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NOTES

PRIVATE CORRESPONDENCE AND FEDERAL OBSCENITY PROSECUTIONS

I. INTRODUCTION

The congressional power to establish and regulate the mails is derived from article I, section 8, clause 7 of the Constitution which states simply that Congress shall have the power “To establish Post Offices and post Roads.” More than one thousand postal inspectors are employed to enforce the wide spectrum of laws which have been enacted under this grant of power to assure the smooth and safe distribution of the mail. Approximately six percent of the yearly arrests made by postal inspectors are for violations of 18 U.S.C. section 1461 which prohibits sending obscene material through the mail. For fiscal year 1964, the arrests and prosecutions made by federal officials in cooperation with state officials, and prosecutions by United States attorneys under this statute totaled 805, resulting in 627 convictions; for the first six months of fiscal 1965 there were 427 arrests, resulting in 326 convictions. It has been estimated that fifty percent of the criminal prosecutions for violation of section 1461 involve more or less private mailings of homemade pornography or obscene letters, as opposed to commercial mailings of obscene ma-

\[\text{Hearings on Invasions of Privacy (Government Agencies) Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, at 66.}\]
\[\text{Crimes relating to the Postal Service are codified in 18 U.S.C. §§ 1691-1734 and range from destruction of letter boxes or mail to falsely labeling vehicles as carriers.}\]
\[\text{Hearings on Invasions of Privacy, supra note 1, at 66, 171.}\]
\[\text{18 U.S.C. § 1461 (1964), reads in part:}\]
\text{Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and — . . . }
\text{Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or from whom, or by what means any of such mentioned matters . . . may be obtained . . .}
\text{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.}
\text{Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery or anything declared by this section to be nonmailable . . . or knowingly takes any such thing from the mails for the purpose of circulating or depositing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.}
\[\text{Hearings on Invasions of Privacy, supra note 1, at 171.}\]
Some of these prosecutions are undoubtedly aimed at persons who, in many cases, have sent "hate" or "crank" mail indiscriminately to innocent or nonconsenting parties. However, people have been and are now being prosecuted for sending private letters to consenting adults if these letters contain obscene material. A question arises as to whether or not the latter type of activity is that which section 1461 seeks to curtail.

Through an analysis of legislative history, case history, and recent opinions of the Supreme Court, the writers will endeavor to support the proposition that private correspondence between consenting parties, whether "obscene" or not, is outside the scope of the obscenity statute.

II. LEGISLATIVE HISTORY

Historically, criminal obscenity was an outgrowth of that group of crimes which involved conduct that affronted the public, such as indecent exposure or public drunkenness. The first obscenity prosecution was aimed at conduct of this type, but was followed soon afterwards by prosecutions for obscene libel. While this early development was heavily influenced by religious considerations, there

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7 While recognizing that peripheral to the discussion contained in this article is the jurisprudential question of the state's role in the enforcement of morals, this note takes the position that the basis of the obscenity law has shifted from its religious or moralistic beginnings to a more utilitarian approach. But see Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 MINN. L. REV. 1009, 1037-38 (1962). This is in direct opposition to the preliminary position taken by Professor Henkin who states, "I believe . . . that obscenity laws are not principally motivated by any conviction that obscene materials inspire sexual offenses. Obscenity laws, rather, are based on traditional notions, rooted in this country's religious antecedents, of governmental responsibility for communal and individual 'decency' and 'morality.'" Henkin, Morals and the Constitution: The Sin of Obscenity, 63 COLUM. L. REV. 391 (1963). Concluding that the current impetus behind the federal obscenity statute is not moralistic, but rather functional, avoids the involved philosophical, and at times almost esoteric, controversy currently going on in this area. See generally, HART, LAW LIBERTY, AND MORALITY (1965); Devlin, THE ENFORCEMENT OF MORALS (1959); Devlin, Law, Democracy and Morality, 110 U. PA. L. REV. 635 (1962); Dworkin, Lord Devlin and the Enforcement of Morals, 75 YALE L.J. 986 (1966). The writers prefer to demonstrate adequate support for the proposition that "in this field, [the law's function is] . . . to preserve public order . . . to protect the citizen from what is . . . injurious, and to provide sufficient safeguards against exploitation . . . of others . . . ." Report of the Committee on Homosexual Offenses and Prosecution, Cmd. No. 247 at 9-10 (1957). While Professor Henkin would probably concur in this article's conclusion—the exclusion of private correspondence between consenting adults from the scope of 18 U.S.C. § 1461—he takes the "high road" and we take the "low road."
gradually began to emerge a more acceptable goal than the protection of the Church against blasphemy.

This emerging goal was the protection of youth against writings thought to be harmful to their healthy development. More broadly, this goal could be described as a desire to suppress that type of writing which has a causal relationship to crime and juvenile delinquency. More recently, there has been expressed a desire to prevent the commercial exploitation of the psychosexual tensions engendered by the conflict between normal sex drives and curiosity of the individual, and the social and legal restraints on overt sexual behavior. While this psychosexual tension is to a certain extent found in everyone, it is probably most pronounced in the young.\(^8\)

To summarize briefly, from the legislative history of obscenity legislation, three considerations will appear paramount in determining whether a writing should be suppressed on the grounds that it is obscene: (1) whether the writing is made public indiscriminately so as to affront or annoy people; (2) if so, whether the writing is of the type that could be causally related to antisocial behavior in the form of crime or juvenile delinquency; and (3) whether the writing is of a commercial nature. Once the conclusion is reached that the above characteristics are essential to a valid prosecution under section 1461, it is submitted that private correspondence between consenting adults is not within the statute. Such correspondence is not commercial, public, nor can it have an adverse effect on youth when not sent to them. If material does have such characteristics and is sent through first-class mail it should not be protected solely on the grounds that it was mailed first-class rather than third-class. Nevertheless, material which might well result in annoyance to the public or affect youth detrimentally when indiscriminately disseminated, should not be prosecuted under the obscenity statute, if in fact it is intended to remain private and be read only by adults who have consented to its receipt. Support for the above conclusion can best be demonstrated by delving into the murky beginnings of obscenity legislation, and following its legislative and judicial development to the present day.

A. English Obscenity Law Prior to 1857

In tracing the development of the crime of obscenity, and obscenity legislation, one discovers that the first reported obscenity case

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8 Cairns, Paul, & Wishner, supra note 7, at 1035, 1040.
was *Le Roy v. Sir Charles Sidley*, a 1663 case involving obscene conduct rather than obscene writing. In London, Sir Charles Sedley, emboldened by drink and completely nude, climbed onto a balcony at "The Cock Tavern" and preached a "mountebank sermon" to a mixed and amazed crowd, shouting that he had for sale "such power as would cause women to run after him." He also used profanities unsparingly, which "aroused public indignation." The result was that:

He was fined 2000 mark, committed without bail for a week, and bound to his good behavior for a year, on his confession of information against him, for showing himself naked in a balcony, and throwing down bottles (pist in) vi & armis among people in Covent Garden, contra pacem and to the scandal of the Government.\(^9\)

In finding that Sir Sedley's conduct warranted punishment, the court reasoned that there existed in the courts a residual power to make criminal an act for which there was no statutory provision or direct precedent, if such act was prejudicial to the public welfare. This power originated in the Court of the Star Chamber, which declared itself to be *custodes morum*, or guardian of morals. The King's Bench gradually developed the same power, and, after the abolition of the Court of the Star Chamber in 1641, claimed itself to be heir to the Star Chamber as *custodes morum*.\(^10\) Although Sir Sedley's conduct was unquestionably public (it had been witnessed by a crowd of hundreds), and was a breach of the King's peace, the elements necessary for the crime of obscene conduct remained undefined.

It was not until 1708, half a century later, that the first recorded action against an obscene writing was instigated. It proved unsuccessful, however, the judge determining that where the defendant had published an allegedly obscene book entitled *The Fifteen Plagues of a Maidenhead*, there was no contravention of the common law. Drawing a distinction between public blasphemy and printed obscenity the court said:

\(^{9}\) [Sid. 168, 82 Eng. Rep. 1036 (K.B. 1663)]. There are various reports with various spellings of the name Sedley.


\(^{11}\) Chandos, "*My Brother's Keeper*" in "To Deprave and Corrupt ..." 18 (Chandos ed. 1962); Note, *Courts Have Power as Custodes Morum To Punish Conspiracy To Do Acts Newly Defined as Corruptive of Public Morals*, 75 Harv. L. Rev. 1652 (1962).
A crime that shakes religion . . . as profaness on the stage, &c., is indictable . . . ; but writing an obscene book, as that intitled "Fifteen Plagues of a Maidenhead" is not indictable, but punishable only in the Spiritual Court . . . .\(^\text{12}\)

The effect of the holding was to place prosecutions for obscene writings, as opposed to offensive public conduct, within the jurisdiction of the ecclesiastical courts which customarily dealt with such moral offenses as adultery and swearing.\(^\text{13}\) Unless the obscenity were manifested in public conduct, the "crime" was thought to have been against the Church, not the State.

Less than twenty years later, however, this distinction between obscene conduct and obscene writing was obliterated. In 1725, Richard Curl, "bookseller . . . printer, and pirate of literature,"\(^\text{14}\) was charged and found guilty of the common law crime of publishing an "obscene libel" in the form of a book entitled *Venus in the Cloister, or The Nun in Her Smock*.\(^\text{15}\)

The King's Bench upheld the conviction on the grounds that:

> [S]ince morality is a part of the law of the land as the Christian religion is, an act which is destructive of morality in general, such as an obscene libel ought to be punished in the same way as one against the Christian Religion, such as blasphemy and libel.\(^\text{16}\)

The judge reasoned rather circuitously that "as to morality, destroying that is destroying the peace of the Government, for the government is no more than the publick order which is morality."\(^\text{17}\) By the weight of this reasoning, the publication of an obscene writing became a crime at common law. It seems that the court here was more concerned with writing that was libelous in character, than with mere pornography.

