

Stanley in Cyberspace: Why the Privacy Protection of the First Amendment Should Be More Like That of the Fourth

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The 1969 case Stanley v. Georgia forbade the government from restricting the books that an individual may read or the films he may watch “in the privacy of his own home.” Since that time, the Supreme Court has repeatedly emphasized that Stanley’s protection applies solely within the physical boundaries of the home: While obscene books or films are protected inside of the home, they are not protected en route to it—whether in a package sent by mail, in a suitcase one is carrying to one’s house, or in a stream of data obtained through the Internet.

However adequate this narrow reading of Stanley may have been in the four decades since the case was decided, it is ill-suited to the twenty-first century, where the in-home cultural life protected by the Court in Stanley inevitably spills over into, or connects with, electronic realms beyond it. Individuals increasingly watch films not, as the defendant in Stanley did, by bringing an eight millimeter film or other physical copy of the film into their house, but by streaming it through the Internet. Especially as eReaders, such as the Kindle, and tablets, such as the iPad, proliferate, individuals read books by downloading digital copies of them. They store their own artistic and written work not in a desk drawer or in a safe, but in the “cloud” of data storage offered to them on far-away servers.

Thus, I argue that courts should revisit and revise their understanding of Stanley v. Georgia in the same way that Katz v. United States revised Fourth Amendment law in 1967—by holding that the privacy it protected is not limited to the physical boundaries of the home (as United States v. Olmstead had held in 1928) but covers wire-line communications and other electronic environments in which individuals have an expectation of privacy. This is not to say that the Court’s understanding of Stanley v. Georgia should be revised in precisely the same way. However, Stanley v. Georgia should, at a minimum, be extended to protect web-based interactions, where use of an electronic resource outside of the home, such as the Internet, is an integral component of the act of possessing, viewing, or reading cultural material.

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This originates from within our environment. It has to,
because nothing can come in from outside except words.

—Philip K. Dick, *Ubik*¹

It isn't just worn out; it's forty years obsolete. . . . [T]he
damn thing is antiquated. Junk it. Forget about it.

—Philip K. Dick, *Ubik*²

INTRODUCTION

2009 was a year that saw an unusually large number of historic fortieth anniversary celebrations, among them, those marking the landing of Apollo on the moon, the creation of the Internet, the Woodstock music festival, the first episode of Sesame Street, and the New York Mets's improbable World Series victory.³ All of these events happened in 1969, some with more fanfare and news coverage than others. To this list of anniversaries, lawyers and legal scholars were able to add their own, as they reflected upon the lasting significance of the

1. PHILIP K. DICK, *UBIK* (1969), reprinted in *FOUR NOVELS OF THE 1960S*, at 609, 781 (Jonathan Lethem ed., 2007).

2. *Id.* at 710.

3. See Julie Bloom et al., *1969*, N.Y. TIMES (July 17, 2009), <http://www.nytimes.com/packages/html/arts/20090717-1969-feature/> (listing and providing a slide show of photographs depicting highlights from 1969); see also Hank Stuever, *Enough Already! All '69 Anniversaries Should be 86ed*, WASH. POST, Sept. 6, 2009, at E2; JohnnyB, *The 40th Anniversary of 1969, LATE FOR THE SKY* (Aug. 9, 2009 3:28 PM), <http://johnnyb-lateforthesky.blogspot.com/2009/08/40th-anniversary-of-1969.html>.

Supreme Court's landmark school speech decision in *Tinker v. Des Moines Independent Community School District*.⁴

But there was another important First Amendment case decided in 1969, the fortieth anniversary of which passed far more quietly: the Supreme Court's decision in *Stanley v. Georgia*.⁵ The silence was, in a sense, appropriate, for instead of bringing the case into line with evolving technologies, the Supreme Court's subsequent glosses on *Stanley* have kept it as narrow in scope as it was when it was first decided, and arguably, have made it even narrower. *Stanley* held that even though obscene movies or books can generally be constitutionally prohibited or punished when in public—because courts view such expression as falling outside the bounds of the First Amendment—such materials are nonetheless *protected* by the First Amendment when read or viewed by a person in her own home.⁶ To hold otherwise and to allow the State to regulate which books we read or films we watch within the home, the Court declared, would come too close to permitting the “control [of] men's minds” and clearly at odds with our First Amendment commitment to freedom of thought.⁷

But while these words have been cited by numerous courts in the subsequent decades, their significance has been tightly limited by a series of decisions holding that material protected *once inside* the home is *not* constitutionally shielded *en route* to it. The Court began imposing such limitations in a pair of decisions issued only two years after *Stanley*. In *United States v. Reidel*, it rejected the petitioner's argument that the State of California violated his First Amendment rights when it indicted him under obscenity laws for mailing three copies of a booklet called “The True Facts About Imported Pornography.”⁸ “Whatever the scope of the ‘right to receive’ referred to in *Stanley*,” the Court said, “it is not so broad as to” establish a “right to do business in obscenity and use the mails in the process.”⁹ In *United States v. Thirty-Seven (37) Photographs*, it went further and held constitutional the seizure of photographs that the owner had not shared or sent to anyone else—but was rather carrying in his own suitcase on a return trip from Europe.¹⁰ A “port of entry,” said the Court, “is not a traveler's home.”¹¹ Indeed, obscenity could be seized “when discovered in the luggage of a returning foreign traveler *even*

4. See generally Symposium, *Tinker Turns 40: Freedom of Expression at School and Its Meaning for American Democracy*, 58 AM. U. L. REV. 1119 (2009).

5. 394 U.S. 557 (1969).

6. *Id.* at 565.

7. *Id.*

8. 402 U.S. 351, 353 (1971).

9. *Id.* at 355–56.

10. 402 U.S. 363, 376 (1971).

11. *Id.* at 365.

though intended solely for his private use.”¹² Two years later, in 1973, the Court continued the narrowing of *Stanley* in a trio of decisions issued on the same day. In *United States v. Orito*, it found constitutional the government’s seizure of obscene films from a storage area of a private airline.¹³ In *United States v. 12 200-ft. Reels of Super 8mm. Film*, it likewise approved the seizure of films from a package carried by someone entering the United States from Mexico.¹⁴ In *Paris Adult Theatre I v. Slaton*, the case where the Court made clear that the State may punish the screening of pornographic films, even to willing adult viewers, the Court emphasized again that *Stanley* had force only within the home.¹⁵ In all three of these decisions, Chief Justice Burger asserted that the freedom of thought protected in *Stanley v. Georgia* was without force not only in public channels of commerce, but everywhere in public life: There is no “zone of constitutionally protected privacy [that] follows [obscene] material when it is moved outside the home area protected by *Stanley*.”¹⁶

In recent years, lower courts have uniformly held that pornography may be seized or punished not only in the mail or in physical transportation, but also in electronic channels of communication. For example, in *United States v. Whorley*, the Court of Appeals for the Fourth Circuit stated that obscene materials obtained through e-mail or through an “interactive computer service” are not within the scope of *Stanley v. Georgia*’s protection.¹⁷ Other courts have reached the same conclusion.¹⁸ More specifically, they have upheld the application of 18 U.S.C. § 1462 to e-mails received at home or webpages viewed at home. Section 1462 provides,

Whoever . . . knowingly uses any . . . interactive computer service . . . for carriage in interstate or foreign commerce . . . [of] any obscene, lewd, lascivious, or filthy . . . writing . . . or other matter of indecent character[,] . . . [s]hall be fined under this title or imprisoned . . .¹⁹

The Court of Appeals for the Third Circuit likewise rejected, in *United States v. Extreme Associate, Inc.*, the notion that, in understanding the

12. *Id.* at 376 (emphasis added).

13. 413 U.S. 139, 140 (1973).

14. 413 U.S. 123, 125 (1973).

15. 413 U.S. 49, 57, 66–67 (1973).

16. *Orito*, 413 U.S. at 141–42.

17. 550 F.3d 326, 332–33 (4th Cir. 2008).

18. See *United States v. Stagliano*, 693 F. Supp. 2d 25, 28–29 (D.D.C. 2010) (allowing prosecution of individuals charged with displaying an obscene movie trailer over an “interactive computer service”); *United States v. McCoy*, 678 F. Supp. 2d 1336, 1365–73, (M.D. Ga. 2009); see also *United States v. Little*, No. 8:07-CR-170-T-24MSS, 2008 WL 151875, at *1 (M.D. Fla. Jan. 16, 2008) (finding *Stanley* allows government to seize and criminalize pornography transmitted “over the Internet”).

19. 18 U.S.C. § 1462 (2006).

scope of *Stanley v. Georgia*, “a new analytical path is necessary in Internet cases.”²⁰

Some scholars have argued that in light of such precedent, *Stanley* is better understood as a privacy case than as a First Amendment case: Instead of marking out a *sphere of activity* as within the realm of protected speech or receipt of information, it marks out a *particular place* (namely, the home) that is a realm of individual sovereignty, instead of state control.²¹ The Supreme Court itself has indicated as much, emphasizing that *Stanley*’s holding was “narrow”²² and stating that it was “hardly more than a reaffirmation that ‘a man’s home is his castle.’”²³

But these observations hardly foreclose all questions about *Stanley*’s meaning, especially as emerging technologies expand and transform the “castle” walls in which individuals enclose themselves. Modern computing power and networking technology not only allow individuals to rapidly deliver reading or viewing materials to their homes through the Web or digital downloading, but also to create virtual *extensions* of their homes. More specifically, many of the cultural activities we engage in inside the home—reading, watching a video, surfing the Web—can now be performed in the privacy of a digital home instead of a physical one. Instead of relaxing in our living rooms, we might do so in the much more “spacious” living room of a virtual mansion we acquire in Second Life²⁴ or another virtual world.²⁵ Instead of buying a safe or chest to store paper documents in a closet, we might buy virtual space in the “cloud” of computer-based storage that numerous companies, such as Google,²⁶ Apple,²⁷ or Dropbox,²⁸ provide for people to store digital files outside of their homes.²⁹ Instead of buying and reading a physical book, many individuals armed with an eReader, an iPad, or another tablet computer

20. 431 F.3d 150, 161 (3d Cir. 2005). The court added that Internet transmission of pornography is not beyond the scope of *Stanley*’s First Amendment protection but is unprotected by any parallel right to freedom of thought or autonomy that might arise out of the substantive due process rights of the Fourteenth Amendment. *Id.* at 159.

21. See, e.g., Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1576 (1988) (“[B]ecause the Court refused to own up to the implications of its holding in *Stanley*, the case can only be understood as a privacy decision . . .”).

22. *Osborne v. Ohio*, 495 U.S. 103, 108 (1990).

23. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).

24. SECOND LIFE, <http://secondlife.com/> (last visited Dec. 17, 2010).

25. See F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 5, 30 (2004) (describing how individuals gather in “virtual living room[s]” in Blazing Falls and other virtual worlds, and how one can “buy a completed mansion” there).

26. See GOOGLE DOCS, <http://www.google.com/google-d-s/documents/> (last visited Dec. 17, 2010).

27. See APPLE MOBILEME, <http://www.apple.com/mobileme/features/idisk.html> (last visited Dec. 17, 2010).

28. See DROPBOX, <https://www.dropbox.com/> (last visited Dec. 17, 2010).

29. See Geoffrey A. Fowler & Ben Worthen, *The Internet Industry Is on a Cloud—Whatever that May Mean*, WALL ST. J., Mar. 26, 2009, at A1 (“[In cloud computing, i]nformation is stored and processed on computers somewhere else—‘in the clouds’—and brought back to your screen.”).

might read a digital book that—unlike its physical counterpart—remains electronically tethered to and, in some cases, subject to alteration or deletion by the company that provided it.³⁰

Are these private cyberspaces covered in any part by the *Stanley* decision's insistence on safeguarding a person's "right to be free from state inquiry into the contents of his library"?³¹ Or does the storing of that library in the cloud or the act of linking it to the Internet through a computer or a digital reader open it up to state control? May the government thus mandate the deletion of an already-downloaded digital book, even though *Stanley* prevents seizure of the same book in its physical form? Is it the case, in other words, that the *only* home that serves as a person's "castle" for First Amendment purposes is the brick-and-mortar home she sleeps and eats in, rather than the numerous virtual and electronic extensions of her home in which she can now find additional privacy?

The answer to this question might seem clear, based on the consistent denial by the lower courts of *Stanley*'s protection to "interactive computer services."³² In a sense, *Stanley* is frozen in time as a result of these interpretations: It protects only physical spaces, not virtual homes, digitally-created spaces on the Internet, or the private sensory enclaves we create and use outside the home with laptops, portable DVD players, and other electronic devices. Thus, the only home protected for First Amendment purposes is the physical space. But, I suggest here that this answer is deeply problematic, and perhaps simply wrong. For it applies assumptions to First Amendment protection of private information that have long been discredited in another, similar area of constitutional protection for liberty and privacy: the Fourth Amendment's protection against unreasonable searches. Many years before the federal courts held that information channeled to a home through an Internet connection lies outside the purely in-home realm protected by *Stanley*, the Court's 1928 decision in *Olmstead v. United States* came to virtually the *same* conclusion about phone wires: "[O]ne who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and . . . the wires

30. See Brad Stone & Motoko Rich, *Companies Race to Rule the E-Books*, N.Y. TIMES, Jan. 21, 2010, at B1 (describing the market for eBooks as "nascent but booming"); Andrew Berg, *Amazon: eBook Sales Surpass Hardcovers*, WIRELESSWEEK (July 20, 2010), <http://www.wirelessweek.com/News/2010/07/Business-Amazon-eBook-Sales-Hardcovers-Mobile-Content/> ("[A] lower price point for eReaders is stimulating dramatic growth in eBook sales."); see also Nicole A. Ozer & Jennifer A. Lynch, *Protecting Reader Privacy in Digital Books*, ASS'N FOR THE ADVANCEMENT OF ARTIFICIAL INTELLIGENCE SYMPOSIUM, Mar. 2010, at 136, 138, available at <http://www.aaai.org/ocs/index.php/SSS/SSS10/paper/view/1041/1500> (explaining that providers of eBooks can monitor the books they have provided and even "delete whole books").

