

# The Catholic Lawyer

---

Volume 17  
Number 3 *Volume 17, Summer 1971, Number 3*

Article 7

---

March 2017

## Obscenity Law: Le Deluge Postponed

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#)

---

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# OBSCENITY LAW: LE DELUGE POSTPONED\*

THE OMNIPRESENT PROBLEM of obscenity raises important legal issues regarding the existence and extent of constitutional limitations to the power of the states and of the federal government to regulate the dissemination of obscene matter. The United States Supreme Court recently decided two controversial cases concerning the scope of protection afforded to obscenity under the Constitution. These cases—*United States v. Thirty-Seven (37) Photographs*<sup>1</sup> and *United States v. Reidel*<sup>2</sup>—offered the Court the opportunity to reevaluate the viability of the *Roth* doctrine in light of the landmark decision of *Stanley v. Georgia*, wherein the Court had held that mere private possession of obscene matter cannot be constitutionally prohibited.<sup>3</sup> By seemingly qualifying the broad statement in *Roth v. United States*<sup>4</sup> that “obscenity is not within the area of constitutionally protected speech or press,”<sup>5</sup> the *Stanley* holding inspired numerous courts<sup>6</sup> to restrict further the *Roth* doctrine and several commentators<sup>7</sup> to sound its deathknell. Diversity of interpretation<sup>8</sup> regarding the impact of the *Stanley* case on the *Roth* doctrine necessitated clarification by the Supreme Court.

---

\* 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. It is a sequel to *Obscenity Law: Après Stanley, Le Deluge?*, 17 CATHOLIC LAW. 45 (1971).

<sup>1</sup> 402 U.S. 363 (1971).

<sup>2</sup> 402 U.S. 351 (1971).

<sup>3</sup> 394 U.S. 557 (1969). For a compilation of articles regarding *Stanley* see *Obscenity Law: Après Stanley, Le Deluge?*, 17 CATHOLIC LAW. 45, 52 n.73 (1971).

<sup>4</sup> 354 U.S. 476 (1957); see Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

<sup>5</sup> *Id.* at 485.

<sup>6</sup> See *Obscenity Law: Après Stanley, Le Deluge?*, 17 CATHOLIC LAW. 45, 55-58 (1971).

<sup>7</sup> Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185, 201 (1969); Karre, *New Directions in Obscenity Regulation?*, 48 TEXAS L. REV. 646, 650 (1970); Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203-04.

<sup>8</sup> See *Obscenity Law: Après Stanley, Le Deluge?*, 17 CATHOLIC LAW. 45, 53 *et seq.* (1971).

The purpose of this article is presentation and analysis of two major obscenity cases. First, the history of the constitutional status of obscenity is reviewed; second, the *Thirty-Seven Photographs* case is examined; third, the *Reidel* case is considered; finally, the present state of this aspect of obscenity law is summarized and possible modification is discussed.

### Background: From Roth through Stanley

The Supreme Court first addressed itself to the constitutional problems posed by obscenity in 1957, in *Roth v. United States*, wherein the Court promulgated the two-level theory of speech:

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.<sup>9</sup>

The Court held, apparently without qualification, that obscenity is not constitutionally protected expression, because it wholly lacks redeeming social value,<sup>10</sup> and, therefore, need not be regulated under the "clear and present danger"<sup>11</sup> or "balancing"<sup>12</sup>

<sup>9</sup> H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 46 (1965).

<sup>10</sup> 354 U.S. at 484-85.

<sup>11</sup> *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.

<sup>12</sup> "In each case [the court] must ask whether

tests. A definitional or per se test was fashioned: 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.

Subsequent decisions modified the two-level theory of speech announced in *Roth*.<sup>13</sup> Expression otherwise nonobscene could be encompassed within the broadened category of nonspeech if pandered,<sup>14</sup> directed toward specific sexually deviant groups,<sup>15</sup> inflicted upon the unwilling,<sup>16</sup> or provided for juveniles.<sup>17</sup> Matter might be obscene per quod.<sup>18</sup>

The Court also has reconsidered its conclusion that obscenity is wholly unprotected. Constitutional barriers to some exercises

---

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).

