

---

## Landmarks

### The Warren Court Protects the Private Possession of Obscene Matter: *Stanley v. Georgia*

VICTORIA PRUSSEN SPEARS

*In April 1969, only a few months after President Richard Nixon took office and at the height of its powers, the Warren Court issued its decision in Stanley v. Georgia, overturning a criminal conviction for the private possession of obscene materials. Subsequent rulings by the Supreme Court appear to have limited the impact of the Stanley ruling, but the decision stood at one time as a clear statement of the right to privacy in one's home.*

About 40 years ago, following a bookmaking investigation, a United States Commissioner issued a search warrant with respect to “the property known as 280 Springside Drive, S.E., in Atlanta, Georgia,” a “two story residence with an annex on the main floor constructed of brick and frame, in Atlanta, Fulton County, Georgia, in the Northern District of Georgia.” With like particularity, the search warrant described the “things to be seized”: “[B]ookmaking records, wagering

---

Victoria Prussen Spears, the “Landmarks” columnist and a member of the Board of Editors of the *Privacy & Data Security Law Journal*, is an attorney in Miller Place, N.Y. She can be reached at [victoriapspears@aol.com](mailto:victoriapspears@aol.com).

paraphernalia consisting of bet slips, account sheets, recap sheets, collection sheets, adding machines, money used in or derived from the wagering business, records of purchases, records of real estate and bank transactions, the money for which was derived from the wagering business, and any other property used in the wagering business, which are being used and/or have been used in the operation of a bookmaking business or represent the fruits of a bookmaking business.”

Under authority of this warrant, federal and state agents entered the house. They found very little evidence of bookmaking activity, but, while looking through a desk drawer in an upstairs bedroom, one of the federal agents, accompanied by a state officer, found three reels of eight millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that Robert Eli Stanley occupied it, he was charged with possession of obscene matter and placed under arrest. Stanley was later indicted for “knowingly hav[ing] possession of...obscene matter” in violation of Georgia law. He was tried before a jury and convicted.

## **PRIOR PROCEEDINGS**

Stanley argued before the Supreme Court of Georgia that his conviction was unconstitutional. The Georgia Supreme Court saw no valid constitutional objection to the Georgia statute, even though it extended further than the typical statute at the time forbidding commercial sales of obscene material. The Georgia Supreme Court held that:

[i]t is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was “with intent to sell, expose or circulate the same.”

Stanley thereafter appealed to the U.S. Supreme Court, arguing that the Georgia obscenity statute, insofar as it punished mere private possession of obscene matter, violated the First Amendment, as made applicable to the states by the Fourteenth Amendment. Georgia contended that

because obscenity was “not within the area of constitutionally protected speech or press,”<sup>1</sup> the states were free, subject to the limits of other provisions of the Constitution,<sup>2</sup> to deal with it any way deemed necessary, just as they could deal with possession of other things thought to be detrimental to the welfare of their citizens. If a state could protect the body of a citizen, could it not, argued Georgia, protect the citizen’s mind?

A unanimous U.S. Supreme Court, in an opinion by Justice Thurgood Marshall, reversed the Georgia Supreme Court’s decision, holding that “the mere private possession of obscene matter cannot constitutionally be made a crime.”

## THE ROTH RULE

Justice Marshall reasoned that it was true that *Roth v. United States* declared, seemingly without qualification, that obscenity was not protected by the First Amendment, and that that statement had been repeated in various forms in subsequent cases.<sup>3</sup> However, Justice Marshall continued, neither *Roth* nor any subsequent U.S. Supreme Court decision dealt with the precise problem involved in Stanley’s case. Roth was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute. The defendant in a companion case, *Alberts v. California*,<sup>4</sup> was convicted of “lewdly keeping for sale obscene and indecent books, and [of] writing, composing and publishing an obscene advertisement of them....” Justice Marshall explained that none of the statements cited by the Court in *Roth* for the proposition that “this Court has always assumed that obscenity is not protected by the freedoms of speech and press” were made in the context of a statute punishing mere private possession of obscene material; the cases cited dealt for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. Moreover, Justice Marshall continued, none of the Court’s decisions subsequent to *Roth* involved prosecution for private possession of obscene materials. Rather, he added, those cases dealt with the power of the state and federal governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter.

