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IN THE

Supreme Court of the United States

No. .....

SAMUEL ROTH,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner, defendant below, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on September 18, 1956.

Opinions Below

The opinions of the Court of Appeals for the Second Circuit are not yet reported but are reproduced in the Appendix, *infra,* pages 2281-2341. The United States District Court for the Southern District of New York issued no opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 18, 1956 (Appendix, *infra,* pp. 2342-2343). By order of Mr. Justice Harlan entered on October 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including No-

vember 17, 1956 and the defendant was placed on bail of $5,000.00.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech and freedom of the press guarantees of the First Amendment?

2. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?

3. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?

4. Did the trial court in its charge to the jury so dissect and oppose the collocation of terms in 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183 so as to render the statute vague and indefinite?

5. Did the trial court err in denying the motion of the defendant to suppress the evidence submitted under Counts 17 and 24 because such evidence was obtained without probable cause and by trick?

6. Was the federal district attorney's argument to the jury so inflamatory and prejudicial as to deprive the defendant of the fair trial contemplated by the Due Process Clause of the Fifth Amendment?

7. Was the trial court's charge as to the interrelationship of the different counts in the indictment so inconsistent as to make the verdict of the jury erroneous?

8. Were the publications, when considered in their entirety, obscene?

Constitutional and Statutory Provisions Involved

1. First Amendment.

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

2. Fifth Amendment.

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

3. Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. 62 Stat. 768, 18 U. S. C. §1461 (derived from R.S. §3893, and originally passed as §148 of an Act of June 8, 1872, 17 Stat. 302). *Mailing obscene or crime-inciting matter.* This statute, upon which the Indictment is based, before its amendment, on June 28th, 1955, provided, insofar as pertinent, as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, papers, letter, writing, print, or other publication of an indecent character; and
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

"Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent 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 deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same 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.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

Note: The Court in its charge to the jury (Record page 579) applied this language as the law applicable to the crimes charged in the Indictment.

An Act of June 28, 1955, 69 Stat. 183, amended 62 Stat. 768, 18 U. S. C. §1461,

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, devise, or substance; and * * *

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

"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 deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same 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.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination. As amended June 28, 1955, c. 190, Secs. 1, 2, 69, Stat. 183."

6 Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Statement of the Case

This prosecution originated in an Indictment which was found by the Grand Jury in the United States District Court, Southern District of New York, on the 20th day of July, 1955. The multitudinous indictment contained twenty-six counts, charging the defendant with wrongfully depositing for mailing and delivery certain matter alleged to be in violation of Title 18 U. S. C. §§2 and 1461, 62 Stat. 768, and a conspiracy count under §371, 62 Stat. 701.

The case came on for trial before the Hon. John M. Cashin, D. J., and a jury, on the 3rd day of January, 1956, and was concluded on the 12th day of January, 1956. In the course of the trial counts 12 and 25 of the indictment were dismissed on motion of the defense counsel with the Government's consent. Count 26, the conspiracy count, was dismissed on motion of the defense counsel after argument. The case went to the jury on the 12th day of January, 1956. They returned a verdict on that day finding the defendant guilty on but four counts, 10, 13, 17 and 24, and

not guilty as to the remaining nineteen counts of the indictment.

The judgment of the Court was rendered on the 7th day of February, 1956. The Court imposed a sentence on the defendant-petitioner of five years and a fine of $5,000 on count 10 (the defendant to be committed until such fine be paid), and sentenced him to a like term on counts 13, 17 and 24, running concurrently with the sentence of five years on count 10, and fined the defendant-petitioner $1 each on counts 13, 17 and 24, which fines of $1, however, were remitted.

The Government called in all some twenty-three witnesses. Of these witnesses, nineteen testified as to counts which were either dismissed, or as to which the defendant was found not guilty, and only four witnesses, including a Government inspector and postmaster, were heard as to the four counts on which the defendant was found guilty.

The Government put in evidence some thirty-five exhibits, which were read in whole or in part to the jury and which, of course, had a cumulative effect upon the jury, although out of the thirty-five only seven exhibits refer to the counts on which the defendant was found guilty. It will be seen that there was a preponderance both of witnesses and exhibits who, due to this multifarious indictment, were heard against the defendant on counts on which he was found not guilty.

It will be noted that in 18 U. S. C. §1461 as amended June 28, 1955, the words characterizing the obscenity as:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;"

included "indecent" and "filthy" in a single characterization. There was no disjunctive between lasciviousness and the words "indecent" and "filthy". Furthermore, it will be noted that both sections as they appeared at the time of the indictment and trial and before contained an artificial definition of the term "indecent" in the following language:

> "The term 'indecent', as used in this section, includes matter of a character tending to incite arson, murder, or assassination. * * * "

No reference was made by the Court to this specific legislative definition.

The Court of Appeals for the Second Circuit affirmed the judgment of the Court below but it felt constrained to refuse to consider the claim of the unconstitutionality of 18 U. S. C. §1461 on the ground that any such claim, as to this statute, was one for this Court alone.

Chief Judge Clark in the course of his opinion took occasion to say that the trial judge in imposing sentence pointed out that the defendant had been convicted several times before under both state and federal law (App. 2288). The petitioner contends that there was no basis in the trial record for this statement. He did not take the stand, so he did not give his side of the controversy. At the time of sentence, Judge Cashin did refer to the fact that defendant had been convicted on a number of occasions.

The defendant claimed before this Court that his previous encounters with the law arose as a result of his publications. Those cases in which he was convicted involved the sale of *Ulysses* by James Joyce, a book which was subsequently held to be not obscene in *United States* v. *One Book Entitled Ulysses,* 72 F. 2d 705 (2nd Cir. 1934) *affirming* 5 F. Supp. 182 (D. S. D. N. Y. 1933); the English version of Arthur Schnitzler's *Reigen,* a movie from which, under the title La Ronde, was permitted circulation by this Court in *Commercial Pictures Corp.* v. *Board of Regents,* 346 U. S. 587 (1954); Sir Richard Burton's translation of *The Perfumed Garden,* a classic fourteenth century Arabic work; *American Anecdotes,* stories which are now available to the public; a translation of *The Anaga Ranga,* a famous Hindu classic dealing with the art of love in the style of the Latin Ovid; and two stories by Boccaccio that can now be obtained at the Public Library and purchased in any book store. His other engagements with the law, in which he obtained dismissals, involved the publication

of Benjamin Franklin's essay entitled *To a Young Man on How to Choose a Mistress; Celestine,* which is the English version of *The Diary of a Chambermaid* by Octave Mirbeau, and which the public library now have available on its bookshelves with an introduction by Jules Romaine; and *Beautiful Sinners of New York.* The defendant has written for such newspapers and magazines as the *Nation, Harper's Weekly, The Daily Mail, The Jewish Chronicle of London, The Boston Transcript* and *The New York Herald.* He is the author of several books, among them *Europe,* published by Liverright; *Now And Forever,* published by Robert McBride Co.; *A Study In Consciousness,* with an introduction by Sir Arthur Eddington, the great English philosopher and mathematician. The defendant is also the editor of Voltaire's *Philosophical Dictionary.* He has long been an important figure in the defense of free press freedoms.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals for the Second Circuit in sustaining the validity of the Federal Obscenity Statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) has decided an important question of Federal Constitutional Law upon which this Court has never squarely or directly passed, and which should be settled by this Court.

The federal obscenity statute involved in this case, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, derives from an act originally passed in 1872, more than three-quarters of a century ago, as a result of the efforts of that feverish Puritan, Anthony Comstock. By virtue of an intensive campaign in which he denounced opponents as lechers and defilers of youth and American womanhood, he succeeded in urging his bill through a busy Congress on the final day of its session. See Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 65 (1938). How-

ever, unlike other frenetic legislation which became dead in letter as in spirit (See e.g., *United States* v. *Williams,* 341 U. S. 70), this statute has not become a Victorian vestigial remainder, but has been actively and frequently enforced, recently amended (See 69 Stat. 183), and promised vigorous prosecution for the future. (See Report of the Select Committee on Current Pornographic Materials, H. Repres., 82nd Cong., pursuant to H. Res. 596 (1952).)

Despite the vitality as well as antiquity of the federal obscenity statute, this Court has never squarely considered or directly passed on the constitutionality of this statute. As Circuit Judge Frank in his concurring opinion in the Court below said:

> "True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved." (Appendix 2293.)

See also Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 Minn. L. R. 295, 301, 352-358 (1954); Cushman, *National Police Power under the Postal Clause of the Constitution,* 4 Minnesota, J. L. Rev. 402, 411 (1920); Deutsch, *Freedom of the Press and of the Mails,* 36 Mich. L. Rev. 703, 729 (1938).

This Court has decided cases involving obscenity statutes where the validity of the statute was not challenged [see, *e.g., United States* v. *Alpers,* 338 U. S. 680 (1949)], and in dicta has commented favorably on such statutes [see, *e.g., Winters* v. *New York,* 333 U. S. 57, 510 (1948); *Hannegan* v. *Esquire,* 327 U. S. 146, 158 (1946)], yet when the issue of the compatibility between a state obscenity statute

and the First Amendment was precisely raised and argued, the Court was equally divided and wrote no opinion. *Doubleday* v. *New York,* 335 U. S. 848 (1948). Indeed, on the most recent occasion this Court had to consider the constitutionality of obscenity legislation, it held, at the last term, in a *per curiam* decision, that a state obscenity statute relating to motion picture films was unconstitutional under the First and Fourteenth Amendments, saying simply: "Judgment reversed. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495; *Superior Films* v. *Dept. of Education,* 346 U. S. 587." *Holmby Productions* v. *Vaughan,* 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 282 Pac 2d 412.

The federal obscenity statute is nothing less than an assertion of federal criminal power over the contents of matter carried in the mails. In the series of cases beginning with *Burstyn,* this Court acknowledged the issue of state power over the contents of a mass medium, the motion picture film, as so important and so ripe for resolution as to warrant review. We believe that federal power over the contents of the press poses issues surely no less grave or unresolved. If it was appropriate for this Court in the motion picture cases to measure the respective values inhering in the conceded interest of a state in preserving morality and the First Amendment freedoms applicable only derivately through the Fourteenth Amendment, then it is urgent for the Court to evaluate and determine the conflict between the disputed federal power to safeguard morality and the freedom of the press as directly guaranteed by the First Amendment.

This case evokes issues which are timely, which are unsettled, and which are of heavy significance to all who use the mails to disseminate published utterances; the writ should issue.

II.

The Court of Appeals for the Second Circuit in sustaining the validity of the federal obscenity statute has decided a federal question in a way in conflict with applicable decisions of this Court in the past twenty-five years.

For nearly the first 130 years of its existence there were no important cases involving the freedom of speech and of the press guarantees of the First Amendment. As Chief Justice Vinson pointed out in *Dennis* v. *United States,* 341 U. S. 494 (1951):

> "No important case involving free speech was decided by this Court prior to Schenck v. United States, 1919, 249 U. S. 47." At 503.

It was not until the prosecutions resulting from World War I that the Court began to explore the implications of the constitutional guarantee for freedom of expression. And it was not until after the opinions of Chief Justice Hughes for the Court in *Stromberg* v. *California,* 283 U. S. 359, and *Near* v. *Minnesota,* 283 U. S. 697, in May and June 1931, that the First Amendment freedoms received their sturdiest development. Since that time, however, there have been many decisions invalidating various kinds of legislation as violating those First Amendment freedoms. An example at the last term is *Holmby Productions* v. *Vaughan,* 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 283 P. 2d 412, in which the Court struck down an obscenity statute of the State of Kansas. Another recent example is *Winters* v. *New York,* 333 U. S. 507 (1948), *reversing* 294 N. Y. 545, in which the Court invalidated a portion of an obscenity law of the State of New York. If the reasoning in these and in numerous other recent decisions of this Court is applied to the federal obscenity statute in the instant case, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, then this statute must be held to be unconstitutional as violating the freedom of the press guarantee of the First

Amendment and the due process clause of the Fifth Amendment. As Circuit Judge Frank stated in his concurring opinion in the Court below:

> "* * * I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years, relative to the First Amendment as applied to other kinds of legislation." Appendix 2291.

However, he went along with his colleagues on the ground that the invalidation of this statute was the business of this Court.

A.

The federal obscenity statute violates the freedom of speech and of the press guarantees of the First Amendment.

The founders of this country, out of an abundance of caution, expressly provided: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." They meant just that. In the past twenty-five years the Court has been approaching the intent and purpose of the First Amendment.

Legislation affecting freedom of speech or of the press, to be valid, must fall within certain narrow exceptions. The words must be such as are likely to incite to a breach of the peace [*Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942)], or such as have a sufficient probability to result in the overthrow of the government by force and violence [*Dennis* v. *United States,* 341 U. S. 494 (1951)]. Federal obscenity statutes do not fall within any of the narrow exceptions which the decisions of this Court have established.

There is no reasonable probability that allegedly obscene publications or pictures have any appreciable effect on the conduct of men, women or children. It is often assumed that so-called obscene publications or pictures will cause sexual delinquency. The truth of the matter is that we do

not know. The Court of Appeals of New York pointed this out recently:

> "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, *e.g.,* Jahoda and Staff of Research Center for Human Relations, New York University [1954]. The impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)" *Brown* v. *Kingsley Books,* 1 N. Y. 2d 177, n. 3, 151 N. Y. S. 2d 639, n. 3 (1956)].

Such evidence as there is tends to indicate that neither publications nor pictures have much if anything to do with sexual or juvenile delinquency. Reference may be made in this connection to two studies, one by the Bureau of Social Hygiene of New York City and the other by the American Youth Commission, on young people in Maryland. Both studies bear out the fact that the sex education of the young comes from other sources than publications. Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 72; Bell, *Youth Tell Their Story.* The Bureau of Social Hygiene of New York City sent questionnaires to 10,000 college and normal school women graduates, 1,200 answers were received. Not one specified a "dirty" book as the source of sex information. Of the 409 replies in answer to the question as to what things were most stimulating sexually, the majority noted very simply, "man". The American Youth Commission for its study took Maryland as a typical state and interviewed 13,528 young people there. This study showed that the chief source of sex education for the youth of all ages and all religious groups was youth's contemporaries. Only 4% reported that they owed most to books.

A recent summary of studies on juvenile delinquency by professors Lockhart and McClure in *Obscenity In the*

Courts, 20 Law & Contemporary Problems 587, 596 (1955), contains these conclusions:

> "(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree

> to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

Circuit Judge Frank quoted these conclusions and covered the authorities on this subject in the appendix to his concurring opinion. Appendix 2313-2321.

