Obscenity Law: Après Stanley, Le Deluge?

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APRÈS STANLEY, LE DELUGE?*

The status of obscenity under our Constitution is a controversial subject which is constantly before federal and state courts because the United States Supreme Court has failed to establish adequate guidelines for courts to follow in determining whether obscene matter is constitutionally protected in various sets of circumstances. The Supreme Court eventually must "reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments."1 The Court held, in Stanley v. Georgia,2 that "mere private possession" of obscene matter was protected under the first and fourteenth amendments,3 and thereby extended constitutional protection to obscenity for the first time. The scope of this recently announced protection must be clearly delineated, for courts throughout the nation have diversely interpreted the implications of the Stanley decision.4

This article hopefully will perform three functions: (1) summarization and analysis of the Stanley opinion; (2) presentation of the diverse constructions of Stanley; and (3) prediction of the scope of constitutional protection that will be afforded to obscene matter. First, the constitutional status of obscenity prior to Stanley is briefly described; second, the Stanley decision is summarized in detail and analyzed in depth; third, the interpretations of Stanley in subsequent decisions are collected and contrasted; fourth, the assertion that obscenity induces criminal conduct as a basis for upholding legislation prohibiting its distribution in all circumstances is carefully considered; finally, predictions are made as to

* This article is a student work prepared by Michael J. Gaynor, a member of the St. John's Law Review and the St. Thomas More Institute for Legal Research. 
3 Id. at 568.
4 See text accompanying notes 74-132 infra.
what view the Court will take when it determines the constitutionality of absolute bans on the public dissemination of obscene material.

**Background: From Roth to Stanley**

Obscenity law involves two basic issues: what is obscene and to what extent may it be regulated. The Supreme Court, which had approved a federal obscenity statute in 1878, first answered these questions in 1957, in *Roth v. United States* and *Alberts v. California*. Therein, the Court maintained that "[a]ll ideas having even the slightest redeeming social importance... even ideas hateful to the prevailing climate of opinion," were entitled to full constitutional protection, being subject to regulation only when they encroached upon the few "more important interests."

Obscenity, however, was defined as matter in which the dominant theme appeals to the prurient interest of the average person when interpreted in its entirety by contemporary community standards, and rejected as wholly lacking redeeming social value. The "dispositive question" was "whether obscenity is utterance within the area of protected speech and press."

The argument that obscenity laws are unconstitutional because they punish incitement to thoughts without requiring proof that those thoughts induce prohibitable action was deftly circumvented:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has 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."


"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.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."


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5 Ex parte Jackson, 96 U.S. 727, 737 (1878).
6 354 U.S. 476 (1957). In *Roth*, the constitutionality of 18 U.S.C. § 1461, which makes obscene matter nonmailable, was at issue; in *Alberts*, the issue was the validity of Cal. Penal Code § 311 (West 1955), which proscribed distribution of obscene material. Id. at 479.
7 Id. at 484. See, e.g., Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959), wherein the Court unanimously held unconstitutional New York's refusal to license a motion picture (*Lady Chatterley's Lover*) on the ground that it depicted adultery favorably. Id. at 687-88.
8 Id. at 489. It should be remembered that this test was a substantial liberalization of the *Hicklin* rule, under which a publication would be held obscene if it tended "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868).
9 354 U.S. at 484-85.
10 Id. at 481.
12 "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has 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."


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deeming social value, and, therefore, need not be regulated under the "clear and present danger" or "balancing" tests. The Court had fashioned a definitional or per se test: when material was challenged, the determination to be made was whether that material satisfied the elements of obscenity, not whether it jeopardized a valid community interest.

The Court explained in detail and modified its views on obscenity before the Stanley decision was handed down in 1969. The definition of obscenity has been narrowed by the addition of requirements that the matter be patently offensive and wholly lacking in redeeming social importance. For matter to be held obscene per se now,

14 "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484.
15 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."
16 "In each case [the court] 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." 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).
17 "There are two categories of speech—that entitled to first amendment scrutiny, although after such scrutiny it may prove subject to regulation; and that so without importance or ideas that it is virtually per se subject to regulation and raises no constitutional issues." H. Kalven, The Negro and the First Amendment 46 (1965); see Kalven, supra note 11.
19 Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). it must be established 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.