Given this context, Justice Marshall stated that Stanley's case could not be decided "simply by citing *Roth*." *Roth* and its progeny "certainly" meant that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But, he declared, the assertion of that interest could not, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of the Court reached that far. Justice Marshall then quoted *Roth*:

[c]easeless vigilance is the watchword to prevent...erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

According to Justice Marshall, *Roth* and the cases following it discerned such an "important interest" in the regulation of commercial distribution of obscene material. That holding, however, could not foreclose an examination of the constitutional implications of a statute forbidding "mere private possession of such material."

## INFORMATION AND IDEAS

Justice Marshall explained that it was "now well established that the Constitution protects the right to receive information and ideas." He added that the freedom of speech and press "necessarily protects the right to receive"<sup>5</sup> information and ideas, regardless of their social worth — a concept that is "fundamental to our free society." Moreover, Justice Marshall noted, in the context of this case — a prosecution for "mere possession" of printed or filmed matter in the privacy of a person's own home — that right took on an added dimension. For also fundamental, Justice Marshall emphasized, "is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." He then quoted from a dissenting opinion by former Justice Louis Brandeis:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man.<sup>6</sup>

Justice Marshall stated that these were the rights that Stanley was asserting: “the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home.” He was “asserting the right to be free from state inquiry into the contents of his library.” Georgia contended that Stanley did not have these rights, that there were certain types of materials that an individual could not read or even possess. Georgia justified this assertion by arguing that the films were obscene. But, Justice Marshall ruled, the “mere categorization” of these films as “obscene” was “insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments.” Whatever may be the justifications for other statutes regulating obscenity, Justice Marshall found that they did not reach “into the privacy of one's own home.” He then emphasized that 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.”

## **A PERSON'S THOUGHTS**

In the face of what Justice Marshall characterized as “these traditional notions of individual liberty,” he explained that Georgia asserted the right “to protect the individual's mind from the effects of obscenity.” According to Justice Marshall, that argument did not amount to anything more than the assertion that Georgia had “the right to control the moral content of a person's thoughts.” Justice Marshall acknowledged that

some might find this to be a noble purpose, but he declared that it was “wholly inconsistent with the philosophy of the First Amendment.” He quoted the Court in *Kingsley International Pictures Corp. v. Regents*:<sup>7</sup>

[t]his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority....And, in the realm of ideas, it protects expression which is eloquent no less than that which is unconvincing.

Moreover, Justice Marshall stated that it was not relevant that obscene materials in general, or Stanley’s films in particular, arguably were devoid of any ideological content. “The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”

Justice Marshall also rejected Georgia’s contention that exposure to obscene materials might lead to deviant sexual behavior or crimes of sexual violence, finding that there appeared to be “little empirical basis for that assertion.” In any event, he stated, if the state was only concerned about printed or filmed materials inducing antisocial conduct, in the context of private consumption of ideas and information the Court should adhere to the view that “[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law....” He added that, given the present state of knowledge, the state “may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.”

Justice Marshall conceded that, in *Roth*, the Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. He distinguished that case from the *Stanley* case, explaining that *Roth* dealt with public distribution of obscene materials

and such distribution was “subject to different objections.” For example, there was always the danger that obscene material might fall into the hands of children, or that it might intrude upon the sensibilities or privacy of the general public, but “[n]o such dangers” were present in Stanley’s case.

