Censorship: The Law and the Courts

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THE MODERN LAW of obscenity drew its first legal breath in 1949—twenty-one years ago. In that year Judge Curtis Bok decided *Commonwealth* v. *Gordon, et al.*,[1] which held that a number of "sexy" books [2] were entitled to protection under the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution. After holding that a book dealing with sex cannot be condemned as obscene unless it presented a clear and present danger of serious social harm, Judge Bok went on to note that a book, however sexually impure and pornographic "cannot be a present danger unless its reader closes it, lays its aside, and transmutes its erotic allurement into overt action." [1] He also expressed doubt that anti-social action follows the reading of an obscene book.

Earlier cases such as *United States* v. *One Book Called "Ulysses"* [3] were decided without reference to the constitutional guarantees secured by the First Amendment.

Seven years later in *United States* v. *Roth* (1956) the late Judge Jerome Frank expanded Judge Bok's First Amendment argument.[4] In doing so he paid his respects to Judge Bok, stating that before reading Judge Bok's opinion he "had little doubt about the validity of a purely punitive obscenity statute. But the next year . . . Judge Curtis Bok, one of America's most reflective judges, directly attacked the validity of any such punitive legislation. His brilliant opinion, which states arguments that (so far as I know) have never been answered, nudged me into the skeptical views contained in this opinion." [5]

Judge Frank invited the Supreme Court to re-examine the whole obscenity question in light of the expanding freedom afforded speech in other areas. "I think it is not improper to set forth," he said, "considerations concerning the obscenity statute's validity with which, up

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to now, I think the Supreme Court has not dealt in any of its opinions. I do not suggest the inevitability of the conclusion that the obscenity statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sources of legislation. Perhaps I have overlooked conceivable compelling contrary arguments. If so, maybe my opinion will evoke them." [5]

In 1957, the Supreme Court accepted Judge Frank's invitation. The result was the now famous *Roth-Alberts* opinion.[6] Unfortunately, the Supreme Court failed to answer the basic question raised by Judge Frank. Instead, the Court lightly brushed aside his suggestion that the obscenity laws invaded the free speech provision of the Constitution, saying merely that "obscenity" was not within the area of constitutionally protected speech because it was utterly without redeeming social importance.

In the thirteen years since *Roth* was decided, the Supreme Court has written hundreds of thousands of words attempting to draw the line separating constitutionally protected speech from criminally obscene speech. Before a work can be condemned under the *Roth* standards it must (1) go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex, nudity or excretion, and (2) appeal to the prurient interests of the average person, and (3) be utterly without redeeming social importance.

The vagueness of the standards and the difficulty of applying them to particular material were revealed by Justice Stewart, who said in *Jacobellis* v. *Ohio*:

> It is possible to read the Court's opinion in *Roth* v. *United States* in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion . . . that under the First Amendment criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the material involved in this case is not that.[7]

In 1967, in the *Redrup-Austin* cases, the Supreme Court shifted its focus. In holding that the lower court finding of obscenity could not stand under any constitutional test of obscenity, the Court added the following significant statement:

> In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. In none was there any suggestion 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. And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg* v. *United States.*[8] *

The *Redrup* case pointed in the direction of freedom for adults to receive or purchase discreetly any material dealing with sex or nudity that appealed to them. While some lower courts followed this direction,[9] the majority failed to do so.[10]

By 1968, Judge Harlan, in *Ginsberg* v. *New York,* acknowledged that the obscenity law was a constitutional disaster area, observing that it "has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." [11] Members of the Court, he said, disagreed among themselves on virtually every aspect of the law. "The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment. From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court." [11]

It was against this background that the Supreme Court decided *Stanley* v. *Georgia* [12] in April of 1969, and withdrew from its earlier holding that obscenity was not protected by the First Amendment. The Court there appeared to embrace much, if not all, of the underlying philosophy of Judges Bok and Frank.

