United States v. Reidel: Resolving an Ambiguity in Obscenity Control

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A federal postal inspector, stating that he was over twenty-one years old, responded to defendant's advertisement in a newspaper by sending money in return for the shipment of a booklet entitled "The True Facts About Imported Pornography." Upon receipt of the booklet, the inspector obtained a warrant to search defendant's premises and found similar booklets and mailing envelopes which had been returned "undelivered." A three-count indictment was returned against the defendant for violating section 1461, title eighteen, which prohibits the knowing use of the mails for the delivery of obscene matter.[1] The defendant contended that the statute was unconstitutional, both on its face and as applied.[2] Assuming *arguendo* that the booklets were obscene, a motion to dismiss was granted by the trial judge.[3] The lower court held that individuals could not be restricted from sending commercial obscene matters through the mails to willing adult recipients.[4] The statute was not declared invalid, but was held not applicable to this "particular prosecution." *Held, reversed*: Section 1461 is not unconstitutional as applied to the distribution of obscene matters through the mails to willing recipients even though they state that they are adults. *United States v. Reidel*, 402 U.S. 351 (1971).

I. The Evolution of Proscriptions Against the Distribution of Obscene Material

The first amendment to the United States Constitution encompasses a number of personal rights, among which are the freedoms of speech and press.[5] These freedoms embrace the right to distribute constitutionally protected literature and necessarily preserve the right to receive it.[6] This right is not absolute,[7]

[1] 18 U.S.C. § 1461 (1964) states in part:

> Every written or printed card, letter, circular, book, pamphlet, advertisement . . . of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . . .
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> . . . .
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> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office . . . .
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> Whoever knowingly uses the mails for the mailing . . . or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense . . . .

[2] United States v. Reidel, No. 5845-HP-Criminal (C.D. Cal., July 8, 1970).

[3] *Id.*

[4] *Id.*

[5] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abolishing the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[6] Martin v. City of Struthers, 319 U.S. 141 (1943); Lowell v. City of Griffin, 303 U.S. 444 (1938).

[7] *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957): "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *See also* United States v. Bennett, 24 F. Cas. 1093, 1101 (No. 14,571) (C.C.S.D.N.Y. 1879): "Freedom of the press does not include freedom to use the mails for the purpose of

for its exercise must be balanced against the state's interest in controlling the distribution of certain kinds of material.[8] One class of material that a state may validly control under the first amendment is "obscene material."[9]

The forerunner of the current federal statute on the distribution of obscene materials was the Comstock Act, which provided that no obscene materials could be carried through the mails.[10] For the first time it became a felony to send such matter through the mails. The act was held constitutional in *In re Jackson*,[11] in which the Court affirmed the authority of Congress to prohibit the use of the mails for the distribution of material which it regarded as contrary to public morals. In 1879 a decision was reached under this statute which specifically held that "freedom of the press does not include freedom to use the

distributing obscene literature, and no right or privilege of the press is infringed by the exclusion of obscene literature from the mails."

[8] Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

[9] The modern definition of obscenity was first stated fully in Roth v. United States, 354 U.S. 476, 489 (1957): "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." After *Roth* a three-pronged test for ascertaining obscenity evolved and is currently in effect: (a) the material must be *utterly* without redeeming social value; (b) the dominant theme of the material must appeal to the prurient interest; and (c) the material must be patently offensive. Memoirs v. Massachusetts, 383 U.S. 413, 418-19 (1966). If these criteria are met in a particular circumstance, *Roth* holds that the material may be constitutionally regulated.

The first attempt to define obscenity was made in Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868), an English decision, which established the criteria as being "whether the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such influences, and into whose hands a publication of this sort may fall." This test gained acceptance in America as "the guideline" for defining "obscene" in United States v. Bennett, 24 F. Cas. 1093, 1102 (No. 14,571) (C.C.S.D.N.Y. 1879). *Bennett* expanded the definition to require that the material in some "substantial part tended to deprave and corrupt." *Id.*

The first departure from the English definition came in 1913 when Judge Learned Hand in dictum indicated his preference for a more modern definition of "obscenity":

> [H]owever consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, 'obscene, lewd, or lascivious.' I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature . . . .

United States v. Kennerley, 209 F. 119, 120-21 (S.D.N.Y. 1913).