<sup>13</sup> For thorough discussion see Hayes, *Obscenity: The Intractable Legal Problem*, 15 CATHOLIC LAW. 5 (1969); Regan, *An Unhurried Look at Obscenity*, 13 *id.* 297 (1967); Note, 12 *id.* 248 (1966); Hayes, *Survey of a Decade of Decisions on the Law of Obscenity*, 8 *id.* 93 (1962).

<sup>14</sup> *Ginzburg v. United States*, 383 U.S. 463, 474 (1966).

<sup>15</sup> *Mishkin v. New York*, 283 U.S. 502, 508 (1966).

<sup>16</sup> *Redrup v. New York*, 386 U.S. 767, 769 (1967) (per curiam).

<sup>17</sup> For a thoughtful discussion of the problem of obscenity in relation to juveniles, see Fagan, *Obscenity Control and Minors—The Case for a Separate Standard*, 10 CATHOLIC LAW. 270 (1964).

<sup>18</sup> See Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127 (1966); Semanche, *Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation*, 13 U.C.L.A.L. Rev. 1173 (1966).

of a state's power to prevent distribution of obscene material were recognized in *Smith v. California*,<sup>19</sup> wherein the Court again stated that obscene expression is not constitutionally protected but held that scienter is essential to a bookseller's conviction for possession of obscene matter.<sup>20</sup> In *New York Times Co. v. Sullivan*<sup>21</sup> the Court opined that "obscenity . . . can claim no talismanic immunity from constitutional limitations" and "must be measured by standards that satisfy the First Amendment."<sup>22</sup> But the Court also stated, in *Ginzburg v. United States*,<sup>23</sup> that obscenity is "inconsistent with any claim to the shelter of the First Amendment,"<sup>24</sup> and reaffirmed that position in *Ginsberg v. New York*.<sup>25</sup> Such was the background to the *Stanley v. Georgia* case.

The *Stanley* case at once enlightened and complicated the confusion regarding the constitutional status of obscenity. Therein, the Court distinguished public distribution of obscene matter from its private possession,<sup>26</sup> applied the "balancing" test,<sup>27</sup> and held, under the first and fourteenth amendments, that the state's "broad power to regulate obscenity . . . does not extend to mere possession by the individual in the

privacy of his own home."<sup>28</sup> Further, the Court asserted that *Roth* and its progeny are not impaired by the *Stanley* decision, apparently explaining this paradox by implicitly limiting the *Roth* doctrine to recognition of a legitimate governmental interest in regulating obscenity and explicitly restricting that interest to the public context.<sup>29</sup> Unfortunately, the Court failed to make itself perfectly clear.

The absence of explicitness encouraged commentators to misread the *Stanley* opinion. One commentator stated that

the Court has repudiated the major premise of the two-level theory that sexual material meeting the obscenity definition is wholly excluded from the first amendment. A rejection of this premise is necessarily a rejection of the two-level theory.<sup>30</sup>

Professor Engdahl similarly concluded

that the fundamental holding of the *Roth* case—that obscenity is a discrete class of expression, excluded from the constitutional protection guaranteed to other kinds of expression and therefore to be treated differently from other kinds of expression—has already met its demise.<sup>31</sup>

Professor Katz also interpreted the opinion as "weaken[ing], if it does not destroy, the theoretical premises and doctrinal content of *Roth v. United States*,"<sup>32</sup> and offered this analysis of the decision:

*Stanley* suggests that *Roth* was dead wrong

<sup>19</sup> 361 U.S. 147 (1959); see Recent Decision, 6 CATHOLIC LAW. 240 (1960).

<sup>20</sup> *Id.* at 152, 154.

<sup>21</sup> 376 U.S. 254 (1964).

<sup>22</sup> *Id.* at 269; see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 201, 217-18 (inferring a breakdown in the two-level theory of speech).

<sup>23</sup> 383 U.S. 463 (1966).

