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# Obscenity through the Mails

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trial is to elicit the truth, and the use of cross-examination has traditionally been considered an effective method of achieving this. The Ohio prior testimony rule which compels exclusion in many cases, even where the right of cross-examination is adequately protected, is contrary to the purpose of the trial. The court should have more discretion as to the admission of prior testimony. From the discussion of the *Bartlett*, *Dougherty*, and *Lyon* cases it is apparent that the courts exercise their discretion most diligently to serve the interests of justice and to protect the rights of the litigants. While the Model Code presents a more radical view than any cases, the Uniform Rules reflect the attitude represented by the three cases aforementioned. All are far more liberal than Ohio's attitude.

To bind the judges by statute is not to give due credit to their ability to conduct a trial and exercise their discretion. A change in the Ohio statute, the elimination of the restriction, would let the triers of fact have the benefit of important testimony. In the *Lyon* case the testimony of the motorman was clearly relevant to the negligence issue, and to try the case without his testimony would have made it very nearly impossible to ascertain the facts. It is safe to say that if a case similar to the *Lyon* case were tried in Ohio, the type of prior testimony proffered in the *Lyon* case would not be admissible unless the Ohio Code were amended<sup>44</sup> to conform to the present trend toward admissibility.

JOHN H. WILHARM, JR.

## Obscenity Through the Mails

This note will concern itself with the authority of the United States Post Office Department, emanating from the Constitution, legislation, and postal regulations, to investigate and terminate the sending of obscene material through the mails. The Post Office Department estimates that 500 million dollars worth of such material will be sent by means of the mails this year alone.<sup>1</sup> This is half as much money as all the legitimate book publishers in America take in.<sup>2</sup> The sales volume of this matter has doubled in the last five years and could, despite the increase in arrests, double again over the next four years unless vigorously checked.<sup>3</sup> To add insult to the injury, the purveyors of this material are including the United States Post Office as a party to their crime.

Although this problem has been with us for years, only recently

44. It is suggested that it would be sufficient to add "or in any subsequent proceedings wherein the parties and issues are substantially the same" immediately following "further trial of the case." The dead-man statute, Ohio Revised Code § 2317.03 (G), would also need to be amended in a similar manner. At present it permits testimony *viva voce* only after the admission of prior testimony in a "further trial of the case."

has the law been catching up, and it still has a long road to travel. Just what is the present status of the law regarding the Post Office and obscenity?

### STATUTES GRANTING AUTHORITY TO THE POST OFFICE DEPARTMENT

At present there are four important statutes which serve to combat obscenity. Two of these deal with interstate commerce<sup>4</sup> and two with the mails.<sup>5</sup> The former two statutes are not within the scope of this note.

Title 18 of the United States Code, section 1461, declares obscene matter to be nonmailable and makes the sending of such material through the mails a crime.<sup>6</sup> Although this statute is basically criminal, the Post Office utilizes it to stop, and hold, detected obscene material en route to the consumer; thus, the statute also serves as a civil sanction against the violator.

Title 39 of the United States Code, section 259(a), the other statute involved, permits the Department to detain, stamp "unlawful," and return mail which is sent to anyone peddling obscenity; it also grants the Post Office the authority to refuse to cash postal money orders or postal notes drawn to such a person.<sup>7</sup> It should be emphasized that the mail is not impounded under this section, but is returned to the sender thereof. Thus, section 1461 is directed at the outgoing mail which contains the lascivious material, whereas section

1. Release No. 260, Post Office Department 1, 2 (Address by Postmaster General Arthur E. Summerfield before the Women's City Club of Cleveland) October 8, 1959; Warburton, *You and the Law vs. Smut*, This Week (Cleveland), September 27, 1959, p. 15, col. 1.

2. Warburton, *You and the Law vs. Smut*, This Week (Cleveland), September 27, 1959, p. 15, col. 2.

3. Release No. 260, Post Office Department 1, 6 (Address by Postmaster General Arthur E. Summerfield before the Women's City Club of Cleveland) October 8, 1959.

4. 18 U.S.C. §§ 1462, 1465 (1958).

5. 18 U.S.C. § 1461 (1958); 64 Stat. 451 (1950), 39 U.S.C. § 259(a) (1958).

6. The relevant portions of § 1461 provide:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . ,

. . . .

is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

The statutory penalties for violation are up to five years imprisonment and/or a maximum fine of \$5,000 for the first offense, and up to ten years imprisonment and a maximum \$10,000 fine for subsequent offenses.

7. The relevant portions of § 259(a) provide:

Upon evidence satisfactory to the Postmaster General that any person . . . is obtaining, or attempting to obtain, remittances . . . through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article . . . the Postmaster General may—

(a) instruct postmasters . . . to return all such mail matter [sent to the purveyor of obscenity] . . . with the word "Unlawful" plainly written or stamped . . . and

(b) forbid the payment . . . of any money order or postal note drawn to the order of such [a purveyor].

