> posed to have a demoralizing influence upon the people. * * *

In 1890, the Court considered the comparable provisions in Section 1 of the Act of July 12, 1876, 19 Stat. 90, and found that an obscene personal letter did not fall within the statute as then drafted. *United States* v. *Chase,* 135 U. S. 255, 261. The Court had no doubts as to the validity of the statute:

> We think that its purpose was to purge the mails of obscene and indecent matter as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination. *Ex parte Jackson,* 96 U. S. 727. This object seems to have been accomplished by forbidding the use of the mails to books, pamphlets, pictures, papers, writings and prints, and other publications of an indecent nature, and also to private letters and postal cards whereon the indecent matter is exposed to the inspection of others than the person to whom the letter is written.

In 1895, a conviction under the then obscenity statute, Rev. Stat. 3893, was affirmed by the Court where the issue related to the validity of the indictment. *Grimm* v. *United States,* 156 U. S. 604.

In 1896, the statute was before the Court three times. The first of these cases, *Rosen* v. *United States,* 161 U. S. 29, involved extended consideration of the extent to which the indictment had to allege which particular pictures and passages were obscene. It also turned on the question of what was meant by

"knowingly" using the mails for the transmission of an obscene publication. The Court said:

> The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious. [161 U. S. at 41–42.]

The second 1896 case was *Swearingen* v. *United States,* 161 U. S. 446, 451, which found that the lower court had erred in instructing the jury that a particular newspaper article was obscene. The article in question (161 U. S. at 447) was coarse and vulgar, but had few sexual references. The Court said:

> The words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel.

The third 1896 case was *Andrews* v. *United States,* 162 U. S. 420, which found that under the amended statute a person could be convicted for mailing an obscene private sealed letter.

In 1897, the Court, in *Robertson* v. *Baldwin,* 165 U. S. 275, 281, was not faced with the statute in question but said:

> Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles or other publications injurious to public morals or private reputation; * * *

In 1897, a conviction under Rev. Stat. 3893 was affirmed in *Price* v. *United States,* 165 U. S. 311, and in *Dunlop* v. *United States,* 165 U. S. 486, 501, where the Court considered the scope of the statute:

> It was in this connection that the court charged the jury that, if the publications were such as were calculated to deprave the morals, they were within the statute. There could have been no possible misapprehension on their part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure, sexual relations. The words were used by the court in their ordinary signification, and were made more definite by the context, and by the character of the publications which had been put in evidence. The court left to the jury to say whether it was within the statute, * * *. We have no doubt that the finding of the jury was correct upon this point.

In 1904, came the Court's decision in *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508, in which it said:

> For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked.

In upholding the validity of the Mann Act in *Hoke* v. *United States,* 227 U. S. 308, 322, the Court relied, as a basic step in its reasoning, upon the validity of the restraint on obscene matter:

> * * * if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature * * *, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

In the same year, 1913, the Court upheld another conviction under the postal obscenity statute. *Bartell* v. *United States,* 227 U. S. 427.

In 1925, the validity of the postal obscenity statute was again used by the Court to support its conclusion as to another law. *Hygrade Provisions Co.* v. *Sherman,* 266 U. S. 497, 502:

> Many illustrations will readily occur to the mind, as for example statutes prohibiting the sale of intoxicating liquors and statutes prohibiting the transmission through the mail of obscene literature, neither of which have been found to be fatally indefinite because in some instances opinions differ in respect of what falls within their terms.

In considering the constitutional limits on the restraints which may be imposed on the freedom of the press in *Near* v. *Minnesota,* 283 U. S. 697, 716, the Court stated:

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing

> dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications.

In 1932, Mr. Justice Brandeis wrote the opinion of the Court in *United States* v. *Limehouse,* 285 U. S. 424, 425, reversing the decision below and holding that the statute must be construed more broadly than had been done by the lower court:

> They [the letters] were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term.

In 1938, in *Lovell* v. *City of Griffin,* 303 U. S. 444, 451, the Court had before it the issue of the constitutionality of a restriction on freedom of the press:

> The ordinance is not limited to "literature" that is obscene or offensive to public morals or that advocates unlawful conduct.

Again in 1942, in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572, the Court was considering the constitutional limits on free speech, and used the validity of restraints on obscenity in support of its decision as to epithets:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate

> breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut,* 310 U. S. 296, 309–310.

In 1946, Mr. Justice Douglas writing for the Court in *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 158, stated:

> The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted.

In *Winters* v. *New York,* 333 U. S. 507, the Court heard argument three times to aid it in its consideration of the limits on state regulation of the content of the press. In holding invalid the New York statute relating to magazines which massed stories dealing with crime, the Court pointed out that magazines are "subject to control if they are lewd, indecent, obscene, or profane," and referred to the permissible uncertainty in the standard "obscene, lewd, lascivious, filthy, indecent or disgusting" (333 U. S. at 510, 518).

In *Kovacs* v. *Cooper,* 336 U. S. 77, 80, the Court relied upon the fact that "obscene" was sufficiently definite in holding that "loud and raucous" was an adequate standard.

In 1952, the Court again relied upon the validity of restrictions on obscenity in reaching a decision on the statute in question in *Beauharnais* v. *Illinois,* 343 U. S. 250, 266. The Court stated:

> Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances.

In the same year, in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 506, the Court left open the question of whether a state, through *prior censorship,* can prevent the showing of obscene moving pictures. The Court did not suggest, however, any doubts as to the validity of post-conduct punishment for the circulation of obscene material.