Hand cast doubt upon the applicability of the old rule to the "morality of the present time" and in effect was seeking a reconsideration of it. He condemned a system which, in order to protect the infirm, denied to the mature in the community its rightful share of serious literature and new insights.

Hand's suggestion was adopted in United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930), in which the Second Circuit held that even though a work may sexually arouse the desires of some, the statute does not "bar from the mails everything which *might* stimulate sex impulses." (Emphasis in original.) It was from this decision that the "dominant theme" requirement, which has been adopted as the modern rule, evolved.

[10] Act of July 12, 1876, ch. 186, § 31, 19 Stat. 90. In 1821 Vermont became the first state to enact a law against the distribution of obscene pictures. VT. STAT. ANN. tit. 13, § 2801 (1957) (originally enacted as Act of Oct. 30, 1821, R.S. 99, § 10). In 1842 the first federal act was passed which limited the distribution of "imported" matters. Act of Aug. 30, 1842, ch. 270, § 28, 5 Stat. 548. This act did not concern itself with printed matter, but solely with works of nude art. In 1857 an amendment was passed which included the distribution of such articles as photographs and printed materials. Act of Mar. 2, 1857, ch. 63, 11 Stat. 168.

[11] 96 U.S. 727 (1878).

mails for the purpose of distributing obscene literature."[12] The reach of the Comstock Act was narrowed in *United States v. Dennett*, which held that the statute was never thought to bar from the mails "everything that *might* stimulate sexual impulses."[13] Moreover, in *Martin v. City of Struthers* the Supreme Court reaffirmed an earlier statement that freedom of speech and of the press "embraces the right to distribute literature . . . and necessarily . . . [protects] the right to receive it."[14] But in *Roth v. United States*[15] the Court stated that obscenity was not within the area protected by freedoms of speech or press, and thus the statutes prohibiting the mailing of obscene matters did not violate the free speech guarantee of the first amendment and its applicability to the states through the fourteenth amendment.[16] This decision was further strengthened by the holding of the Court that "the federal obscenity statute punishing the use of the mails for distributing obscene material is a proper exercise of the postal power delegated to Congress by article I, section 8, clause 7."[17]

If *Roth* stood alone the question of whether the state can regulate the distribution of obscene material to willing adult recipients would have resulted in an easy and obvious affirmative answer. However, the more recent decision of *Stanley v. Georgia*[18] cast some doubt on the continuing vitality of *Roth*. In *Stanley* pornographic films were found in the defendant's home, and he was convicted under Georgia law for possessing obscene material. His conviction was reversed by the Court on the basis that mere private possession of obscene matter cannot constitutionally be made a crime. It was questioned whether the decision abjured or at least impliedly overruled *Roth*, since if a person has the right to receive and possess this material, then someone must have the right to deliver it to him.[19] This ambiguity was presented in *Reidel*.

II. UNITED STATES V. REIDEL

In *United States v. Reidel*[20] the Supreme Court held constitutional the provisions of section 1461, title eighteen,[21] which prohibit the knowing use of the mails for the delivery of obscene materials based on the Court's interpretation that the first amendment does not insulate obscenity from statutory regulation.[22]

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[12] United States v. Bennett, 24 F. Cas. 1093 (No. 14,571) (C.C.S.D.N.Y. 1879).
[13] 39 F.2d 564, 568 (2d Cir. 1930) (emphasis in original).
[14] 319 U.S. 141, 148 (1943).
[15] 354 U.S. 476 (1957).
[16] *Id.* at 485.
[17] *Id.* at 493.
[18] 394 U.S. 557 (1969).
[19] *See, e.g.*, Note, *Obscenity—Federal Statute Allowing Prosecution for Mailing Non-Mailable Obscene Material to Requesting Adults Is an Unconstitutional Infringement of First Amendment Free Speech*, 49 TEXAS L. REV. 575 (1971).
[20] 402 U.S. 351 (1971).
[21] 18 U.S.C. § 1461 (1964).
[22] *Reidel*, in following *Roth* and distinguishing *Stanley*, fails to mention Redrup v. New York, 386 U.S. 767 (1967). *Redrup* had held that paperback books and magazines not published in a manner so obtrusive as to make it impossible for unwilling individuals to avoid exposure to them and not containing pandering were protected in distribution by the first and fourteenth amendments from governmental suppression whether criminal or civil, in personam or in rem, pursuant to statutes not reflecting specific and limited state concern for juveniles. *Redrup* ostensibly set up the only three instances in which the Court would hear an obscenity case: when protection of juveniles from obscenity was concerned; when there had been an invasion of individual privacy; and when there had been pandering. *Reidel*,

The Court, in reversing the lower court holding, emphatically stated *Roth* had not been overruled, that it governed the principal case, and that section 1461 was the appropriate standard to be applied in judging distribution of obscene materials. Having found almost identical issues in *Reidel* and *Roth*, the Court merely affirmed the similar principles established in *Roth*.