259(a) applies to the mail and postal remittances that are sent to the purveyor.

### CONSTITUTIONALITY OF THIS DELEGATION OF AUTHORITY

#### *The Criminal Statute, 18 U.S.C. § 1461*

The federal constitution grants Congress the power to establish post offices and post roads.<sup>8</sup> Under this authority the legislature enacted sections 1461 and 259(a).

Recently the Supreme Court, in *Roth v. United States*,<sup>9</sup> sustained the constitutionality of section 1461.<sup>10</sup> In upholding a criminal conviction, the Court announced that the statute was a proper exercise of the postal power delegated to Congress by the Constitution, particularly since obscenity was outside the area of protected speech and press.

The Court rejected the early leading definition of obscenity,<sup>11</sup> which was that the material was to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons.<sup>12</sup> The standard by which obscenity now is to be judged is as follows:

. . . [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.<sup>13</sup>

The salacious articles need not perceptibly create a clear and present danger of antisocial conduct, but merely a tendency to excite lustful thoughts.<sup>14</sup> If the article includes material with the slightest

8. U.S. CONST. art. I, § 8: "The Congress shall have Power . . . To establish Post Offices and post Roads."

9. 354 U.S. 476 (1957).

10. Roth was also convicted by a California court for keeping obscene books for sale in violation of a state statute. The two cases were combined before the Supreme Court and both convictions were upheld.

11. *Regina v. Hicklin*, L.R. 3 Q.B. 360, 371 (1868):

. . . [T]he 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 may fall.

12. Some early American courts adopted this standard: *Knowles v. United States*, 170 Fed. 409 (8th Cir. 1909); *MacFadden v. United States*, 165 Fed. 51, 52 (3d Cir. 1908); *United States v. Bennett*, 24 Fed. Cas. 1093, 1102 (No. 14571) (C.C.S.D.N.Y. 1879); *United States v. Kennerley*, 209 Fed. 119, 120 (S.D.N.Y. 1913); *United States v. Clark*, 38 Fed. 500, 502 (E.D. Mo. 1889).

13. 354 U.S. 476, 489 (1957). Many American decisions, prior to the *Roth* case, adopted this standard: *Volanski v. United States*, 246 F.2d 842, 844 (6th Cir. 1957); *One v. Olesen*, 241 F.2d 772, 778 (9th Cir. 1957); *Hallmark Productions, Inc. v. Mosley*, 190 F.2d 904, 910 (8th Cir. 1951); *Verner v. United States*, 183 F.2d 184, 185 (9th Cir. 1950); *Burstein v. United States*, 178 F.2d 665, 667 (9th Cir. 1949); *Walker v. Popenoe*, 149 F.2d 511, 512 (D.C. Cir. 1945); *Parmelee v. United States*, 113 F.2d 729, 731 (D.C. Cir. 1940); *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936); *Klaw v. Schaffer*, 151 F. Supp. 534, 540 (S.D.N.Y. 1957); *Bonica v. Olesen*, 126 F. Supp. 398, 402 (S.D. Cal. 1954); *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823, 830 (N.D. Ohio 1953); *United States v. Musgrave*, 160 Fed. 700 (E.D. Ark. 1908).

14. *Roth v. United States*, 354 U.S. 476, 486 (1957).

redeeming social value, it is entitled to full protection, even if the ideas expressed are contrary to public opinion.<sup>15</sup>

*The Civil Statute, 39 U.S.C. § 259(a)*

Although the Supreme Court has never actually ruled on the constitutionality of section 259(a), there is little doubt as to its validity because its wording is similar to section 1461.<sup>16</sup> In view of this likeness, and the fact that the scope and purpose of the two statutes are similar, there exists strong justification for the two laws being interpreted in *pari materia*. Moreover, lower courts have declared section 259(a) to be constitutional.<sup>17</sup>

Another appropriate analogy can be drawn from the Supreme Court's decisions relating to title 39 of the United States Code, section 259, which is a counterpart of section 259(a). Section 259 allows the Post Office to return mail that is being sent to anyone utilizing the mails for fraudulent purposes. In *Public Clearing House v. Coyne*,<sup>18</sup> the Supreme Court first upheld the present section 259. The Postmaster General had issued a fraud order against the appellant, directing that its incoming mail be seized and returned to the senders thereof, stamping it "fraudulent." The Court held this action to be constitutional in that Congress could designate what may be carried in, and what excluded from, the mails.

Years later, section 259 was once more before the Supreme Court.<sup>19</sup> Again, the Court refused to outlaw its operation, but instead, followed their earlier decision in the *Coyne* case.