31. 394 U.S. 557, 565 (1969).

32. See *supra* note 18 and accompanying text.

beyond his house and messages while passing over them are not within the protection of the Fourth Amendment.”³³

But *Olmstead* no longer provides the rule for what is and is not covered by Fourth Amendment protection against unreasonable searches. In 1967, the Supreme Court overruled *Olmstead* in *Katz v. United States*.³⁴ It held that individuals have a constitutional right to protection against unfettered government monitoring not only inside of their homes, but also in various electronic environments, on phone lines, and in public phone booths.³⁵ “[T]he Fourth Amendment” it said, “protects people, not places . . . [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”³⁶ Under the modern formulation of *Katz* (based chiefly upon the concurrence by Justice Harlan in that case), individuals are protected from government monitoring everywhere they have an “expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’”³⁷

This expectation depends heavily upon the nature of the place where they are located, but it is not *only* the home itself where privacy from government can be expected: As the Court said in a later case, “people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks.”³⁸ Why then *are* they shorn of their First Amendment right to private possession or viewing of reading materials when they step from their homes onto these sidewalks? Why does the Court insist there is no “zone of constitutionally protected privacy [that] follows” a reader or film viewer “when [she goes] outside the home area protected by *Stanley*”?³⁹ Freedom of thought and intellectual exploration is, after all, no less fundamental to our constitutional order than freedom from unreasonable searches. Such freedom has been described by the Court as “the matrix, the indispensable condition, of nearly every other form of freedom.”⁴⁰ Why, then, should the now forty-one-year-old case of *Stanley v. Georgia* adhere to constitutional assumptions similar to those rejected in *Olmstead v. United States*, decided forty-one years before *Stanley*?

I argue here that it should not—that it is no longer tenable to isolate *Stanley*’s freedom-of-thought protection from technological development and public space. This is not to say that the shield *Stanley* provided to pornography and to other low-value speech can nullify *all* state

33. 277 U.S. 438, 466 (1928).

34. 389 U.S. 347, 352–53 (1967).

35. *Id.*

36. *Id.* at 351–52.

37. *Id.* at 361 (Harlan, J., concurring).

38. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

39. *United States v. Orito*, 413 U.S. 139, 141–42 (1973).

40. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

restriction of such speech in public life. As Chief Justice White correctly pointed out in *United States v. Reidel*, the Court made it clear in *Stanley* that obscenity was still, in most circumstances, outside the protection of the First Amendment.⁴¹ There may be good reason to think the Court is mistaken to deny First Amendment protection to obscene speech,⁴² but if that is true, then this is a mistake the Court largely endorsed, rather than repudiated, in *Stanley*. What the *Stanley* decision *did not* endorse is a First Amendment regime that would leave individuals subject to state control of the book, film, and photo libraries in their own homes. Freezing *Stanley*'s holding in time so that it remains applicable only to the technology of the late 1960s leaves individuals vulnerable to such cultural micromanagement from the outside; it threatens to let *Stanley*'s freedom-of-thought protection become an anachronism, as our living rooms become more and more electronically (and inextricably) intertwined with sites outside of the home, such as the Internet servers from which we download videos and websites.

Consequently, I suggest here that courts bring *Stanley*'s freedom-of-thought protection up-to-date technologically and put it in line with similar privacy protections in Fourth Amendment law by adopting two principles for applying the case in the future. First, they should recognize that it is not always possible to distinguish between the act of privately *possessing and viewing* a film—which *Stanley* held to be protected—and the *act of delivering* that film through channels of commerce—which *Reidel* held not to be protected. There are circumstances where these two activities merge into one another, where one can access and view text or video in one's home *only* while simultaneously transmitting it through wire lines from the outside world. This is particularly true in cloud computing. A web user can see text or video only as it is delivered through the Internet from outside. In such circumstances, *Stanley* should protect the transmission of a film as well as its possession, because it can protect the latter *only* if it also protects the former.

Second, as Judge Roger Gregory recently noted in a dissent in *United States v. Whorley*, even the cases narrowing *Stanley* did not, before the decision in *Whorley*, expressly allow the State to bar or punish “the sending or receiving of obscene materials [that] involve[] neither a

41. See *United States v. Reidel*, 402 U.S. 351, 354 (1971) (“[T]he 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.” (quoting *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (internal quotation marks omitted))).

42. See, e.g., Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS J. OP. 21, 22 (2005) (“*Miller* has long been antithetical to sound First Amendment theory [and] should be overruled.”).

commercial transaction nor any kind of victim.”⁴³ Courts should adopt Judge Gregory’s Fourth Circuit dissent as the majority rule.

Part I of this Article looks closely at some of the electronic extensions of the home I mentioned earlier—the “cloud” of computer space we use on far-away servers, virtual environments like Second Life, and digital books, like those available on Kindle or iPad. It notes that existing precedent in Fourth Amendment law is likely to provide a basis for barring warrantless State searches of many of these new private electronic environments, but that the same cannot be said of the First Amendment rights recognized in *Stanley*. Part II then argues that this technological freezing of *Stanley*’s scope should be abandoned—because it is neither the case that (1) *Stanley*’s freedom-of-thought protection is inappropriate in cyberspace or in the other private electronic spaces available outside the home, nor that (2) there is something unique about the home that makes it the only environment appropriate for *Stanley*’s protection.

I. THE CHANGING NATURE OF THE RIGHT TO READ: PRIVACY RIGHTS IN THE CLOUD, IN eREADING, AND IN VIRTUAL WORLDS

In the early twenty-first century, the cultural life of the home and of private individual reflection is largely pieced together as we draw upon, and react to, a continuous stream of information delivered from the outside world.⁴⁴ As our in-home reading and video watching migrates to electronic spaces, such as the cloud and other virtual environments, does *Stanley*’s protection for freedom of thought and receipt of information move with them? Or does our movement into a future, always-connected home life necessarily entail leaving *Stanley*’s freedom of thought behind?

I will begin to approach such questions by saying more about the three specific examples I have discussed above: cloud computing, virtual environments, and eReaders. I then explain why these environments, although likely denied protection under the current understanding of *Stanley*, may well receive some Fourth Amendment protection against warrantless searches.

A. CLOUD COMPUTING

Increasingly, written documents we once composed on a desk and stored in a drawer, a wooden chest, or a safe are now composed and

43. 569 F.3d 211, 212 (4th Cir. 2009) (Gregory, J., dissenting), *denying reh’g en banc to* 550 F.3d 326 (4th Cir. 2008).

44. See Adam Ostrow, *CES Shows Us the Internet of the Future*, CNN.COM (Jan. 11, 2010), <http://www.cnn.com/2010/TECH/01/11/mashable.ces.wrapup/index.html> ([If the CES convention] is any indication, the 2010s are going to bring about another quantum leap in the way we work, play and communicate as the Internet becomes embedded in virtually everything we do. . . . [T]he Internet [is] becoming as ubiquitous as electricity. . . .”).

stored electronically, in “the cloud.”⁴⁵ “Cloud computing,” as one writer explains the concept, is “a data-hosting method in which information or services can be accessed by users through the [I]nternet.”⁴⁶ “Information,” as a *Wall Street Journal* primer on the subject explains, “is stored and processed on computers somewhere else—‘in the clouds’—and brought back to your screen.”⁴⁷ Like digital information that is loaded onto, and remains on, one’s own computer, the digital information that we summon from the cloud can take any number of forms: It can be a document that the user herself has written or is in the process of writing;⁴⁸ it can be a book or a magazine article written by someone else;⁴⁹ it can be a photograph, a drawing, or an album full of photographs and drawings;⁵⁰ it can be a movie or another video.⁵¹ Moreover, the text or image accessed from distant computer services often gives little clear indication of its origins. The text that one opens and edits in Google Docs, for example, looks almost identical to the way it would look if it were stored on one’s own computer.⁵² Indeed, the cloud can mimic one’s own, in-home computer in another way: Apart from

45. See Fowler & Worthen, *supra* note 29; see also Christopher Soghoian, *Caught in the Cloud: Privacy, Encryption, and Government Back Doors in the Web 2.0 Era*, 8 J. ON TELECOMM. & HIGH TECH. L. 359, 361 (2010) (“Over 69% of Americans now use webmail services, store data online, or otherwise use software applications such as word processing programs whose functionality is in the cloud.” (citing John B. Horrigan, *Cloud Computing Gains in Currency*, PEW RESEARCH CTR. (Sept. 12, 2008), <http://pewresearch.org/pubs/948/cloud-computing-gains-in-currency>)); William Jeremy Robison, Note, *Free at What Cost? Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1203 (2010) (“Widespread consumer embrace of early cloud computing offerings suggests that a meaningful shift is underway, rather than a passing fad.”).

46. Brian X. Chen, *Apple’s New Data Center Likely to Focus on Cloud Computing*, WIRED GADGET LAB (Aug. 17, 2009, 4:33 PM), <http://www.wired.com/gadgetlab/2009/08/apple-cloud/>.

47. See Fowler & Worthen, *supra* note 29.

48. See John Arlidge, *Are Our Heads in the Cloud?*, SUNDAY TIMES (London), Aug. 9, 2009, at 42 (describing a firm that uses the cloud to store and edit “thousands of files” including “spreadsheets, e-mails, contacts” and a table that tracks the progress of current projects); see also GOOGLE DOCS, *supra* note 26 (“Create and share documents on the web and access them from any computer or smart phone.”).

49. See, e.g., *Frequently Asked Questions*, ZINIO MAGAZINE, <http://imgs.zinio.com/faq/cs.htm> (select query “What are the most basic things I need to know to get started?”) (last visited Dec. 17, 2010) (“Zinio gives you two great ways to view your magazines on a computer: *online* using a web browser or *offline* using the Zinio Reader software. The Online Reader gives you the ability to access your magazines from any web browser with Adobe Flash installed.”).

50. See SheldonW, *Media Distribution, Mobile Entertainment and the Cloud*, THE DIGITAL LIFESTYLE (Oct. 17, 2009, 2:10 PM), http://thedigitallifestyle.com/cs/TDL/b/cloud/archive/2009/10/17/mobile_2Doo_computing_2Doo_the_2Doo_cloud.aspx (“I . . . use public cloud services such as Google Apps, Microsoft Workspace Live, Spotify, YouTube, Flickr and Picasa to store, access and share documents, videos, photo’s [sic] and music . . .”); see also PHOTOBUCKET, <http://photobucket.com> (last visited Dec. 17, 2010) (“Upload, manage, and share your photos and videos for FREE!”).

51. See *Company History*, YOUTUBE, http://www.youtube.com/t/company_history (last visited Dec. 17, 2010) (“YouTube allows people to easily upload and share video clips on www.YouTube.com and across the Internet through websites, mobile devices, blogs, and email.”).

52. GOOGLE DOCS, *supra* note 26 (noting that the documents one sees and edits online have a “familiar desktop feel”).

displaying text or image files that are actually on a server miles away, it can also allow use of computer applications, such as a Word processing program, that are actually running on that far-away server.⁵³

Indeed, as R. Bruce Wells points out, these “online applications have already become almost indistinguishable from their offline counterparts.”⁵⁴ And as Wells observes, the cloud’s ability to both substitute for, and perfectly simulate, in-home computing presents a significant challenge to legal rules that offer protection to only one of these environments and not the other.⁵⁵

This is not the only challenge the rise of cloud computing raises for the future relevance of *Stanley*, however. Assume that it is possible to provide computer users with unmistakably clear warnings that a file they are viewing, or a program they are running, is actually coming from a distant server. Would such a warning *by itself* justify denying them the protection *Stanley* offers to private reading or film watching? It is not entirely clear that it would. After all, the activities a person is engaging in by accessing the cloud—reading a text, viewing a picture, or watching a film, all entirely within their home, and all in isolation from other people—are the digital equivalents of those protected in *Stanley*. If, as the Supreme Court stated in *Kyllo v. United States*, the Fourth Amendment protects not only against the government spying on us through “physical invasions of the home,” but also in “their functional equivalent,”⁵⁶ it is plausible that the First Amendment should likewise protect not only against censorship through physical confiscation of books and films from our living rooms, but also the functional equivalent of such confiscation.

Moreover, if the digital, internet-based variants of reading books, viewing pictures, or watching videos were to become the *primary or exclusive* means of engaging in such activities, then *Stanley*’s First Amendment protections would either have to be extended to cover the Internet, or effectively suffer extinction.