The federal obscenity statute, on its face does not fall within any of the narrow exceptions to the First Amendment; and there is no reasonable probability that allegedly obscene publications generally, and no proof that the publications of petitioner in particular have any appreciable effect on the conduct of men, women or children. In these circumstances the Court should hold this statute to be unconstitutional on its face and as here applied as violating the freedom of the press guarantee of the First Amendment.

B.

The federal obscenity statute violates the due process clause of the Fifth Amendment.

The concept of obscenity is as protean as any we have. There is nothing constant about it except its changeability. It changes not only from group to group but also from person to person. It changes not only from nation to nation but also from city to city and from city to country. It changes not only from one decade to another but also from one hour to another and from court to court. As Fluegel commented in The Psychology of Clothes (International Psychoanalytic Library, No. 18, Ernest Jones, M.D., ed. p. 19): "Even within a given circle of intimates, what is considered quite permissible on one occasion may, a few hours later, be regarded as veritably indecent." What was considered obscene ten years ago is not so today

and what is considered obscene today will not be ten years hence. The obscenity statute in the instant case, as Judge Frank pointed out in his concurring opinion, is thus "exquisitely vague". Appendix 2293. The word obscenity as Circuit Judge Frank stated in the appendix to his concurring opinion is one of "exquisite vagueness". Appendix 2340.

Accordingly, at the last Term the Court held that the word "obscene" was not a sufficiently definite one, at least upon which to base a system of prior restraint. *Holmby Products* v. *Vaughan,* 350 U. S. 870 (1955), reversing 177 Kan. 728, 282 P. 2d 412. That case involved the motion picture *The Moon Is Blue.* A Kansas statute set up a board of review for films, and provided that this board should disapprove of such films as were "cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals". The board of review saw the film twice. The first time it disapproved with this notation: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme". Thereafter the plaintiff sought injunctive relief and the board placed its decision squarely on the word "obscene", saying: " * * * The Board has found that film to be obscene, indecent and immoral, and such as tends to debase or corrupt morals * * * ".

The Supreme Court of Kansas in sustaining the board of review quoted the dicta from *Near* v. *Minnesota,* 283 U. S. 697, 716, (1931); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942); and *Joseph Burstyn Inc.* v. *Wilson,* 343 U. S. 495, 505, 506 (1952) to the effect that there might be a First Amendment exception for that which was obscene. Nevertheless, this Court reversed in a *per curiam* decision.

The statute which the Court struck down in *Holmby* was a civil as distinguished from a criminal one. But if the word "obscene" is not a sufficiently definite one in a civil statute, even though what is involved is a question of prior restraint, then it is clearly not a sufficiently defi-

nite one upon which to base a criminal statute. As the Supreme Court pointed out many years ago through Chief Justice Waite in *United States* v. *Reese,* 92 U. S. 214, 220 (1876): "Every man should be able to know with certainty when he is committing a crime."

Many times under the due process clause this Court has invalidated statutes which did not provide reasonably ascertainable standards of guilt. Two recent examples are *Winters* v. *New York,* 333 U. S. 507 (1948), and *Musser* v. *Utah,* 333 U. S. 95 (1948).

In the *Winters* case this Court held invalid a penal law of the State of New York which prohibited publications that massed in their pages stories of bloodshed and lust, saying:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' Pierce v. United States, 314 U. S. 306, 311; Cantwell v. State of Connecticut, 310 U. S. 296. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment" (333 U. S., at 515).

In the *Musser* case the defendants preached polygamy and were convicted under a state statute which made it an offense to conspire to commit any action "injurious to public morals." There was a conviction which the Supreme Court of Utah affirmed, but this Court vacated the judgment and sent the case back for further proceedings not inconsistent with the Court's opinion. The Court, speaking through Justice JACKSON, said:

> " * * * Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, United States v. Cohen Grocery Co., 255 U. S. 81 * * * " (333 U. S., at 97).

See also *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Herndon* v. *Lowry,* 301 U. S. 242; *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Krauss & Bros.* v. *United States,* 327 U. S. 614; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210; *Smith* v. *Cahoon,* 283 U. S. 553; *Cline* v. *Frank Dairy Co.,* 274 U. S. 445; *Collins* v. *Kentucky,* 234 U. S. 216.

We submit that Circuit Judge Frank was right in his concurring opinion when he stated that the federal obscenity statute did not have "a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, *e.g., International Harvester* v. *Kentucky,* 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.,* 244 U. S. 81; *Connally* v. *General Construction Co.,* 269 U. S. 885; *Cline* v. *Frank Dairy Co.,* 274 U. S. 445; *Champlin Refining Co.* v. *Commission,* 286 U. S. 120; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Musser* v. *Utah,* 333 U. S. 95; *Winters* v. *N. Y.,* 333 U. S. 507; *cf. U. S.* v. *Cardiff,* 343 U. S. 169." Appendix 2340.

Reference may further be made to additional movie censorship cases where the Court struck down statutes on the ground that the language in them was not sufficiently definite. *Superior Films Inc.* v. *Ohio,* 346 U. S. 587 (1954) (Ohio statute involving the use of the words "immoral, educational, or amusing and harmless character"); *Commercial Pictures Corp.* v. *Board of Regents,* 346 U. S. 587 (1954) (New York Statute using the word "immoral"); *Gelling* v. *Texas,* 343 U. S. 960 (1952) (Texas statute using the words "sexually immoral"); *Joseph Burstyn Inc.* v. *Wilson,* 343 U. S. 495 (1952) (New York statute using the word "sacrilegious").

Under the decided cases of this Court the words "obscene" (*Holmby Productions*), "immoral" (*Commercial Pictures*), "moral" (*Superior Films*), "sexually immoral" (*Gelling*), "sacrilegious" (*Burstyn*), "massed stories of bloodshed and lust" (*Winters*), "injurious to public morals" (*Musser*), are none of them sufficiently definite. Obscenity is capable of definition only by exhausting the list

of equally undefinable synonyms "All courts agree that the definition of obscenity is limited to the exhaustion of its synonyms; the disagreement arises in the arrangement of them." Grant and Angoff, *Massachusetts and Censorship,* 10 Boston U. L. Rev. 36, 155.

If obscenity is a term soft in the center, fuzzy at the edges, and elastic throughout when the subject of local law, it is confusion hopelessly confounded when the subject of federal law. At least in a local law the term has reference to some community standards of decency and morality. Such definition may have some discernible signification in a relatively homogeneous community such as a town, county, city or even some states. But it is wholly impossible of intelligible or objective construction when the community is the Nation. What is obscene in Greenwich, Connecticut may not be obscene in Greenwich Village, New York; nudity means one thing to a naked boy on a sharecrop farm and another to a choir boy; a picture of a woman with her breasts exposed causes one reaction to the Florida resident who every day sees women exposed in the sun for tanning and another to a prim Bostonian. Perhaps some extreme polar connotations of the word "obscene" may be found which will cover every community; but every word—including admittedly vague words, such as "good" or "bad"—has such semantic qualities. For purposes of the Fifth Amendment the word "obscene" in 18 U. S. C. §1461, as applied, is fatally vague because the penumbra between what is "obscene" and "not obscene" everywhere in the United States is as vast as the Nation itself; such vagueness means that 18 U. S. C. §1461 contains no objective standards.

Nor is it any answer to this argument to say that a jury in each case decides what is obscene. A person still does not know in advance whether he is committing a crime. As Circuit Judge Frank pointed out in the appendix to his concurring opinion in the court below:

> "Each jury verdict in an obscenity case has been sagaciously called 'really a small bit of legislation ad hoc.' [U. S. v. Levine, 83 F. 2d 156, 157]. So each

> jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?'' (App. at 2332).

Not only must statutes, particularly those with criminal sanctions, provide reasonably ascertainable standards of guilt in order to meet the requirements of due process, but, further, if such statutes involve First Amendment rights the standards which they prescribe must be particularly clear and precise. As Circuit Judge Frank pointed out in the appendix to his concurring opinion:

> ''Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See Stromberg v. California, 283 U. S. 359; Herndon v. Lowry, 301 U. S. 242; Winters v. New York, 333 U. S. 507; Kunz v. New York, 340 U. S. 290; Burstyn Inc. v. Wilson, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218'' (App. 2341).

For additional authorities to the same effect see *Musser* v. *Utah,* 333 U. S. 95 (1948); *United States* v. *C.I.O.,* 335 U. S. 106, 150, 152; Note, 62 Harv. L. Rev. 77.

Since the federal obscenity statute does not provide a reasonably ascertainable standard of guilt, the Court should hold it invalid as violating the due process clause of the Fifth Amendment. Particularly should the Court reach this result because of two additional considerations: this statute involves criminal sanctions; and it applies to an area also under the protection of the First Amendment guarantee of freedom of the press.

III.

The federal obscenity statute is unconstitutional because it trespasses on the reserved powers of the States and of the people in violation of the First, Ninth and Tenth Amendments.

We believe that the absoluteness of the language of the First Amendment is no mere hyperbole. But the full import of that absoluteness emerges only when the First Amendment is considered in conjunction with the Ninth and Tenth Amendments. For while the First Amendment is not read as an absolute when Congress restricts speech incidental to the exercise of an enumerated federal power [*American Communications Association* v. *Douds,* 339 U. S. 382 (1950)], different considerations obtain when the Congress restricts expression unrelated to an expressly delegated federal power and affecting matters cognizable by the states [*Gitlow* v. *New York,* 268 U. S. 652, 672 (1925); *Beauharnais* v. *Illinois,* 343 U. S. 250, 288, 294 (1952)]. When the Congress undertakes, as it did by the federal obscenity statute, to punish expression as a breach of the peace or offensive to morality or decency, it lays claim to jurisdiction over matter the Constitution intended to reserve to the states and the people thereof—a reservation historically implemented by absolutely barring the federal government from an area in which that government was without delegated power.

The body of the Constitution as originally adopted had no reference to the freedoms of speech or press. In the convention of 1787 the delegates considered the advisability of incorporating a provision on the subject but decided to omit it as unnecessary:

> "Friday, September 14, Mr. Pinckney and Mr. Gerry moved to insert a declaration 'that the liberty of the press be inviolably preserved.'
>
> "Mr. Sherman: 'It is unnecessary. The power of Congress does not extend to the press.'

> "On this motion it passed in the negative." Elliott's Debates 545 (1901).

Such diverse persons as Thomas Jefferson and Alexander Hamilton, who scarcely agreed on anything, did agree on this: that no power over the press or speech had been delegated to the federal government. Hamilton in arguing against the Bill of Rights said: "For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" The Federalist 631 (Hamilton ed. 1864).

Jefferson responded:

> "Very well, I agree with you that the power is not legitimately here and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as a common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it not among such powers, we ask for a declaratory amendment to the Constitution which shall put it beyond peradventure that it is not one of the powers granted to the National Government." As quoted in Hart, *Power of Government over Speech and Press,* 29 Yale L. J. 410, 412 (1920).

See also,

> Deutsch, *Freedom of the Press and of the Mails,* 36 Mich. L. Rev. 703, 714 (1938).

In order to remove all possibility of doubt that Congress had no power over the press, not even an implied one, the First Amendment declared:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

the Ninth Amendment provided:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

and the Tenth Amendment added:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The federal government was one of enumerated powers. This did not include any power over freedom of speech or of the press. That which the First Amendment absolutely barred to the federal government, the Ninth and Tenth Amendments reserved to the States and the people—the bar and reservation necessarily co-existing and complementing each other. Thus it was that "fighting words", libel, defamation, etc., were matter for state, not federal action from the beginning. Cf. *Beauharnais* v. *Illinois, supra,* at 290.

Mr. Justice Frankfurter, in his opening address at the conference on "Government Under Law" held on September 22, 23, and 24, 1955 under the auspices of the Harvard Law School, commemorating the two-hundredth anniversary of the birth of Chief Justice Marshall, pointed out:

> "Thus, the gravamen of the attack in the Virginia and Kentucky Resolutions against the Alien and Sedition Acts of 1798 was that they infringed on the rights of the states and were promotive of 'a general consolidated government.' It deserves to

> be recalled that even Jefferson attributed to the states the power which he denied to the federal government. 'Nor does the opinion of the unconstitutionality and consequent nullity of the law—the [Sedition Act],' he wrote to Abigail Adams, 'remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. * * * While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right to do so.' (I am indebted for the exact text of this letter, dated September 11, 1804, to the kindness of Professor Julian P. Boyd, in one of whose forthcoming volumes of 'The Papers of Thomas Jefferson' it will duly appear in its entirety.)" [*John Marshall and the Judicial Function,* 69 Harv. L. Rev. 217, 225-226 (1955)].

Similarly, an expert in the history of the American Revolution observed that Jefferson's fellow Republicans in Congress, while opposing the Federalists' Sedition Act, "were not willing to leave the press entirely free; [they] * * * regarded the punishment of libels and seditious speech and writings as a province of the states rather than of the Federal government. Nathaniel Macon declared that 'the liberty of the press was sacred'—but he meant only as against the Federal government, not against the states. Indeed, as he added, 'the states have complete power on the subject'." Miller, *Crisis in Freedom,* 168-169.

The dissents of Justices Holmes and Brandeis in *Gitlow* v. *New York,* 268 U. S. 652 (1925), carefully distinguished between federal and local power over freedom of expression. Mr. Justice Holmes there indicated that the word "liberty" as used in the Fourteenth Amendment perhaps "may be accepted with a somewhat larger latitude of in-

terpretation than is allowed to Congress by the sweeping language that governs, or ought to govern the laws of the United States" (268 U. S., at 672). This concept was expanded in *Palko* v. *Connecticut,* 302 U. S. 319 (1937), and became the basis for the Court's decision in that case. Later, Justice Jackson perceptively wrote in *Beauharnais* v. *Illinois,* 343 U. S. 250, 288, 294, 295 (1952):

> "As a limitation upon power to punish written or spoken words, Fourteenth Amendment 'liberty' in its context of state powers and functions have meant and should mean something quite different from 'freedom' in its context of federal powers and functions.
>
> * * * * *
>
> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms.
>
> * * * * *
>
> "When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.
>
> "For these reasons I should not, unless clearly required, confirm to the Federal Government such latitudes as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power." (Dissenting opinion.)

We think that punishment of expression as obscene for offending decency, morality, or the peace falls within the category of those subjects intended to be reserved to

the States or the people and absolutely barred to the federal competence. The offense of obscenity, if any, is against the community and its standards, and it is the community which must find the wrong to have been committed; it is for this reason that the issue of obscenity is one of fact for the jury, the voice of the community. Grant & Angoff, *"Massachusetts and Censorship"*, 10 Boston U. L. Rev. 36, 147.