Although fraud differs from obscenity, the sanctions under section 259 and 259(a) are similar.<sup>20</sup> Therefore, since the penalty of returning the respondent's incoming mail was upheld in the fraud cases, this precedent constitutes cogent evidence which further buttresses the validity of section 259(a).

#### ARE THE STATUTES CONSTITUTIONALLY APPLIED

Title 5 of the United States Code, sections 22 and 369, grants to the Postmaster General the power to prescribe regulations for the

15. *Id.* at 484.

16. Section 1461 provides:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . .

Section 259(a) provides:

. . . for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, for substance . . .

Also see *Bonica v. Olesen*, 126 F. Supp. 398, 402 (S.D. Cal. 1954).

17. *Glanzman v. Schaffer*, 252 F.2d 333, 334 (2d Cir. 1958); *Glanzman v. Finkle*, 150 F. Supp. 823, 824 (E.D.N.Y. 1957).

18. 194 U.S. 497 (1904).

19. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948).

20. Under each statute the Postmaster General may order a return of mail sent to a person conducting a fraudulent scheme or to one mailing obscene matter.

governing of his department.<sup>21</sup> Under this authority, postal regulations have been issued which afford the respondent a hearing, either under section 259(a)<sup>22</sup> or 1461,<sup>23</sup> to determine whether the material is obscene.

### *Hearings*

The procedures used are closely modeled after the Federal Administrative Procedure Act,<sup>24</sup> and the postal regulations declare that hearing examiners shall be appointed and qualified pursuant to the act.<sup>25</sup> However, the procedures provided under the postal regulations are not all similar to those provided in the FAPA, nor are they as detailed. Should a discrepancy arise between the regulations and the FAPA, a court will be forced to decide whether the action of the Department is subject to the provisions of the act.

Some earlier decisions held that the FAPA was not applicable to departmental action;<sup>26</sup> however, the modern trend is to require that the procedures under the act be followed when a party would otherwise be denied some privilege under it, and hence, be denied due process of law.<sup>27</sup>

The FAPA provides:

No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly.<sup>28</sup>

Congress has not expressly excepted either section 259(a) or 1461.<sup>29</sup> Therefore, unless the Post Office can "pigeon-hole" either

21. 72 Stat. 547, 5 U.S.C. § 22 (1958), authorizes the head of each department to issue regulations; this grant was held to be within the scope of legislative power. *Ex parte Curtis*, 106 U.S. 371, 373 (1882). 42 Stat. 24 (1921), 5 U.S.C. § 369 (1958), specifically authorizes the Postmaster General to issue regulations.

22. Postal Reg., 39 C.F.R. §§ 201.1-34 (Supp. 1959), provide hearing procedures under 39 U.S.C. § 259(a).

23. 24 Fed. Reg. 4026 (1959), amending 39 C.F.R. §§ 203.1-14, provides hearing procedures under 18 U.S.C. § 1461.

24. 62 Stat. 99 (1948), 5 U.S.C. §§ 1001-11 (1958).

25. 39 C.F.R. § 201.18 (Supp. 1959); 24 Fed. Reg. 4027 (1959), amending 39 C.F.R. § 203.8 (Supp. 1959).

26. *Cates v. Haderlein*, 189 F.2d 369, 371 (7th Cir. 1951), *rev'd*, 342 U.S. 804 (1951) (*mem.*); *Bersoff v. Donaldson*, 174 F.2d 494, 495 (D.C. Cir. 1949).

27. *Cates v. Haderlein*, 342 U.S. 804 (1951) (*mem.*); *Olesen v. Stanard*, 227 F.2d 785, 788 (9th Cir. 1955); *Stanard v. Olesen*, 74 Sup. Ct. 768, 771 (Douglas, Circuit Justice, 1954); *Door v. Donaldson*, 195 F.2d 764, 766 (D.C. Cir. 1952); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 494 (S.D.N.Y. 1959); *Borg-Johnson Electronics, Inc. v. Christenberry*, 169 F. Supp. 746, 753 (S.D.N.Y. 1959); *Pinkus v. Reilly*, 157 F. Supp. 548, 549 (D.N.J. 1957); *Klaw v. Schaffer*, 151 F. Supp. 534, 539 (S.D.N.Y. 1957); *Bonica v. Olesen*, 126 F. Supp. 398, 400 (S.D. Cal. 1954); *LeBaron v. Olesen*, 125 F. Supp. 53 (S.D. Cal. 1954); *Jeffries v. Olesen*, 121 F. Supp. 463 (S.D. Cal. 1954).

28. 60 Stat. 244 (1946), 5 U.S.C. § 1011 (1958).

29. *Borg-Johnson Electronics, Inc. v. Christenberry*, 169 F. Supp. 746, 753 (S.D.N.Y. 1959).

statute into one of the general exceptions in the FAPA, it will be compelled to follow the mandates of the act.