The phrase "contemporary community standards" had been held to require that matter be judged by a national standard.

Decisions subsequent to Roth have extended the applicability of the obscenity classification in special circumstances that do not necessarily strictly satisfy the requirements of the aforementioned definition. In Mishkin v. New York, the Court held that the prurient interest of a specific sexually deviant group toward which matter is primarily directed may be substituted for that of the general public in determining whether that matter meets the prurient-appeal requirement. Similarly, in Ginzburg v. United States, the Court held that material not otherwise "obscene" could lose its constitutional protection if pandered, i.e., presented in a manner designed to appeal to erotic interest. Moreover, the

21 Jacobellis v. Ohio, 378 U.S. 184, 195 (1964): "It is, after all, a national Constitution we are expounding."
23 Id. at 508.
25 "[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test." Id. at 474 Ginzburg had marketed in a manner prompting the reader to look "for titillation, not for saving intellectual content." Id.
Court held, in *Ginsberg v. New York*, that a state may impose a more restrictive standard concerning the matter minors may read and view. The attitude of the Court is best illustrated by the *Redrup v. New York* decision, wherein the matter in question was held not to be obscene per se and no special circumstances were involved. The two-level theory of speech presented in *Roth*, under which the determination of obscenity was wholly definitional, was modified; otherwise nonobscene matter could now be encompassed within the broadened category of nonspeech if pandered, inflicted upon the unwilling, or provided for juveniles. This expanded approach, variously labelled "obscenity per quod," "contextual obscenity," and "variable obscenity," made context the basis for determining whether material not obscene per se would be classified as unprotected expression.

The Court also reconsidered its conclusion that obscenity is wholly unprotected. Constitutional barriers to some exercises of a state's power to prevent distribution of obscene material were recognized in *Smith v. California*, wherein scienter was held to be an essential element in any bookseller's conviction for possession of obscene matter. This attitude was reiterated in *New York Times Co. v. Sullivan*, in the Court's statement that "obscenity . . . can claim no talismanic immunity from consti-
tutional limitations” and “must be measured by standards that satisfy the First Amendment.” In 1966, however, the Court restated the Roth view that obscenity is “inconsistent with any claim to the shelter of the First Amendment.” Two years later, in Ginsberg v. New York, this view of obscenity as unprotected expression, suppressible without regard to the “clear and present danger” test, was reaffirmed. It is in this light that Stanley v. Georgia, the landmark obscenity case of 1969, must be interpreted.

Stanley v. Georgia: Private Possession of Obscene Matter Is Lawful

The operative facts in the Stanley case are simple: federal and state agents found three reels of film, assumed to be obscene, in Robert Eli Stanley's bedroom during an authorized search for bookmaking material. Stanley was convicted of knowingly possessing obscene matter in violation of Georgia law. The Supreme Court of Georgia affirmed his conviction, holding that the state need not prove “intent to sell, expose or circulate the same” under an indictment charging possession of obscene matter.

The United States Supreme Court, distinguishing public distribution of obscene matter from its private possession, applied the “balancing” test and held for the first time that the state's “broad

