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Article 8

First Amendment--Obscenity

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FIRST AMENDMENT — OBSCENITY

The 1970-71 term of the Second Circuit faced the problem of walking the line between first amendment freedoms and government regulation of obscenity. The Supreme Court has left this line vague since it decided *Roth v. United States.*[42] The modifications made by the Court in *Stanley v. Georgia*[43] have added to the confusion. Two recent Second Circuit obscenity decisions are of particular import and must be appraised in the light of subsequent Supreme Court decisions.

Following a jury verdict that the film was obscene, the United States District Court for the Southern District of New York directed forfeiture and confiscation of the motion picture, "Language of Love."[44] Relying on section 305 of the Tariff Act of 1930,[45] the tribunal dismissed the contention of the claimants that the statute, on its face, as administered, and as applied to the film, was unconstitutional. That the film could not be held "obscene" under current constitutional standards

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shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

FED. R. CIV. P. 52(a).

The district court found that the purpose of the transfer was to halt speech. It also found actual harassment. Judge Oakes felt that *Dombrowski* was still applicable where there was actual harassment. See note 38 *supra*. He also felt that the district court was not bound by the army's proceeding under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938 (1964), since it lacked "the usual safeguards of counsel, cross examination and the submission of evidence."

42 354 U.S. 476 (1957).

43 394 U.S. 557 (1969). *See* Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185 (1969); Karre, *New Directions in Obscenity Regulation?*, 48 TEXAS L. REV. 646 (1970). Katz, *Privacy and Pornography:* Stanley v. Georgia, 1969 SUP. CT. REV. 203, presents a variety of possible interpretations of the impact of *Stanley*.

44 United States v. 35 MM. Color Motion Picture Film "Language of Love," 312 F. Supp. 1382 (S.D.N.Y. 1970). The film was seized by the Commissioner of Customs after its arrival in New York from Sweden. The United States Attorney brought an action in the district court for confiscation and forfeiture, pursuant to the Tariff Act. 19 U.S.C. § 1305 (1970)

45 19 U.S.C. § 1305 (1970) provides in part that

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

was likewise rejected. The claimants appealed to the court of appeals.[46]

The Second Circuit considered the jury's vedict on the obscene nature of a work to be at best an advisory opinion. Classification as obscene or not obscene is determinative of the right to constitutional protection under the two-level theory of speech formulated in *Roth v. United States*.[47] Therefore, the Second Circuit acknowledged its obligation to make an independent determination.[48]

Assured that a trial de novo of the jury's obscenity determination was in order, the court of appeals viewed as determinative the manner in which sex was presented in the film, rather than its frequency, variety, or explicitness per se.[49] The court distinguished the film's arousal of sexual instincts from a perversion of those instincts to morbidity and concluded that the film as a whole could not be considered an appeal to prurient interests.[50] It further concluded that the film was not obscene[51] under the three-part test promulgated in *Memoirs v.*

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46 United States v. 35 MM. Motion Picture Film "Language of Love," 432 F.2d 705 (2d Cir. 1970).

47 354 U.S. 476 (1957).

48 432 F.2d at 709-11. The court found precedent for this conclusion in Justice Harlan's separate opinion in *Roth*, 354 U.S. at 497-98:

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.
>
> I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.

Justice Harlan was joined by Justice Stewart for a further presentation of this position, writing for the Court in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962). The Supreme Court later adopted this approach in Jacobellis v. Ohio, 378 U.S. 184 (1964), when Justice Brennan remarked that

> [s]ince it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court.

378 U.S. at 188.

The Second Circuit, itself, had previously relied on these decisions to determine that the decisional task was placed on judges as a natural consequence of the emphasis on a national decency standard. United States v. A Motion Picture Entitled "I Am Curious (Yellow)," 404 F.2d 199, 201-02 (2d Cir. 1968).

49 432 F.2d at 708.

50 *Id.* at 712. In *Roth*, The Supreme Court had defined a work as obscene when, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

354 U.S. at 489.

51 432 F.2d at 709.

Massachusetts.[52] Sequences of the film were offensive, the court observed, not through an excitement of predilections to prurience, but through an intrusion upon peculiarly private areas of interpersonal relations. *De gustibus non disputandum est*, and offenses to sensibilities were deemed a matter of taste. Considerations of taste being appropriate only to "patent offensiveness to prevailing community standards," the court dismissed offensiveness alone as an insufficient ground for censorship.[53] The dominant theme or revealed purpose of the film was central to the court's determination of the existence of social value and the nature of the film's appeal.[54] This theme was found to be the revelation and solution of sexual problems. As such, the court determined that the film advocated ideas, was not without redeeming social value, and, therefore, was entitled to first amendment protection.[55]

Next, the Second Circuit considered the possibility that the legitimate film might be presented by the distributors to the public in a context which constituted "pandering."[56] In such instances, the court noted, the focus is upon the conduct of the distributor; his evaluation of the material being indicative of his purpose.[57] The Second Circuit pointed out, however, that, while such evidence was central to a criminal prosecution against the distributor, this was a civil proceeding against the film itself to determine whether the film may be imported into the country for any purpose at all.[58] For these purposes, a criminal conviction, such as that in *Ginzburg v. United States*, "does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use."[59]

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52 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966).

> For a work to be obscene, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. at 418.

53 432 F.2d at 711.

54 *Id.* at 712.

55 *Id.* at 713.

56 Ginzburg v. United States, 383 U.S. 463, 475-76 (1966):

> Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

57 432 F.2d at 714.

58 *Id.*

59 383 U.S. at 475. The Second Circuit, in "*Language of Love*," added:

> Our case is not a narrowly directed criminal prosecution, and forfeiture pursuant to § 305 [Tariff Act of 1930] would suppress the material entirely and condemn it in all contexts. This the First Amendment forbids unless the material itself is proscribably obscene.

432 F.2d at 714.

The court of appeals finally cautioned that though the film could not be proscribed as "obscene" by adult standards, statutes reflecting specific and limited state concerns could nevertheless be the basis for future prosecutions subsequent to distribution. The court cited the protection of minors and protection against affronts to the innocent citizen as state interests which could be enforced against publication of the film.[60] Given adequate measures against exhibition to minors and regulations requiring "truth in exhibition" by the local exhibitor, however, the court noted, it is not the general public which is exposed to possibly offensive movies, but a very specific audience composed of persons who have freely submitted themselves to exposure.[61] Thus, it emphasized that local communities are not powerless to protect themselves against encroachments on their own limits of decency. Prior restraint on the national level, however, would not be applied by the court to bar the importation of material that was not obscene per se, but merely objectionable to some.[62]

On facts similar to those of *United States v. 35 MM. Motion Picture Film, "Language of Love,"*[63] the Supreme Court was more willing to apply a prior restraint to the importation of allegedly obscene photographs in *United States v. Thirty-Seven (37) Photographs.*[64] In this subsequent decision, a majority of the Court upheld the constitutionality of section 305(a) of the Tariff Act of 1930,[65] by reading into it the

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60 432 F.2d at 714-15. These considerations had been developed in Redrup v. New York, 386 U.S. 767, 769 (1967).

61 432 F.2d at 714-15.

62 As a federal court charged with the delicate responsibility of guarding the First Amendment's guarantee of free expression, we cannot interdict at the border, and for all purposes, a film which does not meet the rigid criteria established by the Supreme Court as the *sine qua non* for suppression.

Id. at 715.

63 432 F.2d 705 (1970).

64 402 U.S. 363 (1971).

65 19 U.S.C. § 1305(a), note 45 *supra,* provides further:

> Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.
>
> In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

19 U.S.C. § 1305(a) (1970).

procedural requirements of *Freedman v. Maryland*.[66] Having thus sidestepped the claimant's procedural argument,[67] the Court allowed application of the statute for the forfeiture of allegedly obscene photographs taken from claimant's personal luggage. A plurality of the Court[68] held that any right to receive obscenity suggested by *Stanley v. Georgia*[69] does not extend to the distribution of obscene materials to the public or to the importation of obscene materials from abroad, whether for strictly private use or public distribution.[70] Thus the Court found the purpose of *Stanley* to be the protection of the sanctity of a person's house. Possession of obscene photographs on one's person or in one's personal luggage was deemed outside the scope of this protection.

The Court's holding in *Thirty-Seven Photographs* is consistent with the decision of the Second Circuit in *"Language of Love."* The

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66 Freedman v. Maryland, 380 U.S. 51 (1965) struck down a state licensing system for motion pictures, holding

> that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.

Id. at 58.