B. DIGITAL BOOKS

Another threat to *Stanley*, similar to that generated by the emergence of cloud computing, is the increasing popularity of digital books. One of the most widely-quoted passages in *Stanley* is its insistence that “[i]f the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books

53. See Arlidge, *supra* note 48 (“In the cloud, the internet becomes our operating system. We use online software that runs in our browser to create the files we need.”).

54. R. Bruce Wells, Note, *The Fog of Cloud Computing: Fourth Amendment Issues Raised by the Blurring of Online and Offline Content*, 12 U. PA. J. CONST. L. 223, 233 (2009).

55. *Id.* at 234.

56. 533 U.S. 27, 44 (2001) (Stevens, J., dissenting).

he may read . . .”⁵⁷ But this statement assumed that the act of reading a book “sitting alone in [one’s] own house” was an act isolated from the public world. The act of reading a modern eBook, by contrast, is less immune to outside influence.⁵⁸ In July 2009, under pressure from the copyright owner who did not want unauthorized copies distributed through Kindle, Amazon deleted George Orwell’s *1984* and other eBooks from Kindle users who had purchased and, in some cases, started to read them.⁵⁹ Yet it is easy to conceive of a situation where Amazon or other eBook providers restrict content *not* in response to private legal action, but rather in response to a government order. Imagine, for example, a situation akin to that in *Stanley*, where a person buys and downloads an eBook or digital magazine with arguably obscene contents, at a time before any court has found them to be obscene. If a court later determines that the material is obscene, might the State then *require* a bookseller to remotely delete reading materials that the police could not, under the holding of *Stanley*, confiscate physically? The State, after all, could certainly impose a harsh penalty for, and order the removal of, obscene material from a website over which it has jurisdiction, even if this prevents a person from linking to such material from the computers in their own living rooms. It is, thus, conceivable that officials would likewise have authority to order an eBook provider to take all measures possible on its own servers to put a stop to the transmission of obscene reading materials.

Moreover, while *Stanley* itself concerned obscenity, one can imagine similar questions arising with respect to other forms of speech that are classified as “low value” by courts and, as such, are given little-to-no protection under the First Amendment. Take, for example, books determined to be libelous. In a blog posting responding to Amazon’s remote deletions, Eugene Volokh asked whether Amazon would be justified if, worried about possible lawsuits, it remotely deleted an already downloaded digital book that “contains a libel—or discloses information that invades someone’s privacy.”⁶⁰ Such a question has important First Amendment implications: Although defamation exposes one to civil liability, not criminal punishment, the Supreme Court has long made it clear that state tort rules allowing people to sue for defamation can infringe First Amendment rights if they restrict or chill

57. 394 U.S. 557, 565 (1969).

58. See Ozer & Lynch, *supra* note 30, at 3 (“Digital book providers can easily track what books an individual considers, how often a given book is read, how long a given page is viewed, and even what notes are written in the ‘margins.’”).

59. See Brad Stone, *Amazon Erases Two Classics from Kindle. (One Is ‘1984.’)*, N.Y. TIMES, July 18, 2009, at B1.

60. See Eugene Volokh, *(Hypothetical) Removal of Libelous Books from Customers’ Kindles?* THE VOLOKH CONSPIRACY (July 19, 2009, 7:39 PM), <http://volokh.com/posts/1248046786.shtml>.

protected speech.⁶¹ While the Court's concerns about such restriction and chilling effects have, in the past, been focused on public discussion,⁶² it is conceivable that the interaction of emerging eReader technology could give rise to a new kind of chilling—one which causes book providers to remotely erase or edit the contents of the private libraries that *Stanley* was meant to shield.

While *Stanley* was, itself, about obscenity, the right it found in the First Amendment—"the right to be free from state inquiry into [and control over] the contents of [one's] library"⁶³—might well protect an individual from state measures aimed at cleansing that library not only of obscenity, but also of other types of low-value speech.⁶⁴

The State would arguably violate one's right to read the books of one's choice if it required a book provider to remotely delete eBooks one has already downloaded to a device. Drawing on cases holding *Stanley* inapplicable to the Internet, courts might likewise hold *Stanley* to be inapplicable here, because such electronic books, unlike their physical counterparts, are stored in a device that remains linked and accessible to a company in the outside world that has contractually retained some control over the nature of the book. As Julie Cohen pointed out in 1996, when increasing amounts of reading materials were moving online, "[t]he same technologies that enable readers to access digitally stored works . . . also . . . enable copyright owners to generate precise and detailed records of such access."⁶⁵ As Nicole Ozer and Jennifer Lynch

61. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.").

62. See *id.* at 269 ("The general proposition that freedom of expression upon *public* questions is secured by the First Amendment has long been settled by our decisions." (emphasis added)).

63. 394 U.S. 557, 565 (1969).

64. This issue has hardly produced any case law, since, outside of obscenity, the Government has not prosecuted people for the possession or viewing of speech in their own homes. In *State v. Poe*, the Idaho Supreme Court rejected the idea that *Stanley*'s holding would apply to "the use of fighting words" uttered within the home (although it held that the statute at issue was overbroad, because it criminalized some speech that, unlike fighting words, was protected). 88 P.3d 704, 720–21, 723 (Idaho 2004) (internal quotation marks omitted). The fighting words analysis is different from that of obscenity, however, because the harm that fighting words cause to third parties—the violent response they tend to provoke—can be just as significant whether such words are used inside or outside the home. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining fighting words as words "which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace," and making no reference to whether they are said in the home or in public). Moreover, the punishment, in that case, is directed at someone who is speaking, not simply listening to or obtaining information. Someone who is reading or watching defamatory information or commercial speech, by contrast, may have a claim that—like the defendant in *Stanley*—she should be able to choose to continue doing so in her own home, free from state restriction.

65. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 983 (1996).

have observed more recently, current eBook providers take advantage of such monitoring capacities: Amazon, for example, “retains information about the books, magazine subscriptions, newspapers and other digital content on the Kindle and the reader’s interaction with that content.”⁶⁶

The lower court cases denying *Stanley*’s protections to the Internet suggest that new digital books and videos fall beyond the scope of *Stanley* when they are transmitted by, and remain controllable through, electronic pathways.⁶⁷ If material is unprotected when it is accessed on an interactive computer service connected to channels of interstate commerce,⁶⁸ one would guess this also to be true when such material is accessed on an interactive mobile device. But as noted above, this would be an odd result in a world where most of our reading is done on eReaders. If the library that *Stanley* vigorously protected from state control soon becomes a library of eBooks, instead of paperbacks and hardcovers, the protection that *Stanley* offers to that library should survive this technological shift.

C. VIRTUAL WORLDS

Existing computing technology not only allows individuals to swap their file cabinets and bookshelves for virtual equivalents, it allows them to build or buy an entire virtual house. Individuals who can only afford to rent a small studio apartment in the real world might be able to purchase a custom-built mansion for themselves in a virtual world. The website for the virtual world, Second Life, for example, invites users to “buy virtual land and build your dream house”⁶⁹ and offers premium members “[y]our own private virtual home.”⁷⁰ Individuals cannot, of course, literally transport their bodies into such computer-simulated homes. The virtual environments currently available to consumers are not yet immersive enough to give them the illusion of doing so. Rather, individuals “enter” and explore these computer-generated houses by controlling and watching an animated character called an “avatar” on their computer screens.⁷¹

While the houses that participants create for their avatars are just computer simulations, they have many of the characteristics and serve many of the purposes of physical homes. Like physical land, virtual “[r]eal estate is created or acquired, subdivided, leased, taxed and

66. Ozer & Lynch, *supra* note 30, at 3.

67. See *supra* text accompanying notes 17–20.

68. See *supra* text accompanying notes 17–20.

69. See *What Is Second Life?*, SECOND LIFE, <http://secondlife.com/whatis> (follow “Get Settled” hyperlink) (last visited Dec. 17, 2010).

70. See *Become a Second Life Premium Member*, SECOND LIFE, <http://secondlife.com/landing/premium> (last visited Dec. 17, 2010).

71. See *Avatar*, SECOND LIFE, <http://secondlife.com/whatis/avatar> (last visited Dec. 17, 2010).

transferred in the game.”⁷² Like physical homes, virtual homes also play host to intimate activity. For example, acting through their avatars, individuals can have conversations with private guests, read a digital book on a virtual sofa,⁷³ or watch a video on a wide-screen television.⁷⁴ They can and do engage in virtual sex.⁷⁵ As Joshua Fairfield writes, the “anonymity” people have come to expect in “novel online environments has caused people to move their intimate lives online”⁷⁶

To what extent are these intimate virtual activities protected by *Stanley*? If, as I have noted earlier, the existing reading of *Stanley* offers no protection to obscene text or imagery when it is accessed or transmitted through “an interactive computer service,”⁷⁷ then expressive activity one engages in, or acts as an audience for, in such a virtual home is far more vulnerable to state monitoring or censorship than is the equivalent activity in a brick-and-mortar home. Even a virtual mansion on a private island designed to provide maximum seclusion for its inhabitants would offer *none* of the constitutional shielding that *Stanley* provides to an old-fashioned film watcher or book reader in a tiny rented apartment.

D. FOURTH AND FIRST AMENDMENT PROTECTION FOR PRIVATE ELECTRONIC ENCLAVES IN PUBLIC SPACE

If *Stanley* becomes less and less applicable to home life, as that life becomes more and more inextricably tied to the Internet, then what is to be done? One possibility, as I have already noted, is to reproduce in First Amendment law a revolution that has already occurred in Fourth

72. Sarah Howard Jenkins, *Application of the U.C.C. to Nonpayment Virtual Assets or Digital Art*, 11 DUQ. BUS. L.J. 245, 247 (2009) (quoting Sean F. Kane, *Asset Creation, Seclusion and Money Laundering in the Virtual World*, INTERNET L. & STRATEGY, July 2006, at 1) (internal quotation marks omitted).

73. See Elizabeth Corcoran, *Walk on the Virtual Side*, FORBES (Dec. 4, 2006), http://www.forbes.com/2006/12/03/second-life-online-oped-cz_ec_1204valleyletter.html; Juanita Deharo, *Virtual Books—A Change in Direction for Second Edition*, JUANITA DEHARO (July 10, 2020, 9:16 PM), <http://juanitadeharo.blogspot.com/2010/07/virtual-books-change-in-direction-for.html>; *Second Life Marketplace*, SECOND LIFE, <https://marketplace.secondlife.com/p/Candy-CouchSofa-and-Coffee-Table/1232818> (last visited Dec. 17, 2010) (a site offering virtual sofas, coffee tables, and other items for one’s virtual living room in Second Life).

74. See e.g., *Punk Hobo’s Nest*, X STREET SECOND LIFE, <https://www.xstreetsl.com/modules.php?name=Marketplace&file=item&ItemID=884742> (last visited Dec. 17, 2010) (selling virtual sofas and television sets to Second Life residents).

75. See MICHAEL RYMASZEWSKI ET AL., SECOND LIFE: THE OFFICIAL GUIDE 11 (2d ed. 2008) (“Second Life gives you the freedom to pursue your dreams and interests. For some residents, this means having as much virtual sex as possible; for others, it may mean attending a religious service or playing combat games in spaceships they helped build.”).

76. Joshua Fairfield, *Escape into the Panopticon: Virtual Worlds and the Surveillance Society*, 118 YALE L.J. POCKET PART 131, 134 (2009), <http://www.yalelawjournal.org/ylj-online/constitutional-law/741-escape-into-the-panopticon-virtual-worlds-and-the-surveillance-society>.

77. See *supra* text accompanying notes 17–20.

Amendment law. The Supreme Court's 1967 decisions in *Katz v. United States*⁷⁸ and in *Berger v. New York*⁷⁹ expanded constitutional limits on government searches so that they shielded not only the space inside of the home, but also electronic channels of communication through which individuals carried on private conversations or other private activity. *Berger* made it clear that the Fourth Amendment did not allow warrantless electronic eavesdropping into the conversations people had over phone lines.⁸⁰ *Katz* then expressly overruled the Court's earlier 1928 holding in *United States v. Olmstead*, finding that the Fourth Amendment protected "people, not places" and, more specifically, could shield certain areas of public space in which people had an expectation of privacy, such as the telephone booth that had been monitored with a bugging device in *Katz*.⁸¹

Of course, in order for this Fourth Amendment revolution to provide a good model for a possible technological updating of *Stanley*, it must cover not only conversations over phone lines and in phone booths, but also cloud computing, eReaders, and virtual worlds. There are two reasons to think that, unlike the First Amendment protection of *Stanley*, modern Fourth Amendment jurisprudence might plausibly be viewed by courts as covering the "interactive computer services," or the mobile device services, that make such emerging electronic spaces possible.

One is simply that, as a result of *Katz* and *Berger*, the Fourth Amendment now covers phone communications that travel through wires, and thus, is more likely than *Stanley* to protect the data that flows to computers over those same wires. To be sure, courts have not yet reached a firm conclusion about the Fourth Amendment status of internet communications. The Court of Appeals for the Ninth Circuit recently stated, "The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question."⁸² As Orin Kerr notes, "the case law applying the Fourth Amendment to the Internet remains sparse."⁸³ Still, the few courts that have addressed the question have found that the Fourth Amendment likely does apply to the contents of e-mail and text messages.⁸⁴

78. 389 U.S. 347 (1967).

79. 388 U.S. 41 (1967).

80. *Id.* at 54–55.

81. 389 U.S. at 351–53.

82. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 904 (9th Cir. 2008), *rev'd*, 130 S. Ct. 2619 (2010).

83. Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 *STAN. L. REV.* 1005, 1029 (2010).

84. *See, e.g.*, *Warshak v. United States*, No. 1:06-CV-357, 2006 WL 5230332, at *5 (S.D. Ohio July 21, 2006) (granting an injunction on the grounds that Warshak was substantially likely to succeed in his claim that he had a "reasonable expectation of privacy in his personal emails"), *vacated on other*

The Supreme Court has thus far avoided weighing in on the subject. Its decision this past term in *City of Ontario v. Quon* did not require such an answer. Since the Justices found that a police department review of its employees' text messages was constitutionally permissible *whether or not* such a review counted as a Fourth Amendment "search," they did not have to decide whether it did.⁸⁵ The Court did, however, hint strongly in dicta that there is good reason to find the Fourth Amendment applicable to e-mail and other electronic content: "Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."⁸⁶ That consideration, it added "might strengthen the case for an expectation of privacy" of the kind necessary to trigger Fourth Amendment scrutiny.⁸⁷ Even if employees lacked such a reasonable expectation of privacy in an employer-provided e-mail or text messaging system, the Court appeared to assume that they would still likely be able to find such privacy in their own personal cell phone and Internet accounts.⁸⁸

A second reason the Fourth Amendment may well apply—not only to internet communications, but also to storage spaces in the cloud—is that the courts have extended these protections to physical spaces that are functionally equivalent to such storage spaces. They have held that the Fourth Amendment bars suspicionless searches of purses,⁸⁹ knapsacks or book bags,⁹⁰ storage lockers⁹¹ and rented apartments.⁹² As the Supreme Court declared, in explaining why a student's purse should not be subject to arbitrary examination by school authorities, students "may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have

grounds, 532 F.3d 521 (6th Cir. 2008); *United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) ("[T]he transmitter of an e-mail message enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant."); *see also Kerr, supra* note 83, at 1026–29 (noting that cases addressing the status of e-mail or other internet content have generally found that the Fourth Amendment applies, while cases addressing the status of non-content information have generally denied Fourth Amendment protection).

85. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) ("[W]e assume several propositions *arguendo*: First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; Second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment . . .").

86. *Id.*

87. *Id.*

88. *Id.* (explaining that there may not be an expectation of privacy when using company equipment, because employees who make use of mobile devices for personal matters can purchase devices on their own for such matters).

89. *See New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

90. *See Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 353 (8th Cir. 2004).

91. *See United States v. Hamilton*, 538 F.3d 162, 169 (2d Cir. 2008) ([Fourth Amendment] privacy interests have been found with respect to . . . storage lockers").

92. *See Johnson v. United States*, 333 U.S. 10, 16–17 (1948).

necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.”⁹³ This point applies with equal force to the spaces we use to store, or make portable, our private electronic files. In a recent comment on the Fourth Amendment’s potential application to the cloud, David A. Couillard points out that much of the material people place in such electronic storage space is at least as private as the material they place in familiar physical containers that the Fourth Amendment has insulated against arbitrary searches: They use the cloud to store private journals, calendars, photographs, and drafts of written work they are not yet ready to share.⁹⁴ If, as the Supreme Court has recognized, students’ backpacks are “‘homes away from home’ for schoolchildren,” then why not also a “‘digital account containing many of the same types of materials, stored in the cloud.’”⁹⁵

The same argument likely justifies extending Fourth Amendment protection to eReaders. A government official wishing to search a person’s eBook—whether by seizing and examining it, or by examining its contents remotely—should have to get the same warrant before doing so that he or she would need to search a person’s book bag. Admittedly, courts have held that even where document or image files have been downloaded to one’s own computer, they are not covered by a “reasonable expectation of privacy” if they are accessible to outsiders through a file-sharing program.⁹⁶ As the Ninth Circuit stated in 2007, “privacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential and that the systems administrators may monitor communications transmitted by the user.”⁹⁷ To the extent that those who download eBooks are aware that these books may still be accessed, deleted, or modified by the company that provided them, this arguably reduces their expectations of privacy. However, to the extent one’s electronic library is accessible to outside monitoring or control, it is the eBook provider, not the public at large, that has such power. Moreover, the privacy of a person’s reading choices has been found by courts to receive significant First Amendment

93. *T.L.O.*, 469 U.S. at 339.

94. David A. Couillard, Note, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205, 2219–21 (2009).

95. *Id.* at 2220–22 (citing *Little Rock Sch. Dist.*, 380 F.3d at 353); see also Kerr, *supra* note 83, at 1021 (“A busybody landlord or building superintendent might enter an apartment to look around . . . [This] possible invasion[] does] not eliminate Fourth Amendment protection in the home, nor should [its] online equivalent[] eliminate that protection in virtual spaces.”).

96. See, e.g., *United States v. Borowy*, 595 F.3d 1045, 1048 (9th Cir. 2010) (“Borowy . . . was clearly aware that LimeWire was a file-sharing program that would allow the public at large to access files in his shared folder unless he took steps to avoid it. . . . Borowy’s subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access.” (internal citation omitted)).

97. *United States v. Heckencamp*, 482 F.3d 1142, 1147 (9th Cir. 2007).

protection. As the Colorado Supreme Court recently said in its decision in *Tattered Cover v. City of Thornton*, “Any governmental action that interferes with the willingness of customers to purchase books, or booksellers to sell books . . . implicates First Amendment concerns.”⁹⁸

The argument for applying Fourth Amendment protections to virtual world homes is perhaps less clear, since they are less analogous to physical homes than virtual containers are to physical storage spaces. One does not, after all, live, sleep, and eat in a virtual home. Yet if people purchase such virtual homes with the understanding that they can use them for intimate activity, and can do so while electronically shielded from outside observation, it is at least plausible that they should be as protected by the Fourth Amendment in that context as they are in a rented apartment or a hotel room.⁹⁹

There are, however, some concerns that arise when the Fourth Amendment is applied in this context, and Couillard discusses the two that are most likely to do so. First, the government must get a search warrant, and in some cases, overcome other legal hurdles only where a person has “a reasonable expectation of privacy.”¹⁰⁰ The Court has often held that people cannot have such a reasonable expectation in areas they leave open to public observation.¹⁰¹ And one might claim that this is true of Web-based storage areas or digital book shelves, which, unlike their physical counterparts, are not covered and obscured by a bag or enclosure that makes them invisible. As Couillard points out, however, most personal storage areas in the cloud are enclosed by other barriers, such as a password protection system or encryption of their contents.¹⁰² These protections may be breached by a skilled computer expert.¹⁰³ Yet this does not make them any less privacy-protecting than the latch on a purse or the lock on a safe, which may likewise be overcome by a pickpocket or lock-picking expert.¹⁰⁴

Second, even if contents stored in a private records file are safeguarded against observation by the world, they may be left open to observation by a specific third party—namely, the third party to whom

98. 44 P.3d 1044, 1052 (Colo. 2002).

99. See, e.g., *Johnson v. United States*, 333 U.S. 10, 16–17 (1948) (excluding evidence gained from warrantless search of a hotel room); see also *United States v. Owens*, 782 F.2d 146, 149 (10th Cir. 1986) (“It is settled that a motel guest is entitled to constitutional protection against unreasonable searches of his or her room.”).

100. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 635 n.8 (1991) (“[W]herever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.” (citation omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 9 (1967))).

101. See *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring) (“[O]bjects, activities, or statements that [a man] exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.”).

102. See Couillard, *supra* note 94, at 2225–26.

103. See *id.* at 2226.

104. See *id.* at 2225–26.

an individual entrusts the management of this information.¹⁰⁵ For example, while the general public does not have access to a person's private bank account information, her bank does.¹⁰⁶ While the public cannot easily find out every phone number she dials, her phone company can.¹⁰⁷ Under the third-party doctrine in Fourth Amendment law, the courts allow the government to obtain such information from banks and phone companies without first obtaining a warrant from a neutral magistrate.¹⁰⁸ In short, once one has chosen to share information with third parties, it should be clear that these third parties may then share it with government officials.¹⁰⁹

This doctrine, one might argue, also applies to the information we bring to the cloud, store in an eReader, or reveal in virtual world activities, because all of this electronic behavior can generally occur only with the assistance of a third party willing to host some of our data on its servers, or in the case of eReaders, to license to us, and perhaps update, digital books from its content delivery systems. The material most consumers store in the cloud, for example, is stored and accessed pursuant to license agreements they enter into with companies like Google or Apple.¹¹⁰ Although many people view the digital books they purchase for their Kindle as equivalent to the physical books they might purchase from Amazon, one significant legal difference is that most of these books are merely "licensed." As Amazon's current Kindle wireless agreement states: "Digital Content will be deemed licensed to you by Amazon under this Agreement unless otherwise expressly provided by

105. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

106. See *United States v. Miller*, 425 U.S. 435, 443 (1976) ("[A bank] depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that . . . the confidence placed in the third party will not be betrayed." (citation omitted)).

107. See *Smith*, 442 U.S. at 742 (stating that everyone who uses a phone knows that they "convey" phone numbers to the telephone company" when they dial them, and finding there is no reasonable expectation of privacy in these dialed numbers).

108. See *supra* notes 105-07 and accompanying text.

109. See *supra* notes 105-07 and accompanying text.

110. See *Arlidge*, *supra* note 48 (explaining how customers turn to services from Google or Apple to upload, store, and access documents). Indeed, some commentators appear to have assumed that the third-party doctrine would likely allow the government to obtain information stored in the cloud without the need for a warrant. See, e.g., Jane Horvath, *Cloud Computing Issues*, in ELEVENTH ANNUAL INSTITUTE ON PRIVACY AND DATA SECURITY LAW 263, 265 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 22883, 2010) ("[T]he Supreme Court[,] in [*United States v. Miller*], set a precedent that may affect the protection of data in the Cloud."); Robison, *supra* note 45, at 1226 ("Computer networks necessarily involve a third-party service provider . . .").

Amazon.”¹¹¹ Likewise, one’s virtual world activities can occur only because they are “rendered” by the powerful servers of the company offering such a simulated existence. Second Life, for example, is constantly created and recreated by the company, Linden Lab. And, as Josh Fairfield warns, virtual world operators receive and feel bound to “comply with government requests for call details, wiretaps, stored chatlogs, and other business records,” which may include records of the activities occurring in one’s virtual house.¹¹² And the third-party doctrine may leave us powerless to raise an effective constitutional challenge.

The third-party doctrine, however, does not automatically open to government monitoring all the information we make available to another party. In the first place, when the Supreme Court denied that a bank’s disclosure of individual records constituted a Fourth Amendment search, it took pains to stress that these records were “not [the] respondent’s ‘private papers.’”¹¹³ Many of the documents a person stores in the cloud *do* consist of such private papers.¹¹⁴ And one’s personal library is often regarded as possessing the same privacy, even where it consists of books written by others. Moreover, the third-party doctrine has also been limited, in certain circumstances, where one rents or leases personal space from another party. Consider the example of a house or apartment that is rented, rather than owned. In most circumstances, it is not merely the person living in the house or apartment, but also the landlord who has a key. Yet, as Jonathan Zittrain points out, the Court found in 1961, even before the *Katz* decision, that “a police search of a rented house for a whiskey still was a violation of the Fourth Amendment privacy rights of the tenant, even though the landlord had given permission for the search. Information stored in the cloud deserves similar safeguards.”¹¹⁵ More specifically, there is a distinction in third-party doctrine between third-party intermediaries who we trust to regularly access or manage information, as we trust banks to oversee our accounts, and other third-party intermediaries, like a landlord, who merely provide us a space for us to manage our own affairs.¹¹⁶ As David Couillard writes, the

111. See *Kindle License Agreement*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200144530> (select hyperlink “Digital Content”) (last updated Feb. 9, 2009); see also Michael Seringhaus, Note, *E-Book Transactions: Amazon ‘Kindles’ the Copy Ownership Debate*, 12 YALE J.L. & TECH. 147, 149 (2009) (noting that Amazon’s license terms “prevent buyers from actually owning books” and analyzing whether courts might nonetheless construe the contract between Amazon and the book purchasers as a sale).

112. Fairfield, *supra* note 76, at 132.

113. *United States v. Miller*, 425 U.S. 435, 440 (1976) (citing *Boyd v. United States*, 116 U.S. 616, 622 (1886)).

114. See *supra* text accompanying note 94.

115. Jonathan Zittrain, Op-Ed., *Lost in the Cloud*, N.Y. TIMES, July 20, 2009, at A19 (citing *Chapman v. United States*, 365 U.S. 610 (1961)).