The first English statute proscribing obscenity was a section in the Vagrancy Act of 1824 which forbade the exposing of an obscene picture or print on any street or public place.\(^\text{18}\) Parliament had evidently given legislative effect to the judiciary's practice (prior to *Rex v. Curl*) of limiting the offense to some public display of the


\(^{13}\) Ernst & Schwartz, *Censorship: The Search for the Obscene* 9 (1964).

\(^{14}\) Alpert, *supra* note 10, at 43.

\(^{15}\) Ernst & Schwartz, *op. cit.* *supra* note 13, at 9.

\(^{16}\) Ernst & Schwartz, *op. cit.* *supra* note 13, at 9.

\(^{17}\) Chandos, *supra* note 11, at 18 (quoting from *Dominus Rex v. Curl*).

\(^{18}\) Vagrancy Act, 1824, 5 Geo. 4, c. 83, § 4. 18 Halsbury's Statutes of England 203-04 (2d ed. Burrows ed. 1948). This section also punished fortune telling, palmistry, indecent exposure and carrying burglary tools.
obscene matter. Obscenity was not yet bad per se, rather the main concern was the effect it had on the orderly working of society. After *Rex v. Curl*, but prior to 1857, there were several other prosecutions for obscene libel based on the premise that the mere publication of obscenity was indeed a crime. However, little use seems to have been made of the provisions of the Vagrancy Act. The holdings of the obscenity cases decided during this period have been variously summarized as showing "a strong link between the prosecution of obscenity and the fear of blasphemy or sedition, mostly blasphemy" or, as formulating no definition or criteria for identifying obscenity other than the ability to smell it.

Because the scope of criminal obscenity was vague, this evolving common law crime, when not used as a means to secure political or religious retribution, was generally lumped together with other affronts to public decency such as indecent exposure or public drunkenness. It was the public outrageousness of the defendant's conduct or writing that was sought to be curtailed. No distinction existed as to which segment of the population should be protected from obscenity (i.e., not only youth but also adults were sought to be protected from the public display of obscenity). Thus, obscenity legislation and case law in the American colonies, and later in the United States, had as its beginning, common law rulings which limited convictions to offenses of a public character. As will be seen, however, this limitation on the concept of obscenity did not impede the later development of obscenity legislation.

**B. Lord Campbell's Act and the Hicklin Case**

Before crossing the Atlantic, two other modifications of the English law should be noted. While these developments did not occur prior to the beginnings of federal obscenity legislation in the United States, they did influence the course of American obscenity law. The first development was the passage of Lord Campbell's Obscene Publications Act of 1857, which provided that obscene publications could

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19 See, e.g., *Rex v. Wilkes*, 4 Burr. 2527, 98 Eng. Rep. 327 (K.B. 1770), which is so heavily involved with the political situation of the time and procedural issues that it really adds little of value to an understanding of obscene libel. See also Alpert, *supra* note 10, at 44-47. In *Wade & Phillips*, *Constitutional Law* (6th ed. 1960) 546, the statement is made that "no case of importance seems to have been reported between the two dates [1727-1868]."

20 *Ernst & Schwartz*, *op. cit. supra* note 13, at 9.

21 Alpert, *supra* note 10, at 47.

22 Paul & Schwartz, *supra* note 6, at 215.

be searched for, seized, and, after a hearing before justices, destroyed if found offensive.\textsuperscript{24} Private libraries were exempted, since the law provided that the obscene books had to be "held for sale"; only public shops were subject to search. The intended application of the law was conceded to be, first "to works written for the single purpose of corrupting the morals of youth," and second, to those works of a "nature calculated to shock the common feelings of decency."\textsuperscript{25}

Lord Campbell's Act was quite similar to the American statutes later passed by Congress, and although the congressional debates do not evidence a particular knowledge of the English statute, in all likelihood, congressional draftsmen were familiar with it. Lord Campbell's Act, in its construction foreshadowed three subtle, yet important facets of obscenity legislation. First, prior to the act some public exposure of the picture or book was an element of the crime. Campbell's Act, however, by providing for the search and seizure of obscene publications, in effect made the possession of obscene material \textit{for sale} criminal per se, irrespective of publication or distribution. Second, a shift in purpose had come about. At common law, obscenity was deemed bad because of its antisocial character, and prosecutions were either for a breach of the peace\textsuperscript{26} or for a libelous attack upon a socially recognized and accepted institution such as the Church or the State.\textsuperscript{27} In contrast, Lord Campbell's Act appeared to have as its main purpose the protection of youth rather than the general public order. Third, it may also be noted that Lord Campbell's Act, similar to the basic American statute, relegated the definition of "obscenity" to judicial interpretation.

This brings us to the second significant English development. Any discussion of English obscenity legislation would be incomplete without considering the definition that was given by the English courts to "obscenity." \textit{The Queen v. Hicklin},\textsuperscript{28} the landmark case which interpreted Lord Campbell's Act and provided the basic definition of "obscenity," becomes important if one is to appreciate the fluctuating definitions given the word "obscenity" by American courts. In \textit{Hicklin}, Henry Scott, an anti-papist, bought and distributed at cost, a pamphlet entitled \textit{The Confessional Unmasked, Showing the

\begin{itemize}
  \item \textsuperscript{24} 5 Halsbury's Statutes of England 721-23 (2d ed. Burrows ed. 1948).
  \item \textsuperscript{25} Alpert, supra note 10, at 51, n.29.
  \item \textsuperscript{26} Le Roy v. Sidley, 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1663).
  \item \textsuperscript{27} Rex v. Wilkes, 4 Burr. 2527, 98 Eng. Rep. 327 (K.B. 1770); Rex v. Curl, 1 Barn. 29, 94 Eng. Rep. 20 (K.B. 1727).
  \item \textsuperscript{28} [1868] 3 Q.B. 360.
\end{itemize}
Depravity of the Romish Priesthood the Iniquity of the Confessional, and the Questions Put to Females in Confession. The pamphlet, argued the defense, was not obscene, but rather an attack on the evils of the Catholic confessional. Benjamin Hicklin, the Recorder of London (a judicial office), held that the pamphlet was obscene according to the common law definition, but that it did not come within the purview of the statute since it had not been published “for the single purpose of corrupting the morals of youth.” The prosecution appealed, and the Lord Chief Justice Cockburn, in reversing, established as a test for obscenity “whether the tendency of the matter . . . 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.”

This definition, in accordance with the import of Lord Campbell’s Act, effectively dispelled the implication of earlier cases, that the writing had to be libelous, as opposed to merely pornographic in nature. At the same time, however, Cockburn’s definition exceeded the main purpose of the act (to protect youth), and in effect, encompassed matter that might not corrupt or deprave more mature readers. Furthermore, Cockburn’s definition eliminated any requirement that it be the defendant’s intention to have this material reach the young, since if there were any chance that the material might reach the corruptible, it was to be circumscribed.

C. Early American Obscenity Law

The early development of the crime of obscenity in the American colonies was essentially parallel to that in England. Prior to 1792, all fourteen states which had ratified the Constitution had obscenity legislation of one form or another. From the titles of these acts, and from the several reported cases prosecuted under them, it appears that, as in England, obscenity offenses in the colonies were inexorably

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29 Id. at 371. Ironically, this test became known as the Hicklin rule when actually it was opposite of Hicklin’s ruling. Perhaps Hicklin is more pronounceable than Cockburn in this connection. The material above has been drawn from ERNST & SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE, 34-35 (1964); Birkett, THE CHANGING LAW in “TO DEPRAVE AND CORRUPT . . .” 80 (Chandos ed. 1962); Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 50-53 (1938); Paul & Schwartz, Obscenity in the Mails: A Comment on Some Problems of Federal Censorship, 106 U. Pa. L. Rev. 214, 216 (1957). As an example to illustrate the profound influence the Hicklin test has had on American law in this area, note that in the first obscenity case to reach the Supreme Court, the trial judge had charged the jury as follows: “The test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall.” Rosen v. United States, 161 U.S. 29, 43 (1896).

linked with criminal libel, outrageous public misbehavior and blasphemous attacks on religion.\textsuperscript{31}

In 1842, the first federal obscenity statute was enacted as part of a tariff act. There is no recorded discussion of the provision prohibiting the "importation of all indecent and obscene prints, paintings, lithographs, engravings, and transparencies . . . . "\textsuperscript{32} Congress' main concern was not with the obscenity provision, but with whether the bill, a protective tariff, might work a detriment to the agrarian South. Thus, the first federal obscenity provision became law, practically unnoticed by those who voted for its enactment.\textsuperscript{33} It should be remembered that as yet, there was only a vague definition of obscenity as we know it today; the English \textit{Hicklin} decision was some twenty-six years in the future, and there was no statutory definition.