Thus this Court, over a seventy-five year period, has consistently and repeatedly considered the restriction here involved as valid and as a model, both as to definiteness and substance, of the sort of restriction to which the press may properly be subjected. The constitutionality of this provision has been relied on in determining the validity or invalidity of other forms of restraint. These decisions reflect not merely dicta but the considered judgment of the Court in some of the most controversial cases that have been before it. The expressions of the Court reflect an appreciation

of the value to society of public morality, and the worthlessness to society of obscene matter.[34a]

As we have said above, the worth of social interests is judged by the regard with which they are held by enlightened society. There can be no doubt as to the views of the country or as to the prior views of this Court.

2. AS TO WHAT FALLS WITHIN THE CONCEPT OF OBSCENITY, THERE HAVE BEEN MARGINAL CHANGES AND DIFFERING VIEWS IN THE BORDERLINE AREA BUT OBSCENITY ITSELF REMAINS DISFAVORED

As petitioner and appellants point out, the boundary line between what is called obscene and what is tolerated has shifted and continues to shift with the passage of time. This peripheral change has been modest, and "hard-core" pornography, the bulk of the published material caught by Section 1461, has never been tolerated. Even today, different countries have different ideas as to exposure, but none, so far as we know, considers as socially acceptable anything which degrades sexual intercourse.

[34a] In 1947, Professor Chafee considering the constitutionality of 18 U. S. C. 1461, observed (*Government & Mass Communications*, vol. 1, p. 282):

> The effect of the First Amendment and freedom of the press upon the administrative mechanism of the Post Office is more important practically than their effect on the postal power of Congress. Questions of the unconstitutionality of legislation are somewhat remote from reality, because the existing postal statutes, if properly construed, seem to fall within the valid powers of Congress.

But in any case the significant point here is that changing mores as to the content of "obscenity" reflect no change as to the non-value of what is concededly obscene. That is still strongly disfavored in all parts of the world and all parts of this country. Different people may have different ideas of what is obscene even at any one time, but this does not indicate that they have any differences on the conclusion that what *is* obscene should not be circulated. It does not indicate any difference as to the relative value with which the competing social interests are held.

Petitioner argues that the more liberal attitude of today as to what is obscene justifies overturning the universal judgment of this country since it was established. We would suggest just the contrary. Within the United States, the edges of obscenity have been melting, so that discussion of many subjects, including sex, can now take place in more direct terms. These minor changes mean that, whatever idea content there may have been which was restricted fifty or seventy-five years ago, there is less today. When there was a greater risk of losing ideas of value by restricting obscenity, the nation decided that obscenity must nonetheless be restrained. Today, when less falls within the concept of obscenity, the result is *a fortiori*. Accordingly, there is less reason than ever before to allow material that is admittedly obscene to be circulated through the mails. Material that is obscene by today's standards is, as petitioner would have to agree, less likely to contain a worthwhile idea than what was considered obscene before.

II

The Fifth Amendment

SECTION 1461 IS NEITHER SO BROAD NOR SO VAGUE AS TO DEPRIVE PETITIONER OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT

Section 1461 is attacked as violative of the Fifth Amendment on two separate grounds. The first of these is that it is too broad. It is said that the legislation is not reasonably restricted to the evil with which it deals, and that, like the Michigan statute considered in *Butler* v. *Michigan,* 352 U. S. 380, 383, the effect is "to burn the house to roast the pig." The second respect in which it is urged that the statute fails to meet the standards of due process is in the definition of the crime. It is said that the statute is so vague that it does not give the jury an adequate basis for a decision based on law. The Government submits that, on the contrary, Section 1461 is neither too broad nor too vague.

A. To prohibit the mailing of publications which are calculated to corrupt and debauch the minds and morals of the average person in the community is no broader a restraint than required

In Point I, supra, at pp. 58–59, 71–74, we have discussed, with respect to the First Amendment, the charge that Section 1461 is too broad a restriction on free speech. We argued that, in the light of the relative balance of the competing interests involved, the statute is an appropriate restriction and therefore does not violate the First Amendment. Now, we consider

the companion issue of whether the statute is too broad under the Due Process clause of the Fifth Amendment—whether, aside from considerations of free speech, Section 1461 is too broad a prohibition for the specific evil with which Congress was dealing.

The Court's decision in this Term in *Butler* v. *Michigan,* 352 U. S. 380, held invalid a state statute which made it a crime to sell to an adult a book "manifestly tending to the corruption of the morals of youth". The Court found that the legislation was not reasonably restricted to the evil with which it was said to deal. In contrast to the Michigan statute, Section 1461 is as narrowly drawn a criminal statute as it could be to meet the evil at which it is directed.

At the trial, the judge correctly charged the jury that to find petitioner guilty under Section 1461 they had to find that the material which he had mailed was "calculated to corrupt and debauch the mind and morals". The judge also instructed the jury that they must appraise the impact of the material on the "average person in the community". What the statute is aimed at is the prevention of the circulation of obscene material which is likely to corrupt the morals of people in general—not any particular class, not children, not the highly susceptible. The jury found the petitioner guilty. The court of appeals found that the evidence amply supported the verdict. Under the limited grant of certiorari, it is to be taken as given that the material to which the statute was construed to apply is likely to corrupt the morals of the average member of the community.

