Still More Ado About Dirty Books (and Pictures): *Stanley, Reidel,* and *Thirty-seven Photographs*

Existing confusion in the field of constitutional obscenity doctrine has been compounded by the Supreme Court's recent decisions in *United States v. Reidel*[1] and *United States v. Thirty-seven Photographs*.[2] Rejecting arguments that the principles announced in *Stanley v. Georgia*[3] precluded all but limited governmental regulation of obscene material,[4] the Court reaffirmed two federal obscenity statutes in *Reidel* and *37 Photos*,[5] dampening speculation that obscenity was slowly being drawn within the First Amendment's protective sweep. Yet *Stanley*'s declaration that private possession of obscene material in the home is constitutionally protected has not been disavowed. This Note will suggest a doctrinal framework for future obscenity cases which reconciles *Stanley*'s concern for protecting individual First Amendment interests with the governmental power to regulate obscene material, as upheld in *Reidel* and *37 Photos*.

I. *Stanley* and the Two-Level Theory

Since 1957, the contours of the Supreme Court's obscenity doctrine have been those established by the celebrated case of *Roth v. United States*.[6] Although the Court had previously suggested that obscenity was not a constitutionally protected form of expression,[7] *Roth* was the first case in which this rule was explicitly stated:[8] "We hold that ob-

1. 402 U.S. 351 (1971), *rev'g* No. 5845-HP-Crim. (C.D. Cal. June 8, 1970) (unreported). *See* pp. 320-22 *infra* for a discussion of the case.
2. 402 U.S. 363 (1971), *rev'g* 309 F. Supp. 36 (C.D. Cal. 1970) (three-judge court). *See* pp. 323-25 *infra* for a discussion of the case.
3. 394 U.S. 557 (1969). *See* pp. 314-15 *infra* for a discussion of the case.
4. *See generally* pp. 321-24 *infra*.
5. 18 U.S.C. § 1461 (1970), which prohibits knowing use of the mails for transmission of obscenity, was upheld in United States v. Reidel, 402 U.S. 351 (1971). United States v. Thirty-seven Photographs, 402 U.S. 363 (1971), upheld 19 U.S.C. § 1305(a) (1970), which prohibits importation of obscene or immoral articles and establishes forfeiture proceedings.
6. 354 U.S. 476 (1957). The *Roth* opinion incorporated two cases, *Roth v. United States* and *Alberts v. California*. The first raised the constitutionality of a federal statute that made it a crime to transmit obscene material through the mails. The second involved a California law prohibiting the sale or distribution of obscene material or its advertisement. After determining that obscene expression was unprotected by the First Amendment, the Court upheld both statutes.
7. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 256, 266 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
8. Obscenity cases had been before the Court on two previous occasions but neither case produced a square decision on obscenity's constitutional status. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 7-8. In Doubleday & Co. v. New

scenity is not within the area of constitutionally protected speech or press."[9] The exclusion of obscenity from constitutional protection meant that the government was not required to justify its suppression of obscene material[10] in traditional First Amendment terms.[11] Instead, stripped of the protections normally granted to expression under the First Amendment, obscene expression could be freely regulated subject only to the due process requirement that such regulation be rationally adapted to serve ends within the scope of government power.[12] The Court's dichotomy, distinguishing between protected speech and unprotected obscenity, has been termed the "two-level theory."[13] It employs a *definitional basis* to establish constitutional discrimination between two classes of expression.[14]

The *Roth* plurality defined obscenity on the basis of "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[15] Having elevated the definition of obscenity to the level of constitutional doctrine, the post-*Roth* Court was forced to adjudicate almost every new development in pornographic creativity. But since the Justices were not in agreement on a definition of obscenity, or indeed whether obscenity was a separate category of speech at all,[16]

York, 335 U.S. 848 (1948), the Court divided equally to uphold without opinion a New York obscenity statute. In Butler v. Michigan, 352 U.S. 380 (1957), the Court unanimously declared a Michigan obscenity statute unconstitutionally overbroad because it banned sales to the general public of books merely deemed unfit for juveniles. The broader question of whether books deemed unfit for adults could be prohibited was not reached.

9. Roth v. United States, 354 U.S. 476, 489 (1957).

10. *Id.* at 486-87.

11. The free expression formulas used by members of the Court to determine when protected speech may legitimately be regulated—"bad tendency," "clear and present danger," "ad hoc balancing of interests," and the "absolutist" position—are all premised on the belief that speech *qua* speech is no evil. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 50-58 (1963). Government's regulation of protected speech may be justified only on the basis of the risks posed by its anticipated consequences.

12. *See* Ginsberg v. New York, 390 U.S. 629, 641-43 (1968). *See also* Nebbia v. New York, 291 U.S. 502, 525 (1934).

13. Kalven, *supra* note 8, at 10-17.

14. Obscenity was not the first class of expression held unprotected by the First Amendment. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (insulting or "fighting words"). *But see* note 19 *infra.*

15. 354 U.S. at 489. For criticism of this test and general commentary on the *Roth* decision see Kalven, *supra* note 8, and Lockhart & McClure, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

16. Despite the fact that the term "obscene" has been found sufficiently precise to resist a "vagueness" attack, United States v. Roth, 354 U.S. 476, 492 (1957), a verbal definition of obscenity has consistently eluded a majority of the Court. The definition which has most recently commanded a plurality of the Court defines obscenity as characterized by three elements: a dominant theme appealing to prurient interests, patent offensiveness to community standards, and content utterly without redeeming social value. A Book v. Attorney General, 383 U.S. 413 (1966) (opinion of Brennan, J., joined

the result was a morass of cases and individual opinions[17] evidencing a good deal of doctrinal confusion.[18]

The Court's 1969 decision in *Stanley,* however, appeared to be a step away from the definitional approach to obscenity, toward placement of the obscenity problem within traditional First Amendment doctrines. Paralleling the abandonment of the two-level theory in libel,[19] the Court in *Stanley* appeared to hold that obscenity was not

by Warren, C.J., and Fortas, J.) [hereinafter cited as *Memoirs*]. Justice White accepts the first two elements of this definition but believes the latter element is merely a consideration in determining the first. *Id.* at 460-63 (dissenting opinion). Justice Stewart defines obscenity as "hard-core pornography" which meets the "I know it when I see it" test. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion); *see also* Ginzburg v. United States, 383 U.S. 463, 497 (1966) (dissenting opinion). Justice Harlan embraced variable standards, believing that all but "hard-core pornography" was protected from federal regulation while states must only "apply criteria rationally related to the accepted notion of obscenity and . . . reach results not wholly out of step with current American standards." *Memoirs, supra,* at 458 (dissenting opinion); *compare Ginzburg, supra,* at 493 (dissenting opinion). Finally, Justices Douglas and Black have rejected the two-level theory entirely and would give obscenity the same full constitutional protection accorded other forms of speech. *See, e.g., Roth, supra,* at 508 (dissenting opinion); *Memoirs, supra,* at 424 (dissenting opinion); Ginsberg v. New York, 390 U.S. 629, 650 (1968) (dissenting opinion). Only in the rare case where the allegedly obscene material fails to fall within any of this mélange of standards can the Court produce a majority opinion. *See* Redrup v. New York, 386 U.S. 767 (1967) (per curiam).

Moreover, this spectrum of obscenity definitions is confused still further by the introduction of other factors which may affect a determination of obscenity *vel non. See Ginzburg, supra* (evidence of pandering material to a finding of obscenity); Mishkin v. New York, 383 U.S. 502 (1966) (prurient interest appeal may be determined by reference to tastes of group at whom material aimed); *Ginsberg, supra* (minors may be protected from material which would not be obscene for adults).

17. One lower court registered a vigorous protest:

> Recently there has been a flood of decisions attempting to cope with obscenity. These cases vary as to facts and statutes applied and construed. Another analysis of this rapidly expanding and confusing field could not supply any new delicacy to this smorgasbord. Particularly is this so when one observes that members of the Supreme Court have written 55 separate opinions in 13 cases on the subject of obscenity in the 10 years prior to 1968 and have not been able to agree on what it is or how to deal with it.

Adler v. Pomerleau, 313 F. Supp. 277, 284 (D.Md. 1970).

18. *See* Comment, *More Ado About Dirty Books,* 75 YALE L.J. 1364 (1966), for an excellent critique of the origins of the *Roth* decision and an examination of the uncertainties created by the Court's decisions in A Book v. Attorney General, 383 U.S. 413 (1966), Ginzburg v. United States, 383 U.S. 463 (1966), and Mishkin v. New York, 383 U.S. 502 (1966).