116. See *Miller*, 425 U.S. at 442 (“[D]ocuments . . . including financial statements and deposit slips . . . contain only information voluntarily conveyed to the banks and exposed to their employees in

companies that give us electronic space in the cloud are more like the latter:

[T]he service provider has a copy of the keys to a user's cloud "storage unit," much like a landlord or storage locker owner has keys to a tenant's space, a bank has the keys to a safe deposit box, and a postal carrier has the keys to a mailbox. Yet that does not give law enforcement the authority to use those third parties as a means to enter a private space.¹¹⁷

Courts would likely analyze each space on its own terms, so one cannot assume that eReaders and virtual world homes will be treated in the same way as are storage spaces in the cloud. But there are plausible Fourth Amendment arguments for protecting each of these spaces on the grounds that, for each, the third-party intermediary is providing the space—and perhaps, in the case of eReaders, a stockpile from which to obtain content for that space—but is not managing a person's choices or informational activities in that space.

We find another, similar basis for shielding the details of our virtual activities in Orin Kerr's recently proposed framework for applying Fourth Amendment law to the Internet.¹¹⁸ Cyberspace, he argues, forces courts to recreate—in virtual environments—the distinction they have traditionally drawn in the brick-and-mortar world between enclosed spaces, such as the home, or a purse, or an envelope, that we use to wall off and shield our private activities, and the open spaces that we share with and that can be seen by others.¹¹⁹ In Fourth Amendment jurisprudence, our acts in confidential "inside" environments are generally constitutionally shielded from officials, whereas our acts in "outside" areas can be freely observed.¹²⁰ This distinction between inside

the ordinary course of business."); *Warshak v. United States*, 490 F.3d 455, 470 (6th Cir. 2007) ("[The third party doctrine] does not necessarily apply . . . to an intermediary that merely has the ability to access the information sought by the government. Otherwise phone conversations would never be protected, merely because the telephone company can access them; . . . storage lockers would never be protected, by virtue of the . . . storage company's ability to access them."), *vacated on other grounds* by 532 F.3d 521 (6th Cir. 2008); *see also* *Com v. Weis*, 348 N.E.2d 787, 789 (Mass. 1976) ("[T]he authority of [an] attendant, if any, to search on behalf of his employer d[oes] not give him power to authorize a police search.").

117. *See* Couillard, *supra* note 94, 2237–38. One might argue that this is not the case when a company providing storage space or access to a particular application on the cloud expressly reserves the right to access the *content* of users' communications, documents, or other files. As Robison notes, such provisions, allowing third-party companies to access content that can then be used to provide users with targeted advertising, are not uncommon. *See* Robison, *supra* note 45, at 1213 ("Many cloud providers rely extensively on advertising revenue [and use c]ontextual[ized] advertising [that] requires access to content.").

118. Kerr, *supra* note 83.

119. *Id.* at 1007 ("[C]ourts should try to apply the Fourth Amendment in the new environment in ways that roughly replicate the role of the Fourth Amendment in the traditional physical setting.").

120. *Id.* at 1010–12 ("[T]he police are permitted to access anything exposed to the general public. . . . On the other hand, entering enclosed spaces ordinarily constitutes a search that triggers the Fourth Amendment.").

and outside, however, has little significance in cyberspace.¹²¹ Thus, Kerr proposes that courts rely, in Internet cases, on a functionally equivalent distinction between the *type of information* that people would generally choose to keep in a private, inside environment when disseminated in the physical world (content information) and the type of information that they would probably leave open to observation (non-content information, such as the address and routing information on the front of an envelope).¹²² As Kerr notes, “the content/non-content distinction captures the basic function of the inside/outside distinction.”¹²³ Whether the Fourth Amendment is protecting one’s sanctuaries in physical space—for example, one’s house, briefcase, or purse—or the content of one’s files and communication in cyberspace, it is, in both cases, keeping the State from helping itself to “the contents of the person’s mind that he normally keeps to himself or only shares with a trusted few.”¹²⁴ Such Fourth Amendment protection for “the contents of [one’s] mind” would almost certainly cover the electronic documents we compose, the e-books we read, and the videos we privately watch.

This is not to say that there is no room for skepticism or uncertainty here.¹²⁵ My point is not that Fourth Amendment protection is certain in each of these spaces, but that it would be an entirely plausible extension of existing Fourth Amendment law. By contrast, the option of extending *Stanley* to the cloud or to virtual world homes seems entirely foreclosed by multiple courts’ refusal to extend it to interactive computer services that involve the Internet.¹²⁶

Given courts’ persistent refusal to extend *Stanley*’s holding to any space that has even slight contact with public spaces or channels of communications,¹²⁷ it is quite likely that reading and video-watching in virtual environments would be far less protected than the reading we do in a physical home. But why? People do not have to revert to primitive, low-tech, and entirely in-home forms of communication or cultural exploration to avoid unfettered monitoring. Fourth Amendment protections against warrantless wiretapping now extend to phone lines and broadband connections. Why, then, should individuals have to confine themselves to increasingly outmoded technologies, disconnected from the information superhighway, to benefit fully from the protection that the Constitution offers for freedom of thought? Why should the

121. *Id.* at 1012 (“[On the] Internet, the inside/outside distinction no longer works.”).

122. *Id.* at 1017–18.

123. *Id.* at 1018.

124. *Id.*

125. *See, e.g., supra* notes 110, 117 (citing authors who believe that, under the third-party doctrine, government access to data stored in the cloud would not likely count as a Fourth Amendment search).

126. *See supra* text accompanying notes 17–20.

127. *See supra* text accompanying notes 17–20.

same low value speech that is protected in an old book or an eight-millimeter film be unprotected when it is read in a digitally downloaded eBook or video, stored or accessed in virtual space? The next Part examines some possible answers to this question, and concludes that none of them are persuasive.

II. REDRAWING FIRST AMENDMENT BOUNDARY LINES: WHY THE PRIVATE-PUBLIC DISTINCTION SHOULD NOT DEFINE THE BORDERS OF *STANLEY V. GEORGIA*

Perhaps the most likely starting point for explaining why there is a difference in the scope of *Katz*'s Fourth Amendment protection and *Stanley*'s First Amendment protection is the difference in what "privacy" each safeguard protects. Both can be described as protecting the privacy that individuals find in the home (and in Fourth Amendment law, in other private environments)—but they each protect privacy in a different sense of the word. The Fourth Amendment largely protects *information* privacy: It protects the individual against observation, monitoring, and surveillance. As Fred Cate notes, the Fourth Amendment is "the primary constitutional limit on the government's ability to obtain personal information about individuals."¹²⁸ It does so by "plac[ing] obstacles in the way of a too permeating police surveillance."¹²⁹ Its protection of the home, for example, is first and foremost a protection against unfettered government gathering of "*information* regarding the interior of the home."¹³⁰ It keeps the home "safe from prying government eyes."¹³¹ By contrast, the State's constitutional violation in *Stanley* was not that it observed or watched something it was forbidden to search for without a warrant.¹³² The police did, to be sure, find the obscene movie Stanley possessed during a search of his house—but that search occurred only *after* they had acquired a warrant from a neutral magistrate based upon probable cause that Stanley was involved in illegal bookmaking activities.¹³³ The State did, however, impermissibly infringe Stanley's privacy in another sense of the word: by limiting his *decisional* privacy.¹³⁴ As the Court declared, it is for each individual to determine how to "satisfy his intellectual and emotional needs in the privacy of his own

128. Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 451 (2008).

129. *United States v. Di Re*, 332 U.S. 581, 595 (1948).

130. *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (emphasis added).

131. *Id.* at 37.

132. *See* 394 U.S. 557, 559 (1969).

133. *Id.* at 558.

134. *See* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1208 (2005) ("[T]he general term 'privacy' encompasses three separate 'clusters.' 'Substantive' or 'decisional' privacy is the constitutional right to make certain fundamental decisions free from government scrutiny or interference.").

home.”¹³⁵ The constitutional violation in *Stanley* occurred not because the State impermissibly monitored Stanley as he read or watched movies, but because it actively thwarted and punished *certain decisions* Stanley made about which books to read or which films to watch.¹³⁶

This difference suggests one hypothesis for why the reach of *Stanley* might be more limited than that of Fourth Amendment privacy protection: Our right to almost unfettered control over the shape and content of our own living environment, one might argue, can only reach the extreme form it took in *Stanley* in an environment that belongs *wholly* to the individual, or group of individuals, who claims this nearly complete sovereignty of cultural choice. When that individual moves, even slightly, into the shared public space one finds over the phone wires, on the Internet, or in the physical public square, her degree of control is necessarily lessened so that her interests may be reconciled (usually with some government coordination) with those of others who share the environment. In short, once she leaves the castle that is her home, her right to control her surroundings and to make her own decisions must now leave some room for the assertion of community values that have no place in a purely solitary environment. By contrast, the Fourth Amendment’s *information* privacy protections are more portable and are better able to coexist with social interaction and to harmonize different interests. Indeed, they exist to shield not only the individual’s *own* decisions about how to shape her personal environment, but also her numerous communications with others.¹³⁷

There is, however, a problem with this explanation: Even if *Stanley*’s right of decisional privacy to engage in certain forms of expression or intellectual exploration is and must be more limited in scope than Fourth Amendment rights of information privacy, this does not clearly explain why it must be limited to one’s brick-and-mortar home. Even if *Stanley*’s right to uncensored thinking, reading, and viewing must be scaled back in environments we share with the community, that does not mean it should also be weakened in other, more private enclaves within public space. If *Stanley* is meant to protect our solitary cultural explorations, then it should protect not only a person’s in-home reading or film-viewing, but also the environments where she stores information, entirely for her own reading and viewing, within the cloud.¹³⁸ Or a virtual home or apartment

135. *Stanley*, 394 U.S. at 565.

136. This is why the Court emphasized in *Stanley* that the First Amendment “means that [the] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.” *Id.* Its concern was not just about State attempts to watch our behavior, but about State efforts to control our behavior. *Id.*

137. *Berger v. New York*, 388 U.S. 41, 59, 62–63 (1967); see also *Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979) (holding unconstitutional under the Fourth Amendment a program of stopping and checking certain drivers without reasonable suspicion).

138. See *supra* Part I.A–B.

accessible only to herself (and the Internet Service Provider that plays the role of virtual landlord).¹³⁹ Or a stream of data that travels—in the form of electrons—through public wires, but takes the form of an obscene text, image, or movie only once it reaches an in-home computer.¹⁴⁰

What then are the possible explanations for why *Stanley*'s First Amendment protection is so much more confined than *Katz*'s Fourth Amendment protection, and why, unlike the latter, it provides no protection to virtual spaces or electronic channels of communication? I will here consider the two most plausible ones: (1) the “character of the public environment” argument, which contends that extending *Stanley*'s freedom-of-thought protection to public space is at odds with the State's obligation to protect public culture or to avoid supporting activities in public space that are at odds with communal morality; and (2) the “unique status of the home” argument, which emphasizes that *Stanley*'s protection is rooted in the unique status of our physical homes and—for reasons of logic, social convention, or both—cannot be applied to other environments that lack the home's long-established historical role as a haven from external observation and control. These arguments are not mutually exclusive, but it is helpful to analyze each separately, since they can each stand on their own.

A. *STANLEY* AND THE CHARACTER OF THE PUBLIC ENVIRONMENT

As noted above, one key argument against extending *Stanley* is that it would tie the government's hands in certain realms of public life that the government must be free to regulate in order to preserve public safety or otherwise to serve the public interest. This is the most plausible logic for Chief Justice Burger's claim, in *United States v. Orito*¹⁴¹ and *Paris Adult Theatre I v. Slaton*,¹⁴² that there is no “‘zone’ of ‘privacy’ that follows a distributor or a consumer of obscene materials wherever he goes.”¹⁴³ But where, precisely, is the harm or legal error in recognizing such a zone?

First, one possible reason that First Amendment privacy rights are more strictly confined to the home than are Fourth Amendment privacy rights lies in the textual differences between these amendments. The

139. See *supra* Part I.C.

140. See Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1251 (2007) (“[M]essages are broken up into small packets of data, which are transferred independently by each router they encounter along the way, and then reassembled.”).

141. 413 U.S. 139, 142–43 (1973).

142. 413 U.S. 49, 66 (1973) (“[W]e have declined to equate the privacy of the home relied on in *Stanley* with a ‘zone’ of ‘privacy’ that follows a distributor or a consumer of obscene materials wherever he goes.”).

143. *Id.*

Fourth Amendment's terms do not bar unreasonable monitoring only of a person's "house[]," but also of her "person[], . . . papers and effects."¹⁴⁴ It would be difficult, given this constitutional language, to evict the Fourth Amendment from public spaces when such spaces are the territory into which people bring themselves, their papers, and their effects. By contrast, the First Amendment contains no such restriction. But neither does it limit "freedom of speech" nor any of its corollaries to the home.¹⁴⁵ Indeed, when an individual leaves her home and ventures into public space, she takes with her the mental powers of perception, thought, and imagination that *Stanley* was meant to protect. The logic of *Stanley* seems to apply just as forcefully to private thought in public space, as well as to private speech or cultural exploration in cyberspace. This specific language of the Bill of Rights therefore, does not, by itself, provide an answer to why First Amendment privacy should have a narrower scope than that of the Fourth Amendment.