Section 5 of the FAPA states that its regulations are to be followed in every "adjudication required by statute."<sup>30</sup> The Post Office Department and some courts have contended that this qualification exempts the Department since neither section 259(a) nor 1461 require a hearing.<sup>31</sup> Recent cases have hurdled this obstacle by reading into section 259(a) a requirement for a hearing.<sup>32</sup> A number of courts have employed other grounds for imposing the act,<sup>33</sup> while some merely assume it applies.<sup>34</sup>

Regardless of whether the FAPA applies to departmental hearings, the courts have, in the past, allowed judicial review on the question of whether the agency had abused its discretion in labeling something obscene. In applying sections 259(a) and 1461, both the courts<sup>35</sup> and the Post Office Department<sup>36</sup> now employ the test of obscenity as expounded in the *Roth* case.

Moreover, the respondent cannot complain that his right to a public trial under the sixth amendment has been infringed because an administrative officer, and not a jury, has determined the material to be lascivious.<sup>37</sup> Impounding the defendant's mail is a civil sanction and not a criminal prosecution, so "due process of law" in this instance need not be by judicial process.

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30. 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958).

31. *Cates v. Haderlein*, 189 F.2d 369, 371 (7th Cir. 1951), *rev'd*, 342 U.S. 804 (1951) (*mem.*); *Bersoff v. Donaldson*, 174 F.2d 494, 495 (D.C. Cir. 1949).

32. *Cates v. Haderlein*, 342 U.S. 804 (1951) (*mem.*); Also see *Riss & Co., Inc. v. United States*, 341 U.S. 907 (1951) (*mem.*); *Wong Yang Sung v. McGrath*, 239 U.S. 33, 50 (1950).

33. *Stanard v. Olesen*, 74 Sup. Ct. 768, 771 (Douglas, Circuit Justice, 1954); *Door v. Donaldson*, 195 F.2d 764, 766 (D.C. Cir. 1952); *Borg-Johnson Electronics, Inc. v. Christenberry*, 169 F. Supp. 746, 753 (S.D.N.Y. 1959); *Pinkus v. Reilly*, 157 F. Supp. 548, 549 (D.N.J. 1957).

34. *Olesen v. Stanard*, 227 F.2d 785, 788 (9th Cir. 1955); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 494 (S.D.N.Y. 1959); *Klaw v. Schaffer*, 151 F. Supp. 534, 539 (S.D.N.Y. 1957); *Bonica v. Olesen*, 126 F. Supp. 398, 400 (S.D. Cal. 1954); *LeBaron v. Olesen*, 125 F. Supp. 53 (S.D. Cal. 1954); *Jeffries v. Olesen*, 121 F. Supp. 463 (S.D. Cal. 1954).

35. *United States v. Padell*, 262 F.2d 357 (2d Cir. 1958) (*mem.*), *cert. denied*, 359 U.S. 942 (1959); *United States v. Keller*, 259 F.2d 54, 57 (3d Cir. 1958); *Glanzman v. Schaffer*, 252 F.2d 333, 334 (2d Cir. 1958); *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 118 (D.C. Cir. 1957), *rev'd*, 355 U.S. 372 (1958) (*mem.*); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 498 (S.D.N.Y. 1959); *Glanzman v. Christenberry*, 175 F. Supp. 485, 487 (S.D.N.Y. 1958).

36. *Jefferson Creations, Inc., POST OFFICE DEPT. HEARING No. 1/87* (1959); *Milco Specialties, POST OFFICE DEPT. HEARING No. 1/96* (1959); *The Filmsters, POST OFFICE DEPT. HEARING No. 1/30* (1958); *Schillaci, POST OFFICE DEPT. HEARING No. 5/180* (1958); *T-R Productions, POST OFFICE DEPT. HEARING No. 5/230* (1958).

37. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 444 (1957); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 189 (1948); *Public Clearing House v. Coyne*, 194 U.S. 497, 509 (1904); *Glanzman v. Schaffer*, 252 F.2d 333 (2d Cir. 1958); *Roth v. Goldman*, 172 F.2d 788, 789 (2d Cir. 1949).

*Interim Order*

Title 39 of the United States Code, section 259(b), enacted in 1956,<sup>38</sup> permits the Post Office to impound the respondent's incoming mail for a period of twenty days pending a hearing in proceedings pursuant to section 259(a). The Post Office also has the authority under section 259(b) to extend the twenty day period by filing a petition in district court. Since the Department may exercise such extraordinary power,<sup>39</sup> the courts have construed each step for an extension of time required by the statute as being jurisdictional, and a failure to comply strictly with all of them will invalidate the postal order.<sup>40</sup>

Unlike section 259(a), section 1461 not only lacks a provision for such a temporary seizure of the mail, but it does not even contain language specifically authorizing the Post Office to stop mail once it has been determined to be obscene. Furthermore, whereas section 259(a) is civil, section 1461 is a criminal statute.<sup>41</sup>

Lower courts have relied on the following phrase in section 1461 to extend the purview of the statute:

[Every obscene article] 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.