To insure prompt judicial interpretation and to prevent administrative delay from itself becoming a form of censorship, *Freedman* further required assurance, (1) ". . . by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) [that] [a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; (3) ". . . [that] the procedure must also assure a prompt final judicial decision" to minimize the damage caused by faulty administrative actions. *Id.* at 58-59.

The Supreme Court in *Thirty-Seven Photographs* amended section 1305(a) to meet these due process requirements:

> Accordingly, we construe § 1305(a) [U.S.C.] to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the District Court. No seizure or forfeiture will be invalidated for delay, however, where the claimant is responsible for extending either administrative action or judicial determination beyond the allowable time limits or where administrative or judicial proceedings are postponed pending the consideration of constitutional issues appropriate only for a three-judge court.

402 U.S. at 373-74.

67 402 U.S. at 368. See criticism of the Court's approach, *id.* at 383 *et seq.* (Black, J. dissenting).

68 Chief Justice Burger, Justices Blackmun, Brennan and White.

69 394 U.S. 557 (1969).

70 By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be left alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search.

402 U.S. at 376-77.

Second Circuit thoroughly analyzed the film before concluding that "Language of Love" was not obscene per se. That the film could not be denied entry into this country was the natural result of this finding. The constitutionality of section 305 of the Tariff Act of 1930 and the right of privacy requirements of *Stanley* were not before the court. In *Thirty-Seven Photographs*, on the other hand, the Supreme Court was not asked to determine the obscenity of the photographs, but rather, assumed arguendo that they were obscene. The importer of the pictures relied on an alleged constitutional guarantee of the privacy of his personal luggage, regardless of the obscene nature of the pictures therein. His cause failed when the Court chose *Thirty-Seven Photographs* as an opportunity to curtail sweeping applications of *Stanley*.

The Second Circuit Court of Appeals had an opportunity to apply *Stanley* in *United States v. Dellapia*.[71] In so doing, the court joined the minority of jurisdictions which have given *Stanley* a broad construction.[72]

Dellapia responded to a personal notice in a magazine seeking "photo-collectors and liberal-minded couples." Correspondence developed between the parties, including an exchange of obscene films conducted through the mails. Dellapia was convicted of violating the Comstock Act[73] after a package of films he had mailed at the request of his correspondents was intercepted by postal inspectors. On appeal, the Second Circuit judged that the films were "obscene in the constitutional sense."[74] Recognizing that under *Stanley* the right to privacy of thought does not extend to "public distribution or dissemination" of

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71 433 F.2d 1252 (1970), *reviewed in* 12 WM. & MARY L. REV. 691 (1971).

72 A list of such cases is presented in Note, *Obscenity Law: Après* Stanley, *Le Deluge?*, 17 CATHOLIC LAW. 45, 55 n.92 (1971). The article also provides a list of cases which have limited *Stanley* to its facts, *id.* at 53 n.75.

73 18 U.S.C. § 1461 (1970) provides in part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance
>
> . . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1461 (1970). See commentary in Stanley v. Georgia, 394 U.S. 557, 562 n.7 (1969).

74 433 F.2d at 1254.

obscene materials,[75] the Second Circuit theorized that a private sharing was nevertheless within the scope of *Stanley*'s protection.[76] Invasions of such private consensual relationships, the court concluded, must be constitutionally justified by a trespass on a valid governmental interest.[77] Applying this requirement to the Comstock Act's broad prohibitions against obscene mailings avoided consideration by the court of the Act's constitutionality.[78]

Rejecting the notion that the protection of society or the correspondents from their own immorality is within the scope of legitimate governmental interest, the court of appeals singled out the protection of minors and the preservation of public decency as within this interest.[79] Since (1) no pandering or public affront could be shown that might bruise the sensibilities of third persons, (2) Dellapia guarded against any exposure to minors, and (3) the correspondence was free of commercial motive, the court concluded that Dellapia's private correspondence could not be prohibited.[80]

This decision suggests that the Second Circuit has run afoul of the Supreme Court's edicts in the companion case to *Thirty-Seven Photographs, United States v. Reidel*.[81] Reidel mailed copies of an allegedly obscene booklet to willing recipients who stated that they were over twenty-one years of age. Holding that his delivery was constitutionally

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[75] Stanley v. Georgia, 394 U.S. 557, 561 (1969). The Supreme Court had summarily affirmed a district court holding that *Stanley* did not prevent application of Georgia's obscenity statute to book sellers. Gable v. Jenkins, 397 U.S. 592 (1970), *aff'g* 309 F. Supp. 998 (N.D. Ga. 1969).