In *Stanley* v. *Georgia* police officers found some reels of obscene films while executing a search warrant in the home of Robert Stanley. The films were seized and Stanley was prosecuted and found guilty

* In *Ginzburg* v. *United States,* 383 U.S. 463 (1966), Justice Stewart tried his hand at defining hard core pornography. He said:

> Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment.

of possessing obscene matter. The Supreme Court reversed, holding that private possession of such matter cannot constitutionally be made a crime in light of the free speech and press provisions of the Constitution. The Georgia authorities argued that since "obscenity" was not within the area of constitutionally protected speech, it followed that Georgia was free to deal with the possession of such material in the same manner as it dealt with other contraband found in the possession of its citizens. Georgia argued that no constitutional provision was violated by a state criminal law which made the possession of "obscene" matter a crime. Justice Marshall, writing for the Court, disagreed, stating that the mere private possession of obscene material is protected by the First Amendment, supplemented by a right of privacy. A fundamental purpose of the free speech provisions, he stated, is the guarantee of "the right to receive information and ideas, regardless of their social worth." This right to receive, he continued, "takes on an added dimension" when joined with the "right to be free . . . from unwarranted governmental intrusion into one's privacy."

In the *Stanley* case, the Supreme Court finally got around to examining the purpose behind obscenity legislation, as Judge Frank had urged them to do some thirteen years earlier. Thus, when Georgia argued that obscenity legislation is necessary to protect the moral health of the community and to prevent harmful conduct that may be incited by contact with obscenity, the Court rejected the arguments.

As to protecting the "moral health" of the community the Court said:

> Georgia asserts the right to protect the individual's mind from the effects of obscenity. 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. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . . Nor is it relevant that obscenity 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.[12]

Rejecting the "incitement" to anti-social behavior argument the Court stated:

> Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence. There appears to be

little empirical basis for that assertion. But more importantly, if the State is only concerned about literature inducing anti-social conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "(a)mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law." [12]

The *Stanley* case appears to hold that obscenity laws remain viable only with respect to public distribution of obscene materials where the State can establish justification for intervention, as in the case of dissemination to minors or unwarranted intrusion on the privacy or sensibilities of the public.

Recognition of the significant impact of the *Stanley* v. *Georgia* decision has already come from lower courts. In *Stein* v. *Bachelor,* a federal court declared the Texas obscenity statute unconstitutional, giving a generous reading to the *Stanley* case. Aware that in a narrow sense the *Stanley* case merely held that the free speech provisions of the Constitution prohibit making private possession of obscene material a crime, the court found it impossible "to ignore the broader implication of the opinion which appears to reject or significantly modify the proposition stated in *Roth* v. *United States,* that obscenity is not within the area of constitutionally protected speech or press." [13] The *Stein* court interpreted *Stanley* as modifying "the dichotomy between protected and unprotected expression by recognizing that at least in some contexts obscenity is afforded First Amendment protection and thus cannot constitutionally be regulated in the absence of a legitimate societal interest." [13]

In *United States* v. *Thirty-Seven (37) Photographs,* another federal court declared the hundred year-old customs law unconstitutional. In that case a citizen returning from Europe had thirty-seven allegedly obscene photographs seized from his luggage by a customs inspector.

In the lawsuit that followed, the court, without deciding how far *Stanley* goes, invalidated the customs law because it prohibited an adult from importing an obscene work for private use. The court then went on to say that "the First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent." [14]

Finally in *Karalexis* v. *Byrne,* a third federal court took *Stanley* to its logical conclusion. The court there held the Massachusetts obscenity statute unconstitutional because it was not limited to protect-

ing youth or the privacy of the general public. After reviewing the Stanley case the court said in *Karalexis* v. *Byrne*: "The question is, how far does *Stanley* go. Is the decision to be limited to the precise problem of 'a mere private possession of obscene material'; is it the high water mark of a past flood, or is it the precursor of a new one."[15] Believing that *Stanley* is the beginning of a new era, the court held that to justify any obscenity law the proponents of the law must prove affirmatively that obscenity raises a "clear and present danger of antisocial conduct or will probably induce its recipients to such conduct." The *Karalexis* court then went on to say that the *Stanley* court had concluded that obscenity presented no such danger to the adult viewer or to the public as a result of the adults' exposure.