<sup>24</sup> *Id.* at 475.

<sup>25</sup> 390 U.S. 629, 641 (1968).

<sup>26</sup> 394 U.S. at 560-61.

<sup>27</sup> *Id.* at 564-68.

<sup>28</sup> *Id.* at 568.

<sup>29</sup> *Id.* at 563-64.

<sup>30</sup> Karre, *supra* note 7, at 650.

<sup>31</sup> Engdahl, *supra* note 7, at 201.

<sup>32</sup> Katz, *supra* note 7, at 203.

in its approach: obscenity is protected speech subject only to regulation in the interest of protecting the unwilling and the young. Rather than state openly that *Roth* was wrong, *Stanley* confines the premise that obscenity is not protected as free speech or press to the context of commercial distribution. The Court here plays a dangerous jurisprudential game. It is equating a general rule subject to qualification (obscenity is not protected speech unless privately possessed) with a qualification of a contrary general rule (obscenity is protected speech unless commercially distributed). For First Amendment purposes it makes a great deal of difference which form the general principle takes. . . . The effect of *Stanley* is to substitute a First Amendment analysis for the much criticized "double level" approach of *Roth*.<sup>33</sup>

Professor Katz read the *Stanley* case as vesting obscenity with constitutional protection divestible upon a finding of obscenity or of distribution to minors.<sup>34</sup> These respected commentators viewed the *Stanley* case as a rejection of, and not an exception to, the *Roth* doctrine.

#### *United States v. Thirty-Seven Photographs*

Contradictory constructions by lower courts necessitated clarification, which was forthcoming in *United States v. Thirty-Seven Photographs* and in *United States v. Reidel*. The operative facts in *Thirty-Seven Photographs* are simple: Milton Luros returned to the United States with thirty-seven photographs, which customs agents seized as obscene pursuant to § 1305(a) of title 19.<sup>35</sup> The United States Attorney

---

All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: . . . Provided, further, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided: and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

<sup>33</sup> *Id.* at 210-11.

<sup>34</sup> *Id.* at 217.

<sup>35</sup> 19 U.S.C. § 1305(a) provides in pertinent part:

instituted forfeiture proceedings in the district court. Luros denied that the photographs were obscene and presented a counterclaim alleging that § 1305(a) is unconstitutional on its face and as applied to him. A three-judge district court declared § 1305(a) unconstitutional, enjoined its enforcement against said photographs, and ordered them returned to claimant Luros. The judgment was based on two grounds: first, that § 1305(a) failed to satisfy the procedural requirements of *Freedman v. Maryland*,<sup>36</sup> and second, that the section could not validly be applied to the seized material under *Stanley v. Georgia*.<sup>37</sup>

To the three-judge court claimant Luros presented a five-fold constitutional attack on § 1305, arguing that:

(1) It excludes from the United States photographs imported for use by adults in the privacy of their homes.

(2) It excludes photographs which are to be distributed to adults only and in a manner which will not invade the sensitivities or privacy of anyone.

(3) It permits customs agents to seize and hold pictures without a time restraint.

(4) It permits a seizure prior to an adversary hearing.

(5) It is unconstitutionally vague.<sup>38</sup>

The basis of this assault was the *Stanley* case, which claimant maintained forbade any restraint upon obscene matter unless

there is danger that such material will reach children or be forced upon people.<sup>39</sup>

Without rejecting the above construction the court decided the case under a narrower reading of the *Stanley* decision. Positing that the right to possess obscene material implies the collateral right to import it, the court concluded that § 1305(a) contravenes the first and fourteenth amendments because "[i]t prohibits a person who may constitutionally view [obscene] pictures . . . the right to receive them."<sup>40</sup> Claimant's admission that he intended to include the photographs under consideration in a book for distribution did not estop him from attacking the validity of the statute. Under *Freedman v. Maryland*, the court reasoned, claimant had standing to show that the statute is constitutionally overbroad.<sup>41</sup> Consequently, the court recognized Luros' right to personally import obscene matter into the United States and, appreciative of the limited cultural opportunities imposed upon the less affluent by their economic condition, also recognized the right of access to foreign obscenity by importation through regular channels.<sup>42</sup>

The court also considered the procedural due process question raised by Luros. Under *Freedman v. Maryland*, any restraint before judicial determination must be brief and safeguards must be provided in the statute or by judicial construction if the first and fifth amendments are not to be contravened.<sup>43</sup> In the *Thirty-Seven Photo-*

<sup>36</sup> 380 U.S. 51 (1965).