The first federal statute concerning the \textit{mailing} of obscene books and pictures was enacted by Congress in 1865, when an amendment was made to a federal postal appropriations bill.\textsuperscript{34} The Post Office Department had requested a variety of amendments dealing primarily

\textsuperscript{31} See the following as cited in Roth v. United States, 354 U.S. 476, 482-83 n.12 (1956): Act Against Drunkenness, Blasphemy, §§ 4, 5 (1737), 1 Laws of Del. 175, 174 (1797); Act for the Punishment of Profane Cursing and Swearing (1791), N.H. Laws 1792, 258; Act for Suppressing Vice and Immorality, §§ VIII, IX (1798), N.J. Rev. Laws 329, 331 (1800); Act for Suppressing Immorality, § IV (1788), 2 Laws of N.Y. 257, 258 (Jones & Varick 1777-1789); Act . . . for the More Effectual Suppression of Vice and Immorality, § III (1741), 1 N.C. Laws 52 (Martin Rev. 1715-1790); Act to Prevent the Grievous Sins of Cursing and Swearing (1700), II Statutes at Large of Pa. 49 (1700-1712); Act for the Prevention of Vice and Immorality, § II (1794), 3 Laws of Pa. 177, 178 (1791-1802); Act for the More Effectual Suppressing of Blasphemy and Prophaneness (1703), Laws of S.C. 4 (Grimké 1790); Act for the Effectual Suppression of Vice, § 1 (1792), Acts of General Assembly of Va. 286 (1794).


\textsuperscript{32} Act of August 30, 1842, ch. 270, § 28, 5 Stat. 566. The act was entitled "An act to provide revenue from imports and to . . . modify existing laws imposing duties on imports . . . . " Act of August 30, 1842, \textit{supra} at 548.

\textsuperscript{33} The further discussion of the prohibition on importing obscene literature only incidentally concerns us. The statute was amended in 1857, enlarging its scope to include "articles," "images," "figures," and "photographs" (Act of March 2, 1857, ch. 63, 11 Stat. 168); amended again in 1890 to include obscene "books, pamphlets, paper or writings . . . . " (Act of October 1, 1890, ch. 1244, § 11, 26 Stat. 614); and is now incorporated in 18 U.S.C. § 1462 (1964), and 46 Stat. 688 (1930), 19 U.S.C. § 1305 (1958).

\textsuperscript{34} Act of March 3, 1865, ch. 89, § 16, 13 Stat. 507.
with matters of administration, and in reply to this request a bill was introduced in the Senate by Jacob Collamer of Vermont.\textsuperscript{35} Evidently, during committee discussion, mention was made of the problem of obscene material being sent in the mail from New York to men in the Union Army, and an amendment was suggested which would remedy this situation.\textsuperscript{36} Due to proposed reconstruction legislation, and other pressing matters, Collamer experienced difficulty introducing the bill. Most of what little discussion there was on the obscenity section occurred on February 8, 1865, as follows:

\begin{quote}
COLLAMER: This new section may perhaps well claim some attention, and it may be liable to some objection. . . . I am not perhaps entirely satisfied with it. It is said that our mails are made the vehicle for the conveyance of great numbers and quantities of obscene books and pictures . . . . and that is getting to be a very great evil. This section is drawn with a view to prevent that.
\end{quote}

\begin{quote}
JOHNSON: If they [obscene pictures and books] are sent in envelopes, how does the postmaster know what they are?
\end{quote}

\begin{quote}
COLLAMER: Printed publications are always sent open at one end. It will not require the breaking of seals.
\end{quote}

\begin{quote}
JOHNSON: You do not propose to let the postmaster break the seals?
\end{quote}

\begin{quote}
COLLAMER: There is not a word said about "seals" in the section. If gentlemen are not satisfied . . . that part of the section [authorizing postmasters to throw out obscene publications] can be stricken out; and I take it the objection would be mainly that it might be made a precedent for undertaking to give him [postmaster] a sort of censorship over the mails . . . . If it is thought that it may furnish a bad precedent to that extent, the first clause of the section may be stricken out, and then the amendment will merely make it penal for anybody to deposit such matter in the mails. . . .
\end{quote}

\begin{quote}
JOHNSON: I move to strike out the first clause. The precedent is a bad one, I think. . . . It is true that most of the printed matter that is sent is sent without being covered or sealed up; but if there is any danger of this kind those who send this species of publications will no doubt begin to seal them, and then the postmaster, whenever he suspects that the envelope contains anything which is obnoxious to objection, will break the seal. It does not appear to me at all necessary to the accomplishment of the purpose . . . .\textsuperscript{37}
\end{quote}

\textsuperscript{35} CONG. GLOBE, 38th Cong., 2d Sess. 450, 654, 660-62 (1865).
\textsuperscript{37} CONG. GLOBE, supra note 35, at 660-61.
Consequently the words "all... obscene publications... discovered in the mails shall be seized and destroyed... as the Postmaster General shall direct..." were omitted.

In this form the bill passed the House and, the first federal obscene mail statute was enacted—an amendment to an appropriation bill, with no House, and little Senate debate. It was passed with no discussion as to its merits, and no definition of obscenity.

While it may be unclear from the dearth of general debate on the bill just what the aim of Congress was, it is certainly clear that Congress did not intend to grant the post office anything resembling a censorship or custos morum power. The Senators' primary concern was to insure that there would be no invasion of first-class mail. Since the statute speaks of publications, it may be inferred that Congress had the commercial pornographer in mind.

38 Act of March 3, 1865, supra note 34. This statute reads as follows:

[N]o obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States; any person or persons who shall deposit or cause to be deposited, in any post office or branch post office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print or other publication, knowing the same to be of vulgar and indecent character, shall be deemed guilty of a misdemeanor, and being duly convicted thereof, shall for every such offense be fined not more than five hundred dollars, or imprisoned not more than one year, or both, according to the circumstances and aggravations of the offense.

39 Paul, supra note 36, at 51.

40 The postal laws were codified in 1872 and a provision was added to prohibit obscene matter on the outside of envelopes or on postcards. Act of June 8, 1872, ch. 335, § 148, 17 Stat. 302. No recorded debate is discoverable for this addition. Cong. Globe, 42d Cong., 2d Sess. 15, 71, 4091-92 (1872). This is mentioned primarily to establish that the acts of 1865 and 1872 were concerned only with obscene material which was exposed to public view, and further, to show that both statutes carried an implied, but strong, inference of noninterference with obscene matter in first-class or sealed envelopes. This statute, which in part is now 18 U.S.C. § 1463 (1964), originally prohibited deposit or carriage in the mail of "any letter upon the envelope of which, or postal card upon which scurrilous epithets may have been written or printed, or disloyal devices printed or engraved..." It was amended in 1873, to delete the phrase "disloyal devices." Act of March 3, 1873, ch. 258, § 2, 17 Stat. 399. Thus modified, the statute was carried into the Revised Statutes as section 3893. The phrase "lewd, obscene or lascivious delineations... terms or language..." broadened the scope of the statute in 1876 (Act of July 12, 1876, ch. 186, 19 Stat. 90), and then the section was again amended in 1888 to read that "all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or postal card, upon which indecent, lewd, lascivious, obscene, libelous, scurrilous or threatening..." writing appeared, would be nonmailable. Act of June 18, 1888, ch. 394, § 2, 25 Stat. 188. Less than three months later the statute was again amended by the additional prohibition of matter "defamatory" or "calculated by the terms or manner or style of display and obviously intended to reflect upon the character or conduct of another..." Act of September 26, 1888, ch. 1039, 25 Stat. 496. The last change in this area came in 1948 when "... libelous, scurrilous, defamatory or threatening character..." was deleted, thus confining the section primarily to a prohibition of "indecent, lewd, lascivious, or obscene..." writing on postcards or envelopes. 18 U.S.C. § 1463 (1964). Language of a libelous, scurrilous, defamatory, or threatening character was incorporated in a separate section. 18 U.S.C. § 1718 (1964).
NOTES

D. The Comstock Act of 1873

The stage was now set for perhaps the most effective one-man lobbyist movement in congressional history. Anthony Comstock went to Congress in 1873 to lobby for what he called "his bill" and which indeed did come to be known as the Comstock Act. Comstock's avowed purpose was to persuade Congress to broaden the postal law so as to outlaw everything obscene or immoral, articles as well as books, from the mails. All Anthony Comstock needed was a stronger law, and he would do the rest necessary to do away with, as he termed it, the "hydra-headed monster" of obscenity.

Sponsored by Senator Buckingham of Connecticut, the bill was reported with unanimous recommendation from the Committee on Post Offices and Post Roads. However, when the bill reached the Senate floor, its contents were seriously questioned. It appeared that many Senators knew little or nothing about the bill's provisions. As Senator Conkling of New York explained:

[Although I have tried to acquaint myself with it [the Comstock Act], I have not been able to tell, either from the reading of apparently illegible manuscript . . . or from private information gathered at the moment, and if I were to be questioned now as to what this bill contains, I could not aver anything certain with regard to it. The indignation and disgust which everybody feels in reference to the acts which are here aimed at may possibly lead us to do something which, when we come to see it in print, will not be the thing we would have done if we had understood it and were more deliberate about it.]

Consequently, the bill was deferred, coming before the Senate three days later on February 1, 1873, when it was passed over because of pressing debate on a postal appropriations bill. The Comstock bill was finally interjected during further debates on the appropriations bill that evening, when a number of the Senators were pressing for

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41 Act of March 3, 1873, ch. 258, 17 Stat. 598. Anthony Comstock's activity in the suppression of vice in the cities of New York and New Haven is interestingly described by him in a letter to Congressman Merriam dated January 18, 1873: "These I have seized and destroyed—obscene photographs, stereoscopic and other pictures, more than 182,000; obscene books and pamphlets, more than 5 tons; . . . stereotype plates for printing obscene books, more than 5 tons; . . . arrest of dealers since October 9, 1871, over 30; publishers, manufacturers and dealers dead since March last, 6." CONG. GLOBE, 42d Cong., 3d Sess., App. 168-69 (1873).