Assuming the validity of the statute under the First Amendment—namely, that Congress may properly forbid the distribution of printed material to persons whom it is likely to corrupt—is a statute unconstitutionally broad for due process purposes which prevents the mailing of material likely to corrupt the average person in the community? By hypothesis, the only narrowing of the statute that could conceivably be done would be to exempt from its scope those exceptional individuals who, because they were particularly hardened, or were blind, or had some other protection against the influence of the material, or because their morals were already fully corrupted, would not be subject to influence by that which would affect the average person.

But statutes do not have to be designed to except from their operation the exceptional case. It is obvious that, in the public interest, speed limits can be adopted even though some skilled drivers could safely go faster without creating any greater risk of injury than that arising when the average person drives at the speed limit. And non-intoxicants can be prohibited in order to control intoxicants. Cf. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Carolene Products Co.* v. *United States,* 323 U. S. 18; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 487–489. The constitutional requirement of due process is that there be a close relationship between the restriction and the evil, not that every exceptional circumstance be omitted from coverage by the act. To protect the

average person in the community Congress need not provide special mailing privileges for a few.[35]

Unlike the statute involved in *Butler* v. *Michigan*, 352 U. S. 380, Section 1461 restricts only a method of distribution in which it is practically impossible to distinguish whether the recipient of the material will be within the class of those susceptible to it. In the first place, it is impossible to tell who is susceptible to the material and who is not. Although we must concede that there are undoubtedly some persons whose morals would not be corrupted by exposure to a particular piece of pornography, there is no known way of separating them from the balance of the population. And although certain pornographic material might not affect one member of the community, more potent pornography, such as motion picture films of sexual orgies, might. It would be impossible to draft or administer a law which judged the material to be mailed by the likelihood that it would corrupt the particular recipient. And even if such a law could be written, it would raise far more serious questions than that here involved of whether restrictions based

[35] Whether or not Congress can prohibit the distribution of obscenity by other means to those not susceptible to it, Congress can certainly decide that it need not devote the mail service to carrying material which is harmful to the average person in the community. There can be no constitutional requirement that Congress must, for the benefit of the few, devote the postal service to distributing material which admittedly tends to corrupt the morals of the average person in the community. See *supra*, pp. 71–73.

423731—57——8

on such subjective standards would provide due process of the law.

This is especially true because we are here dealing with a restriction on what goes through the mail. This fact provides additional justification for the reasonableness of the prohibition contained in Section 1461. There is no practicable method of determining even the age, let alone the susceptibility, of the recipient of material sent through the mails. It is not like the Michigan statute where the seller can look at the buyer and be expected to find out whether he is a minor. As the liquor laws demonstrate, such an across-the-counter transaction can be regulated in terms of the recipient. But the mailing list of advertising circulars cannot be similarly scrutinized. Not only is there no standard by which to judge who is not the average member of the community but there is no way of making sure that material sent through the mail would only go to such recipients. See also *supra,* pp. 61, 71–74; *infra,* pp. 106–107.

It is argued that the statute is too broad because it applies to all—that those who do not want to look at obscenity do not have to buy it. But a prime purpose of the restriction, as with the regulation of narcotics, is to restrain the distribution of material to those who want it. Further, as petitioner's case demonstrates, the commercial distribution of obscenity is not limited to those who want it. Of the exhibits for which petitioner was found guilty most were advertising circulars; only one was published matter for which a price had been paid.

B. *The statutory test, "obscene, lewd, lascivious, or filthy," is not so vague and indefinite as to deprive petitioner of his liberty without due process of law*

1. THE COMMON LAW BACKGROUND AND JUDICIAL CONSTRUCTION MAKE UNDENIABLY CLEAR THE CENTRAL MASS OF MATERIAL AT WHICH THE STATUTE IS DIRECTED

There can be no doubt as to what is the central mass of material at which Section 1461 is directed. A common law background of centuries and over a hundred years of statutory and judicial history in this country provide a firm guide. There is a solid core of material which, within the common law and under the statutes, is known to be obscene without doubt. This includes those matters which explicitly and purposefully deal with sex conduct in a degrading or perverted way, with no artistic aspect whatever—dirt for dirt's sake.

In particular, the judicial decisions construing the concept of obscenity not only make clear the central mass of material at which the statute is aimed but go far to lay down the standards by which the borderline areas are to be blocked out. Under these standards, the statute is limited to that material which, taken as a whole, constitutes a present threat to the morals of the average person in the community. *United States* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2); *United States* v. *One Book Called "Ulysses",* 5 F. Supp. 182 (S. D. N. Y.), affirmed, 72 F. 2d 705 (C. A. 2). Various subsidiary criteria now employed in considering the question of whether material is obscene prune out that which is calculated by its content and stereotyped repetition of such content to portray *ad*