<sup>37</sup> 309 F. Supp. 36, 37 (C.D. Cal. 1970), *rev'd*, 402 U.S. 363 (1971); *see* Comment, 23 ALA. L. REV. 135 (1970).

<sup>38</sup> *Id.* at 37.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 38; *contra*, United States v. Ten Erotic Paintings, 311 F. Supp. 884 (D. Md. 1970).

<sup>41</sup> *Id.* at 37.

<sup>42</sup> *Id.* at 38.

<sup>43</sup> 380 U.S. 51, 58-59 (1965).

*graphs* case the government sought judicial determination as rapidly as possible under the statutory procedures, seventy-six days passing from the date of seizure to the date of hearing.<sup>44</sup> However, Luros was not assured, either by statutory provision or judicial construction, that there would be a judicial determination of the forfeiture within a specified brief period, so the court held that the provision was unconstitutional on this ground too.<sup>45</sup>

Additionally, the court declined to consider as unnecessary claimant's arguments that the statute is unconstitutional because it permits a seizure prior to an adversary hearing, and that it is unconstitutionally vague.<sup>46</sup>

The United States Supreme Court reversed and remanded in a two-part opinion by Justice White. Part I involved the question of procedural due process under *Freedman*; Part II concerned the substantive issue of the constitutional status of obscenity under *Stanley*. Predictably, the Court was divided.

Regarding Part I, Justice White, Chief Justice Burger, Justice Harlan, Justice Brennan, Justice Stewart, and Justice Blackmun concluded that § 1305(a) can be construed as requiring administrative and judicial action within specified time limits so as to avoid the constitutional issue otherwise raised under the *Freedman* case.<sup>47</sup> The lat-

ter case involved a state statute, which is not susceptible to authoritative construction by the Supreme Court.<sup>48</sup> Section 1305(a) being a federal statute, the majority read into it the time limits required under *Freedman*, thereby comporting with legislative intent and furthering the policy of construing statutes to avoid constitutional issues.<sup>49</sup> Specifically, the majority construed the section to require institution of forfeiture proceedings within fourteen days from the time of seizure, and final decision in the district court within sixty days from the filing of the action.<sup>50</sup> Additionally, there would be no invalidation of seizure or forfeiture for delay caused by the claimant or in those instances in which administrative or judicial proceedings are postponed while a three-judge court considers those constitutional questions appropriate only to it.<sup>51</sup> Since forfeiture proceedings in this case had been instituted thirteen days after seizure, and a final decision might have been made within sixty days had Luros not caused a three-judge court to be convened to determine the validity of the statute, the Court held that § 1305(a) may be applied to the photographs in question, if on remand the question of their obscenity is resolved in the district court within sixty days, excluding any delays caused by claimant.<sup>52</sup>

<sup>44</sup> 309 F. Supp. at 38.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> 402 U.S. at 368.

When the validity of an act of Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal

principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

*Id.* at 369.

<sup>48</sup> *Id.* at 369.

<sup>49</sup> *Id.* at 372-73.

<sup>50</sup> *Id.* at 373-74.

<sup>51</sup> *Id.* at 374.

<sup>52</sup> *Id.* at 374-75.

Justices Black and Douglas, dissenting, concluded that reading time limits into the statute is an unconstitutional usurpation of legislative power. They believed that the action by the majority is not supported by Congressional deliberations or by previous censorship cases. They gathered from the legislative history that the Senate did not choose to require prompt judicial review and maintained that the decision whether to rewrite the customs obscenity law is a matter for Congress and not the Supreme Court.<sup>53</sup> In *Blount v. Rizzi*,<sup>54</sup> decided earlier in 1971, the Court had declined to redraft a federal obscenity mail-blocking statute to prevent its invalidation. Justices Black and Douglas saw no basis for distinguishing the present case.<sup>55</sup>

Justice Marshall did not comment upon this aspect of the case.