A second explanation lies in the commercial character of the Internet and of other channels for electronic data. The Supreme Court first began limiting *Stanley* even before internet communications were widespread, by emphasizing the government's power to regulate commercial activity. This was a central theme in Justice White's majority opinion in *United States v. Reidel*.¹⁴⁶ It distinguished *Stanley*'s viewing of pornographic films from *Reidel*'s commercial trade in pornography, noting that "[w]hatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to" establish a "right to do business in obscenity and use the mails in the process."¹⁴⁷ Chief Justice Burger then repeated this theme in *United States v. Orito*,¹⁴⁸ *United States v. 12 200-ft. Reels of Super 8mm. Film*,¹⁴⁹ and *Paris Adult Theatre I v. Slaton*.¹⁵⁰ But the Chief Justice also expressly stated something that had been, at most, merely hinted at in White's earlier opinions. He explained that *Stanley*'s freedom-of-thought protection was inapplicable not only to *commercial* activity in the public sphere, but to *all* activity in the public sphere, even

144. U.S. CONST. amend. IV.

145. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the government for a redress of grievances.").

146. 402 U.S. 351 (1971).

147. *Id.* at 355, 356.

148. 413 U.S. 139, 142 (1973) ("[V]iewing obscene films in a commercial theater open to the adult public or transporting such films in common carriers in interstate commerce, has no claim to such special consideration." (citation omitted)).

149. 413 U.S. 123, 125 (1973) (upholding the seizure of pornography in an airline storage area, in part, by emphasizing Congress's broad power "[t]o regulate Commerce with foreign Nations." (citing U.S. CONST. art. I, § 8, cl. 3) (internal quotation marks omitted)).

150. 413 U.S. 49, 57 (1973) ("[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity . . .").

activity seen and heard only by willing viewers and listeners.¹⁵¹ As noted earlier, he stated that the constitutional zone of privacy protection remains fixed to the home and does not follow the individual anywhere outside of it.¹⁵² He was not entirely clear about the justification for this additional narrowing of *Stanley*, but the Supreme Court and other courts have suggested elsewhere that it is because all activity outside the home, and the wire lines that lead into it, are too closely connected to commerce to be treated as “private.”¹⁵³

This further narrowing of *Stanley*’s scope requires some explaining. Consider the following three variations on *Stanley*’s facts—the first two of which I have already touched upon:

- (1) A modern-day Stanley does not simply possess an obscene film in his own home, he stores it in a private space he has reserved for his use within the “cloud,” in order to watch it over the Internet.
- (2) A modern-day Stanley reads an obscene book rather than viewing an obscene film, and reads it on an eReader after having it wirelessly delivered to his eReader by a hypothetical seller of digital books (some of which are pornographic). The state not only penalizes the bookseller, but orders it to remotely delete the book it illegally sold to Stanley.
- (3) A modern-day Stanley does not simply possess the obscene film in his own home; he receives it on a DVD sent by a friend, free of charge, and watches it on a television set or computer.

It is hard to see why *Reidel*’s holding, allowing the State to target and restrict “business in obscenity,” justifies any restriction of Stanley’s behavior in the first two examples or that of his friend in the third. In the first example, Stanley’s behavior is virtually identical to that in the actual 1969 case—but is updated to include the use of modern technology: He is watching a film that he has stored in his own personal space, for his own personal use, and is watching it in an entirely private environment such that the outside world cannot see it unless he allows them to do so. One might argue that the modern-day variant is commercial in nature, because Stanley is able to store the film on a third-party server and watch

151. See *supra* notes 10–16 and accompanying text.

152. See *supra* note 16 and accompanying text.

153. See, e.g., *Orito*, 413 U.S. at 142–43 (“The Constitution extends special safeguards to the privacy of the home . . . [V]iewing obscene films in a *commercial* theater open to the adult public . . . has no claim to such special consideration. . . . [T]he Government has a legitimate interest in protecting the public *commercial* environment from entering the stream of commerce.” (emphases added) (citations omitted) (citing *Paris Adult Theatre I*, 413 U.S. at 57)); see also *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 161 (3d Cir. 2005) (“*Orito* and *Paris Adult Theatre* affirm the power of the government to ‘regulate interstate commerce to the extent of forbidding the use of such commerce as an agency to promote immorality . . .’ The Internet is a channel of commerce covered by the federal statutes regulating the distribution of obscenity.” (quoting *Orito*, 413 U.S. at 144 n.6)).

it over the Internet only pursuant to a contractual arrangement he enters into with the company operating that server. But why is that any more commercial than keeping an obscene book or DVD in a leased desk or in another piece of rented furniture in one's study? The same question might be raised about the second example. When a person receives a physical book that she did not write herself, she doubtlessly received it from somewhere in the outside world. The fact that the book was obtained in a commercial transaction does not make the subsequent reading of the books a commercial act. Why then would reading an eBook be a commercial act?

The third example differs from the first two in that it is no longer solely Stanley himself who is a knowing participant in possessing and watching the obscene film: Also involved is a friend who serves as the source of the obscene material. But it would be odd to define "commercial" as covering *any* presentation of any item by one person to another. It would, for example, be at odds with the Supreme Court's existing definition of "commercial speech"—which generally receives less protection than most other protected speech—to say that any time one person gives another a book, music CD, or video, she is engaged in commercial expression. Rather, commercial expression is usually understood by the Court to be first and foremost "speech which does 'no more than propose a commercial transaction.'"¹⁵⁴ A simple gift from one person to another is not a commercial transaction and does not propose such a transaction. The Court's decision in *Bolger v. Youngs Drug Products Corp.*¹⁵⁵ emphasized that while the proposal of commercial transaction is perhaps the most important factor in determining whether speech is commercial speech,¹⁵⁶ there are also two others: (1) whether the speech refers to a "specific product," and (2) whether the speaker "has an economic motivation" for the speech.¹⁵⁷ Again, it is hard to see how either of these factors weigh in favor of characterizing an obscene text or movie as "commercial speech" when it is not intended to get the individual to buy a particular product or even to buy anything at all.

Admittedly, the definition of "commerce" is broader in other parts of constitutional law, most notably the jurisprudence of the Commerce Clause.¹⁵⁸ Under the Court's 1942 decision in *Wickard v. Filburn*, for example, even the act of growing food on one's own farm for one's own consumption can count as commerce, because of its effect on the

154. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

155. 463 U.S. 60, 66–67 (1983).

156. *Id.* at 66 (referring to this factor as providing the "core notion of commercial speech").

157. *Id.* at 66–67.

158. U.S. CONST. art. 1, § 8, cl. 3.

market.¹⁵⁹ The Court drew heavily upon similar reasoning when it held that commerce subject to federal government regulation included even the wholly in-state cultivation of medical marijuana.¹⁶⁰ As long as such activity might substantially impact commerce in the aggregate, it could be subject to regulation under Congress's Commerce Clause power.¹⁶¹ However, applying such a broad definition proves too much. Far from explaining the distinction between the in-home film viewing in *Stanley* and the pornography commerce addressed in *Reidel*, it would abolish the distinction altogether—since even Stanley's desire to view obscenity in his own home would affect the market for obscenity.

Nor can one save the confining boundary placed around *Stanley* by arguing that even ostensibly non-commercial expression conveyed through the Internet becomes subject to regulation when the signals that constitute it travel through a "channel of commerce,"¹⁶² such as phone lines. The problem, again, is that the eight-millimeter film Stanley viewed also made its way to his house, in part, through a similar channel, most likely the roads or other physical transportation paths. The implausibility of trying to place principled limits on *Stanley* by holding it inapplicable to all channels of commerce is illustrated by an unusual case in 2008 that found *Stanley* inapplicable to a person's in-home viewing of obscene imagery on the grounds that the imagery "was produced using materials that traveled in interstate commerce."¹⁶³ The question begged by this holding is how to distinguish *Stanley* itself, since the film in Stanley's possession was also unquestionably "produced using materials that traveled in interstate commerce," namely, the cameras used to create those films and the celluloid on which the films were printed.

Thus, one cannot justify banishing *Stanley*'s freedom-of-thought principle from the public sphere simply by defining the whole of that sphere as a realm of commercial activity. There is a substantial amount of private and personal activity, much of it non-commercial, that occurs outside the home.¹⁶⁴ What then are the other plausible arguments for treating the public sphere as wholly beyond *Stanley*'s reach?

159. 317 U.S. 111, 118, 127 (1942).

160. *Gonzales v. Raich*, 545 U.S. 1, 18 (2005) ("The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.").

161. *Wickard*, 317 U.S. at 127–28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

162. *See, e.g., United States v. Whorley*, 550 F.3d 326, 333 (4th Cir. 2008) (stating that the First Amendment protection described in *Stanley v. Georgia* does not place limits on laws concerning "the movement of obscene material in channels of commerce").

163. *United States v. Mees*, No. 4:09CR00145 ERW, 2009 WL 1657420, at *4 (E.D. Mo. June 10, 2009).

164. It would be odd, for example, to say that individuals are engaged in the "business in obscenity," or the commercial distribution or display of obscenity, when they describe an allegedly

One, perhaps, might be found in Chief Justice Burger's statement in *Paris Adult Theatre I* that the government must be empowered to restrict obscenity in the public sphere, not merely to protect "the tone of commerce in the great city centers," but also to protect "the interest of the public in the quality of life and the total community environment"¹⁶⁵ But it is hard to see why a concern for "the quality of life and total community environment" would justify restricting private web surfing, or borrowing or accepting a DVD from a friend. Such private cultural activities have little more impact—by themselves—on the total community environment than does a single person's viewing of a video on her own TV set and DVD player.¹⁶⁶ Moreover, it is not clear how the government's interest in the "total community environment" could ever warrant restricting the speech or thoughts of an individual member of that community—unless it drew on precisely the kind of aggregation principle that was used in *Wickard v. Filburn*,¹⁶⁷ but this is foreign to First Amendment jurisprudence. The First Amendment, for example, does not classify speech itself as "inciting" because the speech is one small component of a large set of acts that together constitute incitement.¹⁶⁸ Nor does it classify speech as "commercial" because its effect is commercial only when considered in conjunction with numerous other instances of speech.¹⁶⁹ In short, such an attempt to hold *Stanley* inapplicable to the public wire lines based on its alleged effects confronts the same question that Justice Black first raised in his dissent in *United States v. Reidel*: "The mere act of importation for private use can hardly be more offensive to others than is private perusal in one's home."¹⁷⁰

Another possibility lies in the sense that, however free people might be to introduce obscenity into their own thoughts, they should *not* be free to introduce it into the channels of communication that are shared with, and sustained by, the public. But the First Amendment public forum doctrine—which, among other things, prevents the government from restricting speech on the basis of content in parks and streets¹⁷¹—

obscene thought to their psychotherapists, sketch an allegedly obscene picture in a private diary while riding on a bus, or e-mail an allegedly obscene story to a friend.

165. 413 U.S. 49, 58 (1973).

166. See *infra* note 170 and accompanying text.

167. See *supra* text accompanying notes 159–61.

168. On the contrary, the particular speech act that the State wishes to restrict as incitement must be "directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

169. See *supra* text accompanying notes 155–57 (listing factors the Court uses to determine whether an instance of speech constitutes commercial speech).

170. *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 381 & n.* (1971) (Black, J., dissenting) (providing a joint dissent for *Riedel* and *Thirty-Seven Photographs*).

171. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("In places[, including streets and parks,] which by long tradition or by government fiat have been devoted to

requires the government to protect speech that is not only unpopular, but that expressly challenges constitutional principles. The government may not, for example, deny neo-Nazis the right to march in a street or rally at a park.¹⁷² Even certain low-value speech, such as outdoor advertisements for cigarettes, is insulated against government restriction.¹⁷³ The speech that travels through internet cables and inside of sealed envelopes is, if anything, likely to be much less of an emotional burden on those who find it objectionable, since, unlike the speech in streets and parks, it will likely remain entirely invisible and inaudible to them. In fact, the data packets that travel through the Internet have little meaning to anyone in between the point of transmission and reception unless that person goes to the effort to intercept and to reassemble all of them into the image or text they carry. It is true that some members of the public might be offended simply by the *knowledge* that government-supported channels of communication are carrying such material, even if it never reaches their eyes and ears.¹⁷⁴ But the same people may be equally offended by their awareness of the *other* resources that allow the Stanleys of the country to view obscenity: the police and security, neighborhood maintenance, and building code requirements, for example, that help Stanley watch and enjoy his preferred films in his own home. Or the protections the State offers to the development and sale of the TV and DVD technology that allow Stanley to watch obscenity in his home. It is a mistake, in other words, to assume that the original film viewing in *Stanley* happened without the same kind of state and societal framework that is necessary to sustain and nourish technologies of communication or of transport.

One other possible means of justifying the distinction that the Court has drawn between private and public life in applying *Stanley* is to redefine it: It is not, one might argue, first and foremost about the line between the intimate life of the home and the social environment outside of it, but rather the line between those activities that involve only a solitary actor and those that involve contacts with others. What distinguishes Reidel, or the protagonists of *Whorley*,¹⁷⁵ from Stanley, perhaps, is that they were not merely producing or in possession of

assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.”).

172. See *Village of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 24 (Ill. 1978) (“The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it.”).

173. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561–66 (striking down such limitations on cigarette advertising as unconstitutionally limiting).

174. See Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1, 16 (2006) (“[Y]ou (the viewer of XXX movies) cannot plausibly deny that some citizens *do* feel emotional distress because of what you are doing: indeed, it may be obvious that they are deeply unhappy about your movie-watching predilections.”).