19. In New York Times Co. v. Sullivan, 376 U.S. 255 (1964), the two-level approach to libel was largely abandoned in the Court's holding that libel against public officials by critics of their official conduct is subject to First Amendment protection unless uttered with knowledge of falsity or reckless disregard for the truth. *Id.* at 283. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 487 (1970). A similar demise was then predicted for the two-level theory in obscenity doctrine. Kalven, *The New York Times Case,* 1964 SUP. CT. REV. 191, 204-05, 212-13, 217.

Subsequent decisions by the Court, expanding the scope of the *New York Times* doctrine, have furnished the *coup de grâce* to the two-level theory in libel doctrine. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (together with Associated Press v. Walker).

A recent decision, Gooding v. Wilson, 40 U.S.L.W. 4329 (U.S. March 23, 1972), suggests that the Court may be sharply limiting the scope of the two-level theory with regard to "insulting" or "fighting words." In *Gooding* a Georgia statute, making the use of "abusive language" in the presence of another person a crime, was declared unconstitutional on grounds of vagueness and overbreadth.

wholly excluded from First Amendment protection.[20] Although *Stanley* was limited to private possession of obscene materials in the home, to the extent that the Court gave *any* First Amendment protection to material assumed obscene it undermined the two-level theory's major premise—that such material is entirely excluded from the First Amendment. This observation, and the balancing of interests process by which the majority reached its decision in *Stanley*,[21] persuaded some commentators that the two-level theory had been abandoned entirely,[22] despite an explicit reaffirmation of *Roth*.[23]

The belief that *Stanley* implied a dramatic shift in Supreme Court obscenity doctrine was shared by a number of lower courts.[24] Perhaps the paradigm case giving *Stanley*'s doctrine a broad sweep was *Karalexis v. Byrne*,[25] which enjoined state prosecution of a theater owner under Massachusetts obscenity laws for exhibiting *I Am Curious (Yellow)* in a public theater. Writing for two members of a three-judge panel, Judge Aldrich began by assuming that the film would be obscene under the standards of *Roth* and subsequent cases.[26] While noting *Stanley*'s reaffirmation of *Roth*, Aldrich argued:

> Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," . . . whereas it held that Stanley's interest was protected by the First Amendment and that the fact that the film was "devoid of any ideological content" was irrelevant.[27]

20. We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.
394 U.S. 568 (footnote omitted). *See* note 24 *infra* for examples of lower court decisions which interpreted *Stanley* as bringing obscenity within the First Amendment.

21. *See* 394 U.S. at 565-68.

22. *See, e.g.*, Engdahl, *Requiem for Roth: Obscenity Law is Changing*, 68 MICH. L. REV. 185 (1969); Note, *The New Metaphysics of the Law of Obscenity*, 57 CALIF. L. REV. 1257 (1969). *But see* T. EMERSON, *supra* note 19, at 485; Comment, 56 VA. L. REV. 1205 (1970).

23. 394 U.S. at 568.

24. *See, e.g.*, United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970); La Rue v. California, 326 F. Supp. 348 (C.D. Cal. 1971); United States v. B. & H. Dist. Corp., 319 F. Supp. 1231 (W.D. Wis. 1970), *vacated*, 403 U.S. 927 (1971); United States v. Articles of "Obscene" Merchandise, 315 F. Supp. 191 (S.D.N.Y.), *appeal dismissed*, 400 U.S. 935 (1970); United States v. Langford, 315 F. Supp. 472 (D. Minn. 1970); United States v. Lethe, 312 F. Supp. 421 (E.D. Cal. 1970); Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated on other grounds sub nom.* Dyson v. Stein, 401 U.S. 200 (1971).

But see United States v. Fragus, 422 F.2d 1244 (5th Cir. 1970); ABC Books, Inc. v. Benson, 315 F. Supp. 695 (N.D. Tenn. 1970); Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969); May v. Harper, 306 F. Supp. 1222 (N.D. Fla. 1969); Great Speckled Bird of Atlanta Coop. N.P. v. Stynchombe, 298 F. Supp. 1291 (N.D. Ga. 1969).

25. 306 F. Supp. 1363 (D. Mass. 1969), *temporary injunction stayed pending appeal*, 396 U.S. 976 (1969), *vacated on other grounds*, 401 U.S. 216 (1971).

26. *Id.* at 1365. *But see* United States v. A Motion Picture Film, 404 F.2d 196 (2d Cir. 1968) (holding the movie *I Am Curious (Yellow)* not obscene).

27. 306 F. Supp. at 1366 (footnotes omitted).

Rejecting the contention that *Stanley* rested on Fourth Amendment privacy grounds,[28] Judge Aldrich concluded in effect that state regulation of obscenity could be premised only upon an affirmative showing of legitimate state interests. An allegation that obscenity was harmful per se was held insufficient,[29] leaving, as suggested in *Stanley*,[30] only two permissible state interests to justify the regulation of obscenity: protection of minors and preventing the intrusion of obscenity on public sensibilities. Since the theater in question barred admission to minors, warned patrons in advance of the film's nature so that they would not be taken by surprise, and carried on inoffensive advertising, Judge Aldrich concluded that the State of Massachusetts had no interest on which to base its prosecution.[31]

Despite the extensive consideration given to the *Stanley* decision in the lower courts,[32] no occasion arose for a full Supreme Court opinion on its rapidly expanding scope[33] until the decisions in *Reidel* and *37 Photos,* late in the 1970-71 Term. In both cases, lower federal courts had concluded that, at a minimum, *Stanley* sharply limited *Roth.* Abandoning the two-level theory, the lower courts had determined through a balancing of interests rationale that the federal statutes in question, which regulated obscene materials, were unconstitutional.[34] The Supreme Court, however, in two opinions by Justice White, ruled that the doctrine in *Stanley* did not reach distribution or importation of obscene material and therefore that such activities could be pro-

28. *Id.* at n.5.

29. Of necessity the *Stanley* Court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not harmful. . . . Had the Court considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

Id. at 1366 (footnotes omitted).

30. 394 U.S. at 567.

31. 306 F. Supp. at 1366. Judge Aldrich also felt compelled to spell out what remained of *Roth* since *Karalexis* quite obviously gave the *coup de grâce* to the two-level theory:

[W]e think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned.

32. Between 1969 and 1972 more than fifty cases in lower federal courts alone involved consideration of the scope of the *Stanley* decision.

33. Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969), which essentially limited *Stanley* to its facts, was affirmed without opinion. 397 U.S. 592 (1970). Two cases giving *Stanley* a broad sweep, Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), and Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), were vacated on procedural grounds. *See* note 24 *supra.* Any possible pattern emerging from these actions was destroyed by the Court's dismissal, without opinion, 400 U.S. 935 (1970), of the government's appeal from United States v. Articles of "Obscene" Merchandise, 315 F. Supp. 191 (S.D.N.Y. 1970), which had also given *Stanley* a broad construction.

34. *See* pp. 320-21 and p. 323 *infra* for discussion of the lower court opinions in *Reidel* and *37 Photos.*

hibited under *Roth*.[35] The two-level theory in constitutional obscenity doctrine suddenly seemed very much alive.

In the aftermath of *Reidel* and *37 Photos*, two key questions arise concerning the future contours of constitutional obscenity doctrine. (1) Can the doctrinal basis of the *Stanley* decision be reconciled with *Reidel* and *37 Photos*? (2) If *Stanley* has only been partially limited, how far does its protection of private possession of obscene material extend? Before considering these questions directly, it is necessary to re-examine the doctrinal foundation of *Stanley*, a case whose ambiguity has led certain commentators and lower courts to misconstrue dramatically its reach.[36]

II. *Stanley* Revisited

Under the authority of a search warrant, federal and state agents had entered Stanley's home to search for "bookmaking materials." Although little evidence of bookmaking activity was found, while searching through a desk drawer in an upstairs bedroom of Stanley's home the agents found several reels of eight millimeter film. Viewing the films on the premises, the agents concluded they were obscene and seized them. Stanley was indicted for "knowingly hav[ing] possession of . . . obscene matter."[37] The resulting conviction was affirmed by the Supreme Court of Georgia[38] and review was granted by the United States Supreme Court.