43 CONG. GLOBE, 42d Cong., 3d Sess. 1524-25 (1873).

44 Id. at 1563.
adjournment. This time the bill was summarily passed without debate.\(^{46}\)

There was no debate in the House either, where the bill passed despite thirty-seven votes against it. In the closing minutes of the March 1st session,\(^{46}\) after several motions to adjourn had been made due to the lateness of the hour and the drowsiness of the Representatives, the House finally approved the Comstock bill. Representative Kerr of Indiana had made a motion to send the bill to the Committee on the Judiciary since, “its provisions are extremely important and they ought not to be passed in such hot haste.”\(^{47}\) This motion was narrowly defeated, however, and the bill passed despite the misgivings of a substantial number of congressmen.

In this manner the United States Congress enacted, with a minimal amount of debate, a broadened and omnibus obscenity statute.\(^{48}\) It was a poorly drafted statute, one which gave no definition of the material it sought to prohibit from the mail.\(^{49}\)

E. Federal Legislation 1873 to 1909

1. “Writing”

In December of 1873, the Comstock Act became section 3893 of the Revised Statutes; three years later it was amended slightly, ostensibly to broaden its coverage.\(^{50}\) Representative Cannon of Illinois introduced the bill in the House and stated that, in his opinion, replacing the phrase “no obscene” with “every obscene” did not “materially change the [section] . . . of the Revised Statutes . . . . Section 3893 of the Revised Statutes is perfected by the bill so as to provide a complete penalty for the mailing of all kinds of matter therein prohibited to pass through the mails.”\(^{51}\) When the House bill reached the Senate, however, Senator Hamlin of Texas, seemingly on the spur

\(^{45}\) Id. at 1571.

\(^{46}\) Actually, the bill passed on Sunday, March 2, 1873 at about 1:30 a.m., the clock having been stopped at midnight to preserve the fiction of passage on a business day.


\(^{48}\) Act of March 3, 1873, ch. 258, 17 Stat. 598.

\(^{49}\) Anthony Comstock was ecstatic, and wrote in his diary: “O how can I express the joy of my Soul or speak the mercy of God . . . .” Mr. Comstock stayed in Washington for the inauguration ceremony, and was made a “special agent” for the Post Office Department by President Grant. PAUL & SCHWARTZ, op. cit. supra note 42, at 24. After less than one year, Comstock was able to say of his activities that he had seized 194,000 obscene pictures and photographs, 134,000 pounds of books, and about 60,300 rubber articles. ERNST & SCHWARTZ, op. cit. supra note 13, at 33.

\(^{50}\) Act of July 12, 1876, ch. 186, 19 Stat. 90.

\(^{51}\) 4 CONG. REC. 3656 (1876).
of the moment, suggested an amendment that was to bother the federal courts for the next decade. "I move an amendment in the first section of the bill . . . . [T]o strike out 'picture-paper,' which is a compound word, and insert the words 'picture, paper, writing.' . . . ." The only question raised on this proposed amendment was whether it was to read "paper-writing" or "paper, writing." It was quickly determined that the latter form was correct, and the amendment passed. While most of the debate on the bill centered on a provision concerned with the mailing of lottery tickets, Senator Morton of Indiana voiced concern with the scope of the bill, thereby demonstrating the first congressional recognition of the difficulty, and necessity, of determining obscenity standards.

Mr. President, in prohibiting the transmission of any matter through the mails there ought to be great care used and it ought to be particularly described and defined. . . . [T]here is a part . . . that I think is vague and susceptible of abuse. It prohibits the transmission through the mail of "every article or thing intended or adapted for any indecent or immoral use." What is an "immoral use?" . . . The word "obscene" is well defined; we can understand what that means; but when you prohibit everything that is for an immoral use, there would be wide differences of opinion on that point. . . . There are many things that a portion of our people would consider immoral that other portions would consider entirely moral.53

There was some discussion on this point, but it was decided that what was immoral in one part of the country, was equally immoral in another part of the country.64 The amendment provoked no discussion in the Senate and the bill was passed as amended.65

2. "Letter"

Congress next became actively concerned with obscenity in the mails in 1888, by again amending section 3893 of the Revised Statutes.66 The most important change was the inclusion of the phrase,

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52 Id. at 4262.
53 Id. at 4263.
64 Unfortunately this has not proven to be the situation. One of the most recent amendments to the obscenity statute (Act of August 28, 1958, 72 Stat. 962) was designed to allow prosecution of offenders in at least two different jurisdictions; that where the letter or obscene material was sent from, and that where the material was received. The reason for the amendment being that it was sometimes difficult to obtain convictions in certain jurisdictions. 1958 U.S. Code Cong. & Ad. News 4012, 4014.
65 4 Cong. Rec. 4403 (1876).
66 Act of September 26, 1888, ch. 1039, § 2, 25 Stat. 496, reads in part:
Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character . . . and every
"letter . . . whether sealed as first-class matter or not." Earlier in the year, a bill had been passed by Congress dealing with "obscene, libelous, scurrilous, or threatening . . . language or [language] reflecting injuriously upon the character or conduct of another . . ." appearing on the outside of envelopes. The main impetus behind that bill had been a desire to suppress the practice of putting such comments as "Bad Debtors' Association for the collection of bad debts" on the outside of envelopes containing over-due bills. Subsequent to its passage, however, a new problem arose, whereby the same remarks were printed on letters enclosed in envelopes with windows. This allowed the objectionable statements to be seen without actually placing them on the outer envelope. Numerous bills were introduced at various times during the session to remedy the situation, and finally, one was passed on September 26, 1888, which not only amended the section dealing with material on the exterior of envelopes, but also added the word "letter" to the list of prohibited obscenity items covered by Revised Statutes section 3893. The discussion surrounding the passage of the bill gives no clear impression whether or not noncommercial, handwritten, correspondence was intended to be included within the general prohibition. Although, indiscriminate dissemination of obscene publications was clearly sought to be curbed by the act, it does not appear that private correspondence between consenting adults was intended to in any way be proscribed.

In addition to the "window loophole," the earlier 1888 obscenity

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57 Act of June 18, 1888, ch. 394, § 2, 25 Stat. 188.
58 19 CONG. REC. 6733-34 (1888).
59 Statute cited note 56 supra.
60 19 CONG. REC. 7660-62 (1888). Senator Vest, in arguing against Senator Hawley's suggestion to reduce the maximum sentence provided by the bill, said:
[T]hese villainous publications have been sent to ladies, to young girls. In one case a female academy was deluged with them. . . A man who had a grudge against a lady would send one of these things through the office [post office] directed to the lady, and she would be outraged by tearing off the envelope and finding the publication in her hands. . . The present law did not reach the case of written publications; it only applied to print. These scoundrels went to work and used the new stylographic process, frequently used by public men now, giving a fac-simile imitation of your letter and your signature. They took these awful publications . . . and stylographed them . . . and they are being sent forth all over the country to young people.
CONG. REC., supra at 7661.
act had been defective in yet another respect. According to Representative Dockery:

[In the former bill which passed the House and Senate, in the opinion of the Postmaster General, implied authority was given postmasters to inspect mail matter of the first-class, and of course, it was not the intention of Congress to grant any such authority.]

Consequently, the September bill included the amendment that, "nothing in this act shall authorize any person to open any letter or sealed matter of first-class not addressed to himself." This addition, remarked Dockery,

[W]isely prohibits postmasters from opening letters to ascertain their contents, but if, for instance, an obscene letter is addressed to the gentleman from Missouri, he will have the authority under this bill . . . to punish the sender. The postmaster, however, has no authority to open the letter.

It may be inferred from the above discussion that perhaps Congress did in fact intend to proscribe private first-class letters, if they were of the type generally referred to as "crank mail" or "hate mail." It is highly doubtful, however, that Congress intended to allow the postal inspectors to effectively circumvent the prohibition against unauthorized opening of first-class mail by the use of decoy letters.

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61 19 CONG. REC. 8189 (1888).
62 Statute cited note 56 supra.
63 19 CONG. REC. 8189 (1888).
64 The phrase "decoy letters" refers to the practice of postal inspectors whereby they place in local papers advertisements which seek "modern young couples" for purposes of correspondence. People answer these advertisements believing they are writing to another couple with similar interests, when in fact they are writing to a postal inspector. When the letters become obscene enough to support a conviction, the postal inspector confronts the party with the letters he has written.

The extent to which the postal authorities will go in the pursuit of obscenity is illustrated by Phelper v. Texas, 396 S.W.2d 396, cert. denied, 382 U.S. 943 (1965), in which the defendant was convicted under a state statute for the possession of obscene pictures. Here, the defendant exhibited some pictures "of nude women" to his milkman, who in turn, notified the police. A detective became friendly with the defendant and upon finding him willing to sell some of the pictures, he notified a postal inspector. The inspector, operating under the alias, Garrett, began corresponding with the defendant relative to the pictures. When the detective returned to the defendant's home to view some more pictures, the defendant informed him that he intended to send the photographs to Garrett. Here, it is obvious that the defendant was encouraged by an official of the Post Office Department to commit an act upon which an indictment could be obtained. Apparently the pictures sent through the mail were not ones which would sustain an indictment, nevertheless, the defendant was arrested and the police searched his home where they found pictures of men and women engaged in sexual intercourse. The defendant testified that he took the pictures upon the encouragement and inducement of Detective Smith and a letter he had received from Garrett. Here, we have people employed by the post office attempting to induce an individual to send material through the mails which can be used to obtain a conviction under the obscenity statute.
That is to say, the type of behavior with which Congress was concerned was that which constituted an annoyance, or nuisance to the recipient of a letter. There was no grant of authority to use decoy letters in order to search out those people, who, if given the opportunity, might send obscene letters through the mails.