It is precisely the predominant influence of the local community in the definition and determination of the offense of obscenity which places that offense outside the scope of federal power. What is the *national* community to which one is to look to define obscenity for *federal* purposes? There is none.

> "The insuperable obstacle is the size and diversity of our Federalism * * * a single federal law against obscene publications which is supposed to impose the same standards upon all the states controls the reading of New York and San Francisco, New Orleans and Boston. * * * Neither our racial nor religious alignments augur well for a federal control of the obscene * * *.
>
> "Apart from such racial and religious differences in fact, there is no uniform sense of the obscene. The federal postmasters have not even such slender moral clues for their guidance as state officials have in the enacted laws relating to the general protection of the public morals" (Ernst & Seagle, op. cit. *supra,* 70-72).
>
> "* * * there is no consistency in the decisions with respect to the same type of material from one period to another, or from one locale to another" Report of the Select Committee on Current Pornographic Material, 82nd Congress 34 (1952)].

The fallacy in hypothesizing some national community homogeneous as to matters of decency and morality—which is the indispensable prerequisite for federal obscen-

ity legislation—is no mere philosophical or abstract constitutional objection. In a very real and substantial way it impairs freedoms which must be left to the states. For when the federal government prosecutes and punishes the mailing of a publication, the effect is to ban the mailing thereof in every state; *even those states and communities which would not deem the mail indecent or immoral or obscene.* Differences in the application of substantially identical standards by New York and Boston have been fully documented. Grant & Angoff, *op. cit. supra,* 164-172, 151-2; Alpert, *"Judicial Censorship of Obscene Literature",* 52 Harv. L. Rev. 40, 53 ff. In addition, the different states have vastly differing legislative and judicial provisions concerning divorce, adultery, and fornication (Ernst & Seagle, *To The Pure,* 72)—important constituents in defining the morality of a community. Accordingly, unless the federal government undertakes to measure the mails by the standards of the most liberal community—a charge to which it will surely demur—the federal power over obscenity involves foreclosing to some communities mail and literature they would not consider objectionable. Plainly, then, the absence of any national community, and the bewildering varieties of local communities, preclude the existence of any federal power over matters of obscenity, and confine that power to the states and to the people.

That power which the Ninth and Tenth Amendments vest in the States and the people and the First Amendment expressly takes from the Congress is not to be subsumed from the postal power contained in Art. I, §8, cl. 7 of the Constitution. Under that postal power, Congress may act to protect the physical integrity of the mail or of the instrumentalities for their transmission. See *e.g.* 18 U. S. C §§1691-1733, 62 Stat. 776-785). But Congress may not act to supervise the written content of that which passes through the mail. The job of the post office department is that of carrying the mail not of censoring it. As Judge Arnold so aptly put it in the concluding paragraph of his opinion in *Esquire* v. *Walker,* 151 F. 2d 49, 55 (1945),

affirmed sub nom, Hannegan v. *Esquire,* 327 U. S. 146 (1946):

> "We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds'."

The first proposal to restrict the use of the mails by printed matter because of its content came in 1835. In December of that year President Jackson proposed the passage of a law which would prohibit the use of the mails "of incendiary publications intended to instigate the slaves to rebellion". Cong. Globe, 24th Cong., 1st Sess., 10 (1835) Northern anti-slavery agitation had become violent and the dissemination of abolitionist literature from the north throughout the south had assumed dangerous proportions. Nevertheless the proposal was defeated, 25-19. It was defeated because the Senators, from the South as well as from the North, regarded legislation barring abolitionist literature from the mails as a violation of the freedom of the press guarantee of the First Amendment. The men who voted against President Jackson's proposal were men who understood the original meaning and purpose of the Bill of Rights. They were men who were already past their early childhood when the first ten amendments were adopted.

Because of the grave constitutional questions involved in President Jackson's proposal the Senate referred the measure to a select committee headed by Senator John C. Calhoun from South Carolina, bitter foe of abolitionist activities and intensely zealous for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering. Yet he took his place with his Northern colleagues to denounce the measure as violative of the freedom of the press guarantee of the First Amendment.

On February 4, 1836, the select committee chaired by Senator Calhoun reported:

> "The committee fully concur with the President * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it.
>
> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law * * *.
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads * * *. The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee refer to the amended article of the constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President * * *" S. Rep. 118, 24th Cong. 1st Sess. 1-3 (1836).

Senator Henry Clay, also from the South, as well as Senators John Davis and Daniel Webster, from New England joined in opposing President Jackson's proposal. They were sympathetic to the purposes of the measure, but they could not see their way clear to voting for it because of the prohibition of the First Amendment.

Senator Davis reminded his colleagues:

> "The liberty of the press was not like the other reserved rights, reserved by implication, but was reserved in express terms; it could not be touched in any manner."

In other words, power over the press was given neither expressly nor by implication to the federal government. On the other hand the denial of such power did not rest on any implication. That denial was in express terms: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Senator Davis had this further comment, which is even more pertinent today than when it was uttered:

> "The public morals were said to be in danger; it was necessary to prevent licentiousness, tumult, and sedition; and the public good required that the licentiousness should be restrained. All these were the plausible pretences under which the freedom of the press had been violated in all ages * * *."

Senator Clay "considered this bill unconstitutional" and as containing "A principle of a most dangerous and alarming character * * *. He had reached the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever * * *. The bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief * * *."

Finally Daniel Webster, whose influence on the early development of our constitutional principles was second only to that of Chief Justice Marshall, vehemently attacked the bill. He was "shocked" at the unconstitutional character of the whole proceeding. He declared that the freedom of the press included "the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?" Further: "Against the objects of this bill he had not a word to say; but with constitutional lawyers there was a great difference between the object and the means to carry it into effect * * * Congress had not the power, drawn from the character of the paper, to decide whether it should be carried in the mail or not; for such decision would be a direct

abridgment of the freedom of the press." See Cong. Globe 24th Cong. 1st Sess. pp. 36, 150, 164-165, 347-348, 351-354, 539.

This Court in an opinion by Justice Field reviewed these debates. *Ex parte Jackson,* 96 U. S. 727 (1878). Justice Field stated:

> " * * * In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation." At pp. 733-734.

For other accounts of this important incident in our history see 6 McMaster, *History of the People of the United States,* 288-291 (1883); Deutsch, *Freedom of the Press and of the Mails,* 36 Mich. Law Review 703, 717-723 (1938); Schroeder, *"Obscene" Literature and Constitutional Law,* 139-140 (1911).

In *Ex Parte Jackson, supra,* this Court further stated that the Fourth Amendment applied to the mails so as to protect sealed communications from unlawful searches and seizures. Justice Field writing for the Court said:

> " * * * 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." At p. 733.

This has remained the unquestioned law. But it is impossible to reconcile this principle with the premise that the postal power is plenary. If the exercise of the postal power is subject to the restraint of the Fourth Amendment it must be equally subject to the restraints of the First, Ninth and Tenth Amendments. No distinction is possible.

The origins of the innocuous postal clause (see Rogers, *Postal Power of Congress,* p. 23; Cushman, *National Police Power Under the Postal Clause of the Constitution,* 4 Minn. L. R. 402), as well as those of the First, Ninth and Tenth Amendments confirm that if there are to be obscenity statutes, even with respect to the mails, they must be on a state and not a national level. " * * * the United States has no criminal jurisdiction over offenses against order and good manners * * *." Chafee, *Free Speech in the United States,* 150 (1941 ed.). " * * * the Federal government clearly has no control over individual morals * * *." Ernst and Seagle, *To the Pure,* 69-70 (1928). See also, Schroeder, *"Obscene" Literature and Constitutional Law,* 140-141 (1911).

We submit that an obscenity statute cannot meet the requirements of the due process clause of the Fourteenth Amendment; certainly on a federal level an obscenity statute should be held invalid not only because of the due process clause of the Fifth Amendment but also because of the prohibition of the First Amendment against any law abridging freedom of the press and the reservations of power to the states and to the people of the Ninth and Tenth Amendments.

IV.

Besides the reasons otherwise set forth in this application, there are special and important reasons for the granting of the writ of certiorari in this case, since there is great national concern over the question of the protection of the publisher, distributor, writer or individual under the First and Fifth Amendments to the Constitution involving the question as to whether or not these amendments do not protect against "obscenity" prosecutions and as applied under the circumstances of this case.

There is pending before this Court (*sub judice*) *Butler* v. *Michigan* case (a Detroit, Michigan case) and there is docketed before this Court the *Alberts* and *Kingsley* cases from California and New York showing the present *national interest* in relationship to the application of the First Amendment to the Constitution and other appropriate Constitutional protection against obscenity laws.

This application alone brings up the question of the prosecution of Section 1461 involving the Constitutionality of the federal obscenity statute and its application under the circumstances of this case to the defendant and other questions related to the prosecution of this case.

There has been docketed in the United States Supreme Court, the case of David S. Alberts, appellant, against State of California, in the October Term No. 61, which case is pending before this court.

There also has been docketed in the October Term 1955, No. 107, the case of Kingsley Books, Inc., Louis Finkelstein, doing business as Times Square Book Shop, and Martin Kleinberg, appellants, against Peter Campbell Brown, Corporation Counsel of the City of New York, Appellee.

In the *Alberts* case Jurisdictional Statement was filed on April 11, 1956.

Motion for leave to file brief *Amicus Curiae* was filed September 26, 1956, and on June 6, 1956, there was filed a brief in opposition to motion to dismiss or affirm.

Motion to dismiss appeal was filed on June 13, 1956, by New York City's Corporation Counsel.

In any event, these matters remain docketed in the United States Supreme Court and have not yet been acted upon but are awaiting the hearing and determination of the case of Alfred E. Butler, Appellant, against State of Michigan, Appellee, which was argued and heard before the Supreme Court some time in October 1956, but to-date there has been no determination.

The *Alberts* case raises the question whether a California Penal Statute proscribing obscene and indecent writings and books upon their face and as construed and applied to appellant, violates freedom of speech and press, and conflicts with the decision of *Holmby Productions* v. *Vaughan,* 350 U. S. 870, and additionally, within the area of freedom of speech and press, the statute and application thereof, denied appellant substantive and procedural due process of law.

The appellant (Alberts) claimed that the statutory standard proscribing "obscene and indecent" literature, violates the decision in *Holmby* v. *Vaughan,* and was unconstitutionally vague and unconfined, and a censorial proscription of ideas and speech, violating freedom of press and speech under the First and Fourteenth Amendments to the United States Constitution.

This was a *State criminal statute* that was involved.

The question presented in the *Kingsley Books Inc.* case involved the validity of a section of the law providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene.

The case of *Alfred E. Butler* v. *State of Michigan* has already been heard before this court and has occasioned considerable interest.

In that case, Section 343 of Michigan *Penal* Code provided the following:

> "Any person who shall * * * sell * * * any book * * * containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious * * * descriptions (tending to incite minors to violent or depraved or immoral acts) manifestly tending to the corruption of the morals of youth, * * * shall be guilty of a misdemeanor."

Sharp challenge has been made that this section is in violation of the First and Fourteenth Amendments to the United States Constitution; that it is against freedom of speech and press clause of the Constitution; that the word "obscene" is so indefinite and vague, etcetera.

The issues involved in the *Alberts, Kingsley and Butler* cases are matters much less serious to the appellants there than the issue presented here.

In the *Alberts and Butler* cases, the criminal statute was a misdemeanor. In the *Kingsley* case it involved the enforcement of a civil remedy. In the present case, defendant received a five-year sentence and a substantial fine.

V.

Title 18, U. S. C., Section 1461 is unconstitutional. The conviction thereunder should be reversed.

Section 1461 reads as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—* * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

> The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

The Court in its charge omitted the last paragraph. Error might be claimed merely in the fact that the omission to charge the crime in the language of the statute was in itself sufficient to cause reversal. A graver question arises, however, for if one reads the statute and inserts the words, the statute would read "every obscene, lewd, lascivious, indecent, including matter of a character tending to incite arson, murder, or assassination, filthy or vile article, etc." It is obvious that when the statute is read as a whole, sense is lost and the charging words become so vague and indefinite as to render the statute unconstitutional. In *United States* v. *Alpers,* 338 U. S. 680, 682, the Court in an opinion per Mr. Justice Minton said:

> "We are aware that this is a criminal statute and must be strictly construed. This means that no offense may be created except by the words of Congress used in their usual and ordinary sense."

In dictionary usage "indecency" is a synonym for "obscenity". (See Funk & Wagnalls New College Standard Dictionary; Webster's New World Dictionary; The American College Dictionary.) The statutory definition of the word "indecent" is irreconcilable with usual and ordinary definitions of the word "indecency". No person could possibly conceive that the word "indecent" in the statute includes arson, murder, or assassination. The notion that a jury charged to consider a matter involving indecency would think that the term meant what the statute says it means, outrages sense. It may well be that instinctively the Court was outraged and, therefore, did not charge in the language of the statute. We have hereinabove referred to numerous authorities on the requirements of certainty in definition of crime. This particular aspect of the case falls squarely within the condemnation in the opinion of *Winters* v. *New York.*

In that case the statute covered "any obscene, lewd, lascivious, filthy, indecent or disgusting book * * *." N. Y. Penal Law §1141(1). Paragraph 2 was added, which made it a crime to publish material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."

It was contended that paragraph 2 was unconstitutional and the Supreme Court accepted an interpretation by the Court of Appeals that the statute forbade the massing of stories of bloodshed and lust in such a way as to incite to crime against the person. The Court said per Mr. Justice Reed:

> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court" (*Winters* v. *New York, supra,* at p. 518).

Here the Legislature might have enacted a specific crime of inciting to arson, or assassination by means specified. What Congress chose to do was to misdefine and destroy the word "indecent". They thus both destroyed the historic use of the word "indecent" in the collocation and at the same time, therefore, destroyed the certainty which that grouping of words had theretofore enjoyed. It created such a situation that the trial court did not even charge in accordance with the statute. The statute in its present form is void and conviction of the defendant here should be reversed.

Where a statute contains language in part which would render the statute unconstitutional, a conviction under a general verdict of a jury is not to be sustained. As was said in *Terminiello* v. *Chicago,* 337 U. S. 1, 5:

> "Since the verdict was a general one and did not specify the ground upon which it rested, it could not be sustained. For one part of the statute was unconstitutional and it could not be determined that the defendant was not convicted under that part.
>
> The principle of that case controls this one. As we have said, the gloss which Illinois placed on the ordinance gives it a meaning and application which are conclusive on us. We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.
>
> The statute as construed in the charge to the jury was passed on by the Illinois courts and sustained by them over the objection that as so read it violated the Fourteenth Amendment. The fact that the parties did not dispute its construction makes the adjudication no less ripe for our review, as the Stromberg decision indicates. We can only take the statute as the state courts read it. From our point of view it is immaterial whether the state law question as to its meaning was controverted or accepted. The pinch of the statute is in its application. It is that question which the petitioner has brought here. To say therefore that the question on this phase of the case is whether the trial judge gave a wrong charge is wholly to misconceive the issue."

