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Constitutional Law - Private Distribution of Obscene Material. United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970)

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of a trend that may culminate in the widespread judicial recognition of this long-sought privilege.³¹ At the very least, *Caldwell* represents a check upon the increasing practice of "convert[ing] news gatherers into Department of Justice investigators. . . ." ³²

ROBERT A. HOLMES

Constitutional Law—PRIVATE DISTRIBUTION OF OBSCENE MATERIAL.
United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970).

A California couple placed a notice in a magazine announcing their desire to hear from "other photo-collectors and liberal-minded couples." Defendant Dellapia responded and correspondence, including an exchange of obscene films, ensued. One of the packages of film mailed by Dellapia at the request of the couple was intercepted by postal inspectors. Dellapia was subsequently arrested by federal authorities and convicted for sending obscene matter through the mail in violation of the Comstock Act.¹

On appeal, the Court of Appeals for the Second Circuit reversed the conviction, ruling that where there is no public distribution and when children are not involved the government cannot constitutionally prosecute an individual for mailing obscene material to adults who have requested it.² The court concluded that the right to possess and receive obscene matter established in *Stanley v. Georgia*³ would be mean-

31. Two cases dealing with this issue have recently been decided. In *State v. Knops*, — Wis. —, 183 N.W.2d 93 (1971), the court adopted the compelling need test as enunciated in *Caldwell*, but found that a compelling need for the newsmen's testimony did exist. In *In re Pappas*, — Mass. —, 266 N.E.2d 297 (1971), the court criticized and rejected the *Caldwell* test stating that such a privilege seriously interferes with law enforcement.

32. 434 F.2d at 1086.

1. The Comstock Act, 18 U.S.C. § 1461 (1964), declares in part that "[e]very obscene . . . article, matter, thing, device, or substance . . . is declared to be non-mailable. . . ." It provides that "[w]hoever knowingly uses the mails for the mailing . . . of [non-mailable matter] . . . shall be fined . . . or . . . imprisoned . . . or both. . . ." See also, 18 U.S.C. § 1465 (1964). For commentary on a Supreme Court decision bearing on the limitations of the Comstock Act see *Stanley v. Georgia*, 394 U.S. 557, 562 n.7 (1969). Cf. *United States v. Book Bin*, 39 U.S.L.W. 4120 (U.S. Jan. 14, 1971); *Public Clearing House v. Coyne*, 194 U.S. 497, 506-08 (1903); *Ex parte Jackson*, 96 U.S. 727 (1877).

2. *United States v. Dellapia*, 433 F.2d 1252, 1258-59 (2d Cir. 1970).

3. 394 U.S. 557 (1969). See generally 11 WM. & MARY L. REV. 261 (1969). During a search of Stanley's home three rolls of obscene film were found. The Supreme Court of Georgia upheld Stanley's conviction for violation of a Georgia obscenity statute, GA. CODE ANN. § 26-6301 (Supp. 1968), repealed, [1968] Ga. Acts 1249, 1346. *Stanley v. State*, 224 Ga. 259, 161 S.E.2d 309 (1968). In reversing, on appeal, the United States Supreme Court ruled that ". . . mere private possession of obscene matter cannot con-

ingless without some corollary right to communicate or transmit it.⁴

In *Roth v. United States*⁵ the Supreme Court upheld the constitutionality of the Comstock Act,⁶ declaring that "obscenity is not within the area of constitutionally protected speech or press."⁷ It has consistently reaffirmed this view in subsequent decisions.⁸ When faced in *Stanley v. Georgia* with the question of mere private possession rather than that of unlimited distribution, however, the Court found *Roth* to be inapplicable.⁹ *Stanley* declared that possession of obscene matter in the privacy of one's own home is protected from state regulation.¹⁰ Discussing the scope of this decision, the *Stanley* Court espoused two guidelines. First, it was careful to warn that *Roth* and its progeny were not impaired by the decision.¹¹ This statement implied that all forms of distribution are subject to governmental regulation. Secondly, in distinguishing earlier cases, the Court explained that when widespread public distribution of obscene material is involved, as it was in *Roth*, there is always a danger that the material might fall into the hands of children or intrude upon the sensibilities of an unwilling public.¹² In

stitutionally be made a crime." 394 U.S. at 559. The Constitution also protects the right to "receive" obscene matter. 394 U.S. at 564. Cf. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

4. 433 F.2d at 1258.

5. 354 U.S. 476 (1957).

6. 18 U.S.C. § 1461 (1964).

7. 354 U.S. at 485.

8. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Smith v. California*, 361 U.S. 147 (1959).

9. 394 U.S. at 560-64.

10. *Id.* at 559, 568.

11. "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the states retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Id.* at 568.

12. The Supreme Court has found only two legitimate reasons for obscenity legislation; protecting children from exposure, and preventing intrusions on the sensibilities of an unwilling public. *Stanley v. Georgia*, 394 U.S. 557, 567 (1969). Preventing crimes of sexual violence, and protecting the society's moral fabric were rejected by the Supreme Court in *Stanley* and other decisions. See Note, *The New Metaphysics of the Law of Obscenity*, 57 CALIF. L. REV. 1237, 1276 (1969). The argument that the government must restrict distribution to adults as a necessary concomitant to protecting children was foreclosed by *Butler v. Michigan*, 352 U.S. 380 (1956). In discussing the argument that statutory schemes prohibiting possession are necessary to prevent distribution, due to the evidentiary problem in proving intent to distribute, the *Stanley* court said, "We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases." 394 U.S. at 567-68.