nauseum the tasteless, offensive, and solely lustful. Thus, the author's purpose may be relevant. *United States* v. *Dennett,* 39 F. 2d 564, 659 (C. A. 2) ("The defendant's discussion of the phenomena of sex is written with sincerity of feeling and with an idealization of the marriage relation and sex emotions."); *United States* v. *One Book Entitled "Ulysses",* 72 F. 2d 705, 706–707 (C. A. 2); *United States* v. *One Book, Entitled "Contraception",* 51 F. 2d 525, 527 (S. D. N. Y.); *United States* v. *Hornick,* 131 F. Supp. 603 (E. D. Pa.), affirmed, 229 F. 2d 120 (C. A. 3); *Parmelee* v. *United States,* 113 F. 2d 729, 735 (C. A. D. C.). The view of book reviewers and the appraisals of competent critics is distinctly helpful. *United States* v. *One Book Called "Ulysses",* 5 F. Supp 182 (S. D. N. Y.), affirmed, 72 F. 2d 705 (C. A. 2); *United States* v. *Levine,* 83 F. 2d 156, 158 (C. A. 2); *United States* v. *Rebhuhn,* 109 F. 2d 512, 515 (C. A. 2), certiorari denied, 310 U. S. 629. Consideration is given to the nature of the advertising, the promotional material, and the reputation of the publisher (*Burstein* v. *United States,* 178 F. 2d 665 (C. A. 9); *Roth* v. *Goldman,* 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938; *United States* v. *Rebhuhn,* 109 F. 2d 512 (C. A. 2), certiorari denied, 310 U. S. 629); as well as to the audience to whom the book is directed, and whom it is likely to reach (*United States* v. *Dennett,* 39 F. 2d 564, 568 (C. A. 2); *Parmelee* v. *United States,* 113 F. 2d 729, 731 (C. A. D. C.); *United States* v. *Rebhuhn,* 109 F. 2d 512, 514–515 (C. A. 2), certiorari denied, 310 U. S. 629).

With these aids, the ultimate question is the effect of the material "on a person with average sex instincts". *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, 183 (S. D. N. Y., affirmed, 72 F. 2d 705 (C. A. 2). Moreover, the "dominant effect" of a book as a whole is the criteria, not the effect of isolated passages torn from context. As the Second Circuit pointed out in the *Ulysses* case (72 F. 2d at 708):

> [W]e believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; * * *.[36]

Under these tests, the central coverage of the statute is undeniably plain—"hard-core" commercial pornography and comparable non-commercial material—and the more peripheral areas of coverage are also indicated with sufficient definiteness. The de-

[36] See, in accord, *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938; *Parmelee* v. *United States*, 113 F. 2d 729 (C. A. D. C.); *United States* v *Levine*, 83 F. 2d 156 (C A. 2); *United States* v. *4200 Copies International Journal*, 134 F. Supp. 490 (E D. Wash.); *United States* v. *One Unbound Volume, Etc.*, 128 F. Supp. 280 (D. Md.); *New America Library of World Literature* v. *Allen*, 114 F. Supp. 823 (N. D. Ohio); *United States* v. *Dennett*, 39 F. 2d 564 (C. A. 2); *Walker* v. *Popenoe*, 149 F. 2d 511 (C. A. D. C.); *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (S. D. N. Y.); *United States* v. *One Book, Entitled "Contraception"*, 51 F. 2d 525 (S. D. N. Y.); *One, Inc.* v. *Olesen*, No. 15,139, decided Feb. 27, 1957 (C. A. 9).

liberate purveyor of pornography knows definitely that his product is forbidden. On the other hand, there is little threat to literature or art. The classics are not in danger.[37]

2. IN THE NATURE OF THE PROBLEM, THERE CANNOT BE A FIXED AND PRECISE BOUNDARY TO OBSCENITY WHICH CAN BE SAFELY APPROACHED WITHOUT THE RISK OF GOING OVER

The subject matter of obscenity is words and pictures. As to each there are endless variations. There can never be a sharp and distinct boundary which the publisher of entertainment material can approach without the risk of being found to have crossed the line. The problem is most clearly seen in the field of photographs. Assume, for example, that a motion picture film is taken which starts with a couple fully clothed and, with pictures being taken at several frames per second, ends up with the couple naked and engaged in forbidden sexual conduct. Each individual frame is then enlarged, a regular photographic print made of it, and the prints lined up. If the prints are then considered as individual photographs, all will agree that the photograph at one end of the line may be freely circulated, and that the photograph at the other end is obscene. Going through these photographs from one end to the other, a point must be reached where they change from the acceptable to the obscene, and yet the difference between the two photographs will hardly be discernible to the naked eye.

[37] The customs statute specifically empowers the Secretary of the Treasury to admit "classics". 19 U. S. C. 1305 (a).

This is not as hypothetical a case as it may seem. The entertainment magazines, which stress the erotic interest, continue to pose girls with less and less on, and in more and more provocative postures. Each is competing with the others to get as close to the obscenity line as possible. See *supra,* pp 35–37. The publishers, who contend that they seek a definite line, ridicule any line that is proposed and point out that there is really little difference between what falls on one side of the line and on the other. No matter where the standard were drawn, there would be borderline cases; there would always be commercial producers trying to cater to the pornographic interest—trying to push their product closer to the legal line.

With written material the problem is simpler if only because fewer people try deliberately to write borderline material.[38] But here, again, there cannot be a razor-sharp and clear-cut line. Each work is judged as a whole. No mechanical test could replace such a judgment.

Even the outer boundary line is not now as vague as petitioner would suggest. The continental mass of commercial pornography is well marked on the maps, and is unmistakable. The shoal waters around the edge are also marked with well known buoys and an occasional wreck. No publisher approaches these waters without knowing what he is doing. Petitioner, with more than twenty-five years' experience in and

[38] Mr. Huntington Cairns, long-time advisor to the Treasury Department in the administration of its statute, comparable to Section 1461, has informed us that, in his view, there is no real difficulty in administration except as to pictures.

out of the courts (Pet. Br. 5–6), is typical of the publisher of borderline material. He knows well the interests to which he is catering, and the risks he is taking. He knows that many of the community will consider what he is circulating to be obscene. He weighs the chances on whether a jury of twelve will unanimously agree beyond a reasonable doubt that the material is so bad that it is likely to corrupt the morals of the average person in the community. Cf. *United States* v. *Wurzbach,* 280 U. S. 396, 399; *Boyce Motor Lines* v. *United States,* 342 U. S. 337, 340; and discussion *infra,* pp. 108–110.