Concerning Part II, Justice White, joined by Chief Justice Burger, Justice Brennan, and Justice Blackmun, offered a plurality opinion concluding that the *Stanley* case did not impair Congress's power to remove obscene matter from the channels of commerce. Specifically, these four justices construed *Stanley* as not requiring "immuniz[ation] from seizure [of] obscene materials possessed at a port of entry for the purpose of importation for private use."<sup>56</sup> They recognized no right infringeable by the exclusion of foreign obscene matter.

That the private user under *Stanley* may

not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. . . . Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right . . . does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution. As we held in *Roth v. United States*, . . . obscenity is not within the scope of first amendment protection. Hence Congress may declare it contraband and prohibit its importation, as it has elected in § 1305(a) to do.<sup>57</sup>

These justices limited the *Stanley* decision to recognition of a right to private possession of obscene matter and rejected the argument that said right implied a collateral right to import, thereby implying that the alleged right to indulge in obscenity recognized in *Stanley* is merely tolerated because the alternative—invasion of privacy—is more abhorrent.<sup>58</sup>

<sup>53</sup> *Id.* at 383 *et seq.* (Black, J., dissenting).

<sup>54</sup> 400 U.S. 410 (1971), wherein the Court declared that "it is for Congress, not this court, to rewrite the statute." *Id.* at 419.

<sup>55</sup> 402 U.S. at 386 (Black, J., dissenting).

<sup>56</sup> *Id.* at 376.

<sup>57</sup> *Id.* at 376-77.

<sup>58</sup> See Gegan, *The Twilight of Nonspeech*, 15 CATHOLIC LAW. 210, 218-19 (1969).

[*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

Justice Harlan concurred in the judgment, but concluded that the claimant, who admitted importing the photographs for commercial purposes, had no standing to challenge the statute as constitutionally overbroad on the ground that it applied to importation for private use.<sup>59</sup>

Justice Stewart also concurred in the judgment. He believed that seizure at the border of obscene matter sought to be imported for commercial dissemination is permissible under the first amendment, but did not agree that matter intended solely for the private use of the importer can be validly seized.<sup>60</sup> Justice Stewart would not limit *Stanley* to its facts.

Justice Marshall, author of the *Stanley* opinion, read his effort as validating regulation of obscenity only when taken to protect children or nonconsenting adults. He argued that

. . . *Stanley* turned on an assessment of which state interests may legitimately underpin governmental action, and it is disingenuous to contend that Stanley's conviction was reversed because his home, rather than his person or luggage, was the locus of a search.<sup>61</sup>

Concluding that the photographs were in

---

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.<sup>74</sup>

<sup>59</sup> 402 U.S. at 378. (Harlan, J., concurring), citing Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 910 (1970).

<sup>60</sup> *Id.* at 378-79 (Stewart, J., concurring).

<sup>61</sup> *Id.* at 360 (Marshall, J., dissenting).

Luros' purely private possession and of no danger to anyone when seized, and believing that the states and the nation have ample opportunity to safeguard their legitimate interests if commercial dissemination occurs, he dissented.<sup>62</sup>

Justices Black and Douglas, who consistently have construed the first amendment broadly, also dissented concerning Part II. They again maintained that the first amendment denies Congress the power to censor books and movies and regretted the Court's restatement of the *Roth* doctrine, *i.e.*, that obscenity is not constitutionally protected expression.<sup>63</sup> These justices maintained that *Stanley* implies that a man can import obscene material for private use, since "[t]he mere act of importation for private use can hardly be more offensive to others than is private perusal in one's home."<sup>64</sup> Otherwise,

[t]he right to read and view any literature and pictures at home is hollow indeed if it does not include a right to carry that material privately in one's luggage when entering the country.<sup>65</sup>

Justices Black and Douglas saw no basis for distinguishing importation for personal use from mere private possession and, therefore, concluded that those justices subscribing to the plurality opinion would either overrule *Stanley* or limit its application to those instances in which "a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."<sup>66</sup>

---

<sup>62</sup> *Id.* at 361 (Marshall, J., dissenting).