A majority of the Court, in an opinion by Justice Marshall, reversed Stanley's conviction, declaring:

> 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.[39]

Mere labeling of the films as obscene, Justice Marshall argued, was an insufficient justification for such interference with personal liberties.[40] State power to regulate obscenity "simply does not extend to

35. *See Reidel*, 402 U.S. at 355; *37 Photos*, 402 U.S. at 376.
36. *See* notes 22 and 24 *supra*.
37. GA. CODE ANN. § 26-6301 (Supp. 1968).
38. Stanley v. State, 224 Ga. 259, 161 S.E.2d 309 (1968).
39. 394 U.S. at 565.
40. *Id.*

mere possession by the individual in the privacy of his own home."[41] Justice Stewart, writing also for Justices Brennan and White, concurred on the grounds that the agents' search warrant conferred no authority to seize the films,[42] which were therefore inadmissible as evidence. In another concurring opinion, Justice Black took his traditional position that obscenity, like other forms of speech, should be accorded full First Amendment protection.[43]

Confusion regarding the *Stanley* decision[44] has undoubtedly been caused in part by the fact that Justice Marshall's majority opinion admits of at least two significantly different interpretations. (1) Obscene material is, absent a showing of subordinating state interests, granted full protection by the First Amendment. (2) Some interaction between an individual's First Amendment rights, not relating to possession of obscene material, and a locus of privacy creates a special kind of privacy in which possession of obscene materials may not be regulated absent a subordinating state interest. These interpretations of the *Stanley* decision may be for convenience denoted the First Amendment theory and the privacy-plus theory[45] and are considered in turn below.

A. *The First Amendment Theory of* Stanley

Justice Marshall began his *Stanley* opinion by noting that neither *Roth* nor subsequent decisions had dealt with the "precise problem" posed by Stanley's privately possessed films. Thus, he contended,

> [n]one 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

41. *Id.* at 568.
42. *Id.* at 571.
43. *Id.* at 568-69.
44. Academy, Inc. v. Vance, 320 F. Supp. 1357, 1359 (S.D. Tex. 1970), illustrates the general uncertainty which prevailed in lower courts concerning *Stanley*'s real meaning:

> The Court's affirmance of [Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969), *aff'd mem.*, 397 U.S. 592 (1970)] would seem to furnish the *coup de grâce* to a broad interpretation of *Stanley*. But the presence of [Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969)] on the Court's pending calendar dispels such facile assurances.
>
> In rendering a decision in *Karalexis*, the Supreme Court may at last specify the extent to which *Stanley* overrules *Roth* . . . . In anticipation of that elucidation, we shall postpone a final ruling on the merits of this case until *Karalexis* provides clarification of the current state of obscenity law.

Unhappily, *Karalexis* was ultimately decided on procedural grounds, leaving *Stanley*'s scope still undefined. *See* Byrne v. Karalexis, 400 U.S. 216 (1971).

45. As formulated here, privacy-plus is not equivalent to that which is generally denominated as a "right to privacy." Fourth Amendment privacy principles or "privacy of the home" doctrines are insufficient to explain *Stanley*'s holding. *See* pp. 317-18 *infra*.

> context of a statute punishing mere private possession of obscene material.[46]

Of course, *Roth* and its progeny "do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity."[47] But the assertion of such an interest, according to Justice Marshall, depends upon the context, and in *Stanley* competing constitutional interests were involved[48]—the protection of "personal liberties." These, Justice Marshall declared, are protected from state interference when exercised in the privacy of the home.[49]

If the majority's opinion had ended at this stage, there would have been less ambiguity concerning *Stanley*'s scope, as rights to possess obscene material would have been rather clearly restricted to the home. But in the process of rebutting Georgia's asserted interests in Stanley's films, Justice Marshall spelled out grounds which seemingly limited state regulation of obscene material in *any* context. Georgia advanced three interests to justify its seizure of Stanley's obscene films: (1) protecting the individual's mind from the effects of obscenity; (2) stopping crimes of sexual violence, which allegedly entailed preventing exposure to obscene material; and (3) eliminating public distribution of obscenity, a policy requiring prohibition of private possession.[50] Justice Marshall rejected these three interests, respectively, as constitutionally impermissible, unsubstantiated, and insufficient to justify infringement of an individual's right to read or observe what he pleases.[51]

By way of example, Justice Marshall then suggested two subordinating state interests which might justify state regulation of obscene material: protection of children from exposure to obscenity and preventing intrusions on the sensibilities of the public.[52] He observed that "[n]o such dangers are present in this case,"[53] but implied that public distribution of obscene material might well justify state intervention

46. 394 U.S. at 560-61.
47. *Id.* at 563.
48. *See* p. 318 and note 61 *infra.*
49. *See* 394 U.S. at 565.
50. *Id.* at 565-68.
51. *See id.*
52. *Id.* at 567. Both interests had been previously recognized by the Court as sufficiently substantial to justify regulation of obscenity. *See* Redrup v. New York, 386 U.S. 767, 769-71 (1967). However, no Court opinion had ever suggested that these were the *only* permissible state interests.
53. 394 U.S. at 567.

to protect these interests. The converse, however, seemed apparent. Whenever these two legitimate state interests were not threatened, obscenity would be protected from state regulation by the First Amendment.

In a concluding footnote, Justice Marshall, distinguishing the status of obscene materials from that of other things, provided additional support for a First Amendment view of *Stanley*:

> What we have said in no way infringes upon the power of the State or Federal government to make possession of other items, such as narcotics, firearms, or stolen goods a crime . . . . *No First Amendment rights are involved in most statutes making mere possession criminal.*[54]

One obvious anomaly remains in a First Amendment theory of *Stanley*. At the conclusion of his opinion Justice Marshall explicitly declared that *Roth* and its progeny had not been "impaired,"[55] an odd statement in view of the two-level theory's premise that obscenity is wholly excluded from the First Amendment. One possible explanation suggested by Justice Marshall's analysis is that in those contexts, such as unrestricted public distribution, in which it is determined that subordinating state interests are present, the state may treat obscene material *as if it were not protected by the First Amendment.*[56] In those contexts and to that extent, *Roth* and the two-level theory were not impaired.

B. *The Privacy-Plus Theory of* Stanley

Although the First Amendment theory fully rationalizes the *Stanley* decision, Justice Marshall repeatedly noted that the First Amendment interests attributed to Stanley were being exercised in the privacy of his own home. It might thus be thought that this "added dimension"[57] in *Stanley* was in fact the only dimension, and that the decision may be explained by a privacy of the home theory or by Fourth Amendment privacy principles. If these privacy doctrines are believed to explain *Stanley* fully, then it must be assumed *ab initio* that obscenity itself remains constitutionally unprotected under the two-level theory.

54. *Id.* at 568 n.11 (emphasis added).
55. *Id.* at 568.
56. This conclusion is suggested by Justice Marshall's discussion of the application of *Roth* to public distribution. *See id.* at 567.
57. *Id.* at 564.

But once this assumption is granted, a strict privacy interpretation of *Stanley* becomes untenable. Privacy of the home underlies the requirement under the Fourth Amendment that authorities obtain a valid search warrant prior to entry.[58] But privacy of the home cannot preclude entry of the home by the state when there exists probable cause that prohibited articles—narcotics, unregistered firearms or obscenity under the two-level theory—are situated on the premises and a valid search warrant is obtained from the appropriate judicial authorities.

In Stanley's particular case the strict privacy of home argument is even weaker. The privacy of Stanley's home had been lawfully invaded *prior to* the discovery of the films. Stanley could hardly have objected to their seizure on the ground that the privacy of his home had *then* suddenly been disturbed. It might be suggested that it was the unwarranted seizure of the films from the upstairs bedroom which comprised the unconstitutional state action; yet this was exactly the point made by the Justices concurring on Fourth Amendment grounds, an argument the *Stanley* majority chose not to follow.[59]

However, the inadequacy of a strict privacy of the home rationale of *Stanley* does not mean that privacy interests were not a doctrinal consideration in the case. Justice Marshall denied the application of *Roth*'s principles to Stanley's situation because the "governmental interest in dealing with the problem of obscenity" could not be insulated in every context from all constitutional protections.[60] In the ensuing discussion, two constitutionally protected rights were identified: "the right to receive information and ideas," and "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[61] Although neither right alone

58. *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970); Katz v. United States, 389 U.S. 347, 357 (1967); Lewis v. United States, 385 U.S. 206, 211 (1966); Schmerber v. California, 384 U.S. 757, 770 (1966); Jones v. United States, 357 U.S. 493, 497-99 (1958).