It is argued that the statute is unconstitutionally vague because a jury in one part of the country might reach a different conclusion as to the same material from that which would be reached somewhere else. There is no merit in this contention. In certain instances, different results might be reached by different juries within the same city. This could be true of many a criminal case and many criminal statutes. But, by and large, the toleration of the country as to sex discussion and exposure is reflected in magazines of national circulation, in movies, radio and television, and in the newspapers. The very uniformity of social mores which has been condemned by many minimizes the problem. There is nothing to suggest that differences as to obscenity are as great as those between a city and a country jury on such well-recognized crimes as reckless driving or disorderly conduct.

The very differences which may be reached by a jury under the standard of obscenity protect the

freedom of press from restraint which would be imposed by a rigid statute which could not reflect more liberal ideas in the borderline area. The provision of a jury trial is primarily for the benefit of the defendant. Such variations as may result will usually work to his favor, since a verdict against him must be the unanimous view of all members.

3. THE STATUTORY STANDARD IS THE BEST THAT HAS BEEN DEVISED AND CERTAINLY LIES WITHIN THE RANGE OF LEGISLATIVE JUDGMENT

The many other statutes dealing with the problem demonstrate the language of Section 1461 is as definite as any that has been devised. A number of state statutes limit themselves to the word "obscene". *E. g.*, Fla. Stat. § 847.01 (1941); Tenn. Code Ann. § 11190 (1934); W. Va. Code § 6066 (1949); Wis. Stat. § 351.38 (1951). Others closely parallel the federal statutes. *E. g.*, "obscene, lewd, lascivious, filthy, indecent, disgusting or impure" (Utah Code Ann. § 76–39–1 (1953)); "obscene, lewd, lascivious, filthy, indecent or disgusting" (N Y. Penal Law § 1141 (1953) and Pa. Stat. Ann. Title 18, § 4524 (Purdon 1939)).

Some states have included within the statute language comparable to that with which the jury is instructed under the federal statutes. The New Hampshire statute defines an obscene book as one—

> whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave the moral behavior of anyone viewing or reading it. [N. H. Laws 1953, c. 233.]

The Georgia statute (Ga. Code Ann. § 26–6301a (1953)) defines obscene literature as—

> any literature offensive to * * * chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed.

None of these would seem to provide any greater degree of certainty than the standard of Section 1461.

Perhaps the best indication that the present statute, as construed, provides as much certainty as can be expected is the product of several years' study looking to the reform of the British laws on obscene material. See St. John Stevas, *Obscenity and the Law* (1956). As we have already noted (*supra,* p. 78), the text of the Obscene Publications Bill which was recently given a second reading (Appendix, *infra,* pp. 120–125) comes remarkably close to adopting the standard of Section 1461, as generally construed and as interpreted in this case. A person who knowingly distributes obscene matter is made guilty of an offense. Matter is to be deemed obscene, if—

> its dominant effect is such as to be reasonably likely to deprave and corrupt persons to or among whom it was intended, to be distributed, circulated, or offered for sale, * * *

So far as certainty in definition of the crime goes, that standard is the equivalent of Section 1461, as construed.[39]

[39] The provision that the effect of a book shall be judged by its impact on persons of the class among whom it was intended the book should be distributed was apparently designed to make sure that books intended for adults need not be held down to a child's standard. See Hansard, March 29, 1957, col. 1506, quoting from this Court's opinion in *Butler* v. *Michigan*, 352 U. S. 380. It would also have the effect of protect-

4. THE PRESENT STATUTORY CONCEPT OF OBSCENITY MEETS THE STANDARDS OF DEFINITENESS LAID DOWN BY THIS COURT

(a) To satisfy the constitutional requirement of clarity in a criminal statute, fair notice must be given as to the conduct which is deemed criminal. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U. S. 612, 617; *Jordan* v. *De-George,* 341 U. S. 223, 230–232; *United States* v. *Petrillo,* 332 U. S. 1. But, as long as there is a core of conduct definitely understood as unlawful, it matters not "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls * * *". *United States* v. *Petrillo, supra,* at 7; *United States* v. *Harriss, supra.*[40]

The concept of definiteness demands no exact or precise standard. It need not be automatic. Thus, as applied to petitioner, 18 U. S. C. 1461 is at least as definite as other statutes sustained by this Court.[41]

---

ing the legitimate publisher of, say, a scientific work, while allowing prosecution against a distributor who was circulating it generally.

[40] See, also, *United Public Workers* v. *Mitchell,* 330 U. S. 75, 103–104; *Williams* v. *United States,* 341 U. S. 97, 101–102; *Jordan* v. *DeGeorge,* 341 U. S. 223, 231–232; *Dennis* v. *United States,* 341 U. S. 494, 516; *Beauharnais* v. *Illinois,* 343 U. S. 250, 263–264; *Robinson* v. *United States,* 324 U. S. 282, 286; *United States* v. *Wurzbach,* 280 U. S. 396, 399.