3. "Filthy"

Congress did not act against obscene mail again until 1909, when the phrase "and every filthy" was added to broaden the statute. This time, however, lengthy debate as to the wisdom of such an amendment preceded its passage. In the House, Houston of Tennessee moved to add the words "vile, filthy or indecent." In opposition, Payne of New York suggested that these words would add nothing to the existing law. Moon of Pennsylvania, the House sponsor of the bill, agreed with Payne and argued further that to include the word "indecent" in the statute would be undesirable:

This word has such a broad signification and means such different things to different people—that is, so many persons consider some things indecent that others do not—. . . . [A]t the time we were considering this section in committee, [we] concluded that the introduction of the word here would open such a broad field for construction on the part of judges and the post office authorities in the application of a criminal statute that it was unwise . . . .

Shereley of Kentucky was of the same opinion:

[S]ome of us who have taken the trouble to look into the history of this section and the matters that have been litigated in the courts know that there is a very great danger by the use of such words as are suggested . . . of giving to the Post Office Department a censorship of the press.

Gaines of West Virginia also voiced strong opposition:

I think there is a pretty general feeling in this House that the power of the Post Office Department to control literature and to control the business of the citizens of the country ought to be curtailed rather than enlarged.

Ultimately, a compromise was reached and the bill left the House with only the word "filthy" added. When the bill reached the

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66 42 CONG. REC. 979 (1909).
67 Id. at 995.
68 Id. at 996.
69 Ibid.
70 Id. at 997.
Senate, a motion was again made to include the phrase "or vile, or filthy, or disgusting," but it, too, met adverse reaction. Among those voicing their disapproval was Senator Baily of Texas, who stated:

I think we have gone far enough with the postal authorities in yielding to them at their solicitations and increasing their power. . . . I resent the idea that we have reached a point where we have to make it a crime in this country for one man to disgust another. . . . 71

Notwithstanding the opposition, Congress in 1909 broadened the statute by adding "and every filthy" to the category of prohibitions; the words "indecent," "vile," or "disgusting," were not included. 72

It would not be until 1965 and 1966 that Congress would again demonstrate such concern over the growing power of the postal inspectors. In 1909 the concern centered primarily on broadening the description of prohibited writing, while during the 1965 and 1966 Senate hearings 73 the main concern would be with alleged invasions of privacy which occurred when first-class mail was opened prior to delivery.

F. Title 18 United States Code Section 1461

In 1948 the postal crimes, along with other federal crimes, were assembled and codified in title 18 of the United States Code. 74 The laws regarding mailing obscene publications, and the mailing of envelopes with obscene or threatening matter on them, which laws formerly had been spread throughout the Statutes at Large, were now grouped into four sections. Section 3893 of the Revised Statutes became 18 United States Code 1461.

The 1948 codification added little to the statute, but seven years later, Congress amended section 1461 by adding the words "indecent" and "vile" and by deleting the word "letter." 75 A lack of re-

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71 Id. at 2391-92.
72 Congress in 1911 amended the statute by passing a rider to the postal appropriations act for that fiscal year. This amendment defined indecent character to include, "matter of a character intending to incite arson, murder, or assassination." Act of March 4, 1911, ch. 241, § 2, 36 Stat. 1339.
73 Hearings on Invasion of Privacy (Government Agencies) Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. pt. 1, at 66.
74 18 U.S.C. § 1461 as enacted by Act of June 25, 1948, ch. 643, § 1461, 62 Stat. 768. But see text accompanying note 143 infra, as to the unexpected effect which the subtle change in wording of the statute (from "and every filthy . . ." to "filthy") had on the subsequent case law.
ported debate on this 1955 amendment in either the House or Senate imparts an inference that Congress acted on the strength of committee reports, and in effect, endorsed in toto the recommendations made therein. These reports pronounced desire to use general language in the statute in order to “strike at all obscene matter.” It is significant to our discussion that the Senate report emphasized the belief that the amendment would aid the struggle against juvenile delinquency. In the committee’s words:

The passage of S. 600 [the amending bill] will contribute greatly in the continuing struggle to combat juvenile delinquency and the corruption of public morals.\(^7\)

The mood of Congress had changed noticeably since 1909. Now, there was little, if any, opposition to extending the postal law’s application. “Vile” and “indecent,” two words which had distressed Representatives Gaines, Payne, Shereley, Houston, and Moon forty-six years earlier were now appended by Congress without comment.

Since 1955 there have been on other amendments to section 1461 that are germane to our present discussion. Consequently, the end result of our investigation into the statutory and common law history of obscenity, bears witness to a definite lack of clear congressional intent to circumscribe correspondence between consenting adults. It is, in fact, questionable whether Congress ever intended to regulate writing in first-class mail, no matter how pornographic, if that writing would not result in some manifestation of antisocial conduct. While recognizing that part of the early basis for obscenity legislation, in this country as well as in England, was a desire to protect public morals, it is difficult to believe that this aim has not given way to an overriding congressional intent to curtail pornography due to its suspected causal relationship to crime and juvenile delinquency. Thus, the purpose of obscenity legislation has become a functional one of protecting the paternal interest which society has in its youth. However, Congress can only enact such legislation; it remains the task of the courts to effectuate this congressional mandate. As will be pointed out in the following section, the judiciary has also shown, amid much confusion, a similar aim in its interpretation of congressional legislation.

III. Case History

A. Are Private Letters within the Obscenity Statutes?

The early history surrounding obscenity in private correspondence was characterized by conflicting decisions and sporadic legislative development. Under section 3893 of the Revised Statutes of the United States, the federal government began to prosecute the sending of obscene matter through first-class mail. As originally enacted, the statute prohibited the mailing of any "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character." In 1876 the statute was amended to include the word "writing" within the enumerated items, the mailing of which was prohibited. Following this amendment, however, several federal courts refused to hold that private letters were to be included in the classification "writing." In 1880, United States v. Williams held that the aim of the statute was to prohibit "published" material which had "the added characteristic of proposed circulation and distribution." Two years later, United States v. Loftis gave added weight to Williams by requiring a "publication" before the obscene matter could be brought within the purview of section 3893. These courts held further, that the word "writing" as set out in the statute, usually means some type of legal document, such as a will or a deed.

At the same time, an opposite view was espoused by other federal courts which held that private letters were within the purview of the obscenity statute. In United States v. Gaylord, the defendant contended that a private letter was not within the terms of the statute because it was not a publication. In rejecting the argument, the court held that the word "publication" did not modify the preceding words in the statute, and agreed further, that books and pamphlets are often not published but merely written. The Gaylord court apparently

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77 Act of July 12, 1876, ch. 186, 19 Stat. 90.
78 3 Fed. 484, 489 (Commissioner's Court, E.D.N.Y. 1880).
79 12 Fed. 671 (D. Ore. 1882). In addition, the court emphasized the private nature of first-class mail: "It was never the intention of the law to take cognizance of what passes between individuals in private communication under the sanctity and security of a seal." United States v. Loftis, supra at 673.
81 17 Fed. 438, (C.C.S.D. Ill. 1883).
82 Id. at 440-41; accord, United States v. Morris, 18 Fed. 900 (C.C.D. Ore. 1884); United States v. Thomas, 27 Fed. 682 (S.D. Miss. 1886); United States v. Baitton, 17 Fed. 731 (Commissioner's Court, S.D. Ohio 1883).
found that the mere fact that an article is hand-written does not exclude it from being a "publication."

These conflicting decisions among the lower federal courts were resolved in the Supreme Court case of United States v. Chase. In Chase, the Court followed the reasoning of those federal courts which had equated the statutory word "writing" with some type of legal document, and thus held that a "writing" must come within one of the other particular classes such as "book, pamphlet, picture, and paper." Therefore to include private letters within the statutory provision, Congress would have to mention them specifically.

The obscenity statute was amended in 1888 to include the word "letter" among the list of items prohibited. Despite this congressional action, certain lower federal courts refused to accede to the legislative intent, and took the position that even though the word "letter" was now contained in the statute, "letter" did not include private correspondence because such letters did not possess the characteristics of a "publication" within the meaning of the statute. However, the views of these courts were in conflict with the holdings of other federal courts. In the decision of In re Wahll, the judge held that private letters were encompassed by the amendment:

In my opinion since the amendment of September 26, 1888, there can be no reasonable doubt that Congress clearly expressed its intention to include obscene letters, whether private and sealed or unsealed.

In United States v. Andrews, the Supreme Court resolved the issue. There, the Court held that the word "letter" included all private letters, sealed or unsealed, containing obscene matter, pointing out, perhaps erroneously, that this was the obvious intent of Congress.