In recognition of the expanded meaning, the *Karalexis* court gave the *Stanley* opinion, the court delayed giving effect to its judgment to permit the Supreme Court to review the case if it chose to do so. The Supreme Court accepted the invitation and stayed the order of the lower court.

It now appears that the three cases which have given *Stanley* v. *Georgia* a broad reading will be reviewed by the United States Supreme Court. No one but a clairvoyant or a fool would confidently predict the outcome of these cases in a court which has a new Chief Justice and is rapidly changing its character. Indeed, as I am writing this article, the *Wall Street Journal* announces that "the Supreme Court is about to wrestle once more with obscenity." Observing that Chief Justice Burger has already "made clear his position advocating stricter local controls over fleshy movies and sexy printed materials"[16] and that President Nixon shares these views, the *Wall Street Journal* predicted a conservative turn.

For the moment one can say no more than the *Karalexis* court said:

> We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we 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. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier. 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 theatre or library. We see no reason for saying he must go alone.[17]

References

1. Commonwealth v. Gordon, 35 al., 66 Penn. D&C Rep.101 (1949).

2. The books involved were *Young Lonigan, The Young Manhood of Studs Lonigan, Judgment Day,* and *A World I Never Made,* all by James T. Farrell; *Sanctuary* and *Wild Palms* by William Faulkner; *God's Little Acre* by Erskine Caldwell; *End As a Man* by Calder Willingham; and *Never Love a Stranger* by Harold Robbins.

3. United States v. One Book Called "Ulysses", 5 F.Supp.182 (1933), affirmed 72 F.2d 705 (1934).

4. Supreme Court Justice Douglas, in a Forward to *The Selected Writings of Judge Jerome Frank; A Man's Reach,* edited by Barbara Frank Kristein (1965), said of Judge Frank's opinion: "One can search the reports and not find a more interesting and profound canvass of an important legal problem than this one on obscenity. It will, I think, remain a classic. Legal precedents, sociology, juvenile delinquency, history, arts and literature, the First Amendment, the Great Books—all are discussed in a fascinating analysis of an ancient and perplexing problem."

5. United States v. Roth, 237 F.2d 796 (1956).

6. Roth v. United States [Alberts v. California,] 354 U.S. 476 (1957).

7. Jacobellis v. Ohio, 378 U.S. 184 (1964).

8. Redrup v. New York [Austin v. Kentucky] 386 U.S. 767 (1967).

9. Grant v. United States, 380 F.2d 748 (1967); Poulos v. Rucker, 288 F. Supp.305 (1968).

10. Milky Way Productions, Inc. v. Leary, 305 F.Supp.288 (1969); United States v. 77 Cartons of Magazines, 300 F.Supp.851 (1969); People v. Sayles, *et al.,* Appellate Dept. of Superior Court of California for County of Los Angeles, No. CR. A-8710 (1970).

11. Ginsberg v. New York, 390 U.S. 676 (1968).

12. Stanley v. Georgia, 394 U.S. 557 (1969).

13. Stein v. Batchelor, 300 F.Supp.602 (D.C. Tex. 1969), probable jurisdiction noted by the United States Supreme Court, 90 S.Ct.428 (1970).

14. United States v. Thirty-Seven (37) Photographs, United States District Court for the Central District of California, Civil No. 69-2242-F/ (1970), unreported (appeal pending in the United States Supreme Court).

15. Karalexis v. Byrne, United States District Court for the District of Massachusetts, Civil Action No. 69-665-J (1969), unreported (appeal pending in the United States Supreme Court).

16. *Wall Street Journal,* March 3, 1970, p. 5.

17. Karalexis v. Byrne, *op. cit.*