This language has been interpreted to mean that section 1461 is not only penal, but imposes a duty on the postmaster to seize and detain this prohibited material after a fair and impartial hearing.<sup>42</sup> Although the Supreme Court has not as yet ruled on this point, the present trend in the law would seem to indicate that its decision would be in accord with those of the lower courts. This solution, however, does not answer the question of whether the Post Office can order an interim stoppage of mail pending the final outcome of a hearing under section 1461. The problem can be analogized to the status of the law relating to section 259(a) before 259(b) was enacted. At that time the courts were split, some implying that the power to order an interim stoppage existed because it was necessary to effectuate

38. This statute was enacted six years after section 259(a). Subsection (c) of this law expressly excuses 259(b) from the requirements of the FAPA.

39. A district court has declared that section 259(b) does not violate due process of law. *Schillaci v. Olesen*, 161 F. Supp. 227, 230 (S.D. Cal. 1958).

40. *Toberoff v. Summerfield*, 256 F.2d 91 (9th Cir. 1958); *Togerooff v. Summerfield*, 245 F.2d 360 (9th Cir. 1957).

41. Title 18 is designated *Crime and Criminal Procedure*.

42. *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 119 (D.C. Cir. 1957), *rev'd*, 355 U.S. 372 (1958) (*mem.*), (citing the *Roth* case); *One v. Olesen*, 241 F.2d 772, 779 (9th Cir. 1957), *rev'd*, 355 U.S. 371 (1958) (*mem.*), (citing the *Roth* case); *Glanzman v. Christenberry*, 175 F. Supp. 485, 486 (S.D.N.Y. 1958); *Monart, Inc. v. Christenberry*, 168 F. Supp. 654, 656 (S.D.N.Y. 1958). Postal regulations issued pursuant to section 1461 declare obscenity to be nonmailable and directs that it not be conveyed. 39 C.F.R. §§ 14.1, 14.3 (1955).



properly section 259(a);<sup>43</sup> others stated that such a decision would be tantamount to legislation.<sup>44</sup> The issue is probably not too important in the majority of cases because of the short interval between the impounding and the hearing dates.<sup>45</sup>

### *Scope of the Final Order*

Once the material is declared obscene, the Post Office Department's order must be directed toward only the salacious matter. It may not include all the respondent's mail, or the decree will be struck down as being a prior restraint.<sup>46</sup>

If separating the legal material from the illegal is practicably impossible, this rule should be relaxed. The Supreme Court has declared that an order can be directed against all of the respondent's mail if, *prima facie*, it can reasonably be said that all the mail is connected with the illegal enterprise.<sup>47</sup>

### *Additional Action*

The Post Office also has the authority under sections 259(a) and 1461 to declare nonmailable, material which advertises obscenity.<sup>48</sup> It is immaterial whether the article in which the solicitation is present is obscene, or, whether the book or pictures advertised therein are.<sup>49</sup> The only relevant issue is, does the advertisement have the "leer that promises obscenity"?<sup>50</sup>

A possible deterrent which would greatly restrict the outlet of salacious material would be a suspension or revocation of the sender's second class mailing permit.<sup>51</sup> This action was held constitutional by

43. *Barel v. Fiske*, 136 F. Supp. 751, 752 (S.D.N.Y. 1954); *Williams v. Petty*, 136 F. Supp. 283, 285 (E.D. Okla. 1953); *In re Rice*, 256 Fed. 858 (S.D.N.Y. 1919). *But see* *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 495 (S.D.N.Y. 1959).

44. *Stanard v. Olesen*, 74 Sup. Ct. 768, 771 (Douglas, Circuit Justice, 1954); *Donnell Mfg. Co. v. Wyman*, 156 Fed. 415, 417 (C.C.E.D. Mo. 1907).

45. 24 Fed. Reg. 4027 (1959), amending 39 C.F.R. § 203.4 (Supp. 1959), declares that the hearing shall be held within 10 days from the date of the filing of the complaint.

46. *Donaldson v. Read Magazine, Inc.*, 33 U.S. 178, 184 (1948) (dictum); *Tourlanes Publishing Co. v. Summerfield*, 231 F.2d 773 (D.C. Cir. 1956) (*mem.*); *Oakley v. Summerfield*, 231 F.2d 775 (D.C. Cir. 1956) (*mem.*); *Summerfield v. Sunshine Book Co.*, 221 F.2d 42, 47 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 921 (1955); *Pinkus v. Reilly*, 170 F.2d 786, 788 (3rd Cir. 1948); *Glanzman v. Finkle*, 150 F. Supp. 823, 825 (E.D.N.Y. \*1957).