Rights of privacy in the home can also establish absolute sanctions against intrusions by other private parties. In all but exceptional circumstances any unauthorized entry of the home would constitute trespass. Any person in exclusive possession of the home at the time of trespass may recover full damages therefore. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.2 (1956); 1 RESTATEMENT (SECOND) OF TORTS § 158 (1965). Under some conditions, such as a threat of violence, force may be legally used to repel intruders from one's home. *Id.* at § 65; State v. Couch, 52 N.M. 127, 137, 193 P.2d 405, 410-11 (1948); Hill v. State, 27 Ala. App. 55, 58, 166 So. 60, 62 (1936), *cert. denied*, 231 Ala. 539, 166 So. 64 (1936). Even a simple knock-on-the-door has been prohibited in the name of privacy. *See* Breard v. Alexandria, 341 U.S. 622 (1951).

59. 394 U.S. at 571.

60. *Id.* at 563.

61. *Id.* at 564. The "right to receive" was subsequently restated by Justice Marshall in several corollary forms: "the right to receive information and ideas, regardless of

had previously been thought to protect possession or acquisition of obscene materials,[62] the language of Justice Marshall's opinion suggests that it was the *combination* of these rights[63] which meant that

> mere categorization of [Stanley's] films as 'obscene' [was] insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments.[64]

Thus, to seize Stanley's films, Georgia was constitutionally required to show a subordinating state interest, which in this case it could not do.[65]

For convenience, this combination of constitutionally protected interests has been labeled "privacy-plus."[66] Its doctrinal rationale will be discussed below,[67] but it is important to note at this point a major distinction between the two possible theories of the *Stanley* decision. Under the First Amendment theory, the state is required to show a

social worth," "the right to read or observe what [one] pleases," and the "right to satisfy [one's] intellectual and emotional needs." *Id.* at 564-65. Both the original and corollary formulations of the "right to receive" derive from one of the major premises of the First Amendment's guarantee of freedom of expression: assuring the means of individual self-fulfillment. *See* T. EMERSON, *supra* note 19, at 6.

62. The "right to receive information and ideas" was traced by Justice Marshall to a number of cases. 394 U.S. at 564. None of these cases includes obscenity within the scope of "the right to receive" and some explicitly reject the possibility. In Martin v. City of Struthers, 319 U.S. 141, 143 (1943), for example, the "right to receive" is derived from the "right to distribute literature," which is in turn cited to Lovell v. City of Griffin, 303 U.S. 444, 451 (1938), a case which explicitly suggests that distribution of obscene literature may be prohibited. Winters v. New York, 333 U.S. 507 (1948), is cited by Justice Marshall for "the right to receive information and ideas regardless of social worth." *Stanley*, 394 U.S. at 564. But *Winters* concerned publications exhorting violence or bloodshed which the Court clearly differentiated from obscene materials:

> Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature . . . . They are equally subject to control if they are lewd, indecent, obscene, or profane.

Winters, supra, at 510.

"The right to be free, etc.," as argued at pp. 317-18 *supra*, cannot by itself prevent invasion of privacy by the state for the purpose of seizing illegal, albeit merely obscene, material provided a valid search warrant is obtained.

63. In summing up his discussion of the "right to receive" and the "right to be free," Justice Marshall observed:

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his home.

394 U.S. at 565. The emphasis appears to be clearly placed on the concurrent exercise of the two rights.

64. *Id.*

65. *See* pp. 316-17 *supra*.

66. An alternative designation might be a "First Amendment right of privacy."

An excellent analysis suggesting that *Stanley*'s doctrinal foundation results from some interaction between the First Amendment and privacy principles was made in Comment, 56 VA. L. REV. 1205 (1970). The conclusion there, however, was that the resulting protection for obscene material in private possession generated a corresponding right to distribute such material. *See id.* at 1219-21. Privacy-plus, in contrast, generates no corollary right to sell or distribute obscenity. *See* pp. 330-32 *infra*.

67. *See* pp. 327-32 *infra*.

subordinating state interest to justify regulating obscene material *in any context.*[68] The privacy-plus theory of *Stanley,* in contrast, speaks only to the requirement of a subordinating state interest to reach obscene material in a locus of privacy.[69] *In all other contexts* the state is free to regulate obscenity as before, under the two-level theory of *Roth.*[70] It is in this respect that, under the privacy-plus theory of *Stanley,* "*Roth* and the cases following that decision are not impaired . . . ."[71]

III. Return of *Reidel* and *37 Photos*

The substantial differences between the First Amendment theory of *Stanley* and the privacy-plus theory can be illustrated within the framework of the *Reidel* decision. Reidel had been indicted for mailing three copies of an illustrated booklet, "The True Facts About Imported Pornography," in violation of a federal statute prohibiting the knowing use of the mails for transmission of obscene material.[72] One copy of the booklet had been mailed to a postal inspector, stipulated to be an adult.[73] Assuming for the purposes of a motion to dismiss the indictment that the booklets were obscene, the district judge ruled nonetheless that there was "no valid governmental interest . . . that

68. *See* pp. 316-17 *supra.*

69. It may be objected that this formulation of privacy-plus merely states that *Stanley* established an independent constitutional right to possess obscene material in private. Justice Harlan suggested that the *Stanley* decision represented something like this in Mackey v. United States, 401 U.S. 667, 692 (1971) (concurring and dissenting opinion). There he argued that *Stanley* was one of the

> [n]ew "substantive due process" rules, that is, those that place . . . certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . . . .

In this regard he associated *Stanley* with Street v. New York, 394 U.S. 576 (1969) (freedom to express publicly one's opinions about the flag), Griswold v. Connecticut, 381 U.S. 479 (1965) (right of marital privacy), and Loving v. Virginia, 388 U.S. 1, 12 (1967) (freedom of choice in marriage: "marriage is one of the 'basic civil rights of man' "). Justice Harlan's view is persuasive but it lacks a doctrinal foundation. It is suggested at note 124 *infra* that privacy-plus is not simply one instance of conduct which may not be proscribed, but is instead a broader doctrine of constitutional limitation on governmental power to proscribe a number of individual private activities.

70. In the penultimate sentence of his opinion Justice Marshall observed:

> 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.*

394 U.S. at 568 (emphasis added).

71. *Id.*

72. 18 U.S.C. § 1461 (1970).

73. The other two copies of the booklet had been mailed by Reidel but had been returned undelivered and were found during a search of Reidel's premises. The prosecution conceded that it had no evidence regarding the age of the intended recipients or their willingness to receive the booklets.

would justify a criminal prosecution for distributing this material."[74] The court implied that the only state interests sufficient to overcome a right to distribute obscene material were the familiar duo of threats to children or to an unwilling public.[75] Concluding that neither of these dangers was present in the instant case, the court dismissed the indictment.

Under the First Amendment theory of *Stanley*, the dismissal of Reidel's indictment would be justified by extrapolating Reidel's "right to sell" from Stanley's "right to possess." If the government has no interest in preventing an individual from receiving obscene material, it can have no greater interest in preventing someone from selling it to him.[76] Alternatively, the prosecution would have been allowed to proceed, but with only two questions at issue: whether the mailings risked exposure to minors and whether the materials were being sent unsolicited.[77] Under the privacy-plus theory, however, since the protected rights[78] and zone of privacy involved in *Stanley* were inapplicable to Reidel's situation, there was no constitutional obstacle to continued prosecution.[79]

The fact that the Court reversed the dismissal of Reidel's indictment itself suggests that the First Amendment theory of *Stanley* was rejected.[80] But the *Reidel* opinion went even further, and explicitly

74. Quoted in Appendix to Appellant's Brief at 13, United States v. Reidel, 402 U.S. 351 (1971).

75. *Id.*

76. To reach this result, the complete First Amendment argument would run as follows: (1) per *Stanley* the government has no substantial interest in preventing a citizen from possessing obscene material; (2) it can have no greater interest in preventing him from acquiring such material since the only possible purpose for such a restriction is to prevent him from enjoying his right to possess; (3) if such a "right to receive" exists as a consequence of the right to possess, the governmental interest is not changed because a person buys the material instead of receiving it in some other way; (4) if a person has a right to buy obscene material which the government may not frustrate, the government may not achieve the same result indirectly by making it a crime to sell obscenity to him. The only circumstances under which the government would be permitted to restrict Reidel's dealings would be upon a showing of some legitimate interest such as protection of minors or preventing intrusions on the privacy of others. As there was no claim of either interest by the government, the indictment should be dismissed.