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40 390 U.S. 629 (1968).
41 Id. at 641.
42 394 U.S. at 559 n.2.
43 Id. at 558.
44 Ga. Code Ann. § 26-6301 (Supp. 1968), providing in pertinent 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. . . .
46 Id. at 261, 161 S.E.2d at 311.
47 394 U.S. at 560-61: None of the statements cited by the Court in Roth for the proposition that “this Court has always assumed that obscenity is not protected by the freedoms of speech and press” were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. Moreover, none of this Court’s decisions subsequent to Roth involved prosecution for private possession of obscene materials. Those cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter.
48 Id. at 564-68.
49 The issue of whether mere knowing possession of obscene matter can be prohibited constitutionally was before the Court in Mapp v. Ohio, 376 U.S. 643 (1961), but that case was decided on another ground. In Stanley, Justices Stewart, Brennan, and White concurred in the result, but would have reversed Stanley's conviction, under the Mapp rule, on the basis of a fourth amendment infringement. Id. at 569 (concurring opinion). In Mapp, Justice Stewart voted to reverse on the ground that the applicable statute, which
power to regulate obscenity . . . does not extend to mere possession by the individual in the privacy of his own home." The Roth doctrine's apparently absolute exclusion of obscenity from constitutional protection was clearly rejected, for the holding of the majority was based on the first and fourteenth amendments. The Court's assertion that Roth and its progeny are not impaired by the Stanley decision must be interpreted in light of Stanley's prior limitation of them to recognition of a legitimate governmental interest in the regulation of commercial distribution of obscene matter. The Roth view—that proof of a "clear and present danger" of antisocial behavior emanating from exposure to obscene matter is unnecessary for regulation of obscenity—was apparently limited to its public dissemination, in which "there is always the danger that obscene material might fall into the hands of children . . . or . . . intrude upon the sensibilities or privacy of the general public." But an important question was not expressly answered: when the aforementioned dangers are eliminated, is dissemination then permitted?

Each of Georgia's attempted justifications of the proscription of mere private possession of obscene matter was succinctly dismissed. First, Georgia contended that the Roth case, wherein it was held that "obscenity is not within the area of constitutionally protected speech or press," allowed prohibition of mere private possession. The Court replied:

[W]e do not believe that this case can be decided simply by citing Roth. Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth nor any other decision of this Court reaches that far. . . . [Citing Roth] cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

The magic word had failed to carry the day; the Court would weigh the constitutional rights sought to be denied against the interests of Georgia in denying them to determine the validity of the conviction.

The Court next described the constitutional rights involved in this case. These fundamental rights were the right to receive information and ideas, without regard to social worth, and "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into

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made mere possession of obscene matter unlawful, was "not consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment." 367 U.S. at 672 (Stewart, J., concurring).

50 394 U.S. at 568.
51 Id.
52 Id. at 567.
53 Id. at 563-64.
54 Id. at 567 (emphasis added).

55 354 U.S. at 485.
56 394 U.S. at 560.
57 Id. at 563-64.
58 Id. at 564, citing Winters v. New York, 333 U.S. 507, 510 (1948). Therein, the Court stated: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. . . . They are equally subject to control if they are lewd, indecent, obscene or profane."
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one's privacy. The latter right brought "an added dimension" to the former one. Stanley was

asserting 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. . . . the right to be free from state inquiry into the contents of his library,

and the Court was most sympathetic to his cause:

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. 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. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Against these powerful personal liberties Georgia raised three arguments. First,

Georgia maintained that it was empowered to safeguard the moral purity of its citizenry from the corrupting influence of obscenity; to that the Court replied:

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

The argument that obscene matter is devoid of ideological content was deemed irrelevant, for the Court was unwilling and/or unable to distinguish "transmission of ideas" from "mere entertainment." No form of obscenity regulation could be justified under this argument, unless it was limited to protection of children.

Next, Georgia contended that the statute in question was valid because obscene matter may prompt deviant sexual behavior, including criminal conduct. The Court noted that the theory that exposure to such material causes antisocial conduct had not been proven, and then asserted that even irrefutable evidence of a causal relationship would not justify prohibition

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59 The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.


60 Id.

61 Id. at 565.

62 Id. (emphasis added).

63 Id. at 566.


66 394 U.S. at 566.

67 Id.

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.

Id. at 567.
of mere private possession. The Court stated 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 . . . ."

The "clear and present danger" test remained unnecessary only in cases dealing with public distribution of obscene matter.

Finally, Georgia alleged that prohibition of possession of obscene matter is an indispensable element in statutory schemes prohibiting its public distribution. The Court did not believe that the difficulty of proving intent to distribute was especially great. It decided that any interest in such prohibition as a necessary incident to prohibition of distribution is outweighed by the fundamental right that would be restricted.