47. *Public Clearing House v. Coyne*, 194 U.S. 497, 510 (1904); *Cadillac Publishing Co. v. Summerfield*, 155 F. Supp. 313, 315 (D.D.C. 1957); *Klaw v. Schaffer*, 151 F. Supp. 534, 536 (S.D.N.Y. 1957).

48. Both statutes forbid circulating information of any kind as to where, how, or from whom obscenity may be obtained.

49. *Grimm v. United States*, 156 U.S. 604, 608 (1895); *United States v. Hornich*, 229 F.2d 120, 122 (3d Cir. 1956); *Cadillac Publishing Co. v. Summerfield*, 155 F. Supp. 313, 314 (D.D.C. 1957); *Klaw v. Schaffer*, 151 F. Supp. 534, 540 (S.D.N.Y. 1957).

50. *Klaw v. Schaffer*, 151 F. Supp. 534, 540 (S.D.N.Y. 1957).

51. See 72 Stat. 139, 39 U.S.C. § 226 (1958); Postal Reg., 39 C.F.R. § 22.3 (Supp. 1959) (application for second class privileges).

the Supreme Court in a case involving the mailing of articles in violation of the Espionage Act.<sup>52</sup>

This penalty<sup>53</sup> was imposed against a sender of risque and racy material in *Hannegan v. Esquire, Incorporated*,<sup>54</sup> but failed, not because it could not constitutionally be accomplished, but because of the manner in which it was attempted. The Postmaster, while conceding that the material was not obscene, contended that it was morally improper, and that the sender had a positive duty to mail only articles for the public good.<sup>55</sup> The Supreme Court rejected this argument and declared that since the magazines wereailable there existed no grounds for the revocation of the respondent's second class mailing permit. This precedent should not be interpreted as standing for the proposition that a solicitor of erotic matter cannot have his permit revoked, for the material in the *Hannegan* case was not technically obscene and, therefore, wasailable.<sup>56</sup> After its failure in that case, the Post Office abandoned this method of attack.

### METHODS OF DETECTION

Although many restrictions impede the discovery of obscenity, there are several avenues that the Post Office may traverse in detecting this objectionable material.

Evidence of obscenity usually emanates from two sources. Either letters of complaint are written by the public,<sup>57</sup> or the Post Office itself uncovers the illegal enterprise.<sup>58</sup> The defendant cannot object if a government inspector writes decoy letters in answer to which the respondent mails the prohibited matter. The Supreme Court has consistently held this action not to constitute entrapment.<sup>59</sup>

52. *United States v. Burleson*, 255 U.S. 407 (1921).

53. 31 Stat. 1107 (1901), 39 U.S.C. § 232 (1958), declares that a second class mail privilege shall not be suspended without a hearing. Postal Reg., 39 C.F.R. § 22.8 (Supp. 1959), also order a hearing, and 39 C.F.R. § 201.40 (Supp. 1959) provides the procedures for such a hearing.

54. 327 U.S. 146 (1946).

55. The Government cited 72 Stat. 139, 39 U.S.C. § 226 (1958) for authority. This statute provides that:

... [T]he conditions upon which a publication shall be admitted to the second class are as follows.

...

Fourth. It must be originated and published for the dissemination of information of a public character . . . .

56. Postal Reg. 39 C.F.R. § 22.2 (1955), declare that obscene matter is nonailable and shall not be conveyed at the second class rate. However, this contention was not argued in the *Hannegan* case.

57. Warburton, *You and the Law vs. Smut*, This Week (Cleveland), September 27, 1959, p. 15, at 16, col. 1.

58. Postal Reg. 39 C.F.R. § 14.10 (Supp. 1959), declare that when "doubt exists as to the mailability of [obscene] matter it shall be withheld and submitted to the General Counsel for instructions."

59. *Price v. United States*, 165 U.S. 311, 315 (1897); *Andrews v. United States*, 162 U.S. 420, 423 (1896); *Rosen v. United States*, 161 U.S. 29, 42 (1896); *Goode v. United States*,

Another means of detection originates from the manner in which mail is classified. All mail is classified into four categories; first, second, third, and fourth. First class mail consists of letters and other sealed matter.<sup>60</sup> The government can open and examine this type of mail only under a warrant; otherwise their action will constitute an illegal search and seizure. Letters and sealed packages in the mail are placed in the same protected category as are a person's private property. This principle was expounded as early as 1877<sup>61</sup> and is still the law today.<sup>62</sup>

The second class, which affords the sender the most favorable rate, embraces all newspapers and other periodical publications.<sup>63</sup> The government is free to inspect this material.<sup>64</sup> This matter is never sealed; thus, the problem of an illegal search and seizure does not arise.<sup>65</sup> Of course, if the sender wishes to circumvent a possible inspection all he need do is to place the material in a sealed envelope and pay the additional first class postage. In this way the Post Office could examine the contents only under the authority of a warrant.<sup>66</sup>