[41] E. g., *United States* v. *Wurzbach,* 280 U. S. 396 ("political purposes"); *United States* v. *Petrillo,* 332 U. S. 1 ("in excess of the number of employees needed by such license to perform actual services"); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 ("any offensive, derisive or annoying word"); *Gorin* v. *United States,* 312 U. S. 19 ("connected with or related to the

Each of the cited cases involved a general standard of considerable latitude, yet individuals were required to meet them. Cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 412–413; *Dennis* v. *United States,* 341 U. S. 494, 515. We point out particularly that the Court has found that an Oregon statute providing that everyone shall drive "in a careful and prudent manner * * * and in no case at a rate of speed that will endanger the property of another" was sufficiently definite. "Following the authority in the *Nash* case, we sustained in *Miller* v. *Oregon, per curiam,* 273 U. S. 657, a conviction of manslaughter under a statute of Oregon." *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 464, 465. It could not be said that "ob-

national defense"); *Minnesota* v. *Probate Court*, 309 U. S. 270 ("psychopathic personality"); *Kay* v *United States*, 303 U. S. 1 ("willfully overvalues any security"); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 ("fair and open competition"); *United States* v. *Shreveport Grain and Elevator Co.*, 287 U S. 77 ("reasonable variations shall be permitted"): *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8 ("unreasonable waste of natural gas"); *Omaechevarria* v. *Idaho*, 246 U. S. 343 ("range usually occupied by any cattle grower"); *Boyce Motor Lines* v. *United States*, 342 U. S. 337 ("practicable and feasible"); *Hygrade Provision Co.* v. *Sherman*, 266 U. S 497 ("Kosher"); *Robinson* v. *United States*, 324 U. S. 282 ("liberated unharmed"); *Waters-Pierce Oil Co.* v. *Texas* (*No. 1*), 212 U. S. 86 ("reasonably calculated", "tend"); *United States* v. *Alford*, 274 U. S. 264 (whether a fire is "near" the public domain); *United States* v. *Ragen*, 314 U. S. 513 ("a reasonable allowance for salaries or other compensation for personal services actually rendered"); *Lloyd* v. *Dollison*, 194 U. S. 445 ("wholesale" or "retail"); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (Hatch Act: "active part in political management or in political campaigns"); *Sproles* v. *Binford*, 286 U. S. 374 ("shortest practicable route"); *Miller* v. *Strahl*, 239 U. S. 426 ("to do all in one's power").

scenity", with its long statutory tradition and common law heritage, is less definite a standard than is reckless driving.

Of particular significance for obscenity is the accepted principle that a common law heritage and tradition is important in determining the clarity of statutory language. In *Jordan* v. *DeGeorge*, 341 U. S. 223, 229 "moral turpitude" was held to be sufficiently definite with the comment: "It is significant that the phrase has been part of the immigration laws for more than sixty years"; cf. *Nash* v. *United States*, 229 U. S. 373, where "restraint of trade" was construed in the light of its common law background.

As for the so-called borderline cases, so much discussed in the various briefs, the Court has also spoken clearly. Justice Holmes observed in *United States* v. *Wurzbach*, 280 U. S. 396, 399:

> But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

More recently, the Court said: "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340.

(b) But one need not look at other statutes to find the standard of definiteness approved by this Court. The concept of obscenity has repeatedly been before

the Court, and repeatedly been found sufficiently definite. In fact, the recognized validity of the obscenity standard has been used as a foundation for decisions on other statutes.[42]

In *Rosen* v. *United States,* 161 U. S. 29, 42, the Court discussed the predecessor to Section 1461:

> Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious.

Again in *Swearingen* v. *United States,* 161 U. S. 446, 450–451, the Court considered the same statute and pointed out that its definition derived from the common law:

> The offence aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. * * *

In *Winters* v. *New York,* 333 U. S. 507, both the majority and the dissent started from the proposition that the concept of obscene and indecent was sufficiently definite for a criminal statute. Mr. Justice Reed, for the majority, wrote:

---

[42] See, also, the related discussion under Point I on the First Amendment, *supra,* at pp. 84–93.

> Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law, as violative of the public policy that requires from the offender retribution for acts that flaunt accepted standards of conduct. * * * The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. [333 U. S. at 515.]

The opinion then went on to refer to the difficulty of defining the line between what is unconstitutionally vague and the *permissible* standard of—

> describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting * * * [333 U. S. at 518.]

And in reaching its conclusion that the statute there involved was too vague, the Court pointed out:

> The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. [333 U. S. at 519.]

In *Kovacs* v. *Cooper,* 336 U. S. 77, 80, the Court again used the words "obscene, lewd, lascivious, filthy, indecent or disgusting" as—

> examples of permissible standards of statutes for criminal prosecution.

With this proposition as a basis for its reasoning, Mr. Justice Reed's opinion went on to find that the ordinance there involved complied with the requirements of definiteness and clarity.

It is submitted that the Court should not depart so widely from its prior views as to find at this time that the concept of obscenity, which has been used as a model for a permissible standard, is now so vague as to deprive petitioner of his liberty without due process of law.

III

The Ninth Amendment

IN EXERCISE OF ITS EXPRESSLY DELEGATED POWER OVER THE POST OFFICE, THE UNITED STATES MAY PROPERLY PUNISH THE MAILING OF OBSCENE MATERIAL WITHOUT INFRINGING UPON ANY RIGHT RESERVED TO THE PEOPLE UNDER THE NINTH AMENDMENT

It is argued that Section 1461 violates unenumerated rights reserved to the people under the Ninth Amendment. We believe that this issue is necessarily resolved by the decision as to the First Amendment.