Unless a jury charged to make a general verdict has before it a statute which read in its entirety is constitutional, it cannot render a proper verdict. This is particularly so in the light of the court's opinion in *United States* v. *Levine,* 83 F. 2d 156, 157:

> "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor

premise, but really a small bit of legislation ad hoc, like the standard of care.''

The bit of legislation required to be made by the jury could only follow an instruction under constitutional legislation in its entirety.

VI.

The admission into evidence of the testimony of Postal Inspector Nelson and Postmaster Johnston, and the introduction of exhibits during their testimony including Exhibits 7, 8, 9, 10 and 11, and the peremptory denial of the defendant's motion for their suppression, constituted a violation of defendant's rights under the Fourth and Fifth Amendments of the United States Constitution.

On the Government's direct case, Nelson, a postal inspector, testified he sent a letter to the Postmaster at Cordele, Georgia, on February 24, 1953, with instructions to the Postmaster that he should purchase a money order for $15.25; that the payee should be Golden Hind Books, New York, N. Y.; that the remitter should be Archie Lovejoy, and that this money order should be enclosed in an attached letter addressed to Golden Hind Books at 110 Lafayette Street, New York 13, N. Y., and that the envelope should be sealed and the letter deposited in the mails.

A money order receipt was to be returned to Nelson by Postmaster Johnston with return of this communication below, showing that this was deposited in the mails at the post office at Cordele, Georgia.

Wiley H. Johnston, the Postmaster at Cordele, Georgia, also testified.

The name, Archie Lovejoy, was that of a fictitious person. Johnston signed that false name. The mail was to be received at R R. No. 5 in Cordele, Georgia.

It is conceded by the Government, and must be conceded on this record, that this was a scheme and plan which was initiated, instigated and provoked by inspector Nelson

against the defendant, and that it was done by trickery, device and forgery.

The mail was afterwards opened and examined and introduced in evidence.

The motion for the suppression of this evidence and the barring of any of the exhibits in connection with this matter, was properly and timely made by defendant's counsel when the witness, Nelson was on the stand, and also when the witness, Johnston, was on the stand, on the ground that the admission of this testimony and the introduction of the exhibits was barred and should be suppressed as an unconstitutional search and seizure, and as contrary to the Fourth and Fifth Amendments of the Constitution of the United States.

This affected the introduction into evidence of exhibits 7, 8, 9, 10 and 11 during the testimony of these witnesses on January 4, 1956 (S. M. pp.) which testimony was against the defendant under counts 17 and 24, upon which he was convicted.

The record shows on its face that there was no probable cause for the search or seizure without a warrant; there was no warrant issued for opening or using the defendant's mail; there was plenty of time for the issuance of a warrant.

That there was no probable cause is clearly shown in the following way:

A mere perusal of the addendum consisting of the Government's exhibits in the *Roth* case which gives the exhibit number, the description of the exhibit, the dates of the mailing, the indictment count number, the witnesses name and the date that the exhibits were marked for identification and in evidence, will show that it was exhibit 7, form 668, that was sent on February 24, 1953, by Nelson, to Cordele, Georgia. That the money order on its face shows it was sent on February 26, 1953, to Golden Hind Books by Postmaster Johnston.

The dates alleged in the indictment in the first count was a circular addressed to James Feldhouse and *dated February 15, 1955.*

The second count, a circular, addressed to Bill B. Klovski, *dated 2/18/55.*

The third count, circular addressed to Brooks Dyer was *dated 1/5/56.*

The fourth count, circular addressed to Mr. R. L. Bissler was dated 2//16/55.

The fifth count, circular addressed to Brooks Dyer was dated 5/25/55.

The sixth count, circular addressed to Uhlich Children's Home was dated 5/26/55.

The seventh count, circular addressed to Charles Berger was dated 6/28/55.

The eighth count, circular addressed to Mr. Richard G. Kahn was dated 4/28/55.

The ninth count addressed to N. W. Registry for Nurses was dated 5/24/55.

The tenth count addressed to Mr. Paul J. Masadowski was dated 12/10/54.

The eleventh count addressed to Duane Elliott was dated 1/3/55.

The twelfth count addressed to Gloria Jean Paulo was dated 12/24/54.

The thirteenth count addressed to Robert Mateinore was dated 11/9/54.

The fourteenth count addressed to Mr. J. Chapman was dated 4/18/55.

The fifteenth count addressed to Mrs. E. W. McCreery was dated 4/15/55.

The sixteenth count addressed to Mrs. Geo. K. Livermore was dated 7/20/53.

The eighteenth count carbon of letter signed Bernard Skriloff was dated 3/11/55.

The eighteenth count package addressed to Bernard Skriloff was dated 3/21/55.

The nineteenth count, package addressed to Bernard Skriloff was dated 3/18/55.

The twentieth count, carbon of letter signed George Blair was dated 4/6/55.

The twentieth count, form 688 sent by Daly to Dover, N. J. was dated 4/7/55.

The twenty-first count, carton mailed to Kings News was dated 6/30/55.

The twenty-second count, carbon mailed to Bell Block News Co. was dated 6/10/55.

The twenty-third count, package addressed to F. C. Weatherdon, Jr. was dated 5/21/55.

The twenty-fifth count, package addressed to Whispering Pines Trct. was dated 12/29/54.

Overt Act 4—Carton was mailed to Kings News 5/9/55.

Overt Act 2—Packing slip was mailed 1/6/56.

This has been set forth in extenso, to show that the record is barren of any probative evidence in this case or in this record that the postal inspector Nelson had any evidence of probable cause to believe that Roth was guilty of violating the postal laws.

It must further be kept in mind that the conspiracy count was *dismissed* (see dates involved); that all other counts except 10, 13, 17 and 24 upon which the jury convicted Roth, had been dismissed by the court or resulted in the jury's exoneration of not guilty; that this left count 10 (Madadowski) and count 13 (Mateinore) which circulars or material were sent out posterior in time November 9, 1954 and December 10, 1954, and that the letter or material referred to in count 17 was allegedly sent on February 19, 1954, and count 24 on *March 10, 1953.*

Thus there is nothing in this record whatsoever from beginning to end upon which the postal inspector or the Government can claim any *probable cause* as to violation of the postal laws by the defendant Roth; there was no *warrant* justifying the Government's action; there was no evidence or foundation laid for the Government's conduct; the application for relief under the Fourth and Fifth Amendments was timely and properly made; no bill of particulars had been granted to defendant; the indictment failed to set forth and give notice to the defendant the obscene matter referred to therein; and the defendant was

peremptorily shut off in his application and denied his rights under the Fourth and Fifth Amendments of the United States Constitution and was denied *hearing* or *relief* by the *summary* and *peremptory* denial of the Judge.

In *Ex-Parte Jackson,* 96 U. S. 727, 729, 733, the Supreme Court said, through Mr. Justice Field:

> "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.
>
> * * * * *
>
> 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."

One of the safeguards around the right of search and seizure is the previous existence of probable cause. In the instant case this was supplied neither by the Government witnesses who obtained the evidence, nor by their knowledge of previous evidence of probable cause in the hands of others, for their testimony is silent as to this, and an examination of the indictment shows that the material in the hands of those other witnesses called by the Government

was obtained *subsequent* to the material obtained by entrapment.

There can be no presumption of guilt. On the contrary, there is a presumption of innocence. Unless the Government were able to establish guilt neither the Government nor the court below could assume guilt, or even the appearance of guilt, at the time of the entrapment. Even though on the trial there might be an appearance of guilt from the testimony of others, that would not sanction the use of evidence obtained by entrapment in the absence of guilt, or the appearance of guilt at the time and previous to the entrapment. Under those conditions there could be no probable cause and the record shows none. The introduction into evidence of the material obtained by these Post Office officials was plainly illegal.

In *Weathers* v. *United States,* 126 F. 2d 118, 119, the Court said:

> "It is well settled that when a person is reliably reported to be violating a law, or when the circumstances show it is likely, he may by an officer be tested by an opportunity, a decoy." (Emphasis added.)

The law is established in *Heath* v. *United States,* 169 F. 2d 1007, 1010:

> "It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused."

In the absence of such foundation the motion to suppress the evidence should have been granted.

(A)

The evidence obtained by Post Office officials was illegally obtained by forgery and by trickery and device, and was opened and examined and introduced into evidence without warrant.

The testimony of the Post Office officials shows that they established Post Office boxes under false names; that they mailed such money orders to the defendant in order to induce the defendant to send to them material which they might later claim to be illegal for transmission through the mails. We have previously assumed that had the Department done this with knowledge of the commission of a crime, or of the intent to commit a crime, then there would have been probable cause for obtaining evidence. But such evidence could have been obtained forthrightly and with due regard to the sanctity of the mails. Even the Post Office officials and the District Attorney conceded on this trial that sealed mail is inviolate. But they chose rather to adopt trickery in order to decoy the defendant.

Such trickery and fraud is not within the protection of the law, which allows entrapment lawfully done. The Post Office might well have received complaints from individuals. It might have received even from some of the witnesses in this case material which was claimed to violate the law in its transmission, but such evidence was not the basis for the entrapment, and could not have been. The only method of entrapment here and of obtaining this evidence without probable cause was by the trickery and device of the Post Office officials utilizing forgery and aliases. As was said in *Ex-Parte Jackson, supra,* at page 735:

> "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; * * *."

The grievance in this case is that it was evidence obtained by opening mail without warrant, which evidence was obtained by trickery and device, and is contrary to law.

In *Sorrells* v. *United States,* 287 U. S. 435, which is cited with approval by the court in the *Weathers* case, *supra,* the Court, at page 445, quoted:

> "When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor."

And again, at page 448, the Court stated:

> "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."

The concurring opinion of Mr. Justice Roberts in the *Sorrells* case (*supra,* at p. 454) defined entrapment as:

> "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."

The concurring opinion, at page 457, stated:

> "The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple

> belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."

Under the circumstances in this case, because there was no probable cause, because the testimony was obtained by trick and device, and because the evidence when obtained was opened without order or warrant therefor, the motion to suppress (made at S. M. P. 290-293) should have been granted under the provisions of both the Fourth Amendment as to evidence obtained by seizures and search without probable cause and under the Fifth Amendment as constituting a denial of due process.

VII

Of the twenty-four counts in the indictment, the petitioner was found guilty of only four counts.

A multifarious indictment and the prejudicial testimony and exhibits under the other twenty-two counts in the light of the charge of the judge and the summation of the District Attorney require a reversal because the petitioner was denied a fair trial and due process.

The indictment contained in all twenty-six counts. Three counts, Nos. 12, 25 and 26 were dismissed and the case was

submitted to the jury on twenty-three counts. The defendant was found guilty only on four counts, Nos. 10, 13, 17 and 24.

The Government called in all some twenty-three witnesses, of whom only four, including a postal inspector and postmaster were heard as to the four counts on which the defendant was found guilty. Nineteen of the Government's witnesses testified as to other matters but their testimony played an important part in the summation and consideration by the jury. In addition to the witnesses the Government put in evidence some 35 exhibits which were read in whole or in part to the jury and had in fact a cumulative effect upon the jury, although only seven of the exhibits referred to the grounds on which the defendant was found guilty.

VIII.

The Judge's charge as to the interrelationship of the counts of the indictment caused such confusion as to make the verdict of the jury erroneous and invalid, denied the defendant a fair trial and due process and denied him the clear charge that he was entitled to under the law.

The Judge's charge as to the interrelationship of the counts of the indictment caused such confusion as to make the verdict of the jury erroneous.

At S. M. P. 585, the Court charged:

> "It follows, of course, if you were to find the defendant not guilty on all of the first seventeen counts, you would have to find him not guilty on the remaining counts."

After the jury had retired, S. M. P. 591-2 discloses the following incident:

> "(The following took place at 6:07 p. m. in the robing room:)

> The Court: I have another note from the jury, gentlemen. It says:
>
> 'We need a clarification of your charge referring to counts 1 to 17 of the indictment as relating to the remainder of the counts.
>
> 'Specifically, did you say if the defendant is "Not Guilty" on the remainder, and why?' "

Then there follows a coloquy between counsel and the Court, S. M. P. 592, 593, 594, 595, 596, 597, which discloses that not only the jury but even counsel and the Court were incapable after a long discussion of reaching agreement on the significance and meaning of the Court's language. The Court, thereupon, undertook, S. M. P. 597, after counsel had left the robing room to frame a recharge and recalled counsel. Again a colloquy took place which covers two pages of the minutes and the jury were recalled. Thereupon, the Court had read to the jury the communication which he had received from them and had read to the jury the portion of the charge as indicated in chambers previously. He asked the jurors whether that helped them and further discussion took place at S. M. P. 600-601, following which the Court asked, "Does that answer your question? Does that clear it up?" The minutes show that the jury nodded assent. The Court thereupon said, "All right." A discussion then took place as to whether the jury should adjourn for dinner. Juror No. 5 asked that the jury to be given about three minutes before they went to dinner to make sure they had a meeting of the minds on what you had just told them. The Foreman asked, S. M. P. 602:

> "The Foreman: Your Honor, would it be possible for the stenographer to transcribe that portion of the charge, have it right there?
>
> The Court: I can't do that. I don't think I have any right to give you the charge. If it isn't clear to you, I will have him read it again.
>
> The Foreman: I think we understand."

The entire proceedings occupied some 10 pages of the stenographer's minutes. It is evident that the question involved a finding of fact with regard to the advertising matter attributed to the defendant and the alleged non-mailable literature alleged to have been distributed by the defendant. It would appear that the Court was attempting in some way to impress upon the jury a relationship between the separate counts embodying advertising and literary matter and it is probable that the jury may have felt that it was essential for them to find some correspondence between counts 1 to 17 and counts 17 to 24 for it is significant that when they brought in their verdict they found the defendant guilty on 2 counts of the first group of 16 and 2 counts out of the group 17, *et seq., i.e.,* counts 10 and 13 out of the first group and 17 and 24 of the second group. *Strikingly enough count 10, count 11 and count 12 are identical except for the name of the addressee. The articles and things alleged to have been transmitted are identical. The testimony was in substantial agreement on all these counts. Yet the jury found the defendant guilty only on count 10.* This could only have resulted from the confusion in their minds and a feeling from that portion of the charge of the Court under consideration here that there must be some corresponding relationship between counts in the first group and counts in the second group. Strangely enough count 17, on which the defendant was also found guilty, and count 24, on which the defendant was found guilty, relate to different matter There was no correspondence between the alleged matter mailed nor uniformity with regard to the findings on the counts.