All mail of the third and fourth classes is also open to examination.<sup>67</sup> However, pursuant to postal regulations, the sender may seal the material, pay first class postage, and avoid an inspection.<sup>68</sup> Although a solicitor of obscenity can circumvent the right of the Post Office to examine the mail by sending it first class, such a choice will be more expensive.<sup>69</sup>

The foregoing classifications of mail, together with the conditions imposed upon each, have generally been sustained as a proper exercise of congressional power.<sup>70</sup> The use of the mails is not a mat-

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159 U.S. 663, 669 (1895); *Grimm v. United States*, 156 U.S. 604, 610 (1895); *United States v. Roth*, 237 F.2d 796, 800 (2d Cir. 1956), *aff'd*, 354 U.S. 476 (1957).

60. 20 Stat. 358 (1879), 39 U.S.C. § 222 (1958); Postal Reg., 39 C.F.R. §§ 21.1-5 (Supp. 1959).

61. *Ex parte Jackson*, 96 U.S. 727 (1877).

62. *Oliver v. United States*, 239 F.2d 818 (8th Cir. 1957).

63. 20 Stat. 359 (1879), 39 U.S.C. § 224 (1958); Postal Reg., 39 C.F.R. §§ 22.1-8 (Supp. 1959).

64. 20 Stat. 359 (1879), 39 U.S.C. § 225 (1958), provides that matter of the second class may be examined at the office of mailing.

65. *Ex parte Jackson*, 96 U.S. 727, 736 (1877).

66. *Id.* at 733.

67. 37 Stat. 557 (1912), 39 U.S.C. § 243 (1958), provides that matter of the fourth class shall be subject to examination.

68. 39 C.F.R. §§ 24.8(b), 25.7 (Supp. 1959).

69. For a listing of the various rates for first, second, third, and fourth class mail see 39 C.F.R. §§ 21.1, 22.1, 23.1, and 24.1 (Supp. 1959).

70. *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913); *Public Clearing House v. Coyne*, 194 U.S. 497, 507 (1904).

ter of right, but of privilege,<sup>71</sup> limited to mailable matter<sup>72</sup> and by the right of Congress to classify.<sup>73</sup>

### IMPROVEMENTS WITHIN THE LAW

Because section 1461 stated that no obscene article "shall be deposited" in the mails, the courts said that the offense was complete upon the deposit of the illegal material.<sup>74</sup> Hence, venue could exist only at the location of mailing.<sup>75</sup> The deposit usually occurred in New York or Los Angeles, and the courts there invariably imposed light penalties.<sup>76</sup> Recently, section 1461 was amended, and now reads no one "shall use the mails" to convey obscenity;<sup>77</sup> this enables the government to establish venue at the district of receipt.

Although section 259(b) permits an interim impounding of 20 days before a final "unlawful" order is decreed, this interval has proved inadequate, for it normally takes the Post Office 45 days to complete administrative proceedings under section 259(a).<sup>78</sup> In view of the time required to break through the red tape, legislation which would increase the length of the temporary order from twenty to forty-five days is essential.<sup>79</sup>

### *Protect the Adolescent*

The purpose of the fight against obscenity is to protect the children of our country.<sup>80</sup> At present this objective is not being accom-

71. *United States v. Burleson*, 255 U.S. 407 (1921); *Houghton v. Payne*, 194 U.S. 88, 99 (1904); *People's United States Bank v. Gilson*, 140 Fed. 1, 5 (C.C.E.D. Mo. 1905).

72. *Roth v. United States*, 354 U.S. 476, 493 (1957); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948); *In re Rapier*, 143 U.S. 110, 133 (1892).

73. *Ex parte Jackson*, 96 U.S. 727, 732 (1877); *Pike v. Walker*, 121 F.2d 37, 39 (D.C. Cir. 1941).

74. *Rosen v. United States*, 161 U.S. 29, 41 (1896); *Ackley v. United States*, 200 Fed. 217, 223 (8th Cir. 1912); *United States v. Grimm*, 45 Fed. 558, 559 (C.C.E.D. Mo. 1891).

75. *United States v. Ross*, 205 F.2d 619 (10th Cir. 1953); *United States v. Comerford*, 25 Fed. 902, 905 (W.D. Tex. 1885).

76. Release No. 260, Post Office Department 1, 7 (Address by Postmaster General Arthur E. Summerfield before the Women's City Club of Cleveland) October 8, 1959; Warburton, *You and the Law vs. Smut*, This Week (Cleveland), September 27, 1959, p. 15, at 17, col. 4.

77. 18 U.S.C. § 1461 (1958).