Those lower courts which interpreted *Stanley* as a partial repudiation of *Roth* followed this line of analysis or a close variant. *See, e.g.*, United States v. B. & H. Dist. Corp., 319 F. Supp. 1231 (W.D. Wis. 1970); United States v. Lethe, 312 F. Supp. 421 (E.D. Cal. 1970); Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969).

77. To reach this disposition of the *Reidel* case under a First Amendment theory, the defendant would be given the affirmative defense of establishing that his distribution procedures did not threaten legitimate state interests. Such reasoning may form the basis for Justice Marshall's concurring opinion in *Reidel*, 402 U.S. at 361-62.

78. *See* p. 318 and note 61 *supra*.

79. Unlike the First Amendment theory of *Stanley*, privacy-plus generates no corollary right to sell or distribute. *See* pp. 330-32 *infra*.

80. The *Reidel* majority opinion was delivered by Justice White joined by Chief Justice Burger and Justices Blackmun, Stewart and Brennan. Justice Harlan held to

rejected the "right to sell" extrapolation from the "right to receive,"[81] primarily on the grounds that this result "would effectively scuttle *Roth*, the precise result that *Stanley* abjured."[82] The *Reidel* opinion begins with the assumption that *Roth* "remains the law in this Court"[83] and ends[84] with the conclusion that "*Stanley* did not overrule *Roth*."[85]

But did *Reidel* overrule *Stanley*? If *Stanley* is interpreted under the First Amendment theory the answer must be affirmative, but a privacy-plus construction of *Stanley* offers some ground for reconciliation. Recognizing that the *Stanley* majority's grant of protection to Stanley's asserted rights[86] could not be completely ignored, Justice White wrote:

> 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.[87]

The doctrinal basis for this assertion was not further elaborated in the opinion, but privacy-plus, as suggested in the foregoing analysis of *Stanley*, would appear to offer the only possible explanation.[88]

his belief that *Stanley* merely placed certain kinds of private individual conduct beyond the power of the state to proscribe, *see* note 69 *supra* and note 88 *infra*, and therefore concurred on the ground that the federal government may prohibit commercial distribution of obscene material. 402 U.S. at 357-60. Justice Marshall's concurrence, *see* note 77 *supra*, was predicated on his unwillingness to find that Reidel's conduct was not within a constitutional construction of 18 U.S.C. § 1461 (1970) without the benefit of a full trial. 402 U.S. at 361-62. Justices Black and Douglas dissented, adhering to their position that obscene expression is entitled to full First Amendment protection. 402 U.S. at 379.

81. *See* note 76 *supra*.

82. 402 U.S. at 355.

83. *Id.* at 354.

84. Almost by way of apology Justice White added a postscript to his *Reidel* opinion by acknowledging 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.

402 U.S. at 357. But, he argued, "the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances," *id.*, and not, by obvious implication, with the courts.

85. *Id.* at 356.

86. Justice White had previously made it clear that he did not interpret these asserted rights as "requir[ing] that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene material." *Id.* at 356.

87. *Id.* at 356 (emphasis added).

88. A possible variant is the interpretation given to *Stanley* by Justice Harlan in Mackey v. United States, 401 U.S. 667 (1971), *see* note 69 *supra*, an interpretation he apparently followed in his *Reidel* concurrence:

The rejection of the *Stanley* First Amendment theory is even more explicit in *37 Photos,* which involved a federal anti-obscenity statute prohibiting importation of obscene articles.[89] Returning from Europe, Milton Luros arrived at Los Angeles International Airport with 37 photographs in his suitcase. Customs agents seized the photographs as obscene, and instituted forfeiture proceedings. Stipulating that the photographs were intended for possible commercial use, Luros counterclaimed and a three-judge court was convened to consider the constitutionality of § 1305 (a) both on its face and as applied to the 37 photographs. The lower court's conclusion that § 1305 (a) was unconstitutional rested on two independent grounds: first, the section failed to comply with the procedural requirements of *Freedman v. Maryland;*[90] and second, the section could not be constitutionally applied to the seized photographs under the doctrine announced in *Stanley.*[91]

Disposing of the *Freedman* procedural issue,[92] Justice White, this

> For me, at least, *Stanley* rests on the proposition that freedom from governmental manipulation of the content of a man's mind necessitates a ban on punishment for the *mere possession* of the memorabilia of a man's thoughts and dreams, unless that punishment can be related to a state interest of a stronger nature than the simple desire to proscribe obscenity as such.

402 U.S. at 359 (emphasis added).

89. The statute provides for no criminal sanctions. If materials are determined to be obscene through in rem proceedings, they are forfeited by the importer.

90. 380 U.S. 51 (1965). *See* note 92 *infra.*

91. United States v. Thirty-seven Photographs, 309 F. Supp. 36, 37-38 (C.D. Cal. 1970). To reach the latter result the court reasoned in effect that *Stanley*'s ban on regulation of privately possessed obscenity was not limited to the home and thus § 1305(a) was unconstitutional on its face because it prohibited private importation of protected, albeit obscene, material. Luros was granted standing to raise this argument under the court's interpretation of standing criteria in Freedman v. Maryland, 380 U.S. 51 (1965), even though his commercial activity might fall constitutionally within the sweep of § 1305(a). *See* note 95 *infra* for further discussion of the standing issue in *37 Photos.*

The court then seemingly went one step further and declared § 1305(a) unconstitutional even as applied to importation of obscene material for commercial purposes on the apparent logic that commercial distribution is required on equal protection grounds to offset advantages based on wealth:

> The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

309 F. Supp. at 38.

92. The district court had ruled 19 U.S.C. § 1305(a) unconstitutional because its seizure and forfeiture procedures did not establish adequate limits on prior restraint and did not provide for prompt resort to the courts for determination of the obscenity of the material in question, under the doctrine of Freedman v. Maryland, 380 U.S. 51 (1965). United States v. Thirty-seven Photographs, 309 F. Supp. 36, 38 (C.D. Cal. 1970). Justice White admitted that § 1305(a) did not contain the explicit time limits required by *Freedman* but argued that construing the statute to incorporate such limits would be consistent with congressional intent. 402 U.S. at 368-72. (Justice Black took vigorous exception to this construction of congressional intent. *Id.* at 382-87.) In an unusual piece of statutory construction, Justice White interpreted § 1305(a)

> to require intervals of no more than 14 days from seizure of the goods to the insti-

time writing for a plurality, first reasoned that if under *Reidel* Congress could prohibit use of the mails for commercial distribution of obscenity, then it could equally exclude commercial obscenity from incoming foreign commerce.[93] Had his opinion stopped at this doctrinal stage, Justice White could probably have written for a majority, as both Justices Harlan and Stewart were prepared to concede Congress' power to prohibit commercial importation of obscenity.[94] But eschewing an opportunity for a narrow decision,[95] he declared § 1305 (a) constitutional with regard to importation for "private use or public distribution"[96] and concluded with a ringing reaffirmation of *Roth*:

> As we held in *Roth* . . . and reiterated today in *Reidel* . . . 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.[97]

A majority of the Court, however, was not prepared to go this far. Four Justices took clear exception to the plurality's dictum on importation for private use,[98] and one felt that the issue need not be reached.[99]

tution of judicial proceedings for their forfeiture and no longer than 60 days from filing of the action to final decision in the district court,

primarily on the ground that such requirements would impose "no undue hardship on the Government." *Id.* at 373-74. Since the Government had miraculously stayed within these manufactured time limits by a single day, § 1305(a) was held constitutional as applied to the thirty-seven photographs.

This example of judicial activism has apparently not ended with this piece of legislation. After establishing the above time limits, Justice White added, "Of course, we do not now decide that these are the only constitutionally permissible time limits." *Id.* at 374. Presumably if the Government pleads "undue hardship" in some future case, § 1305(a) will be further judicially amended.

93. 402 U.S. at 376.

94. *See* notes 98-99 *infra*.

95. A narrower decision might have been reached along the following lines. Much as the Justice construed the statute to avoid the constitutional question posed by *Freedman*, *see* note 92 *supra*, he might have construed § 1305(a) to apply only to non-commercial importation. "[O]nce an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction . . . provided such application affords fair warning to the defendants . . . ." Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965). Thus, Luros could only claim that the distinction between commercial and non-commercial purpose was so vague that "fair warning" had not been given, a dubious argument in view of his stipulation. *See generally* Sedler, *Standing to Assert Constitutional* Jus Tertii *in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *The Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

96. 402 U.S. at 376.

97. *Id.* at 376-77 (emphasis added).