This confusion is understandable since it is obvious that counsel and the Court could not agree on the meaning of the charge. The last significant request of the foreman of the jury that that portion of the charge be given to them in writing sheds light. The jury gave formal assent to the Judge of their understanding but the foreman still could say that they wanted it in writing which must indicate to anyone trying to understand the process of adjudication that they needed more aid than they received.

The confusion here resulted from this attempt to include in one indictment too many counts. The attempt to create a multiplicity of crimes by combining in one indictment 26 counts inevitably leads to confusion. Certainly it did here. The jury's verdict resulting from the colloquies between counsel and the reframed charge of the Court indicate it. Such multifariousness in the indictment was bound to result in lack of due process. Process which is confused can never be due. Defendant was denied a fair trial.

IX.

Defendant was deprived of the fair trial contemplated by due process of law by virtue of the District Attorney's references to the witnesses and exhibits, which were improper, inflammatory and prejudicial.

The prosecution of the case was inflammatory and prejudicial; that from the very opening the District Attorney alluded to money,* though there was no evidence whatever in the case as to profit from the sale of any of the materials charged: this was the beginning note, it was also the concluding note of the summing up. In addition, the District Attorney's actual summing up is as a whole incitative and inflammatory, though it also contains many phrases which in themselves have been condemned—he apologizes for reading things which "would offend the sensibility of any decent person" (p. 559); he says he wants to "stop it" (p. 559); he calls upon the jury to help the United States Government enforce the law that has already been passed (p. 559); he points out that witnesses came at quite some inconvenience to themselves in order to stand up for what they thought was right (p. 560); he incites the jury to resent proper cross-examination of witnesses (p. 561); he suggests an invidious comparison between the

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"To be realistic about it, there is money in this kind of dealing, and you may be assured that there are a great many people who are watching this case with a lot of interest"

Government's witnesses and those who are defending the case; he points out that the Government's witnesses "have done everything that they can do"; (p. 562) and suggests that they remind him (the District Attorney) of the jury, suggesting also that the jury "if this kind of thing had been pouring into your homes * * * would have been on the witness stand yourself"; he challenges the jury to do something by saying (563) "now those people have done everything they can do and they are interested in this case; they are interested to see what you are going to do now"; he reminds the jury of its strength to do what he is inciting it to do by saying "you are in a much stronger position than any one of those people, because you hold in your hands the power to make a final determination of this"; at p. 567 he reads a passage from a literary biography which was an exhibit and by it directly compares the defendant with the persons described in it, who are there called "jackals" (the defendant did not take the stand).

The Assistant District Attorney introduced in evidence a book entitled Aubrey Beardsley by Haldane McFall, Exh. 36, which was admitted without objection on January 9, 1956. This book was unfairly and improperly misused by the Assistant District Attorney.

In his inciting and inflammatory summation (P. 57 Government's appendix), the Assistant District Attorney told the jury:

> (567) "The Jackals who had egged him on to base ends and has sniggered at his obscenities, when his genius might have been soaring in the empyrean, could bring him scant comfort as he looked back upon the untidy patches of his wayfaring; nor were they likely ones to fulfill his agonized last wishes—indeed, almost before his poor wracked body was cold, they were about to exploit not only the things he desired to be undone but they were raking together for their own profit the earlier crude designs that they knew full well Beardsley had striven

his lifelong to keep from publication owing to their wretched mediocrity of craftsmanship."

In the re-cross examination by Assistant District Attorney (S. M. pp. 491-4 inclusive), will be seen how unfairly and deplorably he played up various aspects of this book.

No proof was ever introduced in evidence that the hearsay mentioned in this book was the *truth.* No other evidence was given in the case to show that *any of the facts* mentioned in this book about Beardsley were true.

The witness, Lorge, had never read the book. The defendant had not read the book. There was no evidence in the record at all to show that he ever knew this book existed or ever read any of its contents.

There was not the slightest evidence in the case that the defendant knew that Under The Hill was another title for Venus and Tannhauser.

The use made of this book by the prosecutor in his cross-examinations and in his summation were highly improper, inflammatory, incitative and incompetent, but helped foul the atmosphere so that the defendant never had his day in court.

In fact this court will notice that the defendant's counsel upon the conclusion of the District Attorney's summation said that it was incitative, but the court saw nothing improper in it.

Beginning with 567 and thereafter, the District Attorney talks of the work of the prosecution in the preparation of this case and (at 570) reaches a peak, calling once again attention to the fact "that there are many people who are watching this, because there is money in this", that people are going to be interested to see whether the jury was going to "make it legal or not" and winds up by saying "if you want me and these post office inspectors to continue to work and fight to stop this kind of thing, you can tell us that by bringing back a verdict as quickly as you possibly can, convicting him on every count in this

indictment, and we will do it. And if you don't care, or if you want to continue it, then acquit him, and I can assure you that the sewers will open."

For cases dealing with inflammatory summations see *N. Y. Central R.R. Co.* v. *Johnson,* 279 U. S. 310; *Berger* v. *United States,* 295 U. S. 78 and *Viereck* v. *United States,* 318 U. S. 236.

The above recital just covers the saliencies. The summing up as a whole was inflammatory. Immediately after its delivery, the defendant (p. 571 *et seq.*) objected to it and, charging that it was incitative, requested the Court to correct what had been done. The Court said (p. 572) "You may have your objection noted on the record. I see nothing improper in it. I will put it that way", and the defendant excepted.

It need not be pointed out that a jury is not brought into court to *help* the Government, but to sit *in judgment* as to whether or not the Government has made out a case beyond a reasonable doubt. (See District Attorney's remarks S. M. P. 559).

At (S. M. P. 570), the Assistant District Attorney said:

> "I told you in my opening statement that there are many people who are watching this, because there is money in this; this stuff will sell. They are going to be interested to see whether you are going to make it legal or not. Let me say this: if you want me and the post office inspectors to continue to work and fight to stop this kind of thing, you can tell us that by bringing back a verdict as quickly as you possibly can, convicting him on every count in this indictment, and we will do it. And if you don't care, or if you want to continue it, then acquit him, and I can assure you that the sewers will open."

This appeal to the jury to help the district attorney and the post office inspectors to continue to work falls within the condemnation of the language in *Berger* v. *United States,* 295 U. S. 78. The Court there said at page 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Is it part of a jury's function to encourage a district attorney? Are they not to sit as impartial arbitrators or is the jury an arm of the district attorney's office?

In the light of these remarks of the district attorney, it cannot be said that the defendant had a fair trial.

X.

The publication American Aphrodite when considered in its entirety was not obscene.

Today in judging a publication the courts will (1) look at the publication as a whole rather than at certain parts; (2) consider the effect of the book on the average reader

rather than on the salacious few; (3) consider whether the work under review is dirt for dirt's sake, in other words, whether one can see in it the leer of the sensualist; and (4) consider whether the dirt for dirt's sake is the dominant feature of the work, so dominant that it outweighs all other merits that the work may have. *Brown* v. *Kingsley Books,* 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, affirming 208 Misc. 150, 142 N. Y. S. 2d 735; *Halsey* v. *New York Society for Suppression of Vice,* 234 N. Y. 1; *Walker* v. *Popenoe,* 149 F. 2d 511 (D. C. Cir.); *Parmelee* v. *United* States, 113 F. 2d 729 (D. C. Cir.); *United States* v. *Levine,* 83 F. 2d 156 (2d Cir.); *United States* v. *One Book Entitled Ulysses,* 5 F. Supp. 182 (D. S. D. N. Y.), affirmed 72 F. 2d 705 (2d Cir.). In *Brown* v. *Kingsley Books, supra,* the Court of Appeals concluded its opinion with this paragraph:

> "In reaching the conclusion which I do, I assume, of course, that the statutory prescription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work will be determined by viewing it 'broadly, as a whole', Halsey v. New York Soc. for Suppression of Vice, 234 N. Y. 1, 4-5, 136 N. E. 219, 220, with reference to 'its dominant effect', 'not on any particular class, but upon all those whom it is likely to reach', United States v. Levine, 2 Cir., 83 F. 2d 156, 157; United States v. One Book Entitled Ulysses, supra, 72 F. 2d 705; 707-708, affirming, D. C., 5 F. Supp. 182; and that consideration will be given, among other factors to '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'. United States v. One Book Entitled Ulysses, supra, 72 F. 2d 705, 708. The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the trial court's findings of fact. The same dan-

> ger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectually enforcing its policy against the circulation of the obscene, but in making certain that the courts apply standards that will insure the least possible risk of interference with unobjectionable publications."

Nothing objectionable is to be found in the text of the publications involved in this case.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. It is necessary to determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and we may not consider detached or separate portions in reaching a conclusion. It is necessary to judge the circulars, pictures and publications by present-day standards of the community; do they offend the common conscience of the community by present-day standards.

The book would have to have been read by the jury to determine whether it was obscene. This was not done or permitted.

XI

The Court in its charge incorrectly interpreted Title 18 U. S. C., Sec. 1461. It dissected and opposed the collocation of terms so as to render the statute vague and indefinite. (This Point is set forth in extenso in Point I of Appellant's Brief to the C. C. A., pages 7, *et seq.*).

The petitioner was deprived of his constitutional rights in a prosecution based upon a loose, vague and indefinite indictment, by a denial of a bill of particulars, by the looseness of the term 'obscenity' as applied in this case and as charged to the jury, and by the Assistant District Attor-

ney's use on recross-examination and in summation and otherwise against the defendant of the book "Audrey Beardsley," and by the unfairness of the prosecutor in making inflammatory and incitative and legally incompetent remarks and references to testimony and exhibits and thereby creating an atmosphere of unfairness to petitioner and by preventing petitioner from having a fair and impartial trial, by the failure of the Government to carry its burden of proof or to present any affirmative evidence of defendant's guilt, and by a confusing charge on the part of the Judge, which the jury did not and could not understand.

The Government had the burden of presenting affirmative proof of obscenity; that proof as to obscenity and the standards by which it can be recognized are available and presentable; indeed such proof was adduced by the defendant in this trial; that the Government's failure to adduce such proof placed upon the defendant the burden of proving his innocence.

That the statute indictment or charge under which the prosecution was brought and as construed and interpreted to the Jury both upon the trial and as charged by the Court was so vague and indefinite, that it consisted of question-begging words; that the statute and its interpretation did not have predictability, i.e., one could not tell from it what are the acts which it prohibits and against which it will invoke sanctions; that it is even more unpredictable when read with the cases; that the statute contains all of the vices pointed out with relation to a section of a similar New York State statute (old Sub. 2 of Sec. 1141 Penal Law of N. Y. discussed in the case of *Winters v. New York,* 332 U. S. 507).

That there was not shown in this trial any clear and present danger which might result from the distribution of the matter involved in these mailings; that in a case where an exception is being made to a constitutional guarantee, clear and present danger ought to be shown. See *Terminello* v. *Chicago,* 337 U. S. 1; *Commonwealth* v. *Gor-*

don, 66 Penn. Dist. & Co. Rep. 101 and *Walker* v. *Popenoe,* 142 Fed. 511.

That on all of the evidence, the government failed to make out a case. At the worst evaluation, there existed in law and fact a reasonable doubt in favor of the defendant and the government failed in its proof.

That from the nature of the verdict, it is clear that the jury did not consider the book charged in Count 24 (the other Counts on which the defendant was convicted deal with the mailing of circulars advertising this book) as a whole, and this despite repeated correct charges that they do so. See *U. S.* v. *One Book entitled Ulysses,* 72 F. 2d 705.

That this book, consisting of 200 pages, contained over and beyond the passages complained of in the trial, sections on literary history, poetry, short stories, and the entire book "Twilight of the Nymphs" by Pierre Louys; that the book, as a matter of law, was not obscene.

CONCLUSION

Since this case involves fundamental federal constitutional questions which should be settled by this Court, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID VON E. ALBRECHT,
DAVID P. SIEGEL,
Attorneys for Petitioner.

APPENDIX

Opinion

[Bound Opposite]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 387—October Term, 1955.

(Argued June 6, 1956 Decided September 18, 1956.)

Docket No. 24030

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAMUEL ROTH,

Appellant.

Before:

CLARK, *Chief Judge,* and
FRANK and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, John M. Cashin, *Judge.*

Samuel Roth appeals from his conviction for mailing obscene matter in violation of 18 U. S. C. §1461. Affirmed.

GEORGE S. LEISURE, JR., Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for appellee.*

PHILIP WITTENBERG, New York City (Wittenberg, Carrington & Farnsworth and Irving Like, New York City, on the brief), *for appellant.*

CLARK, *Chief Judge*:

This is an appeal by Samuel Roth from his conviction for violation of 18 U. S. C. §1461. The indictment contained twenty-six counts charging the mailing of books, periodicals, and photographs (and circulars advertising some of them) alleged to be "obscene, lewd, lascivious, filthy and of an indecent character." Three counts were dismissed. After a trial the jury found defendant guilty on four counts, and not guilty on nineteen. The trial judge sentenced defendant to five years' imprisonment and to pay a fine of $5,000 on one count, while on each of the other three counts he gave a like term of imprisonment, to run concurrently, and a $1 fine remitted in each case. On this appeal, defendant claims error in the conduct of the trial, but once again attacks the constitutionality of the governing statute.

This statute, 18 U. S. C. §1461, originally passed as §148 of the act of June 8, 1872, 17 Stat. 302, revising, consolidating, and amending the statutes relating to the Post Office Department, and thence derived from Rev. Stat. §3893, herein declares unmailable "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character,"[1] and makes the knowing deposit for mailing of such unmailable matter subject to a fine of not more than $5,000 or imprisonment of not more than five years, or both. In *United States* v. *Rebhuhn,* 2 Cir., 109 F. 2d 512, 514, certiorari denied *Rebhuhn* v. *United States,* 310 U. S. 629, Judge Learned Hand, in dealing with a claim of unconstitutionality, pointed out that it had been overruled in *Rosen* v. *United States,* 161 U. S. 29, "and many indictments have since been found, and many persons tried and convicted. * * * If the question is to be reopened the Supreme Court must open it." Since

1 As pointed out below, the quoted wording was somewhat expanded by Congress in 1955, after the commission of the offenses here involved.

that decision many more cases have acknowledged the constitutionality of the statute, so much so that we feel it is not the part of responsible judicial administration for an inferior court such as ours, whatever our personal opinions, to initiate a new and uncharted course of overturn of a statute thus long regarded of vital social importance and a public policy of wide general support. It is easy, in mat ters touching the arts, to condescend to the poor troubled enforcement officials; but so to do will not carry us measurably nearer a permanent and generally acceptable solution of a continuing social problem.