Each argument being rejected, the Court summarized the status of obscenity as protected expression:

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth and the cases following that decision are not impaired by today's holding. As we have said, the 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.

It is understandable that the Stanley decision has provoked extensive discussion. The Court rejected Roth's two-level theory of speech in the context of private possession of obscene matter, but did not

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68 Id. at 566.
70 Id. at 567.
72 394 U.S. at 568.
explicitly modify the status of its dissemination to permit controlled distribution. A possible result is an anomalous situation in which the individual can legally possess what may not be legitimately distributed; theoretically, a state can negate the individual's right to indulge in obscenity in his home by prohibiting sales and effectively enforcing such a prohibition. Just as the rights of production and of distribution are useless without corresponding rights of reception and of possession, the latter rights are impotent without the former ones. The Court must perform two important tasks: (1) delineate protected possession from unprotected distribution, and (2) determine whether the right to possess obscene matter implies a correlative right to supply.

Subsequent Decisions: Contradictory Interpretations

The impact of the Stanley case on obscenity law has been interpreted very differently by various courts. Most courts have strictly construed the holding in Stanley, but others have invoked the case to invalidate the application of statutes prescribing distribution and to protect an obscene film unobtrusively offered only to forewarned adults at a public theater. These contradictory readings of the same opinion illustrate the pressing need for clarification.

Professor Gegan eloquently summarized the thinking of the strict constructionist:

[Stanley] does not acknowledge a "right" to undergo pornographic experiences in private any more than the statute of frauds grants a "right" to breach oral contracts. The law tolerates both because of uniquely remedial considerations. The cure would be worse than the disease. The recognition of this does not mean that society either values the disease or considers it with indifference. Should the repellent activity surface in circumstances not relevant to privacy the law will step in. The privilege recognized in Stanley is, in short, a shield for the private citizen, not a sword for the purveyor.\(^7\)

Numerous courts subscribe to this philosophy and refuse to legitimize obscenity further.\(^7\)

\(^7\) Gegan, supra note 73, at 218-19.
Only a few of the cases decided by the aforementioned courts need be discussed to convey adequately the attitude of those courts and to present examples of the various sets of circumstances in which the Stanley case was invoked unsuccessfully. In State v. Reese, a Florida court limited the scope of Stanley's protection of private possession of obscene matter to the home and declined to strike down a statute encompassing prohibition of possession of obscene matter. Three-judge district courts upheld statutes outlawing dissemination of obscene matter against challenges based on Stanley in Newman v. Conover and ABC Books, Inc. v. Benson. In Raphael v. Hogan, a district court decided that Stanley did not protect those who presented an obscene play to an adult audience. In United States v. Melvin, United States v. Fragus, and United States v. Orito, the Fourth, Fifth, and Ninth Circuits, respectively, found Stanley no obstacle in upholding the constitutionality of the federal statute which prohibits knowingly using any common carrier for the transportation in interstate commerce of obscene matter. Similarly, in United States v. Ten Erotic Paintings, a district court upheld Congress' power to proscribe importation of obscene matter against an attack based upon the Stanley case. Each of these cases reflects a desire to limit the constitutional protection afforded obscene matter to its mere private possession, and a most unsympathetic attitude toward those who claim that Stanley's rights to receive and to possess imply a corresponding right with them to distribute.

The Supreme Court recently indicated, perhaps, that the Stanley decision should be strictly construed. In Gable v. Jenkins, wherein the constitutionality of a Georgia statute prohibiting dissemination of obscene material to any person was at issue, a three-judge court read Stanley as "limited to its facts." Noting that possible exceptions, e.g., a husband showing material to his wife, were not present, the court held that the phrase any person did not make the statute constitutionally overbroad. The Supreme Court affirmed without opinion, and some courts have interpreted its action as approval of the lower court's construction of Stanley.  


76 222 So. 2d 732 (Fla. 1969).
77 Id. at 736.
81 419 F.2d 136, 139 (4th Cir. 1969).
82 422 F.2d 1244, 1245 (5th Cir.) supplemented, 428 F.2d 1211, 1213 (1970) (per curiam).
This is the narrowest possible interpretation of Stanley.