Stanley there was no such danger.¹³ The question logically follows, then, whether the *Stanley* rationale can be extended beyond mere possession to include private distribution when none of the enumerated dangers are present.¹⁴

Considerable variance has appeared in decisions relating to this problem. Most courts have restricted the decision to its facts and have not departed from *Roth*.¹⁵ This construction allows an individual to exercise his right to possess obscene matter, but only at the expense of criminal acts on the part of a supplier.¹⁶ Rejecting this view, a small number of courts, in line with *United States v. Dellapia*, have extended the *Stanley* rationale to allow private distribution when no countervailing public interest is involved.¹⁷ This position is based primarily upon an interpretation that *Roth* applies only where there is widespread public distribution to an unwilling public or where children may be exposed to the material.¹⁸ Restricted distribution of obscene matter, properly controlled, is no longer to be condemned.¹⁹ This conclusion is further compelled by the logical inference that a constitutional right to receive a communication would be meaningless without a coextensive right to convey it.²⁰

Support for this contention is found in *Griswold v. Connecticut*,²¹

13. *Id.* at 567.

14. See *Karalex v. Byrne*, 306 F. Supp. 1363 (D. Mass. 1969), *appealed*, 396 U.S. 976 (1969), *prob. juris. noted*, 397 U.S. 985 (1970), *restored to calendar for rearg.*, 39 U.S.L.W. 3006 (U.S. July 14, 1970) (No. 1149, 1969 Term, renumbered No. 83, 1970 Term).

15. See *United States v. Fragus*, 422 F.2d 1244 (5th Cir. 1970); *United States v. Melvin*, 419 F.2d 136 (4th Cir. 1970); *United States v. Gower*, 316 F. Supp. 1390 (D.D.C. 1970); *A.B.C. Books Inc. v. Benson*, 315 F. Supp. 695 (M.D. Tenn. 1970); *Newman v. Conover*, 313 F. Supp. 623 (N.D. Tex. 1970); *Grove Press, Inc. v. Brockett*, 312 F. Supp. 496 (E.D. Wash. 1970); *United States v. 35 MM Color Film*, 312 F. Supp. 1382 (S.D.N.Y. 1970); *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969); *aff'd mem.*, 397 U.S. 592 (1970).

16. *Karalex v. Byrne*, 306 F. Supp. 1363, 1366 (D. Mass. 1969).

17. *United States v. Reidel*, — F. Supp. — (C.D. Cal. 1970), *prob. juris. noted*, 91 S. Ct. 67 (1970); *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757 (D. Mass. 1970), *appeal docketed*, 39 U.S.L.W. (U.S. Aug. 11, 1970); *United States v. Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970); *United States v. 37 Photos*, 309 F. Supp. 35 (C.D. Cal. 1970); *Karalex v. Byrne*, 306 F. Supp. 1363 (D. Mass. 1969), *appealed*, 396 U.S. 976 (1969), *prob. juris. noted*, 397 U.S. 985 (1970), *restored to calendar for rearg.*, 39 U.S.L.W. 3006 (U.S. July 14, 1970) (No. 1149, 1969 Term, renumbered No. 83, 1970 Term); *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969).

18. *United States v. Lethe*, 312 F. Supp. 421, 423 (E.D. Cal. 1970).

19. *Id.* See also cases cited note 17, *supra*.

20. *United States v. Dellapia*, 433 F.2d 1252, 1258 (2d Cir. 1970); *United States v. Lethe*, 312 F. Supp. 421, 425 (E.D. Cal. 1970).

21. 381 U.S. 479 (1965).

in which the Supreme Court reversed the conviction of a professional counselor who had given information to married couples regarding the use of contraceptives in violation of Connecticut law. The Court reasoned that a married couple's right to decide whether or not to receive information and devices or to practice birth control is protected by an implied constitutional right of privacy.²² Recognizing this right necessarily implies that a state cannot be allowed to prohibit the dissemination of information and devices which are essential to its existence.

The *Dellapia* court joins the growing minority of jurisdictions which have extended *Stanley* beyond its facts.²³ In its logical and narrowly circumscribed extension, which provides a legitimate source for adult material acquired for private enjoyment, however, the court recognizes a concurrent governmental right to enforce statutory provisions that protect a recognized public interest.²⁴

WOODROW TURNER, JR.

Evidence—NARCOTICS—QUANTITY REQUIRED FOR CONVICTION OF POSSESSION. *Robbs v. Commonwealth*, 211 Va. 153, 176 S.E. 2d 429 (1970).

In September 1968, the defendant was convicted by a trial court, sitting without a jury, of possession of heroin under section 54-488 of the Virginia Code,¹ a part of the Uniform Narcotic Drug Act. On appeal she contended that the evidence was insufficient to sustain her conviction in that it failed to establish possession of a useable quantity of the narcotic.

22. Although the right of privacy is not explicitly enumerated, it is within the penumbra of specific guarantees of the Bill of Rights. *Id.* at 484.

23. For a thorough discussion of the logic of extending *Stanley* beyond its facts see Engdahl, *Requiem for Roth: Obscenity Doctrine Is Changing*, 68 MICH. L. REV. 185, 229 (1969); Laughlin, *A Requiem for Requiems: The Supreme Court at the Bar of Reality*, 68 MICH. L. REV. 1389 (1970); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 1, 147 (1969); Note, *The New Metaphysics of the Law of Obscenities*, 57 CALIF. L. REV. 1257, 1278, 1279 (1969); 21 BAYLOR L. REV. 503 (1969).

24. See note 12, *supra*.

1. "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this article." This section, along with the rest of the Uniform Narcotic Drug Act, was repealed by the General Assembly in April, 1970. It was replaced by *The Drug Control Act*, ch. 650, [1970] Va. Acts. The corresponding language of the new law is found in VA. CODE ANN. § 54-524.101(c) (Supp. 1970): "It is unlawful for any person knowingly or intentionally to possess a controlled drug unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner"