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Constitutional Law: Possession of Obscene Material in the Home is Constitutionally Protected

W.F. Maher

CASE COMMENTS

CONSTITUTIONAL LAW: POSSESSION OF OBSCENE MATERIAL IN THE HOME IS CONSTITUTIONALLY PROTECTED*

Stanley v. Georgia, 89 S. Ct. 1243 (1969)

Police found three "stag movies" in the defendant's bedroom during a search for evidence of bookmaking.[1] The defendant was convicted for knowingly possessing obscene matter in violation of Georgia law.[2] The Supreme Court of Georgia affirmed the defendant's conviction, holding that an indictment for possession of obscene matter need not allege intent to sell or distribute.[3] On appeal, the United States Supreme Court reversed and HELD, making the mere private possession of obscene matter a crime is prohibited by the first and fourteenth amendments.[4] Justice Black concurred on the theory that all obscenity, public or private, is constitutionally protected.[5] Justices Stewart, Brennan, and White would have reversed without reaching the issue decided by the majority because they felt the films were illegally seized.[6]

It had seemed settled law that obscenity was not protected by the first amendment.[7] In the instant case, the Court through Justice Marshall conceded that past decisions seemed to establish that proposition but distinguished all of them from the instant case because none were decided "in the context of a statute punishing mere private possession of obscene material."[8] The rationale of the instant case is that, while there is a valid governmental interest in dealing with the problem of obscenity, it is not so extensive that it justifies intrusion into the privacy of the home. The first amendment protects the right to receive information and ideas.[9] When, in addition, the right to privacy is involved, the normally legitimate interest in regulating obscenity is invalidated.

The principal concern in past obscenity cases has been with finding a workable definition for the term "obscene."[10] The standard that emerged

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* EDITOR'S NOTE: This case comment received the *George W. Milam Award* as the most outstanding case comment submitted by a junior candidate in the spring 1969 quarter.

1. 89 S. Ct. 1243, 1244 (1969).

2. GA. CODE ANN. §26-6301 (Supp. 1968): "Any person who shall . . . knowingly have possession of . . . any obscene matter . . . shall . . . 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 . . . ."

3. Stanley v. State, 224 Ga. 529, 161 S.E.2d 309 (1968).

4. 89 S. Ct. 1234, 1249-50 (1969).

5. *Id.* at 1250.

6. *Id.* at 1250-52.

7. Roth v. United States, 354 U.S. 476, 485 (1957); *see* Ginsberg v. New York, 390 U.S. 629 (1968).

8. 89 S. Ct. 1243, 1245 (1969).

9. *Id.* at 1247.

10. The basic standard today is: "[T]hree elements must coalesce: it must be established

was a variable one,[11] extremely complex and difficult to apply.[12] As a practical matter, material has not been labeled obscene, absent special circumstances,[13] unless it was hard-core pornography,[14] and even then perhaps not unless it was presented in such a way as to offend the public.[15] Once material was deemed obscene, however, the government could regulate or prohibit it as it would any other matter subject to its power. A state did not have to demonstrate a compelling interest or a "clear and present danger"[16] as it did to justify regulation of first amendment rights. Only the fifth and fourteenth amendment standards of substantive due process had to be satisfied; that is, the law had to be rationally adapted to accomplish a reasonable end within the scope of governmental power.[17] The instant case holds that *some* obscene material can no longer be dealt with in this way.

The language in the opinion repeatedly indicates that the first amendment is the primary basis for the decision.[18] Yet, only private possession of obscene matter is said to be protected.[19] This presents a logical inconsistency, in that private possession of obscenity is constitutionally protected but the principal means of acquiring it (public sale and distribution) are not. Cases abound in which statutes even indirectly burdening free speech or press have been declared unconstitutional.[20] Surely, statutes that bar the sale and

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that (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 or representation of sexual matters; and (c) the material is utterly without redeeming social value." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413, 418 (1966).

11. The standard depended upon such factors as the method and extent of distribution, Ginsburg v. United States, 383 U.S. 463 (1966) (pandering); the purpose for which the material would be used, Mishkin v. New York, 383 U.S. 502 (1966) (prurient interest test to be applied to group for which distribution was intended); United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957) (material being shipped to Institute of Sex Research not obscene since it did not appeal to prurient interest of recipients); and whether the material would reach children, Ginsberg v. New York, 390 U.S. 629 (1968).

12. *See* Comment, *The Substantive Law of Obscenity: An Adventure in Legal Quicksand,* 13 N.Y.L.F. 81 (1967).