Much broader constructions of the Stanley case also have staunch adherents.92


The Commission's Legal Panel interpreted the summary affirmance differently:

The affirmance by the Supreme Court of the Gable case, without oral argument and without written opinion, would not appear to settle existing questions about the reach of the Stanley case. The Supreme Court sometimes utilizes such summary affirmances as the equivalent of a denial of certiorari—i.e., a refusal to exercise jurisdiction to review the case on its merits.

MAJORITY REPORT 436 n.66.


Commentators have pronounced dead Roth's two-level theory of expression93 and suggested that "obscenity is protected speech subject only to regulation in the interest of protecting the unwilling and the young."94 The Majority Report of the President's Commission on Obscenity and Pornography concurred:

The logic of Stanley may thus require the holding that at least some distributions of obscene material to consenting adults may no longer be constitutionally prohibited unless legislation is supported by reasonably apprehended social harms.95

This thinking holds that the “clear and present danger” test should be applied to dissemination of obscene matter, in the face of the statement in Stanley that such was not necessary in cases involving public distribution of obscene material.96

Soon after Stanley was decided, a three-judge court held, in Stein v. Batchelor,97 that a Texas obscenity statute was unconstitutionally broad, on the ground that obscene matter lacks constitutional protection “only in the context of ‘public actions taken or intended to be taken with respect to obscene matter’.”98 Fascinated by Stanley's “broader implications” allegedly rejecting the two-level theory pro-


93 Engdahl, supra note 73, at 201; Karre, supra, note 73, at 650.

94 Katz, supra note 73, at 210.

95 MAJORITY REPORT, supra note 73, at 426.

96 394 U.S. at 567.


98 Id. at 606, quoting 394 U.S. at 561.
mulgated in Roth, this court offered the following observation:

... Stanley may reasonably be read as supporting the proposition that obscenity is fully protected by the First Amendment, but that the State has a legitimate interest in regulating the public dissemination of ideas inimical to the public morality. The proposition implies that obscenity must be regulated under the tests normally applied under the first amendment, under which regulation is valid only insofar as is necessary to serve more important governmental interests.

This thought is embraced in both Reichenberger v. Conrad and Williams v. District of Columbia. In Reichenberger, a district court asserted that prohibition of obscene performances must be restricted to situations wherein such performance is available to children or is imposed upon unwilling adults. Similarly, in Williams, a court of appeals read into a statute punishing the use of obscene language in any public place the requirement that such words be spoken in circumstances threatening breach of peace. The failure of the Stanley Court to delineate the scope of public distribution of obscene matter still regulable under the Roth case prompted these decisions.

Perhaps the leading broad interpretation of Stanley is that offered in Karalexis v. Byrne. Therein, a three-judge court, one judge dissenting, viewed Stanley as limiting Roth to "public distribution in the full sense" and accepting "restricted distribution, adequately controlled." The majority judges, disturbed by the apparent meaninglessness of a right to receive a communication without a corresponding right to communicate and concerned with the limited opportunity of the less affluent, reasoned as follows:

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.

A preliminary injunction permitting exhibition of I Am Curious (Yellow), a motion picture assumed to be obscene was granted, on condition that the plaintiff continue to indicate the possible offensiveness of the film, refrain from pandering, and re-

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99 Id.
100 Id. at n.3.
102 419 F.2d 638 (D.C. Cir. 1969).
103 319 F. Supp. at 1242.
104 419 F.2d at 645-46.
106 Id. at 1366.
107 Id. at 1366-67.
fuse admission to minors.\textsuperscript{109} \textit{Stanley} was interpreted as holding that obscenity constitutes no "clear and present danger" to an adult, since proscription of its private possession in the home would be constitutional if the Court believed obscene matter is harmful per se.\textsuperscript{110} Accordingly, the court concluded that it was probable that the invoked state statute,\textsuperscript{111} which prohibited the commercial distribution of obscene matter without regard to the manner of distribution, was constitutionally overbroad.\textsuperscript{112}