From the time of the Andrews decision, until 1955, the problem of whether "letter" included private correspondence lay dormant. In

83 135 U.S. 255 (1890). Although the Chase case came before the Supreme Court in 1890, it was prosecuted under the older version of the statute under which the indictment had been drawn.
86 42 Fed. 822 (D. Minn. 1890).
87 Id. at 826; accord, United States v. Ling, 61 Fed. 1001 (D. Conn. 1894); United States v. Nathan, 61 Fed. 936 (N.D. Iowa 1894); United States v. Martin, 50 Fed. 918 (W.D. Va. 1892).
88 162 U.S. 420, 424 (1896).
that year Congress passed an amendment to section 1461,89 the then-existent obscenity statute, deleting the word “letter” and adding the term “article.” In affirming the conviction of the petitioner who had sent an obscene letter through the mails, the Sixth Circuit Court of Appeals in Thomas v. United States,90 rejected the argument that by deleting the word “letter” from the statute Congress evidenced an intent that private correspondence not be included within the statute. The Thomas court stated that the 1955 amendment was a measure to provide for a more comprehensive coverage, and Congress most certainly did not intend to exclude private letters from that coverage. The Supreme Court has yet to definitively rule upon the question of whether private letters come within the present obscenity statute, and in Redmond v. United States91 the Court avoided resolving the issue by a per curiam reversal of an obscenity conviction.

At this point in our discussion it would be helpful to divide private letters which have led to prosecutions under the obscenity statute into three general categories. The first category is comprised of letters which come within the terms “obscene, lewd, lascivious, and indecent.” These terms will be discussed under the sub-heading “Obscene Letters.” The second type of letter leading to prosecution is that which contains no direct language that could be termed obscene, but which supposedly solicits “immoral” conduct. The third category consists of letters which are of an insulting and derogatory nature, intended merely to offend the person to whom they are sent. All the above types of letters have been prosecuted by the Justice Department as violations of the obscenity statute. For the purpose of this note, each group will be treated separately until the discussion of Roth v. United States.92

B. Letters Resulting in Obscenity Prosecutions

1. “Obscene Letters”93

The American judicial definition of obscenity is derived from English case law. In United States v. Bennett,94 the Circuit Court for the Southern District of New York, deciding what constituted ob-

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90 262 F.2d 844, 847 (6th Cir. 1959).
92 35 4U.S. 476 (7957). This case will be discussed later. See text accompanying note 147 infra.
93 Discussion of obscene matter includes “lewd, lascivious, and indecent.”
scenity under section 3893 of the Revised Statutes, followed the rule set out in *The Queen v. Hicklin*.

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 may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the very young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.

The *Hicklin* rule was later adopted by the Supreme Court in *Rosen v. United States* and *Swearingen v. United States*. In *Swearingen* the Supreme Court reaffirmed the *Hicklin* test for obscenity, but held that the allegedly obscene newspaper article was mailable because it did not come within the limits of the *Hicklin* rule. Holding that the words of the statute, "obscene, lewd, or lascivious," do not describe three separate offenses but only one, the Court found the apparently libelous article in this case was not obscene because it did not fall under the offense at which the statute was aimed, namely, to prohibit

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

In the years that followed, several courts voiced their opinions purporting to add to, or clarify the meaning of the *Swearingen* rule.

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95 As amended by Act of July 12, 1876, ch. 186, 19 Stat. 90.
96 [1886] 3 Q.B. 360.
98 161 U.S. 29 (1896).
99 161 U.S. 446 (1896).
100 The article read: "[T]his black hearted coward is known to every decent man, woman, and child in the community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Savior, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion. He is a contemptible scoundrel and political blackleg of the lowest cut. He is pretending to serve Democracy and is at the same time in the pay of the Republican party. He has been known as the companion of negro strumpets and has revelled in the lowest debauches. . . . He is lower, meaner, filthier, rottenest, in the rottenest strumpet that prowls the streets by night." *Id.* at 447 n.1.
102 See *Dysart v. United States*, 272 U.S. 655 (1926); *Griffin v. United States*, 248 Fed. 6 (1st Cir. 1918); *Magon v. United States*, 248 Fed. 201 (9th Cir. 1918); *Botsford v. United States*, 215 Fed. 510 (6th Cir. 1914); *Knowles v. United States*, 170 Fed. 409 (8th Cir. 1909); *MacFadden v. United States*, 165 Fed. 51 (3d Cir. 1908); *Hanson v. United States*, 157 Fed. 749 (7th Cir. 1907); *Burton v. United States*, 142 Fed. 57 (8th Cir. 1906); *United States v. Davidson*, 244 Fed. 523 (N.D.N.Y. 1917); *United States v. O'Donnell*, 165 Fed. 218 (C.C.S.D.N.Y. 1908); *United States v. Bene-
United States v. Wrightman\textsuperscript{103} held that obscenity "implies something tending to suggest libidinous thoughts or excite impure desires." United States v. Wroblenski\textsuperscript{104} quotes the obscenity test of Swearingen and then states, "In other words, the tendency must be to corrupt the recipient, and not merely to offend or hurt, as the charge relates to a sealed letter..." In United States v. O'Donnell\textsuperscript{105} and United States v. Benedict,\textsuperscript{106} a New York district court reiterated the rule that the sealed letter must contain language which will have or which may have "an immoral effect, in the sense relating to sexual impurity, upon whose hands the writing may come."\textsuperscript{107} This rule was followed in United States v. Davidson,\textsuperscript{108} where the writer of a letter accused the addressee of being a prostitute and the mother of a bastard child, and of being surrounded by prostitutes and bastards, and threatened to inform people generally of the addressee's reputation. The court felt that this letter was not within the statute because it could not corrupt the morals of the person to whom it was sent. These cases all reveal that the judiciary's principal concern seemed to be with the possible corrupting influence which the article may have upon the recipient.

In Knowles v. United States,\textsuperscript{109} the court broadened the Swearingen test by stating the "true test to determine whether a writing" is nonmailable under the section as it now reads "is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."\textsuperscript{110} By the phrase "and into whose hands it may fall," the court focuses its attention upon the indiscriminate dissemination of obscene matter, a concern which has since permeated the court decisions. However, this emphasis upon the indiscriminate dissemination is in basic conflict with the nature of a private letter sent to one particular person.

The Hicklin rule, although modified, and made subject to variations such as the Swearingen test, has had a lasting effect on obscenity

\textsuperscript{103} 29 Fed. 636 (W.D. Pa. 1886).
\textsuperscript{104} 118 Fed. 495-96 (E.D. Wis. 1902).
\textsuperscript{105} 165 Fed. 218 (C.C.S.D.N.Y. 1908).
\textsuperscript{106} 165 Fed. 221 (C.C.S.D.N.Y. 1908).
\textsuperscript{107} Id. at 222.
\textsuperscript{108} 244 Fed. 523, 529 (N.D.N.Y. 1917).
\textsuperscript{109} 170 Fed. 409 (8th Cir. 1909).
\textsuperscript{110} Id. at 412. (Emphasis added.)
law. However, one of the primary factors under consideration in the above cases is the aspect of the effect of the letter, or other writing, on its recipient—a test very different from the "average man" standard which has been applied by modern courts.

The first case to apply the "average man" test to determine whether the matter mailed tended to corrupt the morals of the recipient was United States v. Levine.111 There, the defendant was tried for mailing obscene circulars which advertised obscene books. The trial court judge had charged the jury that the statute was directed against stimulating sensuality and that the degree of stimulation was not to be measured by its effect, either on the highly prudish, or the highly educated, but rather upon the average human mind. Although the Second Circuit Court of Appeals upheld this charge to the jury, it reversed on other statements made by the trial judge, and went on to criticize the Hicklin rule, saying simply that the Supreme Court never adopted it.112 While the Levine court conceded that the Hicklin rule had been followed by many of the lower federal courts, it reasoned that these courts had merely cited the rule as authority without considering its merits. Although the Levine court cites Burton v. United States,113 United States v. Clarke,114 and United States v. Smith115 as possible support for an obscenity standard based on the reactions of those to whom the article was sent, it states that it was now overruling those decisions as they applied to this, the Second Circuit. The court justified its position by voicing a warning against what it considered to be the unjust effects of the Hicklin rule:

This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interest of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would have applied it consistently.110

Despite the Levine court's avowed purpose of narrowing the test of obscenity, it failed. No court had yet proposed that the Hicklin

111 83 F.2d 156 (2d Cir. 1936).
112 Id. at 157. But see Rosen v. United States, 161 U.S. 29, 43 (1896), and Swearingen v. United States, 161 U.S. 446, 451 (1896), where the court seemed to adopt the Hicklin rule.
113 142 Fed. 57 (8th Cir. 1906).
114 38 Fed. 732 (E.D. Mo. 1889).
115 45 Fed. 476 (E.D. Wis. 1891).
110 United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936).
rule deemed matter obscene if there was "the mere possibility" that some unbalanced person might in some way come upon it. What Levine actually did was to place upon the jury the onerous task of deciding what the "average man" would consider obscene.

The "average man" test was further refined in Burnstein v. United States, where the court held the test to be applied was whether the matter was offensive to the common sense of decency and modesty of the community, and also, whether the matter tended to suggest or arouse sexual desires or thoughts in the minds of those who might be depraved or corrupted by such matter. Here, the Burnstein court seems to have come to a curious mixture of both the objective and subjective tests.

In Verner v. United States, a 1950 case, the court rejected any application of a subjective test of obscenity to private correspondence. There, the defendant had written two letters attacking the chastity of his former paramour, and containing a lewd suggestion about her relationship with another man who was also a recipient of one of the letters. In upholding the conviction, the circuit court refused to consider evidence that the addressees of the letters, both adults, could not have been induced by the letters to commit any act of sexual immorality. Similarly rejecting the subjective test, Cain v. United States, affirmed a conviction under section 1461 of a defendant who had sent his girl friend letters described by the court as dealing "in a shockingly gross and sensual manner with sex matters," and stated that the mailing of the letters violated the statute irrespective of their exciting lustful thoughts in the addressee's mind.