78. *Hearings on H.R. 7379 Before the Committee on Post Office and Civil Service*, 86th Cong., 1st Sess., 28 (1959); Warburton, *You and the Law vs. Smut*, This Week (Cleveland), September 27, 1959, p. 15, at 17, col. 2.

79. Such a bill passed the House with one dissenting vote on September 1, 1959, and is now pending before the Senate, H.R. 7379, 86th Cong., 1st Sess. (1959).

80. Release No. 260, Post Office Department (Address by Postmaster General Arthur E. Summerfield before the Women's City Club of Cleveland) October 8, 1959; Release No. 170, Post Office Department, July 6, 1959; Meisler, *Filth Still Travels by Mail*, Cleveland Plain Dealer, November 1, 1959, § B, p. 1, col. 5; Warburton, *You and the Law vs. Smut*, This Week (Cleveland), September 27, 1959, p. 15, col. 1.

plished. The number of children receiving this harmful material through the mails is increasing.<sup>81</sup>

Most psychiatrists and psychologists feel that an ordinary child can be upset by obscenity in the sense that it may distort his emerging concepts of sexuality, cause revulsion, anxiety, pre-occupation, and guilt; and that occasionally a youth who already has a disturbed personality may be stimulated to a perverse offense by obscene literature. They would deny, however, that a stable child brought up in a wholesome family could be made delinquent or mentally ill by obscenity alone.<sup>82</sup>

By the standard pronounced in the *Roth* case, the test of obscenity is the reasonable adult; thus, the child is unprotected, and any evidence relating to the effect of lascivious matter upon him is irrelevant.<sup>83</sup> The courts are faced with a dilemma — whether to protect the child, or the inalienable right of free speech which is so deeply rooted in our Constitution?

At present there is no federal law prohibiting the sale of obscene material to adolescents. That such a statute could be constitutionally drafted is entirely probable; there is dictum in at least two cases to this effect.<sup>84</sup> In holding expert testimony as to the undesirable effect of obscenity upon juveniles to be irrelevant, the court in *Volanski v. United States* stated:

If the causal effect of such material upon juvenile delinquency is demonstrable, it may be assumed that an unambiguous statute specifically prohibiting its distribution by interstate commerce to juveniles would be a valid exercise of Congressional power. But Congress has not enacted that kind of law.<sup>85</sup>

If the federal government does not draft such a statute, then it is up to the respective states to do so; and even if the federal government were to pass such a law, that action would not preclude the states from doing the same. Federal and state statutes outlawing obscenity are not in conflict unless the state law physically interferes with the federal.<sup>86</sup>

Until such laws are passed, the obligation to see that children read only decent material primarily rests with the parents and within the self-control of the individual reader.

81. The Post Office estimates that one out of every 35 children of school age in the nation will be exposed to the demoralizing effect of pornography.

82. Interviews with college psychiatrists and psychologist in Cleveland, Ohio, March 18, 1960: Benjamin Spock, M.D., Professor of Child Development; Jane W. Kessler, Ph.D., Director, Mental Development Center; Willard D. Boaz, M.D., Director, Child Psychiatry Clinic.

83. *Volanski v. United States*, 246 F.2d 842, 844 (6th Cir. 1957).

84. *Cf. Butler v. Michigan*, 352 U.S. 380, 383 (1957); *Volanski v. United States*, 246 F.2d 842, 844 (6th Cir. 1957).

85. 246 F.2d 842, 844 (6th Cir. 1957).

86. *Roth v. United States*, 354 U.S. 476, 494 (1957); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 96 (1945).

## CONCLUSION

The obscenity law is finally becoming more strict and promises to continue in that direction in the future. When section 1461 was held constitutional in the *Roth* case, the civil sanctions of sections 1461 and 259(a) were also impliedly upheld. Moreover, since title 39 of the United States Code, section 259 (the fraud statute), differing only slightly from section 259(a), has been held to be constitutional, there is little room for question as to the validity of the latter.

A grey area remains in the application of sections 1461 and 259(a). The Post Office Department must be careful to afford the respondent a proper hearing, one as similar as possible to that provided for in the Federal Administrative Procedure Act. Once the material is judged to be obscene the order must envelope, if possible, only that matter which is illegal. If these two requisites are not adhered to, the government may discover that its otherwise effective work has been in vain.

A word of caution should be interjected at this point lest that which is merely risque or suggestive be labeled obscene; the material, as a whole, must deal with sex in a manner appealing to the *prurient* interest, and not just be obnoxious. The Post Office Department and the courts should be particularly careful when applying this standard to literature, as opposed to photography, as the former is more apt to possess some social value than is a wordless picture. The material must be judged on a careful case by case determination, for even a temporary loss of the use of the mails can cause irreparable harm to the sender, especially in the case of a legitimate publisher who may never be able to retrieve his losses.

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