13. Note 11 *supra.*

14. "[I] have reached the conclusion . . . criminal laws in this area are constitutionally limited to hard-core pornography. I shall not . . . attempt further to define . . . that shorthand description . . . . But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

15. Recently, for example, a motion picture that explicitly depicts sexual intercourse was held not to be obscene under prevailing Supreme Court standards. United States v. A Motion Picture Film Entitled "I Am Curious — Yellow," 404 F.2d 196 (2d Cir. 1968).

16. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

17. *E.g.,* Nebbia v. New York, 291 U.S. 502, 525 (1934) (fourteenth amendment requires only that states observe "due process" when legislating for the public welfare).

18. *E.g.,* "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." 89 S. Ct. 1243, 1248 (1969).

19. *Id.* at 1245, 1249, 1250.

20. *E.g.,* Smith v. California, 361 U.S. 147 (1959); NAACP v. Alabama, 357 U.S. 449 (1958).

distribution of obscene matter substantially affect its private possession and use – a constitutional right.

Conceptual problems are presented because the Court uses the first amendment rather than the right to privacy[21] as the primary basis for its decision. The Court says "this right to receive information and ideas . . . takes on an added dimension" in the context of a person's own home.[22] Apparently, the right to privacy operates to expand the coverage of the first amendment. The instant case appears to be the first in which this principle was recognized, but for two reasons this is not especially surprising. First, although it has been talked about and used in one way or another for many years,[23] the right to privacy has only recently been fully recognized as an independent constitutional right. Second, the right to privacy has already affected the application of the first amendment on several occasions; restrictively, for example, in cases upholding statutes dealing with libel,[24] sound amplifying equipment,[25] and door-to-door selling.[26] The instant case demonstrates that the right to privacy may expand the area of first amendment operation as well as restrict it.

Understanding how the right to privacy expands the guarantees of freedom of speech and press to cover obscenity is difficult. Historically, the first amendment has been viewed as a protector of ideas and their communication.[27] One of the reasons why obscene matter has never been constitutionally protected is that it has never been regarded as having any ideological content.[28] With the holding in the instant case, where the right to privacy is

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21. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

22. 89 S. Ct. 1243, 1247 (1969).

23. The first significant commentary was written before the turn of the century, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). An explicit reference was made to the right to privacy, even before this article, in Boyd v. United States, 116 U.S. 616, 630 (1886). The Court held in that case that the fourth and fifth amendments applied "to all invasions on the part of the government and its employe's [*sic*] of the sanctity of a man's home and the privacies of life . . . ." The early cases dealt with the right to privacy as created by the fourth and fifth amendments and limited it to a property concept. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928), in which Justice Brandeis wrote his famous dissent in support of "the right to be let alone." The right to privacy has been extended beyond a material concept involving trespass since then, and *Olmstead* was finally overruled as a limitation of the right to privacy. Katz v. United States, 389 U.S. 347 (1967).

24. Curtiss Publishing Co. v. Butts, 388 U.S. 130 (1967). *But cf.* Time, Inc. v. Hill, 385 U.S. 374 (1967).

25. Kovacs v. Cooper, 336 U.S. 77 (1949); *cf.* Saia v. New York, 334 U.S. 558 (1948) (restrictions can be imposed only if the statute is narrowly drawn).

26. Breard v. City of Alexandria, 341 U.S. 622 (1951) (commercial solicitation door-to-door not protected by the first amendment). *Contra*, Martin v. City of Struthers, 319 U.S. 141 (1943) (distribution of religious handbills door-to-door protected by the first amendment).

27. Roth v. United States, 354 U.S. 476, 484 (1957); *cf.* International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957) (picketing that involved more than the communication of ideas did not receive full protection as speech).

28. The test for obscenity, which was advanced in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413 (1966) and subsequent cases, indicates this. One of the things that is meant by the prurient interest

involved, the Court has either rejected the traditional meaning of the first amendment and included within its protection non-ideological material, or it has decided that obscene matter communicates ideas. This is necessarily so because the first amendment, although it is expanded by the right to privacy, is the stated basis for the decision.

Dicta in the case indicate that the Court is adopting the latter alternative — that obscene material has ideological content. In reply to Georgia's assertion that a state has the right to protect the individual's mind from the effects of obscenity, the Court says that the argument misconceives what the Constitution protects. It protects not merely the expression of ideas that are conventional or shared by a majority but "in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."[29] This statement would be meaningless without the assumption that the films contained ideas.