The statute in question was adopted in exercise of the postal power delegated to the United States by Article I, section 8, clause 7 of the Constitution. There can be no doubt as to the general power of the United States to control what is sent through the mail and to punish persons for violation of its laws in this regard. *Ex parte Jackson,* 96 U. S. 727, and see *supra,* pp. 71–73. The exercise of this delegated power is unrestricted, unless it is cut across by some other explicit provision of the Constitution. If the Court should find that Section 1461 violates the First Amendment, no further inquiry need be made. But if, as we contend, the First Amendment

does not prevent the adoption of Section 1461 as an exercise of the postal power, then there is no provision of the Constitution which would limit the postal power.

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily, the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. [*United Public Workers* v. *Mitchell,* 330 U. S. 75, 95–96.]

To uphold petitioner's position on the Ninth Amendment, should he lose on the First, would require the Court to reach two rather remarkable conclusions: First, that there was reserved to the people by the Ninth Amendment some kind of a right to publish and distribute obscene material which was greater in scope than the freedom of the press protected by the First Amendment; and, secondly, that this unenumerated right reserved to the people under the Ninth Amendment could operate to take back some of the power expressly delegated to the United States in Article I, section 8. There is no support for either proposition.

423731—57——9

IV

The Tenth Amendment

UNLESS BARRED BY THE FIRST AMENDMENT, THE EXERCISE BY THE UNITED STATES OF ITS EXPRESSLY DELEGATED POSTAL POWER DOES NOT INFRINGE ON RIGHTS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

We believe that the question of the Tenth Amendment also turns on the decision as to the First Amendment. We accept, of course, the proposition that the United States was given no expressly delegated power to control the press directly and also that the First Amendment cuts across the delegated powers in Article I, section 8. The First Amendment sets a limit on the extent to which the delegated powers may be used to restrain excesses of speech or press. Congress may not use its postal or commerce powers to abridge the freedom of the press in violation of the First Amendment.

But if this Court has been correct in its prior holdings, and if we are correct in our argument under Point I, that punishment for sending obscene material through the mail does not violate the First Amendment, then the law providing for such punishment is clearly within the delegated postal power. Falling within the postal power, it is not one of the rights reserved to the states.

There can be no doubt that, unless barred by an express constitutional restriction, the delegated powers may be used to control matters primarily subject to state control. Although the United States may not

be able to regulate lotteries as such, it may prevent the sending of circulars about lotteries through the mail, *Ex parte Jackson,* 96 U. S. 727, and bar the interstate transportation of lottery tickets. *Champion* v. *Ames,* 188 U. S. 321. Although the police power governing the adulteration of food and the conduct of women was reserved to the states, Congress may use its delegated power over interstate commerce to seize adulterated food shipped in interstate commerce, *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, or to punish for the interstate transportation of women for immoral purposes. *Hoke* v. *United States,* 227 U. S. 308; *Caminetti* v. *United States,* 242 U. S. 470, 491:

> * * * the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Similarly, Congress can prohibit the use of the mails to defraud, even though the states have the primary responsibility for protecting against fraud and deceit.

The general principle was summed up by Mr. Justice Brandeis in *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or

that it may tend to accomplish a similar purpose.

The numerous cases discussed above (*supra,* pp. 84–92) in which the Court has upheld the validity of the postal restriction on obscenity are not only holdings that such power is consistent with the First Amendment but also that such power is not barred by the Tenth Amendment. There is thus no question of the states' having a reserved right to regulate obscene material in the United States mails—unless it is now found that the First Amendment prevents the Federal Government from doing so. If Section 1461 is valid under the First Amendment, it does not conflict with the Tenth. If it is invalid under the First, the Court need not bother to consider the Tenth.

But beyond this analysis, there is no merit in the suggestion that each state should be free to decide what constitutes obscenity for mailing purposes and whether such material should be allowed to circulate in that state via the United States mails. Any such system would be impossible to administer. The Post Office could not have forty-eight standards of what was mailable. It would have to carry freely everything sent, even though to send it was a crime in the state in which it was mailed and to receive it was a crime in the state where it was received. Under this view, the United States would be required by the Constitution to aid in the circulation of obscene material which was illegal in every state. The United States would be required to receive from abroad advertisements for pornography as well as pornography

itself (and presumably from the District of Columbia), and transport it in the mail to anyone in the country. We can see no merit in such a construction of the Constitution, wholly out of keeping with the constitutional history of this country which increasingly has involved the use of the delegated powers in support of anything which the states can do under the Fourteenth Amendment.

Petitioner argues that to hold Section 1461 invalid would not remove all restraints on obscenity—that the states would still be free to impose restraint. To support his view that the Constitution permits state restraint he quotes from Jefferson and from Congressional debate in 1836 (Pet. Br. 10, 12, 18–21). These general expressions of view all took place prior to the adoption of the Fourteenth Amendment.

This Court has made clear that free speech and freedom of the press are part of the liberty that is protected by the Fourteenth Amendment. Although the standards of permissible regulation may not be precisely the same, it is the same liberty which is protected. It would certainly be an odd result, inconsistent with prior views, to hold that the United States was constitutionally required to carry through the mail material of which the states could prevent the publication. Punishment for sending obscene material through the mail does not infringe on rights reserved to the states.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY, III,
Assistant Attorney General.
ROGER FISHER,
Assistant to the Solicitor General.
JEROME M. FEIT,
Attorney.