## A FUNDAMENTAL RIGHT

Finally, Justice Marshall addressed the argument that prohibition of possession of obscene materials was a necessary incident to statutory schemes prohibiting distribution, an argument that he stated was based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. Justice Marshall said that the Court was not convinced that such difficulties existed, but said that even if they did “we do not think that they would justify infringement of the individual’s right to read or observe what he pleases.” Because that right was “so fundamental to our scheme of individual liberty,” its restriction could not be justified by the need to ease the administration of otherwise valid criminal laws, according to Justice Marshall.

Accordingly, the Court held that the First and Fourteenth Amendments prohibited making mere private possession of obscene material a crime.<sup>8</sup>

## CONCLUSION

Justice Marshall made it clear that the Court’s decision in *Stanley* did not impair *Roth* and the cases following that decision, and that states retained “broad power” to regulate obscenity — that power, however, did “not extend to mere possession by the individual in the privacy of [the individual’s] own home.” Justice Marshall also made it clear that the *Stanley* decision “in no way” infringed upon the power of the state or federal government “to make possession of other items, such as narcotics, firearms, or stolen goods, a crime.” Justice Marshall emphasized that the Court’s holding in *Stanley* turned upon the Georgia statute’s infringement of “fundamental liberties” protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes

making mere possession criminal, he explained.

Additionally, Justice Marshall noted that the Court in *Stanley* was not expressing any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials, such as the statute making criminal the otherwise lawful possession of materials which “the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation...”<sup>9</sup> In such cases, Justice Marshall said, compelling reasons may exist for overriding the right of the individual to possess those materials.

Importantly, the Warren Court’s ruling in *Stanley* has been limited, or at least limited to its facts, by a number of subsequent Court decisions. For instance, two years after *Stanley*, in *United States v. Reidel*,<sup>10</sup> the Court distinguished *Stanley* and upheld a federal law prohibiting the knowing use of the mails for the delivery of obscene matter as applied to the distribution of obscene materials to willing recipients who stated they were adults. Justice White delivered the opinion of the Court, in which the new Chief Justice, Warren Burger, and new Associate Justice Harry Blackmun joined. Three justices from the Warren Court — Justices Potter Stewart, John Marshall Harlan, and William Brennan — also joined the majority; Justice Marshall concurred in the judgment; and Justices Hugo Black and William Douglas dissented. In his opinion for the Court, Justice White declared that “Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned.”

Then, in 1990, the Court issued its opinion in *Osborne v. Ohio*,<sup>11</sup> ruling that states may constitutionally proscribe the possession and viewing of child pornography. Among other things, Justice White cautioned in his opinion for the Court that “*Stanley* should not be read too broadly.” One can imagine that even if the Court were to decide *Stanley* today, it might reach the same result, but would be unlikely to do so in such broad, pro-privacy language.

## NOTES

<sup>1</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>2</sup> See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>3</sup> See, e.g., *Smith v. California*, 361 U.S. 147 (1959); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (opinion of Brennan, J.).

<sup>4</sup> 354 U.S. 476 (1957).

<sup>5</sup> *Martin v. City of Struthers*, 319 U.S. 141 (1943); see *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (Brennan, J., concurring).

<sup>6</sup> *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

<sup>7</sup> 360 U.S. 684 (1959).

<sup>8</sup> Justice Hugo Black wrote a separate concurrence in which he simply stated that he agreed with the Court “that the mere possession of reading matter or movie films, whether labeled obscene or not, cannot be made a crime by a State without violating the First Amendment, made applicable to the States by the Fourteenth.” Justices Potter Stewart, with whom Justice William Brennan and Justice Byron White joined, wrote a separate opinion concurring in the result, declaring that in this case a search “that began as perfectly lawful became the occasion for an unwarranted and unconstitutional seizure of the films.” These justices wrote that because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in evidence at Stanley’s trial and his conviction had to be.

<sup>9</sup> 18 U.S.C. § 793(d).

<sup>10</sup> 402 U.S. 351 (1971).

<sup>11</sup> 495 U.S. 103 (1990).