98. Justice Stewart concurred on the ground that the First Amendment does not prevent seizure of obscene materials imported for commercial distribution, but objected

Both on the basis of its facts—commercial purpose was stipulated—and the reservations of the majority, *37 Photos* cannot be said to have resolved the issue of whether importation of obscene material for private use may constitutionally be prohibited.[100]

Under no construction of the *37 Photos* decision is the First Amendment theory of *Stanley* tenable. The plurality flatly deny that obscenity is within the First Amendment. The concurring opinions of Justices Harlan and Stewart imply the same conclusion in their unqualified willingness[101] to prohibit importation for commercial purposes.[102]

The *Stanley* privacy-plus theory, however, continues to offer a harmonizing alternative. Assume, contrary to the stipulated facts, that Luros had imported the thirty-seven photographs with provable intent to view them privately. The privacy-plus combination of fundamental individual interests, which in *Stanley* triumphed over governmental interests in regulating obscenity, could not be any less preferred merely because the photographs were in a suitcase which could be lawfully searched by customs rather than in a home which could be lawfully searched by the police.[103] To the extent that private possession of

to any implication that such material imported for private use could be confiscated. 402 U.S. at 378-79. In a dissenting opinion Justice Marshall argued that *Stanley* proscribed such seizure from private possession and that the Government could protect its valid interests if and when commercial distribution should occur. *Id.* at 360-62. Justices Black and Douglas dissented, contending that the First Amendment fully protected obscene material. *Id.* at 379.

99. Justice Harlan's concurrence was premised on the belief that § 1305(a) was constitutional as applied to importation for commercial purpose. Since he contended that Luros lacked standing to raise the rights of private importers under an overbreadth claim, he saw no need to consider the constitutionality of a ban on private importation of obscene material. *Id.* at 377-78. *See* note 95 *supra* for additional discussion of the standing issue.

100. The issue of whether 19 U.S.C. § 1305(a) (1970) is constitutional as applied to importation of obscene material for private use has now been posed squarely, in United States v. Twelve Two-Hundred Foot Reels of Film, *prob. juris. noted,* 404 U.S. 813 (1971). *See also* United States v. Articles of "Obscene" Merchandise, 315 F. Supp. 191 (S.D.N.Y.), *appeal dismissed,* 400 U.S. 935 (1970) (§ 1305(a) unconstitutional as applied to importation of obscene material for private use).

101. Neither concurrence suggested that a showing of a subordinating state interest was required to effect prohibition of obscene material imported for commercial purposes. *See* 402 U.S. at 377-79.

102. A right to import obscene material for commercial use follows from a First Amendment theory of *Stanley* under the same logic that extrapolates a right to distribute commercially from the right to possess. *See* note 76 *supra.* A denial of the required result necessarily implies rejection of the initial premise that obscenity is fully protected by the First Amendment, absent showing of a subordinating state interest. *Compare* the district court's derivation of the right to commercial importation, note 91 *supra.*

103. Justice Marshall rejected any attempt to distinguish between the two situations for the purpose of applying *Stanley* principles:

obscenity in Luros' suitcase and in Stanley's home can thus be analogized,[104] privacy-plus would require proscription of government efforts to enforce a ban on obscene material imported for private use. Thus, the refusal of a majority of the *37 Photos* Court to uphold such

> *Stanley* turned on an assessment of which state interests 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.

402 U.S. at 360 (dissenting opinion).

104. In terms of the governmental interests involved, there are two possible differences which suggest that the situations may not be analogous. First, it might be thought that governmental interests in privately possessed obscenity at the border are stronger than when it is possessed in the home because it is difficult to determine what is intended for private use. Once past the border, the material is realistically irretrievable. However, this contention, that a ban on private possession is a necessary adjunct to a statutory scheme prohibiting public distribution, was specifically rejected in *Stanley*, 394 U.S. at 567-68.

Second, it might be argued that because customs procedures are in rem and no crime is charged, the congressional power to exclude does not run afoul of normal constitutional sensitivities. However, on at least one occasion, this theory has been flatly rejected:

> The Government attempts to avoid [A Quantity of Books v. Kansas, 378 U.S. 205 (1964)] by arguing that the First Amendment has no inhibitory effect on Congress's "complete" control of foreign commerce. This novel theory is not buttressed by citation to a single court opinion which has ever intimated such a possibility. The only rationale offered in support of the theory is to the effect that unless it be accepted, there will be practical limitations on the ability of Congress to restrict the importation of "obscene" books or other material. This may well be. However, Constitutional guarantees may not be subverted to expediency. . . .
>
> The Government goes on to argue that even if the First Amendment does apply to Congressional powers over foreign commerce, it would not prohibit a law authorizing summary seizure of foreign magazines. . . . [T]he essence of the First Amendment right to freedom of the press is not so much the right to print as it is the right to read. The rights of readers are not to be curtailed because of the geographical origin of printed materials.

United States v. Eighteen Packages of Magazines, 238 F. Supp. 846, 847-48 (N.D. Cal. 1964). Such a theory would also appear to be negated by Lamont v. Postmaster General, 381 U.S. 301 (1965) (requirement that individual must submit request in writing to receive "foreign Communist propaganda" in the mail held unconstitutional abridgement of First Amendment rights). Finally, such an argument is implicitly rejected by the *37 Photos* plurality in its efforts to rewrite § 1305(a) to conform to the procedural requirements of Freedman v. Maryland, 380 U.S. 51 (1965). *See* note 92 *supra*. If in rem customs procedures were not subject to the First Amendment, no consideration of the procedural issue would have been required.

In terms of the individual interests involved, there are also two possible differences between possession of obscene material in the home and in a suitcase carried in public. First, it could be suggested the First Amendment interest half of the privacy-plus equation is somehow changed because an individual is merely carrying obscene material to some sanctum for private perusal rather than actively exercising his First Amendment interests at the time. But potential exercise of First Amendment rights has traditionally been guarded almost as vigorously as their actual exercise. *See* Lamont v. Postmaster General, *supra;* NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Watkins v. United States, 354 U.S. 178 (1957); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

Second, it could be argued that the interests embodied in the other half of the privacy-plus equation, a private locus of possession, are different when obscene material is possessed in the home or in a suitcase. Katz v. United States, 389 U.S. 347 (1967) suggests that determination of whether a locus of privacy exists does not depend on a specific geographical area but instead on an evaluation of whether the individual has reasonable expectations that his activities have been removed from the perceptions of the general public. *Id.* at 351-52. *Cf.* Fried, *Privacy*, 77 YALE L.J. 475, 482-83 (1968).

a ban permits *Stanley*'s continued vitality under the doctrine of privacy-plus.[105]

IV. Privacy-Plus: Old Wine In A New Bottle?

Privacy-plus is more than just an isolated harmonizing principle for the *Stanley, Reidel* and *37 Photos* decisions. Basically rooted in "chilling effect" doctrine, privacy-plus represents a label of convenience for an amalgam of familiar constitutional principles first brought into focus on obscenity problems in *Stanley*. Neither *Roth* nor subsequent Court decisions on obscenity issues had encountered the precise problem posed by Stanley's privately possessed films. Confronted with this extreme situation, the *Stanley* majority drew back from the full implications of the *Roth* two-level theory and refused to allow the governmental regulatory interest to be "insulated from all constitutional protections"[106] in every context. Under privacy-plus, the "constitutional protections" discerned by the *Stanley* majority were those relating to protection of traditional First Amendment rights of the individual,[107] considered in the particular context of a locus of privacy in which obscene, and therefore illegal, materials were possessed. To protect the *general exercise* of such rights from inhibition, limitations were established on the otherwise valid governmental power to regulate obscenity. The consequence of these limitations was that possession of obscene material in a locus of privacy could not be subjected

Under this construction of a locus of privacy, the only significant difference between a suitcase at the border and the home is the degree of certainty that search by public officials will transpire. Since disclosure to these officials cannot be held tantamount to disclosure to the "perceptions of the general public" under the *Katz* formulation—to do so would make every situation susceptible of state intervention a public one—there would appear to be no material difference between possession of obscene material in a suitcase and in the home. Arguments that suitcases may break open and spill their contents, etc., would lead to the exclusion of all potentially offensive items, such as contraceptives, from suitcases.

105. Justice Stewart clearly perceived the implications for *Stanley* of the plurality's dictum on private importation:

> The terms of the statute [19 U.S.C. § 1305(a)] appear to apply to an American tourist who . . . returns home with a single book in his luggage, with no intention of selling it or otherwise using it, except to read it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley v. Georgia* . . . .