APRIL 1957.

APPENDIX

Proposed British Legislation on Obscenity

Printed below is the pending Obscene Publications Bill which was read a second time in the House of Commons on March 29, 1957. The debate appears in Hansard, Volume 567, cols. 1493–1583.

Obscene Publications Bill

EXPLANATORY MEMORANDUM

1. The Bill makes changes in both the substance and the language of the law. The common law misdemeanour of obscene libel disappears and is replaced by a new statutory offence.

2. The question of guilty knowledge is declared to be relevant, and the test of obscenity is made dependent upon:

(*a*) the dominant effect of the publication;

(*b*) the literary or other merit of the publication;

(*c*) the class of persons among whom it is intended to circulate.

3. The word "obscene" is extended to cover publications that unduly exploit horror, cruelty and violence.

4. Whereas the common law sets no limit to the punishment for obscene publications, the Bill defines maximum penalties.

5. Further, the Bill amends the law relating to "destruction orders" by magistrates in the following ways:—

(*a*) by introducing the same test of obscenity as that prescribed for criminal offences;

(*b*) by giving the author, publisher, printer and distributor the right to give and call evidence.

6. The destruction of obscene publications by the customs authorities is made dependent on the issue of a destruction order by a magistrate.

7. Provision is made for uniformity in the operation of the law by making all proceedings in England and Wales subject to the consent of the Attorney-General.

ARRANGEMENT OF CLAUSES

A BILL TO AMEND AND CONSOLIDATE THE LAW RELATING TO OBSCENE PUBLICATIONS

A. D. 1957

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Offences under the Act

1. Any person who shall wilfully and knowingly distribute, sell, or offer for sale,

or write, draw, print or manufacture for any of the aforesaid purposes, any matter which to his knowledge is obscene within the meaning of this Act, shall be guilty of an offence:

Provided that in any proceedings under this Act, or under the Obscene Publications Act, 1857, a person who wrote, drew or composed, or printed or published the matter in respect of which the proceedings are brought shall be entitled, if he desires, to appear and to be represented in the proceedings and to be heard by the court upon the question whether the matter is obscene.

Definition of obscenity

2. Any such matter shall be deemed to be obscene for the purposes of this Act, the Obscene Publications Act, 1857, or any other enactment, if

(*a*) its dominant effect is such as to be reasonably likely to deprave and corrupt persons to or among whom it was intended, to be distributed, circulated, or offered for sale, or

(*b*) whether or not related to any sexual context, it unduly exploits horror, cruelty, or violence, whether pictorially or otherwise:

Provided that in deciding whether such matter is or is not obscene the court may receive expert evidence as to the literary or artistic merit, or the medical, legal, political, religious, or scientific character or importance of the said matter.

Penalties

3. Any person who commits any offence against this Act shall be liable on summary conviction to a fine not exceeding one hun-

dred pounds or to imprisonment for a term not exceeding four months, or on conviction on indictment to a fine not exceeding five hundred pounds or to imprisonment for a term not exceeding twelve months.

Prohibition of importation of obscene matter

4.—(1) The Commissioners of Customs and Excise are hereby empowered to seize and detain any obscene matter which is in course of being imported into or exported from England and Wales.

(2) When any such matter is so seized, the Commissioners of Customs and Excise shall take proceedings under the Obscene Publications Act, 1857, as adapted by sections one and two of this Act, for the order of a court of summary jurisdiction that the matter seized be either destroyed, delivered to the consignee or returned to the person from whom it was seized:

Provided that where such proceedings have not been instituted within a reasonable time, the matter seized shall be returned either to the consignee or to the person from whom it was seized.

Enactments nullified

5. The provisions of any Act, whether public, general, local, or private, which are in terms identical or substantially identical with any of the provisions of this Act, are hereby declared to be of no effect.

Obscene libels

6. It is hereby declared that obscene libel shall not be punishable at common law.

Savings

7. Nothing in this Act shall affect the operation of the Judicial Proceedings (Regulation of Reports) Act, 1926, or the Law of Libel Amendment Act, 1888.

Initiation of proceedings

8. No proceedings under this Act or under the Obscene Publications Act, 1857, except for the purpose of subsection (1) of section four of this Act, shall be initiated unless by, or with the consent of, the Attorney-General.

Repeals.

9. The enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title and extent.

10.—(1) This Act may be cited as the Obscene Publications Act, 1957.

(2) This Act shall not apply to Scotland or to Northern Ireland.

SCHEDULE

ENACTMENTS REPEALED

Session and Chapter	Short Title	Extent of Repeal
5 Geo. 4 c 83	Vagrancy Act, 1824	In section four, the words "every person willfully exposing to view in any street, road or highway, or public place, or in the window or other part of any shop or other building situate in any street, road, highway, or public place, any obscene print, picture or other indecent exhibition"
10 & 11 Vict c. 89	Town Police Clauses Act, 1847	In section twenty-eight, the words "or publicly offers for sale or distribution or exhibits to public view any profane, indecent, or obscene book, paper, print, drawing, painting or representation"
39 & 40 Vict. c. 36	Customs Consolidation Act, 1876.	In section forty-two the words "Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles"
15 & 16 Geo 6. and 1 Eliz. 2. c. 55	Magistrates' Courts Act, 1952.	Paragraph 16 of the First Schedule.

U. S. GOVERNMENT PRINTING OFFICE 1957