[76] 433 F.2d at 1255.

> Clearly, the Court did not intend that one forfeit the shelter of *Stanley* merely by sharing his private collection of obscenity with another for his private use. . . . Dellapia was neither indicted nor convicted for "public" distribution within the meaning of *Stanley*. Since the government has shown no special circumstances that would justify its prosecution of Dellapia in the face of *Stanley*, his conviction must be reversed.

Id. at 1255-56.

> [t]here is no evidence in the record to sustain a finding that this was anything but a "private exchange." There was not a shred of evidence that Dellapia offered the films for sale to the general public. Nor did the government show that Dellapia made a profit on his transactions with Gerard.

Id. at 1255 n.11.

> Private communication seems no less part of freedom than privacy to read one's own books. If not, then the privacy that *Stanley* held inviolable is less robust than we would have thought.

Id. at 1259.

[77] *Id.* at 1260.

[78] *Id.* at 1259-60. This is comparable to the Supreme Court's subsequent attempt in *Thirty-Seven Photographs* to save section 305 of the Tariff Act from constitutional attack. *See* note 66 *supra* and accompanying text.

[79] 433 F.2d at 1256-59.

[80] *Id.* at 1256-60.

[81] 402 U.S. 351 (1971). For discussion of both *Thirty-Seven Photographs* and *Reidel* see note, *Obscenity Law: Le Deluge Postponed*, 17 CATHOLIC LAW. 255 (1971).

protected, the district court dismissed the indictment against Reidel for violation of section 1461 (18 U.S.C.).[82] The Supreme Court reversed this judgment, relying on an earlier section 1461 conviction in *Roth*. Thus the *Roth* espousal that "obscenity is not within the area of constitutionally protected speech or press"[83] was reinforced, and *Stanley* was restricted to its facts. While the Court had asserted in *Stanley* that mere private possession of obscene matter cannot be constitutionally proscribed, it was now barring a means by which private possession might be acquired.

Upon closer inspection, however, distinctions present themselves which may reconcile *Dellapia* and *Reidel*. The Supreme Court relied heavily on the fact that Reidel was dealing in obscenity as a commercial enterprise, and was employing the services of the postal system in the furtherance of his moneymaking scheme.[84] This was too much for the Court. It violated all possible interpretations of section 1461, and sought to capitalize on the right of privacy. In *Dellapia*, on the other hand, the Second Circuit predicated its holding on the fact that Dellapia's activities were noncommercial.[85] *Stanley*'s protection of private possession and enjoyment may readily be held to cover a small group's private possession and enjoyment. Postal exchanges of obscene material within the group would not violate the purpose of this protection. However, *Stanley* clearly may not be extended to cover the commercial realm. Entrepreneurs may not seek the shelter of *Stanley* while blatantly violating its purpose. Public peddlers of pornography may not label their activities as private, when those activities consist of soliciting and publicly distributing obscene material, and thus offending the public conscience.[86]

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[82] *See* note 73 *supra*. The Ninth Circuit has recently sustained convictions under 18 U.S.C. § 1461 (1964) in accordance with the Supreme Court's later holding in *Reidel*. *See* United States v. Jacobs, 433 F.2d 932 (9th Cir. 1970); Miller v. United States, 431 F.2d 655 (9th Cir. 1970).

[83] 354 U.S. 476, 485 (1957).

[84] 402 U.S. at 356 (opinion of the Court), 357 (Harlan, J., concurring).

[85] The distinction between commercial and non-commercial conveyances of obscene matter was endorsed in United States v. New Orleans Book Mart, Inc., 328 F. Supp. 136, 143-46 (E.D. La. 1971). In Redmond v. United States, 384 U.S. 264 (1966), the Solicitor General moved to vacate a judgment of conviction for mailing private correspondence containing allegedly obscene matter. The Court granted the motion per curiam since such prosecution was against the policies of the Justice Department. The concurring opinion of Justices Stewart, Black and Douglas declared that irrespective of what the policies of the Justice Department happened to be, prosecution for such a private mailing was in violation of the Constitution. *Id.* at 265.