<sup>63</sup> *Id.* at 379 (Black, J., dissenting).

<sup>64</sup> *Id.* at 381 (Black, J., dissenting).

<sup>65</sup> *Id.* (Black, J., dissenting).

<sup>66</sup> *Id.* at 382 (Black, J., dissenting).

Thus the *Thirty-Seven Photographs* case was decided without a majority. Four justices denied that there is a constitutional right to import obscene matter for private use; one judge concurred in that judgment, on the ground that the question was not properly before the Court; and four justices asserted that the aforementioned alleged right does exist.

*United States v. Reidel*

The companion case to *Thirty-Seven Photographs* was *United States v. Reidel*. The operative facts in the latter case are simple: Reidel advertised in a newspaper the sale to adults of a booklet about imported pornography and was indicted for mailing copies in violation of § 1461 of title 18, which proscribes knowingly using the mails to deliver obscene matter.<sup>67</sup> He

moved to dismiss the indictment, on the ground that delivery of obscene material through the mails to willing recipients who claim to be adults is constitutionally protected under *Stanley*. The trial judge, who ruled from the bench and did not write an opinion, assumed, *arguendo*, that the booklets in question were obscene and, agreeing with Reidel that § 1461 is unconstitutional as applied to him, dismissed the indictment.<sup>68</sup> The Supreme Court reversed.<sup>69</sup>

Justice White delivered the majority opinion, in which Chief Justice Burger and Justices Harlan, Brennan, Stewart, and Blackmun joined. They decided this case under *Roth*, wherein the Court had affirmed a conviction under § 1461 for knowingly mailing obscene matter and held that "obscenity is not within the area of constitutionally protected speech or press."<sup>70</sup> The *Stanley* decision was no obstacle to them, for it concerned mere private possession and, moreover, expressly stated:

<sup>67</sup> The statute in pertinent part provides:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice 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, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed;

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed,

or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

See Schmidt, *A Justification of Statutes Barring Pornography from the Mail*, 26 *FORDHAM L. REV.* 70 (1957).

<sup>68</sup> The district court decision accords with *United States v. Dellapia*, 433 F.2d 1252 (2d Cir. 1970), noted in 12 *WM. & MARY L. REV.* 691 (1971); *United States v. Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970), noted in 49 *TEXAS L. REV.* 575 (1971); *United States v. Langford*, 315 F. Supp. 472 (D. Minn. 1970).

<sup>69</sup> 402 U.S. at 352.

<sup>70</sup> 354 U.S. 476, 485 (1957), quoted *id.* at 354.

*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.<sup>71</sup>

The constitutional protection afforded to the assumedly obscene film in *Stanley* apparently was dependent upon the scope of the right of privacy in relation to the locus therein involved, *i.e.*, the home, and therefore consistent with the statement in *Roth* that obscenity per se is not constitutionally protected expression.<sup>72</sup>

The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.<sup>73</sup>

Unlike Stanley, Reidel alleged a constitutional right to traffic in obscene materials and to employ the mails in pursuance thereof. The Court reaffirmed *Roth's* exclusion of such dissemination from constitutional protection.

The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's

right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion abjured. Whatever the scope of the "right to receive" referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings which *Roth* held unprotected by the First Amendment.<sup>74</sup>

The constitutional question before it decided, the Court offered in a noteworthy postscript this analysis of obscenity law:

*Roth* and like cases have interpreted the First Amendment not to insulate obscenity from statutory regulation. But the Amendment itself neither proscribes dealings in obscenity nor directs or suggests legislative oversight in this area. The relevant constitutional issues have arisen in the courts only because lawmakers having the exclusive legislative power have consistently insisted on making the distribution of obscenity a crime or otherwise regulating such materials and because the laws they pass are challenged as unconstitutional invasions of free speech and press.