Against this background we are impressed by the decision this year of a great court in *Brown* v. *Kingsley Books, Inc.*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 641, 642, where, accepting general constitutionality of such legislation, the decision breaks new ground in upholding authorization of preventive relief by way of injunction at the suit of a public officer.[2] In his opinion, Judge Fuld summarizes the controlling law thus: "That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court [citing cases] and by the United States Supreme Court [citing cases]." Among cases from New York which he cites is *People* v. *Doubleday & Co.*, 297 N. Y. 687, 77 N. E. 2d 6, affirmed by an equally divided court, 335 U. S. 848,

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2 The injunction against sale of paper-covered booklets "indisputably pornographic, indisputably obscene and filthy"—the words are Judge Fuld's, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 640—was granted under a 1941 statute, N. Y Code Cr. Proc. §22-a, on suit of the Corporation Counsel of the City of New York. While the court was unanimous in holding the statute constitutional and the injunction proper, there were two opinions—a detailed analysis of the legal background by Judge Fuld, concurred in by two other judges, and a brief and more formal statement by Judge Desmond, concurred in by two other judges.

while among the cases in the United States Supreme Court upon which he relies are *United States* v. *Alpers,* 338 U. S. 680; *Winters* v. *People of State of New York,* 333 U. S. 507, 510, 518, 520; and *United States* v. *Limehouse,* 285 U. S. 424. He goes on to say: "Imprecise though it be—its 'vague subject-matter' being largely 'left to the gradual development of general notions about what is decent' (per L. Hand, J., *United States* v. *Kennerley,* D. C., 209 F. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard." In the case last cited, Judge Hand asked, " * * * should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" and continued: "If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence." In quoting this with approval, the Ninth Circuit has recently said: "We think Judge Learned Hand was in the best of his famous form in his happy use of words." *Besig* v. *United States,* 9 Cir., 208 F. 2d 142, 147.

So this important social problem, which has come down to us from English law and which has led to statutes of a generally similar nature in almost all of the other jurisdictions in this country, see *Brown* v. *Kingsley Books, Inc., supra,* 1 N. Y. 2d 177, 151 N. Y. S. 2d 639; Note, 22 U. of Chi. L. Rev. 216, has resulted in a general judicial unanimity in supporting such prosecutions. There is a considerable body of additional precedents beyond those cited above, both in the Supreme Court of the United States and in other federal jurisdictions, of which various examples are given in the footnote.[3] It will not do to distinguish these

3 See, e g., *Ex parte Jackson,* 96 U. S. 727; *Swearingen* v. *United States,* 161 U. S. 446; *Dunlop* v. *United States,* 165 U. S. 486; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508; *Robertson* v. *Baldwin,* 165

cases as dicta or suggest that they have not considered modern problems. They are too many and too much of a piece to allow an intermediate court to make an inference of doubt in the circumstances. We can understand all the difficulties of censorship of great literature, and indeed the various foolish excesses involved in the banning of notable books, without feeling justified in casting doubt upon all criminal prosecutions, both state and federal, of commercialized obscenity. A serious problem does arise when real literature is censored; but in this case no such issues should arise, since the record shows only salable pornography. But even if we had more freedom to follow an impulse to strike down such legislation in the premises, we should need to pause because of our own lack of knowledge of the social bearing of this problem, or consequences of such an act;[4] and we are hardly justified in rejecting out of hand the strongly held views of those with competence in the premises as to the very direct connection of this traffic with the development of juvenile delinquency.[5] We conclude, therefore, that the attack on constitutionality of this statute must here fail.

U. S 275, 281; *Near* v. *Minnesota ex rel. Olson*, 283 U. S 697, 716; *Chaplinsky* v *New Hampshire*, 315 U. S 568, 571-572; *Beauharnais* v. *Illinois*, 343 U S 250, 266, *Schindler* v. *United States*, 9 Cir., 221 F. 2d 743, certiorari denied 350 U. S 938, *United States* v. *Hornick*, 3 Cir., 229 F. 2d 120, affirming D C. E D. Pa, 131 F Supp. 603; *Roth* v. *Goldman*, 2 Cir, 172 F 2d 788, certiorari denied 337 U. S 938

4 See Fuld, *J.*, in *Brown* v *Kingsley Books, Inc*, 1 N Y. 2d 177, 151 N. Y. S. 2d 639, 641, n. 3: "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children (See, e g, Jahoda and Staff Research Center for Human Relations, New York University [1954], The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate)"

5 Sen Rep. No. 113, 84th Cong., 1st Sess, supporting the 1955 amendment to §1461 discussed below, has this to say: "The subcommittee of

Defendant, however, takes special exception to the judge's treatment in his charge of the word "filthy," asserting that he opposed this term to the other parts of the statute, so as to render the statute vague and indefinite. What the judge said was this: " 'Filthy' as used here must also relate to sexual matters. It is distinguishable from the term 'obscene,' which tends to promote lust and impure thoughts. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." But this seems to us in line with long-standing judicial definitions of the term. The words "and every filthy" were inserted in the statute at the time of the enactment of the Penal Code in 1909. And in *United States* v. *Limehouse, supra,* 285 U. S. 424, 426, in 1932, Mr. Justice Brandeis for the Court pointed out the obvious intent to add "a new class of unmailable matter—the filthy." As he definitely pointed out, this plainly

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the Committee on the Judiciary investigating juvenile delinquency in the United States reports that the nationwide traffic in obscene matter is increasing year by year and that a large part of that traffic is being channeled into the hands of children. That subcommittee recommended implementation of the present statute so as to prevent the using of the mails in the trafficking of all obscene matter. The passage of S. 600 will contribute greatly in the continuing struggle to combat juvenile delinquency and the corruption of public morals." 2 U. S. Code Cong. & Adm. News 2211 (1955).

See also Chief Justice Vanderbilt, *Impasses in Justice,* [1956] Wash. U. L. Q. 267, 302: "(4) Our greatest concern with the oncoming generation, I submit, relates to the perversion of young minds through the mass media of the movies, television, radio, and the press, especially so-called comics. Wertham, Seduction of the Innocent (1954). See also Feder, Comic Book Regulation (Univ. of Calif. Bureau of Pub. Admin. 1955). The problem is only beginning to receive the consideration its seriousness calls for. Here is a field in which the law schools are well equipped to furnish leadership in a controversy where rare discrimination and courage are required."

Perhaps scholarly research may suggest better statutes than we have; but it is doubtful if help can be found in such suggestions as for the inclusion in legislation of the enticing invitation, "For Adults Only." *Cf.* Ernst & Seagle, To the Pure 277 (1928).

covered sexual matters; and the Court, so he said, had no occasion to consider whether filthy matter of a different character also fell within the prohibition. We do not see how this case can be read other than as support for the interpretation made by the court below and for the validity of the Act as interpreted. Moreover, earlier it had been ruled by the Sixth Circuit in *Tyomies Pub. Co.* v. *United States,* 6 Cir., 211 F. 385, 390, in 1914, that the trial judge properly submitted the issue to the jury as to whether or not a picture was filthy with the explanation: "By the term 'filthy' is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing." This is in substance what Judge Cashin charged here. See also *United States* v. *Davidson,* D. C. N. D. N. Y., 244 F. 523, 534, 535; *Sunshine Book Co.* v. *Summerfield,* D. C. D. C., 128 F. Supp. 564.

Hence, having in mind Judge Hand's admonition in *United States* v. *Kennerley, supra,* D. C. S. D. N. Y., 209 F. 119, 121, that the jury must finally apply the standard thus indicated, we think there was nothing objectionable in the judge's instructions to the jury. Certainly, against this background, "filthy" is as clear and as easily understandable by the jury[6] as the terms "obscene" and "lewd" already committed to its care. Possibly some different nuances might have been given the term—though we are not sure what, nor are we given suggestions—but we cannot believe that the jury would have been helped. Nor did the defendant at the time find anything to question in the charge; his counsel, after the judge had granted all the specific additional requests he made, said that the judge had "fairly covered everything." Now he is not in a position to press this objection. Here we have more than a waiver by failure

6 And by Judge Fuld and his colleagues; see *supra* note 2.

to object. We have in fact an instance of submission of issues to the jury on more than a single ground which might have been separated had the parties so desired. Since no request for separate verdicts or for withdrawal of this issue from the jury was made, the conviction must stand as supported by the clear evidence of obscenity. *United States* v. *Mascuch,* 2 Cir., 111 F. 2d 602, certiorari denied *Mascuch* v. *United States,* 311 U. S. 650; *United States* v. *Smith,* 2 Cir., 112 F. 2d 83, 86; *United States* v. *Goldstein,* 2 Cir., 168 F. 2d 666, 672; *Claassen* v. *United States,* 142 U. S. 140, 147; *Stevens* v. *United States,* 6 Cir., 206 F. 2d 64, 66; *Todorow* v. *United States,* 9 Cir., 173 F. 2d 439, 445, certiorari denied 337 U. S. 925; *United States* v. *Myers,* D. C. N. D. Cal., 131 F. Supp. 525, 528. On either ground, therefore, this assignment of error must fail.

Our conclusion here settles the substantial issues on this appeal. As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison. Very likely the jury's moderate verdict on only a few of the many counts submitted by the government and supported by the testimony of those who had been led to send their orders through the mail was because of this wide scope given the defense. As the judge pointed out in imposing sentence, defendant has been convicted several times before under both state and federal law. Indeed this case and our discussions somewhat duplicate his earlier appearance

in *Roth* v. *Goldman,* 2 Cir., 172 F. 2d 788, certiorari denied 337 U. S. 938.

Defendant claims error in entrapment because his advertisements were answered by government representatives. But this method of obtaining evidence was specifically approved in *Rosen* v. *United States, supra,* 161 U. S. 29, 42, and has been usual at least ever since. *Ackley* v. *United States,* 8 Cir., 200 F. 217, 222. In no event was there any improper entrapment. See *United States* v. *Masciale,* 2 Cir., Aug. 22, 1956. The government's summation in the case was within the scope of the evidence, and the court's charge was concise and correct. But one other matter needs to engage our attention. That was the defendant's claim of error in that the court charged with respect to the statute as it was at the time of the offenses, although it had been amended on June 28, 1955, or before the trial. But this amendment was designed to stiffen the Act and arose because in *Alpers* v. *United States,* 9 Cir., 175 F. 2d 137, a conviction for mailing obscene phonograph records was reversed on the ground that such records were not clearly embodied in the statutory language quoted above. Although this decision was reversed and the conviction reinstated in *United States* v. *Alpers, supra,* 333 U. S. 680, the Congress was so anxious that there be no loophole that it enacted an amendment making unmailable now "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."[7] It would seem clear, therefore, that defendant has no ground of complaint because he was tried under the statute existing at the time of his offense; and in no event could he have been harmed.

Judgment affirmed.

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7 It also eliminated the former fifth paragraph now superfluous. See the Senate Report cited *supra* note 5.

FRANK, *Circuit Judge,* concurring:

The reference in Judge Clark's opinion to juvenile delinquency, might lead the casual reader to suppose that, under the statute, the test of what constitutes obscenity is its effect on minors, and that the defendant, Roth, has been convicted for mailing obscene writings to (or for sale to) children. This court, however, in *U. S.* v. *Levine,* 83 F. 2d 156 (C. A. 2), has held that the correct test is the effect on the sexual thoughts and desires, not of the "young" or "immature," but of average, normal, adult persons. The trial judge here so instructed the jury.*

On the basis of that test, the jury could reasonably have found, beyond a reasonable doubt, that many of the books, periodicals, pamphlets and pictures which defendant mailed were obscene. Accordingly, I concur.**

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* He said: "The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish. * * * In other words, you must determine its impact upon the average person in the community."

** The statute condemns the mailing not only of "obscene" matter but also of "filthy" matter Parts of the indictment here charged the defendant with mailing "filthy" publications. The trial judge told the jury they could convict the defendant for mailing a "filthy" publication, if they found that it treated "sexual matters in such a vulgar and indecent way so that it tends to arouse a feeling of disgust or aversion." The following contention might be urged:

> The very argument advanced to sustain the statute's validity, so far as it condemns the obscene, goes to show the invalidity of the statute so far as it condemns "filth," if "filth" means that which renders sexual desires "disgusting." For if the argument be sound that the legislature may constitutionally provide punishment for the obscene because, anti-socially, it arouses sexual desires by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial—and thus not the subject of valid legislation which punishes the mailing of "filthy" matter. To avoid this seeming inconsistency, the statute should be interpreted as follows: The mailing of a "filthy" matter is a crime if that matter tends to induce acts by the recipient which will cause breaches of the peace. This interpretation is in line with

I do so although I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years,* relative to the First Amendment as applied to other kinds of legislation. The doctrine expressed in those opinions, as I understand it, may be summarized briefly as follows: Any statute authorizing governmental interference (whether by "prior restraint" or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite to a breach of the peace,** or with sufficient probability tend either to the over-throw of the government by illegal means or to some other overt anti-social conduct.†

U. S. v. *Limehouse,* 285 U. S. 424. There the Court affirmed the conviction of a defendant who had mailed letters to divers persons which, in "foul language," accused them of sexual immorality. Those letters thus were within the category of "fighting words"—i.e., insulting words or the like—which may constitutionally be made criminal precisely because they tend to provoke breaches of the peace. Where, however, "filthy" language appears in a book, or picture, and involves no insults to particular persons, there will be no such consequences.

If this were the correct interpretation of "filthy," then that part of the statute condemning the "filthy" would not apply to the acts of the defendant here, and the judge's instructions re "filthy" would have been erroneous.

But I think we need not here consider that interpretation since I agree with my colleagues that, for the reasons they state, assuming there was error, the defendant's deliberate acquiescence in the judge's instructions prevents him from now so asserting.

* "For nearly 130 years after its adoption, the First Amendment received scant attention from the Supreme Court"; Emerson, The Doctrine of Prior Restraint, 20 L & Cont Problems (1955) 648, 652.

** See, e.g., *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572.

† The judicial enforcement of private rights—as in suits, e.g., for defamation, injury to business, fraud, or invasion of privacy—comes within the exception.