175. See *United States v. Whorley*, 569 F.3d 211, 212 (4th Cir. 2009).

obscenity for their own viewing, but rather were attempting to *send* it to others. They were, in other words, disseminating it out into the world, rather than keeping it to themselves—and it is this attempt to *spread* obscene speech that makes it a *public* concern in the way that Stanley's original viewing was not.

One might analogize this to that which helps to define the contours of another form of problematic speech: defamation. One becomes liable for defamation not merely by *viewing or listening* to false speech, but by making that speech to others under conditions in which one knows, or should know, of its false or defamatory nature.¹⁷⁶ One is not guilty of defamation merely by listening to it.¹⁷⁷ The same is true of incitement: It is the inciter, not his target audience, who is subject to prosecution for trying to foment violence.¹⁷⁸ One might draw the same distinction here: A person who merely views pornography in his home or on his computer terminal is protected by *Stanley's* right to receive information and ideas. The person or entity who knowingly delivers it to him is not.

There is, however, an important weakness in this analogy. An audience member who merely hears defamation or incitement is simply a passive recipient of such information and may not believe in or act upon it. By contrast, the person who orders obscene speech through the mail or downloads it from the Internet is a more active participant and is likely to be aware of its obscene nature when doing so. They are, in a sense, not merely viewing it, but cooperating with the sender to provide it to themselves. Moreover, they act as their own providers in this sense, even when there *is* no identifiable sender. When Stanley goes to the shelf where he stored an obscene film and then places it in a projector he has purchased, he provides his own means of viewing the film.¹⁷⁹ When he goes to his personal storage space in the cloud and downloads an obscene video he previously uploaded there, he is, again, serving as his own provider. Why then should the State be allowed to punish a provider of obscene speech only when it is a person other than the viewer or listener himself? One might suggest that it is generally more permissible for the government to prevent harm inflicted by one person upon another than to prevent a person's harm to herself. This argument is weak where a

176. Thus, the elements of defamation include “a false and defamatory statement concerning another” and “an unprivileged publication [of that statement] to a third party.” RESTATEMENT (SECOND) OF TORTS § 558 (1977).

177. *Id.* (listing no element that embraces receipt of the communication).

178. As noted above, speech is punishable only if the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

179. Indeed, some of the cases held *Stanley* inapplicable by implausibly extending the kind of speech-delivery that is counted as “commercial” and permitted the State to punish individuals who were carrying materials only for their own private viewing. *See, e.g., United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973).

person inflicts such “harm” according to another’s wishes, instead of against them. If the government cannot paternalistically restrict whatever harm flows from obscenity when a person imposes it on herself without help, it is not clear why it should be able to impose such restriction when help is available and only with respect to the helper, instead of the person helped to obtain obscene speech.¹⁸⁰

In short, there are no characteristics of public space that mark it out as wholly inappropriate for the freedom-of-thought protection identified in *Stanley*. Going forward, one option for courts is to go back to the turn in the road taken by the Court in *Reidel* and to rethink precisely how its limitation of *Stanley* should be understood. In the first place, we might note that the Court in *Reidel* did not evict *Stanley*’s protection from all corners of public space or channels of information, but simply from those that carried and enabled the “business in obscenity.”¹⁸¹ Where use of an e-mail service or interactive computer service does not involve any such business, it should not automatically be denied *Stanley*’s freedom-of-thought protection simply on the basis that it occurs in channels of communication that are also, at times, channels of commerce.

Reidel also differentiated *Stanley* by noting that it dealt with possession and individual perception of obscene materials, whereas *Reidel*’s sending of such materials was “distribution.”¹⁸² This distinction, however, only makes sense under circumstances where it is possible to distinguish the acts that constitute possession and perception from those that constitute distribution. Where the act of distribution *merges into* the activity of possessing a text, image, or video—as it does in use of the cloud to access stored materials or use of an eReader—*Stanley* should not cease to protect the possession and perception that takes place.¹⁸³

This leaves us with an alternative vision of how *Stanley* should apply in the twenty-first century, one quite different from the widely espoused notion that it is without force in any circumstances other than its original, increasingly archaic, setting. *Stanley* should apply not only to the brick-and-mortar environment that *used to* define the boundaries of home life. It should also apply to those of our interactions with the contemporary

180. *Whorley*, 569 F.3d at 214 (Gregory, J., dissenting) (suggesting that *Stanley* should protect the sender of non-commercial e-mails with obscene text where there is no harm caused).

181. *United States v. Reidel*, 402 U.S. 351, 354–57 (1971).

182. *Id.* at 356.

183. *Osborne v. Ohio* and subsequent cases analyzing possession of child pornography limited *Stanley*’s reach in a manner entirely unrelated to whether the material is viewed inside or outside the home, whether it is commercial or non-commercial, or whether it is possessed or distributed. Even purely private in-home possession of child pornography is made possible only by harming the child who has been exploited (and whose dignity and mental well-being might suffer further damage from distribution of the obscene materials). *Osborne*, 495 U.S. 103, 111 (1990) (“[T]he materials produced by child pornographers permanently record the victim’s abuse. The pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”).

public environment that are functionally equivalent to our in-home lives insofar as they involve (1) private access to and viewing of materials, rather than wide distribution of them, and (2) like the home, have a primarily non-commercial nature. As long as obscenity or other low-value speech has such features and also lacks the harm-threatening characteristics of child pornography or other speech likely to cause significant damage to third parties, it should be safeguarded against state restriction.

Still, there are some who may hesitate to accept this narrower vision of *Stanley* without considering another possible basis for limiting *Stanley* to home life, traditionally understood. Thus, the next subpart turns from asking what is special about public space (where *Stanley*'s freedom of thought is allegedly unsuitable) to asking what is special about the physical space of the home that might (as the Court has insisted) make it the *only* environment where *Stanley*'s protection can have any force.

B. *STANLEY* AND THE UNIQUENESS OF THE HOME

I have assumed thus far that even if one objects to extending *Stanley*'s freedom-of-thought protection to cover our public activities, one can at least imagine how such an extension might work. After all, it is not merely in the home, but also in public space that we engage in intellectual exploration and private reflection about the things we see and hear. If *Stanley* is meant to protect our ability to perceive the world free of blinders, and to deliberate about it free from external interference, why wouldn't its protections be able to follow those activities out of the home and into public space?

But this question, one might object, fundamentally misunderstands the holding of *Stanley*. The home, some might argue, was not merely *one* site that a person might, as the Court put it, "satisfy his intellectual and emotional needs"¹⁸⁴ almost entirely insulated from government control; it was an *inseparable part of the freedom* that *Stanley* was identifying. The Court after all, did not simply give people a right to "satisfy his intellectual or emotional needs," but rather a "right to satisfy [them] in the privacy of [their] *own home[s]*."¹⁸⁵ If that is right, then the problem with attempting to carry freedom of thought beyond the walls of the home is not merely that it is inappropriate or harmful beyond those walls, but that it cannot, by definition, extend beyond them, because it is no longer the same liberty.

Why, then, might *Stanley* be inextricably linked to the home in this way, when our mental activity and powers of perception are not so confined? One possible answer has to do with the nature of the home.

¹⁸⁴ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

¹⁸⁵ *Id.* (emphasis added).

There is, one might claim, something about the home, and the role it plays in our lives, that makes it an irreplaceable sanctuary for this particular kind of freedom. One might argue, for example, that the home attained its status as a place to hide from the outside world, in large part because of its nature as a place where our ownership gives us a greater degree of control over the environment than anywhere else. As Friedrich Hayek has argued, “[f]reedom . . . presupposes that the individual has some assured private sphere, that there is some set of circumstances in his environment with which others cannot interfere.”¹⁸⁶ In Hayek’s view, it is in large part individual property rights that define this sphere: Our property rights in the space of the home help to carve out a piece of the environment where our decisionmaking power is subject to minimal state interference.¹⁸⁷ The same vision of the home, as the deepest and most insulated retreat from the external world, plays an important role in Fourth Amendment law where, as Justice Scalia noted in *Kyllo*, “[i]n the home . . . all details are intimate details, because the entire area is held safe from prying government eyes.”¹⁸⁸

This view provides the basis for a possible response to my central question as to why the scope of the First Amendment privacy protections is so much narrower than is the scope of the Fourth Amendment privacy protection recognized in *Katz v. United States*. *Katz*, one might argue, provides the wrong Fourth Amendment analogy, because it protects against warrantless monitoring information on phone lines that might well be innocent—or even valuable—conversation, information of a sort that the government has no business spying on.¹⁸⁹ By contrast, the obscene film at issue in *Stanley* has no such value: It is, by definition, information that the government can bar or restrict, and—much like a wanted criminal who has found sanctuary in a foreign embassy—is saved from state regulation not because of *what* it is, but only because of *where* it is. If that is so, then the correct Fourth Amendment analogy is provided not by *Katz*, but by a combination of the Court’s decisions in *United States v. Place*¹⁹⁰ and *Kyllo v. United States*.¹⁹¹ In *Place*, the Court made clear that when a government search technique—in that case, a police dog trained to alert only to drugs¹⁹²—“discloses only the presence

186. FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 13 (Phoenix ed. 1978).

187. *Id.* at 140 (emphasizing how a “protected sphere” for individual action is established in part through “recognition of private property”).

188. *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

189. 389 U.S. 347, 352 (1967) (“[T]he public telephone has come to play [a vital role] in private communication.”); *see also* *Berger v. New York*, 388 U.S. 41, 56–60 (1967) (discussing that eavesdropping in criminal investigations is necessarily “broad in scope,” because it indiscriminately records all of a conversation and not simply those parts relevant to criminal activity).

190. 462 U.S. 696 (1983).

191. 533 U.S. 27.

192. 462 U.S. at 697–98.

or absence of . . . a contraband item” then there can be no threat to any Fourth Amendment privacy interests, since no one has a legitimate interest in hiding possession of a criminal substance.¹⁹³ The same rule should apply in the First Amendment context, one might argue, where one’s contraband is informational contraband with no First Amendment value. However, one might add, drawing on *Kyllo*, that even certain forms of contraband that do not generate a constitutional shield by themselves, do stand behind such a shield in the home because, as noted above, “[i]n the home . . . all details are intimate details,” and “the entire area is held safe from prying government eyes.”¹⁹⁴

The Court seemed to adopt a similar interpretation of *Stanley* in *United States v. Reidel*. *Stanley*’s freedom of thought, it insisted, did not depend at all on the nature of the material Stanley was watching; this freedom did “not depend on whether the materials are obscene or whether obscenity is constitutionally protected.”¹⁹⁵ Rather, his right to watch these (or any) materials in private was “independently saved by the Constitution.”¹⁹⁶ More specifically, the First Amendment rights at issue in *Stanley*, arose from something about Stanley’s situation other than the film he was viewing—and that something, assumed the Court, had to be the intimate and private environment he was in.¹⁹⁷

There are, however, some puzzles in this interpretation of *Stanley*. It cannot be, after all, that *everything* one does in the privacy of one’s home is covered by the First Amendment. On the contrary, the Court in *Stanley* took pains to stress that “[w]hat 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.”¹⁹⁸ Later courts have made it clear that one’s right to view even obscene materials free of state interference does not prevent law enforcement from punishing viewing of materials, like child pornography, the production and dissemination of which entail harm to the children depicted.¹⁹⁹ But if illegal activities like possession of drugs or other dangerous substances are not shielded from punishment by the walls of the home, why is the possession of an illegally obscene film or book shielded?

193. *Id.* at 707–08.

194. 533 U.S. at 37.

195. *United States v. Reidel*, 402 U.S. 351, 356 (1971).

196. *Id.*

197. *Id.* at 355 (noting that *Stanley* protects people only against the government’s unwanted intrusion into their homes).

198. 394 U.S. 557, 568 n.11 (1969).

199. *See Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (“The State does not rely on a paternalistic interest in regulating Osborne’s mind. Rather, Ohio has enacted [this law] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.”).

There must be something about the latter activity *other than its location* in the home which accounts for why it receives First Amendment protection denied to other acts. One possibility is that, as the Court proclaimed in *R.A.V. v. St. Paul*, even “low value” speech actually has some First Amendment value: “We have not said,” the Court made clear, that low-value speech “is *in all respects* worthless and undeserving of constitutional protection.”²⁰⁰ Another possibility is that even if Stanley’s obscene film viewing is devoid of any protectable First Amendment expression, it might involve the exercise of another distinct First Amendment freedom, namely, the freedom of thought. Because Stanley’s viewing of a film would—unlike selling drugs or manufacturing chemicals—only involve perceiving and thinking, it may be that it falls within the scope of freedom of thought, even if it is outside the scope of freedom of speech *per se*.²⁰¹ But these suggestions raise doubts about the argument that the freedoms in *Stanley* are inextricably tied to the home: Once we recognize that even speech ostensibly outside the scope of the Free Speech Clause, such as obscenity, may well have some First Amendment value—either because there is some residual First Amendment value in all expression, or because it is an exercise of our freedom of thought—then the question arises as to why this value cannot be recognized to offer some protection outside of the home’s walls.