However, the next paragraph of the opinion meets the issue more directly. The Court says it is not relevant that obscenity in general, or the particular films in the instant case, are arguably devoid of any ideological content. "[T]he 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."[30] Taken literally, these statements would indicate that *all* obscenity is constitutionally protected.

The Court next qualifies these dicta by mentioning that the states might have some power to control the public dissemination of ideas inimical to the public morality, but the states cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.[31] All of this reemphasizes, rather than resolves the tension created by holding that the right to receive and use these "ideas" privately is protected while the means of acquiring them is not.

Georgia also argued that exposure to obscene material may lead to deviant sexual behavior or crimes of sexual violence.[32] In the context of the instant case, this amounted to the argument that although private possession of obscenity might be protected by the first amendment, still a clear and present danger can be shown that justifies its regulation. The Court did not agree: "There appears to be little empirical basis for that assertion. . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscenity 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

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test is that the material will affect the individual wholly at an emotional rather than intellectual level. And the "utterly without redeeming social value" test means at least that obscenity is not the kind of expression of ideas that the first amendment was intended to protect. *See* Finnis, *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967).

29. 89 S. Ct. 1243, 1248 (1969) (citation omitted).

30. *Id.* at 1248, 1249 (citation omitted).

31. *Id.* at 1249. It also might be noted here that if government may not concern itself with men's private thoughts, the prurient interest test for determining obscenity would seem to be irrelevant.

32. *Id.*

to the manufacture of homemade spirits."[33] Presumably, the private possession of obscene matter does not present a clear and present danger, but the public sale or distribution of it does. The logic of this conclusion is questionable since in either case the "danger" of obscenity lies in the effect it has on the individual who receives it, not in its sale or distribution per se. Justice Douglas has individually expressed the view in a past case[34] that empirical evidence shows no psychological danger from obscenity under any circumstances. Here for the first time a majority of the Court is adopting that view but limiting it to private circumstances. In doing so the Court has gone half way to refuting one of the most basic arguments supporting the regulation of obscenity. However, this has created yet another logical inconsistency, the resolution of which would be to hold that the sale and distribution of obscenity also present no danger. Despite its claim to the contrary,[35] the Court may be edging toward the position that obscenity in general is constitutionally protected.

Such a position would resolve the logical inconsistency of the instant case. It would not mean, however, that the sale and distribution of obscene matter could not be regulated in any way. *Roth v. United States*[36] rejected the necessity of justifying obscenity regulation by proving that it created a clear and present danger of antisocial conduct. In distinguishing *Roth* from the instant case, the Court indicated that the public distribution of obscene material was subject to different objections than was mere private possession. "The danger that it might fall into the hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public"[37] were given as examples of such objections. These would probably be the first areas of concern if the Court were to overrule *Roth* and give obscenity general constitutional protection. Exposure to children would be a clear and present danger in accordance with the normal first amendment standard, and offensive public distribution would violate the right to privacy of the general public that, as has been seen, can restrict first amendment provisions.

While perhaps alarming to the lay public, the instant decision is not particularly surprising from a legal standpoint. In 1961, *Mapp v. Ohio*[38] presented the Court with the same issue but the conviction was reversed on other grounds. Justice Stewart concurred but would have reversed on the basis of the first amendment.[39] In the same case, four of the seven justices of the Ohio supreme court felt that a statute that punished mere private possession of

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33. *Id.*

34. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413, 432 (1966) (concurring opinion).

35. "[T]he States retain broad power to *regulate* obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." 89 S. Ct. 1243, 1250 (1969) (emphasis added). One may speculate on the significance, if any, of the fact that *regulate* rather than *prohibit* was used.

36. 354 U.S. 476 (1957).

37. 89 S. Ct. 1243, 1249 (1969).

38. 367 U.S. 643 (1961).

39. *Id.* at 673.

obscene matter violated the first and fourteenth amendments.[40] Also, the increasing importance of the right to privacy portended the result in the principal case.

Moreover, a broad examination of the Court's standards for determining what is obscene indicates that the Court has been less lenient where broad distribution or pandering was involved.[41] In some sense the inverse of pandering is private possession. The fact, too, that the Court has generally drawn the line at offensiveness is more relevant to a concern with public obscenity than it is to private obscenity. The obscenity standard is not at issue in the instant case[42] but the social policy considerations that affect the standard for determining obscenity also affect its constitutional protection. The general disposition of the Court to protect any legitimate communication of ideas, coupled with the enormous difficulty of determining what does not convey an idea for constitutional purposes, resulted in a lenient standard under which almost nothing was classed as obscene. Similar difficulties will exist where public concerns clash with the private right to possess obscenity.