It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This

<sup>71</sup> 402 U.S. at 354, quoting 394 U.S. at 568.

<sup>72</sup> These justices found this sufficiently clear to justify summary affirmance in *Gable v. Jenkins*, 397 U.S. 592 (1970) (per curiam), *aff'g* 309 F. Supp. 998 (N.D. Ga. 1969) (three-judge court). The lower court had strictly construed the *Stanley* decision in upholding a state statute prohibiting distribution of obscene matter to any person. See *Obscenity Law: Après Stanley, Le Déluge?*, 17 CATHOLIC LAW. 45, 54 (1971).

<sup>73</sup> 402 U.S. at 356.

<sup>74</sup> *Id.* at 355.

may prove to be the desirable and eventual legislative course. But if it is, 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 developments.<sup>75</sup>

This statement is a welcome clarification of the status of obscene matter constitutionally and statutorily: obscenity is neither constitutionally protected nor constitutionally prohibited; its regulation is exclusively within the domain of the legislature, subject to possible constitutional infirmities consistent with its constitutionally unprotected status.

Justice Harlan, who joined in the opinion of the Court, also wrote a concurring opinion, wherein he approved the rejection by the Court of the contention that *Stanley* implies a right to receive obscene material through any channel provided there are sufficient safeguards to protect children and nonconsenting adults. Such an interpretation, he asserted, would negate the essence of the *Roth* holding by extending constitutional protection to obscenity based upon its content. For *Roth* authorizes proscription and not mere regulation of obscenity, and *Stanley* reaffirms *Roth*, thereby allowing state and federal governments to respond to the problem without establishing legitimate interests.<sup>76</sup> However,

the power which *Roth* recognized in both state and federal governments to proscribe obscenity as constitutionally unprotected cannot be exercised to the exclusion of other constitutionally protected interests of the individual.<sup>77</sup>

The basis of the *Stanley* decision, Justice Harlan concluded, is the idea that freedom of thought necessitates prohibition of punishment for mere private possession of even obscene matter, and

the "right to receive" recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts; rather, it is a right to a protective zone ensuring the freedom of a man's inner life, be it rich or sordid.<sup>78</sup>

Justice Marshall concurred in the judgment in *Reidel*. He believed that danger that obscene matter would reach children was inherent in the scheme under which *Reidel* distributed his materials, for the only safeguard that *Reidel* took was a requirement that purchasers declare their age, and concluded that his conduct was violative of a constitutionally valid construction of § 1461.<sup>79</sup>

Justices Black and Douglas, who construe the first amendment literally, again dissented, on the ground that Congress lacked the power to declare obscene matter nonmailable. They read *Stanley* as implicitly suggesting the abandonment of the *Roth* doctrine and deplored the Court's reaffirmance of it.<sup>80</sup>

### Conclusion

The *Thirty-Seven Photographs* and *Reidel* cases have clarified the impact of

<sup>75</sup> *Id.* at 356-57.

<sup>76</sup> *Id.* at 358 (Harlan, J., concurring).

<sup>77</sup> *Id.* at 359 (Harlan, J., concurring).

<sup>78</sup> *Id.* at 359-60 (Harlan, J., concurring).

<sup>79</sup> *Id.* at 361-62 (Marshall, J., concurring).

<sup>80</sup> *Id.* at 379-80 (Black, J., dissenting).

the *Stanley* decision on the *Roth* doctrine. While the Court is divided, a majority of its justices views *Stanley's* holding that mere private possession of obscene matter is constitutionally protected, as consistent with *Roth's* exclusion of obscenity from constitutional protection. The constitutional protection extended to obscenity in *Stanley* is

based on the right of privacy, the material itself not being entitled to constitutional protection. The two-level theory of speech is still the law. Obscenity is neither constitutionally protected nor constitutionally proscribed; its prohibition or regulation is within the discretion of Congress and state legislatures.