Similar charges of constitutional overbreadth have been successful in several prosecutions under federal obscenity statutes. In \textit{United States v. Lethe},\textsuperscript{113} a district court concluded that the federal statute prohibiting mailing obscene matter is unconstitutional as applied to sending such materials through the mails to a requesting adult.\textsuperscript{114}

If the government has no substantial interest in preventing a citizen from reading [obscene] books and watching [obscene] films in the privacy of his home, then clearly it can have no greater interest in preventing him from acquiring them. The only possible purpose in preventing him from acquiring them is to prevent him from enjoying them.\textsuperscript{115}

"[U]nless the government can demonstrate it has some substantial interest in preventing the sale other than keeping the purchaser from buying,"\textsuperscript{116} the court reasoned, "[t]he distributor must . . . be allowed to provide what the person is entitled to see."\textsuperscript{117}

In \textit{United States v. Dellapia},\textsuperscript{118} the Second Circuit advanced the same analysis in its attempt to determine the scope of constitutional protection granted to obscenity by the \textit{Stanley} Court. The Second Circuit concluded that consenting adults may share their private collections of obscene material and reversed a conviction, under section 1461, for use of the mails in furtherance of this form of mutual enjoyment.\textsuperscript{119} The court rejected protecting an adult from his personal moral views (if they did not harm others) as a legitimate governmental interest, stating that the Constitution guarantees to "every adult . . . the freedom to nurture or neglect his moral and intellectual growth."\textsuperscript{120} The privacy protected in \textit{Stanley} was read to encompass private communication.

A Wisconsin district court concurred in this interpretation in \textit{United States v. B\&H Distribution Corp.}\textsuperscript{121} This court read the \textit{Stanley} case as recognizing only two legitimate governmental interests in regulation of obscenity, \textit{i.e.}, protection of children and of unwilling adults, and concluded that "the test of constitutionality to be applied since

\textsuperscript{109} 306 F. Supp. at 1368.
\textsuperscript{110} \textit{Id.} at 1366.
\textsuperscript{112} 306 F. Supp. at 1367.
\textsuperscript{114} \textit{Id.} at 426 (construing 18 U.S.C. § 1461 (1964)).
\textsuperscript{115} \textit{Id.} at 424.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 425.
\textsuperscript{118} 433 F.2d 1252 (2d Cir. 1970).
\textsuperscript{119} \textit{Id.} at 1258.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} 319 F. Supp. 1231 (W.D. Wis. 1970).
Stanley must be the test of whether the proscribed uses or conduct are in conflict with either of the two permissible governmental goals.\textsuperscript{122} Action not inconsistent with these goals enjoys first amendment protection, for the court defines public conduct involving obscene matter as action in conflict with these two constitutional interests.\textsuperscript{123} The application of section 1462, prohibiting interstate transportation of obscene matter, was held invalid, because the matter in question was not transported so as to influence children or violate the sensibilities of unwilling adults, and because the nation or the state cannot frustrate indirectly the individual’s right to use obscene matter by outlawing transmission of the requisite materials to him.\textsuperscript{124}

Like-minded courts have invalidated applications of section 1305 of title 19,\textsuperscript{125} which bans importation of any obscene matter. Positing that the right to possess such material implies the collateral right to import it, a three-judge court, in United States v. Thirty-Seven (37) Photographs,\textsuperscript{126} decided that the statute contravenes the first and fourteenth amendments because “[i]t prohibits a person who may constitutionally view [obscene] pictures . . . the right to receive them.”\textsuperscript{127} Another three-judge court concurred in United States v. Articles of “Obscene” Merchandise.\textsuperscript{128} This court read Stanley as attributing to Roth a traditional First Amendment rationale to assure its validity while withdrawing from the theory of an absolute exception for obscenity so clearly discerned in the First Amendment by the majority in Roth.\textsuperscript{129}

It saw a return to “straightforward First Amendment theory,” under which regulation is restricted to protection of children and prevention of obtrusion,\textsuperscript{130} and deemed unconstitutional section 1305, so far as it prohibits importation of obscene matter for private use.\textsuperscript{131} The Stanley Court’s statement that the right to receive matter, regardless of social value, is basic\textsuperscript{132} was considered a complete repudiation of the two-level theory espoused by the Roth Court.