United States v. Thirty-seven Photographs, 402 U.S. 363, 379 (concurring opinion).

Another analysis which suggests that *Stanley*'s protection of obscene material in the home survives *Reidel* and *37 Photos*, and merits extension to all situations involving mere private possession, may be found in *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 235-37 (1971).

106. Stanley v. Georgia, 394 U.S. 557, 563 (1969).

107. *See* p. 318 and note 61 *supra*.

to criminal sanctions. Privacy-plus thus appears to be a special application of the more familiar theory of the "chilling effect,"[108] combined with privacy principles, to the field of constitutional obscenity doctrine.

A generalized theory of privacy-plus can be illustrated utilizing one of the individual rights recognized in *Stanley*, "the right to read or observe what [one] pleases,"[109] and an application of "chilling effect" principles. This "right to read or observe what one pleases" necessarily implies the right to receive, and therefore to possess, all *constitutionally protected materials.*[110] But since inhibition as well as prohibition of the exercise of First Amendment rights is a power denied to the government,[111] the scope of sanctions against the possession of *unprotected material* must also be carefully limited. If an individual is deterred from acquiring and possessing a non-obscene book because he fears that it may be obscene and that he will be punished for its possession, his right to "read or observe what he pleases" has clearly been "inhibited." The First Amendment will not tolerate any law which causes a man returning home from his local bookstore to wonder whether his latest purchase may lead to his arrest.

It is no answer that the line between the obscene and the non-obscene is sufficiently clear that acquisition of the latter will not be deterred. As the Court itself has observed:

> [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . .[112]

The employment of such "sensitive tools" can hardly be expected from the average citizen, especially since members of the Court itself, using

108. One Justice has explained the "chilling effect" doctrine as affecting both substantive and procedural rights:

> To give these freedoms [those of the First Amendment] the necessary "breathing space to survive" . . . the Court has modified rules of standing and prematurity . . . . We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting). *See*, Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 826 (1969).

109. 394 U.S. at 565. *See* note 61 *supra*.

110. Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); Marsh v. Alabama, 326 U.S. 501, 505 (1946); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

111. Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan, J., concurring).

112. Speiser v. Randall, 357 U.S. 513, 525 (1958).

such "tools," reach such dramatically different results.[113] Moreover, "[w]hat is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to the other."[114] While the Court has rejected a vagueness attack on the definition of obscenity in a commercial context,[115] it has not weighed the issue with reference to inhibitions of a private individual's "right to read or observe what he pleases"—inhibitions inherent in governmental attempts to ban possession of obscene materials. Privacy-plus analysis, the *Stanley* holding, and the traditional concern for First Amendment freedoms suggest that these inhibitions are unconstitutional.[116] Privacy-plus requires that the individual be allowed to read or observe obscene material in private in order to safeguard his First Amendment rights to read or observe non-obscene material.

Privacy-plus does not, however, proscribe governmental efforts, in the form of prohibitions on commercial distribution, to make it impossible for an individual to acquire obscene material. If a person is physically unable to find an obscene book to buy or an obscene movie to watch, his right to acquire or view non-obscene materials is not inhibited. Privacy-plus merely states that once an individual has acquired obscene material, by whatever means,[117] and so long as that

113. *See* note 16 *supra.*

114. Hannegan v. Esquire, Inc., 327 U.S. 146, 157 (1946).

115. A plurality of the Court denied that obscenity standards were vague in the commercial context of *Roth:*

> [W]e hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

United States v. Roth, 354 U.S. 476, 492 (1957) (Brennan, J.). However, after experiencing difficulty in applying *Roth*'s standards, Justice Brennan may have had second thoughts concerning its clarity. On one occasion he conceded that the *Roth* test admits of a "perhaps inherent residual vagueness," Ginzburg v. United States, 383 U.S. 463, 475 n.19 (1966), and on another that it contains "ambiguities inherent in the definition of obscenity." Mishkin v. New York, 383 U.S. 502, 511 (1966). Justice Harlan has been more explicit in his criticism of the uncertainties stemming from *Roth:*

> The upshot of all of this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not would find himself in utter bewilderment.

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707 (1968) (dissenting opinion).

116. [T]he necessity for safeguarding First Amendment protections for non-obscene materials means that the Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 518 (1962) (Brennan, J., concurring) quoting from Marcus v. Search Warrant, 367 U.S. 717, 731 (1961). *See also* Monaghan, *First Amendment Due Process,* 83 HARV. L. REV. 518, 518-19 (1970).

117. It might be suggested that a consequence of allowing private possession of obscenity while prohibiting legal distribution would be a widespread black market. Government inability to enforce obscenity laws may suggest the unwisdom of such laws but problems of enforcement cannot be used as an excuse to infringe or inhibit First Amendment freedoms. *See* Stanley v. Georgia, 394 U.S. 557, 567-68 (1969).

material is retained for private use,[118] the state may levy sanctions against the individual for possession of it[119] only upon showing a subordinating state interest.[120]

Commercial distributors of obscenity cannot invoke privacy-plus to defend their trade. Under the First Amendment theory of *Stanley*, an individual would have a "right to possess" obscene material, and limitations on governmental power to proscribe sales could be extrapolated

118. The scope of the term "private use" is obviously a key issue. Would private use include, for example, reading an obscene book on a public bus? Showing obscene films to friends at home? To strangers? Lending an obscene picture to a friend? Mailing an obscene picture to friends? To strangers? One standard would be whether the individual had reasonable expectations that he has removed his activity and the obscene material from the perception of the general public. *See* Katz v. United States, 389 U.S. 347, 351-52 (1967). *Compare* United States v. White, 401 U.S. 745, 752-53 (1971). Such a standard yields results on situs issues fairly easily, *e.g.*, exposing obscene material to others on a bus would probably be within the public's perceptions. But the standard does not readily suggest where along the spectrum, reaching from exposure to one other person to exposure to a number of persons, the state may legitimately intervene to prevent public distribution. The issue would be further complicated by considerations of the relationship between transferor and transferees, *i.e.*, giving obscene material to two friends might remain without the perception of the general public but giving such material to two strangers might be said to admit of no reasonable expectation that the material would remain outside of the public's domain. For a holding that exchange of obscene material through the mails by friendly correspondents was a "private relationship," see United States v. Dellapia, 433 F.2d 1252, 1258 (2d Cir. 1970).

The scope of the term "private use" has been posed directly to the Court in United States v. Orito (E.D. Wis. Oct. 28, 1970) (unreported), *prob. juris. noted*, 404 U.S. 819 (1971), in the context of another federal anti-obscenity statute prohibiting interstate shipment of obscene material by common carrier, 18 U.S.C. § 1462 (1970). The respective interests of government and the individual affected by interstate transport for private use are no different than those involved in importation for private use. *Cf.* note 101 *supra*. In either situation, the doctrine of privacy-plus requires protection of such shipments absent proof of commercial purpose or of a subordinating state interest.

A decision holding § 1462 constitutional as applied to interstate shipment of obscene material for private use would imply rejection of the last remaining doctrinal basis of *Stanley* and, in effect, would limit that case to its facts. Justice Black's prophecy would then be wholly fulfilled:

> [P]erhaps in the future that case [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.

402 U.S. at 382 (dissenting opinion).

119. It has been suggested that one method of avoiding the "chilling" problem in obscenity regulation is to adopt methods of control other than criminal prosecutions such as in rem civil proceedings. *The Supreme Court 1965 Term*, 80 HARV. L. REV. 91, 193 (1966). Such methods might reduce the degree of "chilling" but would not eliminate the problem. The threat of investigation of the contents of one's library has a deterrent effect on book purchase even though such investigation may only be for the purpose of confiscation. Purchasers of books abroad would still hesitate to acquire anything which might be taken away by customs if only to avoid risking financial loss.

120. Since privacy-plus merely extends the protection of the First Amendment to certain forms of private individual activity, the scope of its protection is no greater than that normally granted by the First Amendment. A subordinating state interest in the regulation of a subject within the state's constitutional power may justify limiting First Amendment freedoms. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963). Thus, if an individual in the privacy of his home shows obscene material to the neighbor's children, state sanctions against such exhibition may be invoked, since protection of minors from exposure to obscene material has been recognized as a subordinating state interest. *See* Stanley v. Georgia, 394 U.S. 557, 567 (1969); Ginsberg v. New York, 390 U.S. 629 (1968). *Cf.* Butler v. Michigan, 352 U.S. 380 (1957).

therefrom.[121] But the privacy-plus theory as formulated here merely states that the government may not enforce its ban on obscenity in the context of private possession of obscene materials—not because the materials are protected, but for fear of the consequences that might flow from such intrusions. The protection of privately-possessed obscenity is a prophylactic limitation on the reach of an otherwise valid governmental power. No "right to possess and receive" obscene material exists, hence no corollary right to sell or distribute such material can be generated.