The troublesome aspect of the federal obscenity statute —as I shall try to explain in the Appendix to this opinion— is that (a) no one can now show that, with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults, and (b) that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires—not overt dangerous or anti-social conduct, either actual or probable

Often the discussion of First Amendment exceptions has been couched in terms of a "clear and present danger" However, the meaning of that phrase has been somewhat watered down by *Dennis* v *U S*, 341 U S 494 The test now involves probability "In each case (courts) must ask," said Chief Justice Vinson in *Dennis,* "whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" It has been suggested that the test now is this "The more serious and threatened the evil, the lower the required degree of probability" * It would seem to follow that the less clear the danger, the more imminent must it be At any rate, it would seem that (1) the danger or evil must be clear (i e, identifiable) and substantial, and (2) that, since the statute renders words punishable, it is invalid unless those words tend, with a fairly high degree of probability, to incite to overt conduct which is obviously harmful For, under the First Amendment, lawless or anti-social "acts are the main thing Speech is not punishable for its own sake, but only because of its connection with those * * * acts * * * But more than a remote connection is neces-

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* Lockhart and McClure, Obscenity and The Constitution, 38 Minn L Rev (1954) 295, 357, *cf* Kalven, The Law of Defamation and the First Amendment, in (University of Chicago) Conference on The Arts, Publishing and the Law (1952) 3, 12

sary * * *" * See, e g, *Communications Ass'n* v *Douds,* 339 U S 382, 398, as to "the right of the public to be protected from *evils of conduct,* even though the First Amendment rights of persons or groups are thereby in some manner infringed" (Emphasis added)

As I read the Supreme Court's opinions, the government, in defending the constitutionality of a statute which curbs free expression, may not rely on the usual "presumption of validity" No matter how one may articulate the reasoning, it is now accepted doctrine that, when legislation affects free speech or free press, the government must show that the legislation comes within one of the exceptions described above See, e g, *Dennis* v *U S,* 341 U S 494, *Joseph Burstyn Inc* v *Wilson,* 343 U S 495, 503 Moreover, when legislation affects free expression, the void-for-vagueness doctrine has a peculiar importance, and the obscenity statute is exquisitely vague (See the Appendix, point 9)

True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional But the Court has not directly so decided, it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved in recent years I base that statement on the following analysis of the cases

> In *Ex parte Jackson,* 96 U S 727 (1877), the Court held valid a statute relating to the mailing of letters, or circulars, concerning lotteries Such letters or circulars might well induce the addressees to engage in the overt conduct of engaging in lotteries The Court, only

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* Chafee, The Blessings of Liberty (1956) 69

in passing, referred to the obscenity statute and said it, too, was valid

In *Rosen* v *U. S.*, 161 U S 29 (1896), the issue was solely the sufficiency of an indictment under the obscenity statute, not the validity of that legislation, and the Court did not discuss its validity

In *Van Swearingen* v *U S*, 161 U S 446 (1896), the Court reversed a conviction under the obscenity statute, it did not consider its constitutionality

Dunlop v *U S*, 165 U. S 486 (1896), did not discuss the constitutionality of the statute, moreover, the opinion (at 501) shows that it dealt with advertisements soliciting improper sexual relations, i e, with probable conduct, not with mere thoughts or desires

In *Public Clearing House* v *Coyne,* 194 U S. 497 (1904), which did not involve the validity of any obscenity Act, the Court said in passing (p 508) that its constitutionality "has never been attacked"

In *U S* v *Limehouse,* 285 U S 424 (1932), the Court decided the correct interpretation of the word "filthy" in the statute, and did not consider the question of constitutionality Moreover, there the defendant had mailed letters attacking the characters of the recipients who might well have been moved to conduct in breach of the peace.

In *Winters* v *New York,* 333 U S 507 (1948), the Court held void for vagueness a state statute making it a crime to distribute publications consisting principally of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes The Court said in passing (p 510) that legislation subjecting obscene publications to governmental control is valid

In *Doubleday* v *New York,* 335 U S 848 (1948), the Court, by an evenly divided vote, without opinion af-

firmed a state court decision sustaining a state obscenity statute

In *U S* v *Alpers,* 338 U S 680 (1950), the Court construed the statute as amended, and affirmed a conviction thereunder, but did not consider its constitutionality

In the following cases, where the validity of no obscenity statute was involved, the Court, in passing, referred to such legislation as valid *Robertson* v *Baldwin,* 165 U S 275, 281 (1897); *Near* v *Minnesota,* 283 U S 697, 716 (1931); *Lovell* v *Griffin,* 303 U S 444, 451 (1938), *Chaplinsky* v *New Hampshire,* 315 U. S 568, 571-572 (1942), *Beauharnais* v *Illinois,* 343 U. S 250, 266 (1952)

I agree with my colleagues that, since ours is an inferior court, we should not hold invalid a statute which our superior has thus often said is constitutional (albeit without any full discussion) Yet I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity which, up to now, I think the Supreme Court has not discussed in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation Perhaps I have overlooked conceivable compelling contrary arguments If so, maybe my Appendix will evoke them

To preclude misunderstanding of my purpose in stirring doubts about this statute, I think it well to add the following·

(a) As many of the publications mailed by defendant offend my personal taste, I would not cross a street to obtain them for nothing, I happen not to be interested in

so-called "pornography", and I think defendant's motives obnoxious But if the statute were invalid, the merit of those publications would be irrelevant *Winters* v *New York,* 333 U S 507, 510 So, too, as to defendant's motives "Although the defendant may be the worst of men * * * the rights of the best of men are secure only as the right of the vilest and most abhorrent are protected" *

(b) It is most doubtful (as explained in the Appendix) whether anyone can now demonstrate that children's reading or looking at obscene matter has a probable causal relation to the children's anti-social conduct ** If, however, such a probable causal relation could be shown, there could be little doubt, I think, of the validity of a statute (if so worded as to avoid undue ambiguity) which specifically prohibits the distribution by mail of obscene publications for sale to young people But discussion of such legislation is here irrelevant, since, to repeat, the existing federal statute is not thus restricted

(c) Congress undoubtedly has wide power to protect public morals But the First Amendment severely limits that power in the area of free speech and free press.

(d) It is argued that anti-obscenity legislation is valid because, at the time of the adoption of the First Amendment, obscenity was a common law crime Relying (*inter alia*) on *Bridges* v *California,* 341 U S 252, 264-265 and

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* Judge Cuthbert Pound dissenting in *People* v *Gitlow,* 234 N Y 132, 158

** The Appendix contains a discussion of the writings of those described by Judge Clark as persons "with competence in the premises" It tries to show (1) that the overwhelming majority of persons with such competence assert that there is no justification for the thesis that a demonstrable causal relation exists between reading or seeing the obscene and anti social conduct, even of children, and (2) that the chief proponent of the opposite view with respect to the effect on children's conduct does not maintain the same as to adult conduct

Grosjean v *American Press*, 297 U S 233, 248-249, I have tried in the Appendix to answer that argument

(e) The First Amendment, of course, does not prevent any private body or group (including any Church) from instructing, or seeking to persuade, its adherents or others not to read or distribute obscene (or other) publications That constitutional provision—safeguarding a principle indispensable in a true democracy—leaves unhampered all non-governmental means of molding public opinion about not reading literature which some think undesirable, and, in that respect, experience teaches that democratically exercised censorship by public opinion has far more potency, and is far less easily evaded, than censorship by government * The incessant struggle to influence public opinion is of the very essence of the democratic process A basic purpose of the First Amendment is to keep that struggle alive, by not permitting the dominant public opinion of the present to become embodied in legislation which will prevent the formation of a different dominant public opinion in the future **

(f) At first glance it may seem almost frivolous to raise any question about the constitutionality of the obscenity statute at a time when many seemingly graver First Amendment problems confront the courts. But (for reasons stated in more detail in the Appendix) governmental censorship

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* Public opinion, by influencing social attitudes, may create a convention, with no governmental "sanction" behind it, far more coercive than any statute *Cf* Holmes, Codes and The Arrangement of the Law, 2 Am L Rev (1870) 4, 5

Notably is this true of conventions as to obscenity La Barre, Obscenity An Anthropological Appraisal, 20 L & Con Problems (1955) 533

** The results of current public opinion may not always be happy But our democracy accepts the postulate that, in the long run, the struggle to sway public opinion will produce the wisest policies For further discussion of this theme, see the Appendix

of writings, merely because they may stimulate, in the reader, sexual thoughts the legislature deems undesirable, has more serious implications than appear at first glance We have been warned by eminent thinkers, of the easy path from any apparently mild governmental control of what adult citizens may read to governmental control of adult's political and religious reading John Milton, Thomas Jefferson, James Madison, J S Mill and Tocqueville have pointed out that any paternalistic guardianship by government of the thoughts of grown-up citizens enervates their spirit, keeps them immature, all too ready to adopt towards government officers the attitude that, in general, "Papa knows best" If the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds? And even if we confine attention to official censorship of publications tending to stimulate sexual thoughts, it should be asked why, at any moment, that censorship cannot be extended to advertisements and true reports or photographs, in our daily press, which, fully as much, may stimulate such thoughts?

(g) Assuming, *arguendo,* that a statute aims at an altogether desirable end, nevertheless its desirability does not render it constitutional As the Supreme Court has said, "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislatures of good purpose to promote it without thought of the serious break it will make in the ark of our covenant * * * "*

In a concurring opinion in *Roth* v *Goldman,* 172 F 2d 788, 790 (1948), I voiced puzzlement about the constitution-

* The Child Labor Tax Case, 259 U S 20, 37

ality of administrative prior restraint of obscene books. I then had little doubt about the validity of a purely punitive obscenity statute But the next year, in *Commonwealth* v *Gordon,* 6 Pa C & D 101 (1949), Judge Curtis Bok, one of America's most reflective judges, directly attacked the validity of any such punitive legislation. His brilliant opinion, which states arguments that (so far as I know) have never been answered, nudged me into the skeptical views contained in this opinion and the Appendix

APPENDIX

As a judge of an inferior court, I am constrained by opinions of the Supreme Court concerning the obscenity statute to hold that legislation valid. Since, however, I think (as indicated in the foregoing) that none of those opinions has carefully canvassed the problem in the light of the Supreme Court's interpretation of the First Amendment, especially as expressed by the Court in recent years, I deem it not improper to set forth, in the following, factors which I think deserve consideration in passing on the constitutionality of that statute

1.

Benjamin Franklin, in 1776 unanimously designated Postmaster General by the First Continental Congress, is appropriately known as the "father of the Post Office" Among his published writings are two[1]—*Letter of Advice to Young Men on the Proper Choosing of a Mistress* and *The Speech of Polly Baker*—which a jury could reasonably find "obscene," according to the judge's instructions in the case at bar On that basis, if tomorrow a man were to send those works of Franklin through the mails, he would be subject to prosecution and (if the jury found him guilty) to punishment under the federal obscenity statute [2]

That fact would surely have astonished Jefferson, who extolled Franklin as an American genius,[3] called him "venerable and beloved" of his countrymen,[4] and wrote approv-

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1 See Van Doren, Benjamin Franklin (1938) 150 151, 153 154 Franklin's *Letter to The Academy of Brussels* (see Van Doren, 151 152) might be considered "filthy"

2 18 U S C Section 1461

3 Jefferson, Notes on the State of Virginia (1781 1785), Query VI, See Padover, The Complete Jefferson (1943) 567 at 612

4 Jefferson, Autobiography (1821), See Padover, *loc cit*, 1119 at 1193

ingly of Franklin's *Polly Baker*.[5] No less would it have astonished Madison, also an admirer of Franklin (whom he described as a man whose "genius" was "an ornament of human nature")[5a] and himself given to telling "Rabelaisian anecdotes"[6] Nor was the taste of these men unique in the American Colonies "Many a library of a colonial planter in Virginia or a colonial intellectual in New England boasted copies of Tom Jones, Tristram Shandy, Ovid's Art of Love, and Rabelais * * *"[7]

As, with Jefferson's encouragement, Madison, in the first session of Congress, introduced what became the First Amendment, it seems doubtful that the constitutional guaranty of free speech and free press could have been intended

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5 Jefferson, Anecdotes of Franklin (1818), see Padover, *loc cit*, 892 at 893

5a On Franklin's death, Madison offered the following resolution which the House of Representatives unanimously adopted "The House being informed of the decease of Benjamin Franklin, a citizen whose genius was not more of an ornament of human nature than his various exertions of it have been to science, to freedom and to his country, do resolve, as a mark of veneration due to his memory, that the members wear the customary badge of mourning for one month" Brant, James Madison, Father of the Constitution (1950) 309, Annals, April 22, 1790.

6 Padover, The Complete Madison (1953) 8 9.

George Washington, who knew Franklin well, treasured a gold headed cane given him by Franklin See Padover, The Washington Papers (1955) 112

See Judge Bok, in *Commonwealth* v *Gordon*, 66 Pa D & C 101, 120 121 "One need only recall that the father of the post office, Benjamin Franklin, wrote and presumably mailed his letter of Advice to Young Men on the Proper Choosing of a Mistress, that Thomas Jefferson worried about the students at his new University of Virginia having a respectable brothel, that Alexander Hamilton's adultery while holding public office created no great scandal * * *"

7 Ernst and Seagle, To The Pure (1928) 108

Everyone interested in obscenity legislation owes a deep debt to many writings on the subject by Morris Ernst For such an acknowledgment, see Acknowledgments in Blanshard, The Right to Read (1955)

to allow Congress validly to enact the "obscenity" Act. That doubt receives reinforcement from the following.

In 1799, eight years after the adoption of the First Amendment, Madison, in an Address to the General Assembly of Virginia,[8] said that the "truth of opinion" ought not to be subject to "imprisonment, to be inflicted by those of a different opinion"; he there also asserted that it would subvert the First Amendment[9] to make a "distinction between the freedom and the licentiousness of the press." Previously, in 1792, he wrote that "a man has property in his opinions and free communication of them," and that a government which "violates the property which individuals have in their opinion * * * is not a pattern for the United States."[10] Jefferson's proposed Constitution for Virginia (1776), provided "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."[11] In his Second Inaugural Address (1805), he said "No inference is here intended that the laws provided by the State against false and defamatory publications should not be enforced * * * The press, confined to truth, needs no other restraint * * *; and no other definite line can be drawn between the inestimable liberty of the press and demoralizing licentiousness. If there still be improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion."