The "average man" test was utilized in ruling upon the obscenity of five private letters in Ackerman v. United States. There, a magazine writer and researcher in the field of lesbianism and homosexuality, mailed five letters, with pictures enclosed to a 38-year-old father, under the assumption that the addressee was a lesbian. An interesting fact of the case was that apparently the addressee, in answering the defendant's letters, wrote nothing to dispel this assumption. Describing the letters as "filled with wildly erotic, filthy, prurient comments and inquiries concerning the details of the ad-

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117 178 F.2d 665, 667 (9th Cir. 1949).
118 183 F.2d 184, 185 (9th Cir. 1950).
120 293 F.2d 449 (9th Cir. 1961).
121 Brief for Appellant, p. 6, United States v. Ackerman, 293 F.2d 449 (9th Cir. 1961).
dressee's private parts," the court refused to apply what the accused contended should be the proper test in cases of noncommercial private correspondence: whether the material was an appeal to the prurient interest of the only person likely to receive it, specifically, the addressee. The court in rejecting the proposed subjective test reasoned first, that the statute includes private correspondence, and second, that to adopt the accused's proposed interpretation of section 1461 would make the statute inapplicable in one of the types of cases which it was intended to cover, namely, "the indiscriminate mailing of filthy and obscene, although purportedly private letters by crackpots or perverts." The court also felt that such an interpretation might also endanger well-intentioned letter writers with prosecution because of the reaction of the addressee. The court does not seem to have realized the apparent contradiction in its reason for rejecting the defendant's argument, that is, that "well-intentioned letter writers do not send letters indiscriminately." The court claimed that one of the purposes of the statute was to prevent the indiscriminate mailing of obscene private letters. This may be so, but in the Ackerman case, the letters had been sent to only one person. To apply this court's reasoning as a general rule would create an injustice, for most cases do not involve an indiscriminate sending of obscene letters. The Ackerman court overlooked a possible solution which would allow a defense, based on evidence that the addressee could not be led to commit any act of sexual immorality from the letter involved, to rebut the general presumption based on the "average man" test.

Even after Levine's espousal of the "average man" test there have been cases accepting the reaction of the particular recipient to be a determinate factor. The very nature of these cases shows the impracticality of a general application of the "average man" test. Hence, the Second Circuit Court of Appeals held that a "conditional privilege" was accorded to mailers of works of scientific or literary merit, and that such works were not obscene if the persons for whom they were intended were "among the privileged classes" of persons who would not abuse the information contained in such articles. The same privilege was also accorded by the District of Columbia Circuit Court of Appeals to a report by a consumer's organization to prop-

122 Ackerman v. United States, 293 F.2d at 453. (Emphasis added.)
123 United States v. Rebhuhn, 109 F.2d 512, 514 (2d Cir.), cert. denied, 310 U.S. 629 (1940); United States v. Nicholas, 97 F.2d 510, 512 (2d Cir. 1938).
124 Consumers Union of United States v. Walker, 145 F.2d 33, 35 (D.C. Cir. 1940), where the court allowed the mailing of contraceptive information to married couples who certified that they used prophylactics on the advice of a physician.
erly qualified persons. These cases demonstrate the desirability of maintaining a policy which allows for certain exceptions to the “average man” test when adherence to it would appear to inhibit the educational or informational processes. But even with such a policy, the courts are merely allowed to make value judgments as to who is qualified to view obscenity and who is not. The problem of apprising the citizen who uses the mails to transmit obscene matter as to whether he is a possible offender still remains unsolved.

In general, the “average man” test, when applied to private letters, allows a jury to decide in any specific case whether an entirely private matter is obscene to the average man. This, in effect, allows a decision based on the jury’s own impressions and prejudices, and can easily lead to an unjust and hypocritical result. In other words, a person, before writing a letter which to him is not obscene, must stop and decide whether twelve men or women would feel that his letter would be obscene to the “average man.” There are two reasonable alternatives to this dilemma. One alternative would be to adopt a new defense for private correspondence cases. The second alternative would be to completely withdraw private letters from the purview of the obscenity statute.

2. “Letters Containing Language Not Directly Obscene or Filthy but Soliciting Immoral Conduct”

The federal government has prosecuted cases involving letters which in themselves contain no words capable of being termed “obscene, lewd, lascivious, or filthy.” These letters generally contain some type of suggestion which the postal authorities designate as an attempt to solicit “immoral” conduct. A notorious case in point is United States v. Martin. Here, the accused sent a letter to a woman, with whom he had had only a visual acquaintance, asking her to take an overnight journey with him to a nearby town. He promised to pay her expenses plus an additional five dollars, with the added thought that, if she would accompany him, he would give her a nice time and she would never regret it. The court held that this letter violated the obscenity statute, and defined obscenity in emotional rather than academic terms, as “that which is offensive to chastity and modesty,” adding that this letter would offend the chastity of any “pure-minded woman.”

126 30 Fed. 918 (W.D. Va. 1892).
127 Id. at 921. Thus proving that Judge Magruder’s well-known statement “that there is no harm in asking” may not be true if one asks through the mails. Magruder,
In contrast to *Martin, United States v. Lamkin*\(^{128}\) sustained a motion to quash an indictment under the obscenity statute, holding that, although the accused was undoubtedly attempting to use the mails for a "heinous offense against society" and affecting "assignment and seduction," there was nothing indecent in the language, words or expressions used, and therefore there was no indictable offense.\(^{120}\) A decade later, the same court in *United States v. Journal Co.*,\(^{130}\) refused to sustain an indictment against a defendant who had used the mail to transmit copies of testimony in a celebrated criminal case.

In *Parish v. United States*,\(^{131}\) the accused had sent a letter in which he claimed that he, and others had seen the addressee, a young female school teacher, in a compromising position with a named man, at a particular time and place. He requested that the addressee meet and talk with him, either at his place of business or at a place selected by her. The court held that while there was no obscene language used, the immoral intent of the writer was clear. The defendant had charged a woman of presumably good character with immoral conduct in order to obtain a private meeting with her; enough, declared the court, to sustain a conviction under the statute.

However, in *Krause v. United States*,\(^{132}\) the court rejected an argument based on the writer's supposedly immoral intent. The government contended that the defendant's letter was an invitation to engage in homosexual activity. In voicing its disapproval of the action, the court critically analyzed the situation:

The letter was written by one man to another and does not on its face contain a single obscene, lewd, or lascivious word, or a suggestion of an immoral or indecent character, and in the absence of such obscene word or indecent suggestion in the letter no such construction can be given thereto. The statute alone creates and defines the crime, and the government cannot, by suggestion,

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\(^{120}\) Id. at 463, where the court said: "The statute does not declare that the letter must be written for an indecent or obscene purpose, but that the letter itself, in its language, shall be of indecent character. The letters set out in the indictment are not themselves of indecent character, and, if used for such purposes as have been named, congress has not made such purposes criminal. When a law denounces a letter containing obscene language, and does not denounce a letter decent in terms, but written for an indecent purpose, an indictment founded only upon the obscene purpose cannot be maintained."

\(^{130}\) 197 Fed. 415 (E.D. Va. 1912).

\(^{131}\) 247 Fed. 40 (4th Cir. 1917).

\(^{132}\) 29 F.2d 248 (4th Cir. 1928).
innuendo, averment, or charge, add to its provisions, nor can it widen the statute's application by adding to the letter or writing something not contained therein.\footnote{Id. at 251. (Emphasis added.) The letter reads: My Dear Buddy

No doubt you will be surprised to hear from me, but I just had to inquire how you are. I have been thinking of you every day since we met, as I enjoyed our meeting, and I hope you could meet me quite often, if convenience presents itself. Now, Buddy, I will be down the chateau this Friday night at 8. So if you can come which I hope you can, I will meet you at the station, at Severna Park, in the meantime I will try to call for you at the Hospital with a Friend and his car. So try to get your little Pal to come with you no others. I will call you up Friday noon time if every think \textit{[sic]} will be o.k. trusting you are well and happy as Sat morning last, you know. So try to come.

Yours truly

Victor Krause.

With sincere regards.

Krause v. United States, \textit{supra} at 249. See Dysart v. United States, 272 U.S. 655 (1926).}

Although the foregoing actions would concededly succumb to the comparatively recent \textit{Roth} standard of obscenity,\footnote{See text accompanying note 160 \textit{infra}.} there are further arguments to demonstrate why these actions should be outside the scope of government regulation. To illustrate, it becomes apparent that prosecution for this type of offensive letter could only come about in one of three ways:

1. pursuant to a complaint registered by an individual addressee;
2. through the illegal interception and investigation by postal authorities of first class mail;
3. through the devious practice of enticing suspected offenders to send objectionable letters to agents employed by the postal authorities.