The Supreme Court’s extension of first amendment protection to private possession of obscene matter has raised important constitutional questions regarding regulation of the dissemination of obscene matter. The decisive issue is this: is obscenity constitutionally protected expression, subject to regulation only in the interest of more important governmental goals, \textit{i.e.}, protection of children and prevention of obtrusion, or is it generally regulable, ex-

\textsuperscript{122} Id. at 1234.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 1235-37.

\textsuperscript{127} 309 F. Supp. at 38.
\textsuperscript{129} Id. at 195.
\textsuperscript{131} Id. at 196.
\textsuperscript{132} 394 U.S. at 564.
cept in special circumstances, e.g., private possession in the home? The Stanley opinion can be read to support either view. Therein, the Court clearly declared that the Roth doctrine remained unimpaired in cases involving public dissemination of obscene material, but failed to define the scope of public dissemination. Instead, the Court stressed the importance both of privacy and of the right to receive. This permitted those courts called upon to apply Stanley either to strictly limit its protection of obscene matter to the private context, or to broaden its holding, on the ground that the right to private possession is negated without similar recognition of a corresponding right to provide. Consequently, confusion is the present state of the law regarding obscenity.

Scope of Constitutional Protection of Obscene Expression Under the “Clear and Present Danger” Test

If the Supreme Court decides to extend constitutional protection to obscene expression in all contexts, then the government must show important interests to justify restriction of that protection. Five considerations have been proposed to support prohibition of dissemination of obscene matter: (1) prevention of crime; (2) preservation of the public morality; (3) facilitation of law enforcement; (4) protection of children; and (5) prevention of obtrusion. The Stanley Court accepted considerations (4) and (5) and rejected considerations (2) and (3). Since protection of children and prevention of obtrusion do not require and, therefore, cannot be the basis for a blanket prohibition on the dissemination of obscene material, the Court would be called upon to determine whether consideration (1)—prevention of crime—is adequate reason for such prohibition. This possibility prompts brief analysis of the alleged relationship between obscenity and antisocial behavior.

The Roth case was decided in 1957, when the general belief was that there is a causal relationship between obscenity and crime. In 1954, Dr. Fredric Wertham concluded that obscene materials were an important factor in the causation of violence, delinquency, and sexual maladjustment in children. Two years later, a United States Senate Subcommittee found that "[t]he impulses which spur people to sex crimes unquestionably are intensified by reading and seeing pornographic materials." J. Edgar Hoover, Director of the Federal Bureau of Investigation, testified, in 1959, that

we do know . . . that in an overwhelmingly

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\[133\] Id. at 567.
\[134\] Id. at 566.
\[135\] Id. at 567-68.

\[136\] The argument that the government can justify restriction of distribution to adults as necessary to insure protection of children is foreclosed by Butler v. Michigan, 352 U.S. 380, 383 (1957), which stated that "reducing the adult population . . . to reading only what is fit for children" would be "to burn the house to roast the pig." Accord, Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). The same type of constitutional overbreadth would invalidate laws prohibiting all manners of dissemination in order to prevent obtrusive distribution.

\[137\] F. WERTHAM, SEDUCTION OF THE INNOCENT (1954).

\[138\] S. REP. No. 2381, 84th Cong., 2d Sess. at 62 (1956).
large number of cases sex crime is associated with pornography. We know that sex criminals read it, are clearly influenced by it. I believe pornography is a major cause of sex violence.\textsuperscript{139}

There was opinion to the contrary,\textsuperscript{140} but the above quotations reflect generally the atmosphere in which the Roth decision was made.