[86] In *New Orleans Book Mart* the district court held that a commercial distributor of obscene material lacked standing to attack the constitutionality of sections 1462 and 1465 for overbreadth. While a literal reading of the acts would prohibit both commercial and private transportation of obscene materials, the court limited application of the acts

Synthesizing *Reidel* and *Thirty-Seven Photographs* against the background of *Roth* and *Stanley*, it may be postulated that while obscenity is not protected by the first amendment, the right to privacy is. Commercial transactions in obscene materials are clearly outside the scope of privacy; private communications, by mail or otherwise, are not.[87] Legitimate governmental interests, however, may outweigh the interest of the preservation of privacy. These special governmental interests include, but are not necessarily limited to, the protection of minors, the protection of society against affronts to public decency, and the protection of society from foreign obscenity.[88] The Second

to commercial activities. Such a rule, the court maintained, would excise most of the overbreadth and eliminate much of the chill, thus rendering an expansive approach to standing unnecessary. 328 F. Supp. 136, 145, 146 (E.D. La. 1971).

87 As early as 1877 the Supreme Court assured that the Constitution prevented the Comstock Act from subjecting letters and sealed packages to unreasonable searches and seizures, in *Ex parte* Jackson, 96 U.S. 727 (1877):

> The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter, — between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. *Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection,* except as to their outward form and weight, *as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.* Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

96 U.S. at 732-33 (emphasis added).

Jackson thus serves to emphasize that constitutional protections of privacy apply equally to sealed private correspondence through the mails at they do to effects in the home. The protections that *Stanley* affords to the private possession of obscenity in the home, therefore, likewise extend to such matter when in sealed private correspondence.

88 Giving *Stanley* a more limited scope than that necessarily warranted by *Reidel* would lead to the conclusion that the mail is another such special governmental interest. *Jackson* lends support to this argument with the proviso that no unreasonable searches or seizures be employed in the enforcement of that interest:

> Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages, or from agents depositing them in the post office, or others cognizant of the facts.

96 U.S. at 735.

Circuit's decisions and reasoning in *Dellapia* and *"Language of Love"* are in full concert with such state of the law.

ZONING — EQUAL PROTECTION

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect to use and occupation of private lands in urban communities.[89]

Inherent to the problem forseen by the Supreme Court in *Euclid v. Ambler Realty Co.*[90] is the difficult task of providing equal protection of the law to all citizens, and developing a viable community.[91] Current standards of equal protection demand a re-evaluation of zoning principles.[92] Discretionary powers of local governments have always created a deep concern about the constitutionality of zoning ordinances.[93]

Under this reasoning, it is significant that *Dellapia* did not involve an arbitrary postal inspection, but rather evidence obtained from the recipient. While Dellapia's prosecution would not, therefore, violate the *Jackson* rule, its vulnerability to a reasonable reading of *Stanley* would remain.

89 Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In this early case the Court approved a comprehensive zoning ordinance. The village of Euclid had adopted a zoning plan which was attacked as denying liberty and property without due process and denying equal protection of the law. It was considered a liberal and tolerant attitude compared to prior decisions of the period. *See* Ribble, *The Due Process Clause as a Limitation on Mutual Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 699 (1930).

90 272 U.S. 365 (1926).

91 *See generally* Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 967 (1968). The difficulty lies in the relationship of economic and racial classes. Legislation which segregates economic classes by setting minimum building plots or minimum values of particular areas are subject to constitutional scrutiny as contradictory to traditional notions of equal protection. In Shelly v. Kramer, 334 U.S. 1, 20 (1943), the Court stated that "freedom from discrimination by the States in enjoyment of property rights" is imperative. When state action is inescapably adverse to the enjoyment of this right, the city must show a compelling government interest in order to overcome a finding of unconstitutionality. Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954); Adickes v. S.H. Kress & Co., 252 F. Supp. 140 (S.D.N.Y. 1966).

92 Different approaches to zoning have been used, all of which tend to discriminate economically and therefore racially:

(1) Minimum size building lots. See Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969). This article contains a discussion of the efficiency, desirability and possible alternatives of large lot zoning.

(2) Minimum floor space. See Note, *Zoning for Minimum Standards, The Wayne Township Case*, HARV. L. REV. 1051, 1057 (1953), for a discussion of the relationship of state police power (health, safety, morals and welfare) to citizens and certain zoning ordinances.

(3) Strict building codes which raise the cost of erection.

(4) Prohibition of multiple dwellings. See Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1062-68 (1963). *See also* Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 331 (1955).

93 In *Euclid*, a land owner questioned the constitutionality of a zoning ordinance