In fact, while it is in the nature of the home to offer a very effective sanctuary for our private intellectual and cultural lives, it is not the only such sanctuary, and is often not even the most effective or suitable one. It is not the most effective, because the physical walls of the home often leak sound, and the windows sometimes allow glimpses from on-lookers.²⁰² Moreover, for those who share a home with family members or roommates, one’s private reading or film-viewing choices may well be subject to observation by others within the home environment. By contrast, a password-protected space in the cloud on the Web might be far more closed off to the world, at least so long as the electronic walls that safeguard it prevent outside breaches. Moreover, the home is often not a suitable place for inner exploration, because one must sometimes venture far outside the home (either physically or through cyberspace) to obtain resources that are sometimes crucial for reflecting upon, and addressing, intellectual and emotional needs: books or other cultural

200. 505 U.S. 377, 385 (1992) (quoting *id.* at 401 (White, J., concurring)) (internal quotation marks omitted).

201. See Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141, 1192–93 (2008).

202. Indeed, the Court has made it clear that warrantless visual surveillance of the home’s windows from a public street does not violate the Fourth Amendment. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001) (noting that historically, visual surveillance from outside the home was considered clearly lawful because “the eye cannot . . . be guilty of a trespass” (quoting *Boyd v. United States*, 116 U.S. 616, 628 (1886)) (internal quotation marks omitted)).

sources from outside, discussions with therapists or religious counselors, and other sources of guidance. Indeed, in some cases, an individual may find that free thought and intellectual exploration require not a retreat into the home, but an escape from it. Consider the case of a young man or woman like the protagonist of *The Chosen* who needed to make secret trips to the public library to explore a secular world that was forbidden territory in his family's strict religious environment.²⁰³ Or the young man profiled in a *New York Times* story who furtively uses the Internet to find and read materials that help him live with, and reflect upon, his homosexuality.²⁰⁴ For such individuals, home life interferes with, rather than supports, their freedom of thought.

If it is not the nature of the home considered by itself that justifies the First Amendment shield raised by *Stanley*, it may be that there is also something else about the home that does so—namely, its special status in social convention and history. Even if the role the home plays in our lives is *not* unique, and even if we can find places outside the home in which we feel more comfortable and safe from others' observation, these other places—for better or worse—do not have the same historically and legally significant pedigree that the private residence has acquired over the centuries.

In this respect, one might argue, the freedom-of-thought protection that *Stanley* recognizes in the home is quite similar to the protections provided by the public forum doctrine to “traditional public forums.” This doctrine sets aside for unfettered debate and dialogue, certain government-owned property, most notably, streets and parks.²⁰⁵ While the government may impose content-based speech restrictions on much of the public property it operates—for example, it may bar protests in military bases or disallow disruptive speech in public schools²⁰⁶—it generally may *not* impose such restrictions in streets and parks. The reason is not simply because of the nature of streets and parks, but because of the tradition that surrounds them. As the Court said in the case that launched the development of the public forum doctrine, the 1939 case of *Hague v. Committee for Industrial Organization*, “use of the streets and public places [for unfettered discussion] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of

203. CHAIM POTOK, *THE CHOSEN* 86–87 (1967) (describing a young man who secretly visits the public library to escape from an Orthodox Jewish household so that he can read secular literature).

204. Jennifer Egan, *Lonely Gay Teen Seeking Same: How Jeffrey Found Friendship, Sex, Heartache—and Himself—Online*, N.Y. TIMES (Magazine), Dec. 10, 2000, at 110.

205. See *supra* text accompanying note 171.

206. See *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that regulations barring political rallies or demonstrations in a military base were constitutional under the First Amendment); *DeFabio v. E. Hampton Union Free Sch. Dist.*, 623 F.3d 71, 77–78 (2d Cir. 2010) (“Student speech . . . may be restricted if the speech will ‘materially and substantially disrupt the work and discipline of the school.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969))).

citizens.”²⁰⁷ As I have noted elsewhere,²⁰⁸ this claim was a misleading one: in the late nineteenth- to early twentieth-century, managers of public parks in America often barred political, religious, and commercial speech from parks on the ground that parks were supposed to be places for peaceful relaxation.²⁰⁹ Thus, the Court in *Hague* was not simply giving legal recognition to a pre-existing social convention, but rather creatively and selectively using the social convention surrounding parks to satisfy a perceived constitutional need, namely, the First Amendment need for *some* space where individuals might meet, debate, or protest, and where they could not simply be silenced by a government edict denying them a place to speak or listen. The Court in *Stanley*, one might argue, did precisely the same thing for the home: It drew upon strong social norms of home privacy to answer a constitutional need it perceived for *some* space in which individuals could read books, watch videos, or engage in other cultural activities free from worries that doing so could easily trigger state interference.

Moreover, one might argue, the public forum doctrine also provides a model for refusing to extend *Stanley*'s protection beyond its original boundary lines. Many commentators have noted that people now typically seek debate and reading materials not in parks but on the Web or through other electronic media.²¹⁰ Along with at least one Supreme Court Justice (Justice Kennedy), commentators have called for updating the public forum doctrine to include these new forums for debate and deliberation.²¹¹ But the majority of the Court has disagreed,²¹² perhaps because while the public forum doctrine has First Amendment benefits, the rules of the traditional public forum weaken the government's law-making ability; to allow these rules to spill beyond traditional categories might thus weaken government power in many areas where it needs to be robust. The same might be argued about *Stanley*: It makes sense to limit it to the traditional confines of the home, even as certain features of home life migrate into electronic realms, because a constitutional limit on

207. 307 U.S. 496, 515 (1939).

208. See Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 834-36 (2006).

209. *Id.*

210. See, e.g., Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 200-01 (1998).

211. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”).

212. See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring) (advocating for the creation of public forums in cyberspace, administered by the State, to provide the electronic equivalent of the sidewalks in the physical world).

government power as disabling as *Stanley*'s should not be lightly extended.

There are, however, two problems with this argument for limiting *Stanley* to the home and denying its protections to our private interactions in cyberspace. First, the same strategy has not entirely succeeded in the public forum doctrine. The Court has officially refused to extend the protection of the traditional public forum doctrine beyond streets and parks.²¹³ However, it has provided an extension of sorts, quietly and unofficially, by creating a new rule that provides traditional public forum-type protections to *other* government-owned properties. In the 2001 case of *Legal Services Corp. v. Velazquez*, it announced a rule that even with respect to properties where the government has more leeway to regulate speech, it may not use this leeway to “use an existing medium of expression and to control it . . . in ways which distort its usual functioning.”²¹⁴ Consequently, even where government property does not, like parks or streets, have a long historical tradition of setting it aside for unfettered speech, it may still have certain social practices associated with it that present a barrier to certain kinds of speech regulations. Because such limits on speech regulation arise from the *inherent* nature of public property itself, rather than from government designation, the government cannot remove them simply by declaring such property a non-public forum. For example, in *Velazquez*, the Court held that barring lawyers from making certain kinds of arguments would distort the expression that lawyers must engage in to serve as effective advocates.²¹⁵ One might argue that the Court should consider similar measures in understanding the reach of *Stanley*. Even if no environment can provide the same protection for freedom of thought that the home has been held to provide, other environments might play an important, albeit more specific or limited, role in protecting or advancing our freedom to think, and would be disabled from doing so by certain kinds of government limits. Such institutions may include libraries, counseling centers, or other places in public life that people often go to engage in private reflection that may not be possible in their homes.

This difficulty with holding fast to the present, very narrow limits of *Stanley* is closely connected with a second problem. However appealingly simple it might be to limit *Stanley*'s reach to a single, easily identifiable environment, such simplicity is unjustified if it fails to protect the freedom *Stanley* was meant to assure. Freedom of thought might intuitively be threatened not only by intrusions into home life, but also by other government invasions into individuals' attempts to shape their

213. *Id.* at 679 (refusing to find that airports are public fora similar to streets and parks).

214. 531 U.S. 533, 542–43 (2001).

215. *Id.* at 544 (“[The State] may not design a subsidy to effect [a] serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.”).

own psyche—for example, by government limits on or monitoring of the books individuals read outside of the homes, of the counseling sessions they seek with therapists or other sources of guidance, or of cultural exploration they engage in at libraries, theaters, or on websites. Again, a Fourth Amendment example—this time, from the realm of Fourth Amendment scholarship—is helpful here. As Anthony Amsterdam said, in criticizing Fourth Amendment cases that permitted the government to engage in aerial surveillance (with high magnification cameras) of certain in-home environments, the Fourth Amendment has not provided enough protection from police surveillance when it provides such protection only to those who “retir[e] to the cellar, cloa[k] all the windows with thick caulking, tur[n] off the lights and remai[n] absolutely quiet.”²¹⁶ A similar observation might be made about the limits courts have placed on the scope of *Stanley*. Indeed, such an observation has been made by Justice Hugo Black.²¹⁷ *Stanley*, he argued, will be of little value if it protects a person only when he “writes salacious books in his attic, prints them in his basement, and reads them in his living room.”²¹⁸

To update Black’s complaint with modern examples, how meaningful is an individual’s First Amendment right to read the book of their choice in her own home if she is not protected from government-mandated remote deletion of an illegally obscene eBook? How protected is she in the right to privately possess her own video in an age where the only place she can feasibly store such a video is in a digital medium that is inevitably linked to the data channels of the outside world—and where information is increasingly stored in, and not simply sent through, servers outside of the home? As Judge Gregory recently noted in dissenting from a refusal to provide a rehearing en banc for a defendant convicted, in part, for an e-mail describing a sexual fantasy: “In today’s world, our e-mail inbox, just as much as our home, has become the place where we store the ‘memorabilia of [our] thoughts and dreams,’ and the same principles that animated *Stanley* call now for *Stanley*’s extension to” such technology.²¹⁹

216. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402 (1974).

217. *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

218. *Id.*

219. *United States v. Whorley*, 569 F.3d 211, 214 (4th Cir. 2009) (Gregory, J., dissenting), *denying reh’g en banc* to 550 F.3d 326 (4th Cir. 2008).

CONCLUSION

His stove had reverted. Back to an ancient Buck natural-gas model with clogged burners and encrusted oven door . . . The TV set had receded back a long way; he found himself confronted by a dark, wood-cabinet, Atwater-Kent tuned radio-frequency oldtime AM radio . . . The vidphone had been replaced by a black, hook-style, upright telephone. Pre dial.

— Philip K. Dick, *Ubik*²²⁰

I look around and see only what's obsolete

The early versions of things in redesign

— The Loud Family, *Backward Century*²²¹

For almost all of the forty years since it has been decided, *Stanley v. Georgia* has been widely cited for its ringing endorsement of freedom of thought. It has also been largely isolated from the rest of First Amendment law and frozen in time, covering only the late-Sixties technology of its era. For example, it strongly protects the right to read the book of one's choice in the privacy of one's living room, but may not protect the right to read an eBook beamed wirelessly from the outside world to a digital reading device. It protects the right to view a film on an old-fashioned projector, but probably would not protect the right to store and view a video the way viewers increasingly watch them, by accessing a video file stored in a far-away server and running it on one's own computer or mobile device. And it protects the physical spaces that shield intimate activities and communication, but not their functional equivalents in virtual worlds or cyberspace storage lockers.

I have argued that there is little sense in continuing to view *Stanley* as an isolated, unchanging island, separated from the public world. As with Fourth Amendment search and seizure law, as transformed by *Katz v. United States*, courts should abandon the fiction that our private internal and expressive lives remain hidden inside of our privately owned houses and buildings. The Court in *Katz* recognized that the “persons, houses, papers, and effects” must be understood to encompass the electronic environments and channels that evolved to serve many of the same functions. As noted above, the First Amendment public forum doctrine has too: Although the Court has refused to expand the definition of “traditional public forum” beyond streets and parks, it has

220. DICK, *supra* note 1, at 724, 726.

221. THE LOUD FAMILY, *Backward Century*, on ATTRACTIVE NUISANCE (Alias Records 2000).

nonetheless extended First Amendment protection to new environments like the Internet by recognizing their special place in First Amendment law,²²² and by warning the government that the Constitution bars it from distorting “the usual functioning of a medium of communication.”²²³ The freedom of thought safeguarded in *Stanley* likewise deserves to be saved from becoming an anachronism. Like freedom from unreasonable searches and freedom to speak in public, the freedom to think and receive information privately deserves to be staunchly protected from state censors—and to be protected in the spaces where we exercise this freedom now, not only those where we exercised it forty years ago.

As I have shown, moreover, courts do not need to revolutionize First Amendment law to update and salvage *Stanley*. They must merely recognize that in the online world of the twenty-first century, it is no longer plausible to offer First Amendment protection to an individual’s personal library *only* on the condition that she keep that library separate from, and unconnected to, the Internet. Even the most private reading and film viewing is no longer easy to isolate from the network of computers outside the home. Courts must recognize that possessing and viewing a film increasingly entails having it transmitted into one’s home over electronic channels. The act of distribution, in other words, can no longer be disentangled from that of reading, viewing, or simply possessing cultural materials. State punishment of the former thus, necessarily imposes censorship of the latter—and imposes precisely the kind of harm *Stanley* was meant to prevent.

222. See *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (describing the Web as “a vast library,” providing immediate access to millions of titles, and noting the Internet’s crucial role in modern communication).

223. See *supra* text accompanying notes 213–14.