The view of the effects of obscenity was revised in the light of subsequent research during the 1960's. As the decade opened, James Kilpatrick, a staunch defender of prohibition of obscene material, announced that a causal relationship between obscenity and antisocial behavior could not be proved statistically, although "the common sense of mankind, supported by the opinions of experts, holds strongly that such a relationship exists," but recognized no need to justify obscenity laws with "evidence of immediate and direct incitement to overt acts—evidence of readers who lay down their dirty books and rush to the streets for a night of satyriasis."\textsuperscript{141} In 1962, a lawyer and two behavioral scientists reported that there was no transitional link showing that arousal from exposure to obscene material affects overt behavior.\textsuperscript{142} Condemnations of the alleged effects of obscenity were issued periodically,\textsuperscript{143} but the need for proof of a causal connection between it and antisocial conduct was growing. In 1964, the theory that obscenity prevents crimes of sexual violence was seriously advanced.\textsuperscript{144} The following year, the Institute for Sex Research reported that the only inference to be drawn from a strong response to obscenity is imaginativeness, sensitivity, and projection ability in people who so react.\textsuperscript{145} Most recently, the majority of the President's Commission on Obscenity and Pornography concluded that indulgence in obscenity neither corrupts people's characters nor significantly contributes to antisocial behavior or crime.\textsuperscript{146} Thus, the pre-

\begin{itemize}
\item \textsuperscript{141} Murphy, The Value of Pornography, 10 Wayne L. Rev. 655, 661 (1964); see Falk, The Roth Decision in the Light of Sociological Knowledge, 54 A.B.A.J. 288, 290 (1968).
\item \textsuperscript{142} P. Gebhardt et al., Sex Offenders: An Analysis of Types 403-04 (1965).
\item \textsuperscript{143} J. Kilpatrick, supra note 139, at 234 (italics omitted).
\item \textsuperscript{144} Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009, 1034 (1962).
\end{itemize}
vailing expert opinion is different from that at the time of the Roth case.

It seems probable that the Supreme Court would decide that this possible danger from obscene matter is insufficient under the "clear and present danger" test to justify prohibition of controlled dissemination. The Stanley Court, which weighed this factor against the interest in private consumption, noted the paucity of evidence supporting the proposition that experiencing obscenity prompts deviant sexual practices or crimes. The Court could conclude that this argument is sufficient justification for prohibition of public dissemination under the "clear and present danger" test, but this writer believes such an expectation is wishful thinking.

Conclusion

The probability is that the Supreme Court will uphold controlled commercial distribution of obscene matter if it rejects the Roth doctrine's absolute exclusion from constitutional protection of public dissemination of obscene expression. However, the Court will not so reject the Roth case in the near future. The absence of conclusive proof that obscenity creates a "clear and present danger" of antisocial behavior, which would otherwise be required to justify an absolute ban on its dissemination, will prompt the Court not to further restrict the Roth doctrine's rejection of the need to show "clear and present danger." While the fervent belief that obscenity is a source of corruption that must be eliminated remains in the public mind, the Court will be reluctant to embrace the obtrusive obscenity concept.

Obscene expression was brought from beyond the pale of the first amendment in the Stanley case. This action has required courts to consider the question whether Stanley "is . . . the high water mark of a past flood, or . . . the precursor of a new one." These courts have construed this landmark decision contradictorily, thereby necessitating clarification from the Supreme Court. However, the Court will not so reject the Roth case in the near future. The absence of conclusive proof that obscenity creates a "clear and present danger" of antisocial behavior, which would otherwise be required to justify an absolute ban on its dissemination, will prompt the Court not to further restrict the Roth doctrine's rejection of the need to show "clear and present danger." While the fervent belief that obscenity is a source of corruption that must be eliminated remains in the public mind, the Court will be reluctant to embrace the obtrusive obscenity concept.


149 "Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391, 395 (1963).

There are but two predictables regarding what will happen when the Court finally takes the question of the scope of constitutional protection to be afforded to obscene expression: (1) protection of children and of the privacy of unwilling adults will be held to outweigh any interest in its unrestricted dissemination; and (2) the

151 "Stanley was one of those few occasions when a per curiam reversal without opinion would have been most welcome." Katz, supra note 73, at 217.