The immediate consequence of the instant case is that all statutes that punish mere private possession of obscene matter are unconstitutional. Thus, Florida Statutes, section 847.011 (2),[43] which specifically punishes knowing possession of obscene matter, is unconstitutional on its face. Additionally, the constitutionality of subsection 847.011 (1) (b),[44] providing that knowing possession of six or more similar or identical items of obscene material is presumptive evidence of intent to sell or distribute them, will depend upon its application. While the right of the states to regulate the sale or distribution of obscene matter has as yet been in no way abrogated, it is not likely that the Court will allow the instant ruling in the instant case to be circumvented by a statutory presumption where other circumstances would indicate private use. Six stag films, for example, might well be possessed for private use. The constitutional application of this subsection will necessarily depend upon the presence in each case of other evidence indicating an intent to sell or distribute. This effectively renders the provision useless, at least to the

40. State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960). This was not determinative of the case since Ohio law then required that "all but one of the judges" had to agree to declare a state law unconstitutional, Stanley v. Georgia, 89 S. Ct. 1243, 1246 n.7 (1969).

41. *E.g.*, Ginzburg v. United States, 383 U.S. 463 (1966).

42. It was assumed from the outset that the films were obscene. 89 S. Ct. 1243, 1244 n.2 (1969).

43. "A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic . . . matter . . . or any article . . . of immoral or indecent 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 . . . ." FLA. STAT. §847.011 (2) (1967). Insofar as the descriptive words other than "obscene" may mean something more stringent than the prevailing constitutional law definition of that term, this section of the statute may be applied unconstitutionally. Subsection 10 adopts the prurient interest test for the word "obscene" but does not mention the other descriptive words.

44. "The knowing possession by any person of six or more identical or similar materials, matters, articles or things . . . is presumptive evidence of . . . violation . . . ." FLA. STAT. §847.011 (1) (b) (1967).

extent it deals with *similar* items, which are relatively few in number. A stronger case can be made for the statute insofar as it deals with *identical* materials, for it is quite unlikely that six or more identical items would be possessed for private use only.

The other subsections of the statute dealing with seizure[45] and with transportation of obscene material into the state with intent to sell[46] are subject to the limitations mentioned above. The prohibition on transmission of obscene matter to children under the age of eighteen[47] should remain unaffected.[48]

More generally, *Roth* remains the law as to nonprivate obscenity, and it is unlikely, especially in view of probable personnel changes in the Court, that it will be overruled entirely. Most likely a compromise and a balancing will occur between the public interest relying on *Roth* and private right relying on the instant case. For example, the manufacture of obscene matter in the home or a "private" sale or transmission of such material in a noncommercial context will probably be protected. On the other hand, it seems likely that the Court will continue to recognize the right of the general public not to have obscenity thrust upon it. Also, the Court will probably remain cognizant of the very real practical difficulty of preventing offenses to the public's sensibilities and protecting children from obscenity where public sale of such matter is allowed, even without advertising or display. Present laws restricting the mailing of unsolicited obscenity and those regulating obscenity in advertising and in the mass media will no doubt survive the balancing process. Any balancing, however, will necessarily shift the Court from its former position toward the protection of all obscenity. The shift will help to resolve the tension created by protecting the private use of obscenity while leaving the principal means of its acquisition unprotected.

It is also a speculative possibility that the first amendment, fortified by the right to privacy, may be extended to protect certain types of active *conduct* in the privacy of the home. In this regard, the developing concept of "symbolic free speech" in which acts are said to communicate ideas[49] might be coupled with the right to privacy to provide constitutional protection for certain types of private conduct that the Government may now reach.

The principal case does nothing to relieve the Court of the great difficulty it has experienced in past dealings with the complex problem of obscenity. If anything, the problem is now more complex than ever.

W. F. MAHER

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45. FLA. STAT. §§847.02-.03 (1967).
46. FLA. STAT. §847.011 (1) (a) (1967).
47. FLA. STAT. §847.012 (1) (1967).
48. *See* 89 S. Ct. 1243, 1249 (1969).
49. *Cf.* Tinker v. Des Moines Independent Community School Dist., 89 S. Ct. 733 (1969) (wearing of armbands at school as social protest protected by the first amendment); *In re* Giannini, 72 Cal. 655, 446 P.2d 535 (1968) ("topless" dancing in nightclub protected by the first amendment as communlication of ideas).