A distributor of obscenity might attempt to assert the "rights" of potential readers of his material. But privacy-plus does not protect the right of any individual to buy an obscene book,[122] nor does it protect against a possible inhibition of the right to acquire non-obscene material, created by distributors' reluctance to carry items which border on the obscene. Although one consequence of a distributor's uncertainty about what is obscene may be the non-availability of some constitutionally protected materials for some individuals, this "chilling" is different from that which underlies privacy-plus. Privacy-plus establishes limitations on governmental sanctions directed against the individual for private use of obscene material. The direct threat of such sanctions is likely to "chill" the exercise of the individual's First Amendment rights to a much greater degree than any indirect "chilling" caused by a distributor's failure to carry certain titles.[123]

121. *See* note 76 *supra.*

122. *See* pp. 329-30 *supra.*

123. The principal difference between a bookseller's apprehension of the line between the obscene and the non-obscene and the private individual's is that the bookseller has an incentive to move as closely to the line as the law will allow. Motivated by profit, the distributor who deals in erotica will likely familiarize himself with some of the "nicer" distinctions in obscenity definitions. He can afford the services of legal counsel both to tell him what he may carry and to provide assistance should he stray over the line. The private individual has neither the incentive to become an obscenity "expert" nor the resources to procure counsel and defense.

The indirect "chilling" of distribution of protected material occasioned by obscenity laws was considered in Smith v. California, 361 U.S. 147 (1959). The solution adopted was the requirement of a strict scienter element in obscenity statutes. Justice Brennan, writing for a majority of the Court, recognized that even after the requirement of "knowing sale" had been imposed, some degree of "chilling" of potential purchasers' rights would remain, but did not consider the issue further. *Id.* at 154-55. In a concurring opinion Justice Frankfurter speculated philosophically that such consequences were unavoidable:

> As a practical matter therefore the exercise of the constitutional rights of a State to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of non-obscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally.

Id. at 164. The Court's refusal to consider a vagueness attack on the definition of obscenity may also be taken as an implied rejection of an argument based on a "chilling"

Privacy-plus is thus a purely preventive doctrine. Its protection of private possession of obscene material does not lay the foundation for a broader doctrine which would protect the sale or distribution of obscenity under the First Amendment.[124]

V. *Stanley* and The Future Contours of Obscenity Doctrine

It is clear, at a minimum, that for the present Court *Stanley* is not the revolution in obscenity doctrine that it was initially proclaimed to be.[125] The contention in *Reidel* that the right to possess obscenity in the home does not depend on whether such material is constitutionally protected[126] and the description of obscenity as "contraband" in *37 Photos*[127] make it clear, to paraphrase *Roth,* that obscenity is *still* not within the area of constitutionally protected speech or press.[128]

The rejection of the First Amendment theory of *Stanley* in *Reidel* and *37 Photos* should not, however, be applauded. Bringing "obscene" material within the First Amendment would relieve the judicial system of the dreary burden of adjudicating the obscenity *vel non* of countless

of rights resulting from a distributor's uncertainty about what is obscene. *See* note 115 *supra.*

Features of a system of obscenity regulation other than the definition of obscenity itself must, however, conform to strict procedures that will ensure against curtailment of constitutionally protected material. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963) (system of "informal" administrative censorship violates Fourteenth Amendment). *See also* Freedman v. Maryland, 380 U.S. 51 (1965); Marcus v. Search Warrant, 367 U.S. 717 (1961).

124. However, similar application of "chilling" and privacy principles to other First Amendment rights, recognized by the *Stanley* majority, offers the possibility of developing privacy-plus doctrine applicable to a broad range of private individual activity. For example, the "right to satisfy [one's] emotional needs," 394 U.S. at 565, might be extrapolated into a general doctrine of limitation on state power to prescribe standards of private sexual conduct for consenting adults absent showing of a subordinating state interest. One lower court has apparently accepted such a doctrine already. On the basis of *Stanley, In re* Labody, 326 F. Supp. 924 (S.D.N.Y. 1971), holds that private homosexual acts are irrelevant to a determination of whether one "has been and still is a person of good moral character" for the purposes of a naturalization petition, in the absence of a showing of corruption of the morals of minors. *Id.* at 930. *Cf.* Doe v. Bolton, 319 F. Supp. 1048, 1054 (N.D. Ga. 1970).

It might also be thought that the recommendations of the recent report of the National Commission on Marijuana and Drug Abuse incorporate privacy-plus principles. The major features of the recommended scheme are that production and distribution of marijuana would remain criminal activities as would possession with intent to distribute commercially; marijuana would be contraband subject to confiscation in public places, *but* all criminal sanctions would be withdrawn from private use and possession incident to such use. N.Y. Times, March 23, 1972, § 1, at 19, col. 1.

125. On the other hand neither *Reidel* nor *37 Photos* necessarily presage Court approval of a "Federal Drive on Pornography." *Cf.* New York Times, Oct. 10, 1971, at 82, col. 3.

126. 402 U.S. at 356.

127. 402 U.S. at 377.

128. *See* pp. 309-10 *supra.*

new entertainments.[129] The Court has shown signs of unhappiness with this consequence of the two-level theory in its continued practice of per curiam reversals of obscenity convictions on the apparent grounds that the prosecution failed to show pandering, obtrusive advertising or exploitation of juveniles.[130] If the Court is in fact retreating from the burden of adjudicating obscenity definitions, it would seem more appropriate to articulate this policy than to cloak it in the haze of ambiguous case-by-case dispositions.[131]

A call for a return to First Amendment principles in obscenity regulation has been made before.[132] *Stanley*, however, offered the first opportunity to make such a doctrinal shift with a minimum of dislocation. Although that opportunity was not utilized, if *Stanley* is given a privacy-plus gloss its doctrine can remain as an important limitation on the reach of *Roth* and the two-level theory. Absolving the courts of the necessity for adjudicating the obscenity *vel non* of materials in private possession is a step forward. The protection privacy-plus offers for a variety of private individual activities[133] is also encouraging. Further consideration of *Stanley*'s scope should focus on retaining the principles of privacy-plus.

129. *Reidel* and *37 Photos* were deceptively easy cases for the Court because in both the obscene character of the materials in question had been stipulated below. Far less ink was spilled than in a case like A Book v. Attorney General, 383 U.S. 413 (1966), where obscenity *vel non* was directly at issue.

130. Between 1967 and 1971 the Supreme Court summarily reversed per curiam more than 20 obscenity convictions, citing only Redrup v. New York, 386 U.S. 767 (1967). The Court's action is somewhat ambiguous because the *Redrup* citation can be given two different interpretations. Either the material in all of these cases met none of the obscenity definitions employed by members of the Court or, since such material is obscene only in the context of pandering, obtrusive advertising, intrusions on the public or exploitation of juveniles, a failure to prove one of these contexts was a failure to prove obscenity *vel non*. *See* 386 U.S. at 769-71. The second interpretation seems more likely in view of Justice Harlan's nearly consistent pattern of dissent in such cases under his variable standards doctrine. *See* note 16 *supra*. In the face of these dissents, joined frequently by Chief Justice Burger after 1968, one cannot reasonably say that the material in such cases meets none of the obscenity definitions employed by the Court.

131. Chief Justice Burger has sharply criticized the policy of *Redrup* per curiam reversals:

> I find no justification, constitutional or otherwise, for this Court's assuming the role of a supreme and unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before it without regard to the findings or conclusions of other courts, state or federal. That is not one of the purposes for which this Court was established.

Walker v. Ohio, 398 U.S. 434 (1970) (dissenting opinion).

132. *See, e.g.*, T. EMERSON, *supra* note 19, at 495-503; Engdahl, *supra* note 22; Note, *Stanley v. Georgia: New Directions in Obscenity Regulation?*, 48 TEX. L. REV. 646, 659-60 (1970); Comment, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1402-05 (1966).

Oregon has already adopted legislation creating a system of obscenity regulation based on First Amendment principles. Under ORE. REV. STAT. §§ 167.060-167.100 (1971) adults may sell, purchase, and possess obscene material unless the distribution threatens exposure to juveniles or unwilling recipients.

133. *See* note 124 *supra*.