The broad phrase in the First Amendment, prohibiting legislation abridging "freedom of speech or of the press," includes the right to speak and write freely for the public

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8 See Padover, The Complete Madison (1953) 295-296

9 Madison referred to the "Third Amendment," but the context shows he meant the First

10 See Padover, The Complete Madison (1953) 267, 268 269.

11 Padover, The Complete Jefferson (1943) 109

concerning any subject As the Amendment specifically refers "to the free exercise of religion" and to the right "of the people to assemble" and to "petition the government for a redress of grievances," it specifically includes the right freely to speak to and write for the public concerning government and religion; but it does not limit this right to those topics Accordingly, the views of Jefferson and Madison about the freedom to speak and write concerning religion are relevant to a consideration of the constitutional freedom in respect of all other subjects Consider, then, what those men said about freedom of religious discussion. Madison, in 1799, denouncing the distinction "between the freedom and the licentiousness of the press" said, "By its help, the judge as to what is licentious may escape through any constitutional restriction," and added, "Under it, Congress might denominate a religion to be heretical and licentious, and proceed to its suppression * * * Remember * * * that it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion * * * "[12] Jefferson, in 1798, quoting the First Amendment, said it guarded "in the same sentence, and under the same words, the freedom of religion, of speech, and of the press; insomuch, that whatever violates either, throws down the sanctuary which covers the others "[13] In 1814, he wrote in a letter, "I am really mortified to be told that in the United States of America, a fact like this (the sale of a book) can become a subject of inquiry, and of criminal inquiry too, as an offense against religion, that (such) a question can be carried before the civil magistrate. Is this then our freedom of religion? And are we to have a censor whose imprimatur shall say what books may be sold and what we

12 Madison, Address to the General Assembly of Virginia, 1799, see Padover, The Complete Madison (1953) 295

13 See Padover, The Complete Jefferson (1943) 130

may buy? * * * Whose foot is to be the measure to which ours are all to be cut or stretched?" [14]

Those utterances high-light this fact Freedom to speak publicly and to publish has, as its inevitable and important correlative, the private rights to hear, to read, and to think and to feel about what one hears and reads The First Amendment protects those private rights of hearers and readers.

We should not forget that, prompted by Jefferson,[15] Madison (who at one time had doubted the wisdom of a Bill of Rights)[16] when he urged in Congress the enactment of what became the first ten Amendments, declared, "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable barrier against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights" [17] In short, the Bill of Rights, including the First Amendment, was not designed merely as a set of admonitions to the legislature and the executive, its provisions were to be enforced by the courts.

Judicial enforcement necessarily entails judicial interpretation The question therefore arises whether the courts, in enforcing the First Amendment, should interpret it in

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14 See Padover, The Complete Jefferson (1943) 889

15 Jefferson's Letter to Madison (1789), Padover, The Complete Jefferson (1943) 123 125 See also Brant, James Madison, Father of the Constitution (1950) 267

16 The Federalist No 84, Cahn, The Firstness of the First Amendment, 65 Yale L J (1956) 464

17 Madison, Writings (Hunt ed) V, 385, Corwin, Liberty Against Government (1948) 58 59, Cahn, The Firstness of the First Amendment, 64 Yale L J (1956) 464, 468

accord with the views prevalent among those who sponsored and adopted it or in accord with subsequently developed views which would sanction legislation more restrictive of free speech and free press

So the following becomes pertinent Some of those who in the 20th Century endorse legislation suppressing "obscene" literature have an attitude towards freedom of expression which does not match that of the framers of the First Amendment (adopted at the end of the 18th Century) but does stem from an attitude, towards writings dealing with sex, which arose decades later, in the mid-19th Century, and is therefore labelled—doubtless too sweepingly—"Victorian" It was a dogma of "Victorian morality" that sexual misbehavior would be encouraged if one were to "acknowledge its existence or at any rate to present it vividly enough to form a life-like image of it in the reader's mind"; this morality rested on a "faith that you could best conquer evil by shutting your eyes to its existence," [18] and on a kind of word magic.[19] The demands at that time for "decency" in published words did not comport with the actual sexual conduct of many of those who made those demands "The Victorians, as a general rule, managed to conceal the 'coarser' side of their lives so thoroughly under a mask of respectability that we often fail to realize how 'coarse' it really was * * * Could we have recourse to the vast unwritten literature of bawdry, we should be able to form a more veracious notion of life as it (then) really was" The respectables of those days often, "with unblush-

18 Wingfield Stratford, Those Earnest Victorians (1930) 151

19 See Kaplan, Obscenity as an Esthetic Category, 20 Law & Contemp Problems (1955) 544, 550 "In many cultures, obscenity has an important part in magical rituals In our own, its magical character is betrayed in the puritan's supposition that words alone can work evil, and that evil will be averted if only the words are not uttered"

ing license," held "high revels" in "night houses " [20] Thanks to them, Mrs Warren's profession flourished, but it was considered sinful to talk about it in books [21] Pretty obviously, those "Victorians" did not suppress obscene books in the belief that the reading of those books induced the very sexual behavior which the suppressors themselves practiced Such a prudish and purely verbal moral code, at odds (more or less hypocritically) with the actual conduct of its adherents[22] was (as we have seen) not the moral code of those who framed the First Amendment [23] One would suppose, then, that the courts should interpret and enforce that Amendment according to the views of those framers, not according to the later "Victorian" code [24]

The "founding fathers" did not accept the common law concerning freedom of expression

It has been argued that the federal obscenity statute is valid because obscenity was a common law crime at the time of the adoption of the First Amendment Quite aside from

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20 Wingfield Stratford, *loc cit*, 296 297

21 Paradoxically, this attitude apparently tends to "create" obscenity For the foundation of obscenity seems to be secrecy and shame "The secret becomes shameful because of its secrecy" Kaplan, Obscenity As An Esthetic Category, 20 Law & Contemp Problems (1955) 544, 556

22 To be sure, every society has "pretend rules" (moral and legal) which it publicly voices but does not enforce Indeed, a gap necessarily exists between a society's ideals, if at all exalted, and its practices But the extent of the gap is significant See, *e g*, Frank, Lawlessness, Encyc of Soc Sciences (1932), *cf* Frank, Preface to Kahn, A Court for Children (1953)

23 It is of interest that not until the Tariff Act of 1824 did Congress enact any legislation relative to obscenity

24 For discussion of the suggestion that many constitutional provisions provide merely minimum safeguards which may properly be enlarged—not diminished—to meet newly emerging needs and policies, see Supreme Court and Supreme Law (Cahn ed 1954) 59 64

the fact that, previous to the Amendment, there had been scant recognition of this crime, the short answer seems to be that the framers of the Amendment knowingly and deliberately intended to depart from the English common law as to freedom of speech and freedom of the press See *Grosjean* v *American Press Co*, 297 U. S 233, 248-249; *Bridges* v *California*, 314 U S 252, 264-265;[24a] Patterson,

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24a In *Bridges* v *California*, 314 U S 252, 264 265, the Court said "In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press' Schofield, Freedom of the Press in the United States, 9 Publications Amer Sociol Soc, 67, 76 More specifically, it is to forget the environment in which the First Amendment was ratified In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment said 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body (Parliament), the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution' 1 Annals of Congress 1789 1790, 434 And Madison elsewhere wrote that 'the state of the press * * * under the common law cannot * * * be the standard of its freedom in the United States' VI Writings of James Madison 1790 1802, 387 There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices On the contrary, the only conclusion sup ported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other

Free Speech and a Free Press (1939) 101-102, 124-125, 128; Schofield, 2 Constitutional Law and Equity (1921) 521-525

Of course, the legislature has wide power to protect what it considers public morals But the First Amendment severely circumscribes that power (and all other legislative powers) in the area of speech and free press

Subsequent punishment as, practically, prior restraint

For a long time, much was made of the distinction between a statute calling for "prior restraint" and one providing subsequent criminal punishment,[25] the former alone,

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liberties, the broadest scope that could be countenanced in an orderly society"

In *Grosjean* v *American Press Co*, 297 U S 233, 248 249, the Court said "It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship for this abuse had then permanently disappeared from English practice * * * Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist Cf *Continental Illinois Nat Bank* v *Chicago, R I & P Ry Co*, 294 U S 648, 668-669 And, obviously, it is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions *Murray's Lessee* v *Hoboken Land & Improvement Co*, 18 How 272, 276 277, *Waring* v *Clarke*, 5 How 441, 454 457, *Powell* v *Alabama, supra*, pp 60 65 In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists * * *"

25 Blackstone, most influentially, made this distinction, 4 Blackstone, Commentary, 151 162 His condonation of punishment reflected the views of his patron, Lord Mansfield, who, an opponent of a free press, took an active part in punishing published criticism of the government

But men like Jefferson and James Wilson abhorred the Tory political views of Blackstone and Mansfield, both of whom had ranked high in the opposition to the American Colonists Jefferson wrote to Madison of "the horrid Mansfieldism of Blackstone which had caused many young American lawyers to slide into Toryism" Jefferson applauded Tucker's "republicanized" edition of Blackstone published in 1803 See Frank, A Sketch of An Influence, in the volume Interpretations of

it was once said, raised any question of constitutionality *vis-à-vis* the First Amendment [26] Although it may still be true that more is required to justify legislation providing "preventive" than "punitive" censorship,[27] this distinction has been substantially eroded See, e g, *Dennis* v *U. S*, 341 U S 494; *Schenck* v *U. S*, 249 U S 47, *DeJonge* v. *Oregon,* 299 U S 353, *Thornhill* v *Alabama,* 310 U S 88, 97-98; *Chaplinsky* v *New Hampshire,* 315 U S 568, 572 note 3 See also Hale, Freedom Through Law (1952) 257-265; Emerson The Doctrine of Prior Restraint, 20 Law & Contemp. Problems (1955) 648 (a thought-stirring discussion of the problem), Kalven, loc cit at 8-10, 13 (For further discussion of this theme, see *infra*)

The statute, as judicially interpreted, authorizes punishment for inducing mere thoughts, and feelings, or desires

For a time, American courts adopted the test of obscenity contrived in 1868 by Cockburn, *L J.*, in *Queen* v *Hicklin,* L R 3 Q B 360 "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall" He added that the book there in question "would suggest * * * thoughts of a most impure and libidinous character"

Modern Legal Philosophers (1947) 189, especially 231, see also 191, 196 198, 205, 207, 210, 215-217 For James Wilson's denunciation of Blackstone's political attitudes, see, *e g*, Wilson's opinion in *Chisholm* v *Georgia,* 2 Dall 419, 453, 458, 462

26 See Holmes, *J* in *Patterson* v *Colorado,* 205 U S 454 (1907) citing Blackstone But compare his subsequent dissenting opinion in *Abrams* v *U S*, 250 U S 616, 624 (1919) which abandons Blackstone's dichotomy

27 For these phrases, see Lasswell, Censorship, 3 Ency of Soc Sc (1930) 290, 291

The test in most federal courts has changed They do not now speak of the thoughts of "those whose minds are open to * * * immoral influences" but, instead, of the thoughts of average adult normal men and women, determining what these thoughts are, not by proof at the trial, but by the standard of "the average conscience of the time," the current "social sense of what is right" See, e g , *U S* v. *Kennerly,* 209 F 119, 121, *U S.* v *Levine,* 83 F 2d 156, 157, *Parmelee* v *U S*, 113 F 2d 729 (App D C). Yet the courts still define obscenity in terms of the assumed average normal adult reader's sexual thoughts or desires or impulses, without reference to any relation between those "subjective" reactions and his subsequent conduct The judicial opinions use such key phrases as this. "suggesting lewd thoughts and exciting sensual desires",[28] "arouse the salacity of the reader," [29] "allowing or implanting * * * obscene, lewd or lascivious thoughts or desires," [30] "arouse sexual desires" [30a] The judge's charge in the instant case reads accordingly "It must tend to stir sexual impulses and lead to sexually impure thoughts" Thus the statute, as the courts construe it, appears to provide criminal punishment for inducing no more than thoughts, feelings, desires.

No adequate knowledge is available concerning the effects on the conduct of normal adults of reading or seeing the "obscene."

Suppose we assume, *arguendo,* that sexual thoughts or feelings, stirred by the "obscene," probably will often issue

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28 *U S* v *Dennett,* 39 F 2d 564, 568 (C A 2)

29 *U S* v *Levine,* 83 F 2d 156, 158 (C A 2)

30 *Burstein* v *U S*, 178 F 2d 665, 667 (C A 9)

30a *American Civil Liberties Union* v *Chicago,* 3 Ill (2d) 334, 121 N E (2d) 585

into overt conduct Still it does not at all follow that that conduct will be anti-social For no sane person can believe it socially harmful if sexual desires lead to normal sexual behavior since without such behavior the human race would soon disappear [31]

Doubtless, Congress could validly provide punishment for mailing any publications if there were some moderately substantial reliable data showing that reading or seeing those publications probably conduces to seriously harmful sexual conduct on the part of normal adult human beings. But we have no such data.

Suppose it argued that whatever excites sexual longings might *possibly* produce sexual misconduct. That cannot suffice: Notoriously, perfumes sometimes act as aphrodisiacs, yet no one will suggest that therefore Congress may constitutionally legislate punishment for mailing perfumes In truth, the stimuli to irregular sexual conduct, by normal men and woman, may be almost anything—the odor of carnations or cheese, the sight of a cane or a candle or a shoe, the touch of silk or a gunny-sack. For all anyone now knows, stimuli of that sort may be far more provocative of such misconduct than reading obscene books or seeing obscene pictures Said John Milton, "Evil manners are as perfectly learnt, without books, a thousand other ways that cannot be stopped."

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31 *Cf* the opinion of Mr Justice Codd in *Integrated Press* v *The Postmaster General,* as reported in Herbert, Codd's Last Case (1952) 14, 16 "Nor is the Court much impressed by the contention that the frequent contemplation of young ladies in bathing dresses must tend to the moral corruption of the community On the contrary, these ubiquitous exhibitions have so diminished what was left of the mystery of womanhood that they might easily be condemned upon another ground of public policy, in that they tended to destroy the natural fascination of the female, so that the attention of the male population was diverted from thoughts of marriage to cricket, darts, motor bicycling and other occupations which do nothing to arrest the decline of the population"

Effect of "obscenity" on adult conduct

To date there exists, I think, no thorough-going studies by competent persons which justifies the conclusion that normal adults' reading or seeing of the "obscene" probably induces anti-social conduct. Such studies do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that "obscenity" represents a ponderable causal factor in sexually deviant adult behavior "Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior" [32] What little competent research has been done, points definitely in a direction precisely opposite to that assumption.

Alpert reports[33] that, when, in the 1920s, 409 women college graduates were asked to state in writing what things stimulated them sexually, they answered thus: 218 said "Man"; 95 said books, 40 said drama, 29 said dancing; 18 said pictures, 9 said music Of those who replied "that the source of their sex information came from books, not one specified a 'dirty' book as the source Instead, the books listed were The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal diseases, medical books, and Motley's Rise of the Dutch Republic" Macaulay, replying to advocates of the suppression of obscene books, said "We find it difficult to believe that in a world so full of temptations as this, any

32 Lockhart and McClure, Obscenity and The Courts, 20 L & Contemp P (1955) 587, 595

33 See Alpert, Judicial Censorship and The Press, 52 Harv L Rev (1938) 40, 72