The decision is most notable for its clarification of the conflict which many writers in the area had found to exist between *Roth* and *Stanley*. *Stanley* had stood in apparent contradistinction to *Roth*. Notwithstanding this conflict the Court in *Reidel* followed *Roth* and stated that *Stanley* compelled no different result since it was restricted to the possession and not the distribution of obscene materials. *Stanley* had held that "the first and fourteenth amendments prohibit making mere possession of obscene materials a crime."[23] This statement implied, in contrast to *Roth*, that obscenity, at least in the circumstances specified, was within the area of constitutionally protected speech and press. Such a holding would also have severely undermined, if not destroyed, the *Roth* rationale for upholding the statute in *Reidel*. While *Roth* did not specifically mention the distribution-possession distinction, *Roth* appeared to give the state the power to regulate, while *Stanley* appeared to take that power away.

In the face of this conflict the Court quickly pointed out that *Roth* remains valid law and that *Stanley* is strictly limited to the facts it presents. Upon examining the facts in *Stanley* it was apparent that its rationale was rooted in the right of *privacy* rather than the right to possess obscene material per se. Some obscenity is thus protected to the extent of its relationship to the right of privacy. For example, the state could not control the thoughts of an individual since an exercise of such control would be an invasion of the individual's right to privacy. If an individual has obscene books in the privacy of his home or if he is thinking obscene thoughts, he is constitutionally protected from government intrusion.[24] However, the basis for affording such protection would not be a determination that the obscenity was constitutionally protected, but would be based on the penumbral right of privacy, which is protected from governmental intrusion.[25] Thus, obscenity would be shielded if present in a "privacy situation," as in *Stanley*, but otherwise it would not be, and would be subject to the right of the state to protect public morality.

In *Reidel* there are "no complaints about governmental violations of his private thoughts or fantasies," but a claim to a first amendment right to do

at least on the facts, would appear to fall into either one of these latter two categories. The Court apparently did not feel compelled to categorize *Reidel* in any one category. On the other hand it could be said that the Court was expanding the criteria it established in *Redrup* if *Reidel* did not fall within one of the three instances. A third solution would be that the Court was impliedly overruling *Redrup*.

[23] 394 U.S. at 568.

[24] "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." *Id.* at 565.

[25] Griswold v. Connecticut, 381 U.S. 479, 483 (1965): "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." Under this theory the "right to privacy" is raised to the status of an independent right which results from the penumbra cast by the specific constitutional rights, without resting the right squarely on any one of them.

business in obscenity and use the mails in the process.[26] Clearly under *Roth* such a right remains unprotected.

In conclusion the Court touched on the argument that adults should have the right to receive whatever communicative materials they desire. The Court's reply was that "the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. *Roth* and like cases pose no obstacle to such development."[27] Thus, if any change is to occur, the legislature, and not the judicial system, must act.

III. CONCLUSION

The Court remains consistent with prior decisions in upholding the constitutionality of acts prohibiting the use of mails for distributing obscene materials. The theory that the state has an exigent interest in protecting its children[28] apparently will prevail to uphold the banning of distribution of obscene materials. The Court in *Reidel* seems to be allowing the exigent interest rationale to extend to adults as well as children. Until legislatures act, the right to receive obscenity regardless of its social value will be denied to willing adults.

Mr. Justice White, in the first such statement in a majority opinion, stated that obscenity laws are "so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers"[29] that such legislative action may prove to be desirable. But again, it is the legislature and not the judiciary that must act to achieve such an end.

Perhaps the significance of *Reidel* is not so much its reaffirmation *of Roth*, but rather its emphatic distinction of *Stanley* from *Roth* and *Reidel*. Such a clarification established that the government retains the right to protect public morality.

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[26] 402 U.S. at 356.
[27] *Id.* at 357.
[28] Ginsberg v. New York, 390 U.S. 629, 636 (1968).
[29] 402 U.S. at 357.