. Russek, 49 Misc. 2d 484, 267 N.Y.S.2d 848 (Dist. Ct. 1966); People v. Roberts, 2 Misc. 2d 668, 154 N.Y.S.2d 201 (Utica City Ct. 1956); State v. Wetzel, 173 Ohio St. 16, 179 N.E.2d 773 (1962).

The California Supreme Court, when presented with the same issue as that in the present case, accurately presaged the holding of *Stanley* in *In re Klor*, 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966). The appellant movie-maker was convicted of possessing obscene films, which he contended he did not intend to distribute in their unedited form. The California Court said:

> Without the requirement that the defendant be shown to have prepared the material with the intent to distribute it in its obscene form, the statute would apply to matter produced solely for the personal enjoyment of the creator . . . . Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments. [Citing Griswold v. Connecticut.]

Id. at 819, 415 P.2d at 794, 51 Cal. Rptr. at 906.

20. The Court noted that although Georgia asserted that exposure to obscenity could lead to deviant sexual behavior, "there appears to be little empirical basis for that assertion." Stanley v. Georgia, 89 S. Ct. at 1249.

21. *Id.* at 1248.

22. *Id.* at 1248.