This last method borders on entrapment and would appear to be a completely unjustifiable function for the Department. Under each type of prosecution, juries would be confronted with additional problems in ascertaining the motives of the alleged offender, and in determining what shall constitute sexually immoral conduct between adults. The reader should note with particularity the additional burden which these problems impose upon the juror who has already been charged with the difficult task of applying the "average man" test.\footnote{See text accompanying note 125 \textit{supra}.} It is questionable, in light of the problems posed, whether continued prosecutions for mailing letters which merely solicit immoral conduct will lead to results that are just or desirable.
3. "Filthy Letters"

Historically, before a court would declare a letter obscene, it had to at least meet the requirements of the Hicklin rule, that is, it had to have the tendency to deprave and corrupt the morals of those who might receive it. Letters which were extremely crude and insulting could not lead to conviction because they could not possibly corrupt the morals of anyone. In United States v. Wyatt, the court stated that "the contents of a letter may be coarse, vulgar, and indecent, and yet the letter not be obscene, lewd, or lascivious within the meaning of the statute." And, in Swearingen, the Supreme Court held that letters which are merely abusive, profane, coarse, scurrilous, and vulgar, or even libelous are not within the prohibition of the statute. United States v. Wrightman held that, although the letters were exceedingly coarse and vulgar, one of them being grossly libelous, they were not within the statute. The preceding three cases paved the road for the amendment to the Revised Statutes (the obscenity statute) which made nonmailable every "obscene, lewd or lascivious, and every filthy, book . . . or other publication of an indecent character." Yet, even following this statutory modification, some lower courts continued to hold that the crude insulting type of letter was still not within the statute, and thereby treated the new phrase as nothing more than a modifier of the words that appear before it in the statute.

However, the Supreme Court in United States v. Limehouse reached a different result. In Limehouse, Mr. Justice Brandeis, writing for the majority, held that the trial court had erred in quashing the indictment of one charged with mailing "a certain filthy letter and writing." Although the trial court had reasoned that the letter was not obscene, the Supreme Court declared that the words "and every filthy" in the statute "added a new class of unmailable matter—the filthy."

The wording of the statute was further modified by the amend-
ment of 1948.\textsuperscript{144} The wording was changed at that time to “every obscene, lewd, lascivious, indecent, filthy, or vile article.” Notwithstanding the Supreme Court interpretation, and the subsequent legislative action, certain of the lower federal courts persisted in recognizing “filthy” as a separate class of nonmailable matter, not bound by either the new or old versions of the statute.\textsuperscript{144}

However, in the 1961 case, \textit{Flying Eagle Publications, Inc. v. United States},\textsuperscript{146} the Court reasoned that the words “indecent, filthy or vile” as used in the statute, were limited in their meaning by the preceding words “obscene, lewd, lascivious.” The fact that this case is better reasoned is clear when we consider the ironic statement made by Mr. Justice Brandeis in \textit{Limehouse}:

> The lower court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collection of words, it treated the amended clause as if it had read “obscene, lewd, lascivious, or filthy,” [as it now does read], and then, applying the doctrine of \textit{noscitur a sociis}, gave to “filthy” the meaning attributed in the \textit{Swearingen} case to the words “obscene, lewd, or lascivious.”\textsuperscript{146}

This statement by Justice Brandeis has now come back to haunt the courts because the present form of the statute uses the precise language of Justice Brandeis’ hypothetical. Therefore, applying the doctrine of \textit{noscitur a sociis} to the wording of the present obscenity statute, one has to conclude that “filthy” modifies the words before it and does not designate a separate class of nonmailable material. Considering this reasoning, it appears that today, an indictment based on a letter being “filthy” would fail unless it could also be brought within the classification of “obscene.”

\section*{IV. The Constitutional Application of Section 1461 to Private Letters}

This portion of the note will be devoted to a determination, based upon the Supreme Court decisions handed down in the last decade, of whether or not private correspondence between consenting adults

\textsuperscript{144} Flying Eagle Publications, Inc. v. United States, 285 F.2d 307, 308 (1st Cir. 1961); Verner v. United States, 183 F.2d 184, 185 (9th Cir. 1950); Big Table, Inc. v. Schroeder, 186 F. Supp. 254, 262 (N.D. Ill. 1960).

\textsuperscript{146} United States v. Limehouse, 285 U.S. 424, 426 (1932); The doctrine of \textit{noscitur a sociis} means, “that general and specific words are associated with and take color from each other . . . . The meaning of a word is or may be known from the accompanying words.” BLAcK, LAw DIcToNARY (4th ed. 1951).
may be circumscribed by the provisions of section 1461. In order to
clarify the confusing nature of these decisions, this discussion will
be divided into three separate questions: (1) What is the current
definitional test of obscenity? (2) Can private correspondence fall
within this definition as obscene? (3) Does prosecution of private
correspondence coincide with the basic policy underlying the ob-
scenity laws?

A. The Current Definitional Test of Obscenity

In 1957 the constitutionality of section 1461 was seriously chal-
lenged for the first time. Prior to Roth v. United States the validity
of the obscenity statute had been assumed; however, in Roth, the
Supreme Court explicitly announced its intention to determine the
constitutional question. The specific issue under consideration was
whether the publication and sale of obscenity, however defined, could
be criminally punished in light of first amendment guarantees. The
court, after stating that obscenity is not protected speech under the
First Amendment since it is "utterly without redeeming social im-
portance," proclaimed the standard for obscenity to be "whether
to the average person, applying contemporary community standards,
the dominant theme of the material taken as a whole appeals to
prurient interests." Thus, while affirming the conviction of the
defendant, the Court set forth what appeared to be a definitional test
for future obscenity cases.

After the decision in Roth, the Court had an opportunity to apply
its new standard in several diverse situations. In 1957, the Court
reversed convictions dealing with magazines for nudists and those

148 Id. at 484.
149 Id. at 489.
150 The reader should be advised at this juncture that there was in fact no Roth
definition. Although in several decisions the Court does refer to the Roth definition or
the Roth test, it at the same time (often on the same page) observes that "our dis-
cussion of definition was not intended to develop all the nuances of a definition re-
quired by the constitutional guarantees." Mishkin v. New York, 383 U.S. 502, 508
n.7 (1966). Further, the Court in Roth was only concerned "with the question
whether the First and Fourteenth Amendments protect material that is admittedly
obscene, the Court there had no occasion to explore the application of a particular
phasis added.) It is apparent that the definition of obscenity is not rigid but fluid,
and to speak of the Roth definition without recognizing the subsequent refinements
would be quite incorrect.
151 Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), reversing 249 F.2d
114 (D.C. Cir. 1957).
which were meant to appeal to homosexuals. Both decisions were per curiam opinions in which the Court reversed merely by citing the Roth case.

It was not until 1962 that the Court enunciated further guidelines as an aid in determining what actually constitutes obscenity. In Manual Enterprises v. Day, the Court was squarely presented with the question of whether or not the materials before it were obscene—a question the Court was not faced with in Roth. Speaking for a splintered Court, Mr. Justice Harlan with Mr. Justice Stewart joining, held that the court of appeals had misconstrued Roth by making prurient interest the sole test of obscenity, and that such a reading of the Roth case “would be not only inconsistent with section 1461 and its common-law background, but out of keeping with Roth’s evident purpose to tighten obscenity standards.” The Court asserted that the statute was aimed at obnoxious material, and declined “to attribute to Congress any such quixotic and deadening purpose as would bar from the mails all material, not patently offensive, which stimulates impure desires relating to sex. Indeed such a construction of section 1461 would doubtless encounter constitutional barriers.” In summary, to find obscenity under the federal statute, Manual Enterprises required proof of two distinct elements: patent offensiveness and prurient interest appeal. Both had to conjoin before challenged material could be found obscene under section 1461.

Two years later in Jacobellis v. Ohio, the Supreme Court, again hopelessly split, chose an Ohio obscenity prosecution as a vehicle to further refine the obscenity standard. Under the impression that it

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153 One Incorporated v. Oleson, 355 U.S. 571 (1958), reversing 241 F.2d 772 (9th Cir. 1957). See also Times Film Corp. v. Chicago, 355 U.S. 35, reversing 244 F.2d 432 (7th Cir. 1957).
154 Mr. Justice Harlan announced the judgment of the Court in an opinion in which Mr. Justice Stewart joined. Mr. Justice Black concurred in the result and wrote no separate opinion. Mr. Justice Frankfurter and Mr. Justice White took no part in the decision of the case. Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined, concurred in the reversal but on different grounds. Mr. Justice Clark dissented.
156 Ibid. (Citation omitted.)
157 378 U.S. 184 (1964). Mr. Justice Brennan announced the judgment of the Court, and delivered an opinion in which Mr. Justice Goldberg joined. Mr. Justice White concurred in the judgment, but wrote no separate opinion. Mr. Justice Black, joined by Mr. Justice Douglas concurred in reversal but on different grounds. Mr. Justice Stewart concurred in a separate opinion. The Chief Justice, joined by Mr. Justice Clark, dissented. Mr. Justice Harlan dissented in a separate opinion.
was reiterating the Roth standard, the Court announced that material could not be constitutionally proscribed unless utterly without socially redeeming value. This element came to constitute a separate and distinct constitutional test apart from the relevant questions of prurient interest and patent offensiveness. Perhaps the best summary of these criteria is to be found in the recent case of Memoirs v. Massachusetts, another obscenity case decided without a majority opinion. Mr. Justice Brennan, joined by Mr. Chief Justice Warren and Mr. Justice Fortas, declared:

We defined obscenity in Roth in the following terms: "[W]hether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." . . . Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The Court further cautioned that each of the three federal criteria must be applied independently. Memoirs, standing alone, connotes that for material to be declared constitutionally obscene, each of the three criteria must be proven as elements of the government's case. Two cases decided the same day, Mishkin v. New York and Ginz-
burg v. United States,\(^{162}\) have somewhat reshaped the first and third elements set out in Memoirs; nevertheless, it seems clear that the second element of "patent offensiveness" emerges unscathed. As will appear in the immediately following discussion, the second element by definition excludes private correspondence as a class to which the statute can be constitutionally applied.

\(^{162}\) 383 U.S. 463 (1966). The defendant and three corporations which he controlled were convicted of violating § 1461. Formerly the Court in determining the obscenity vel non had, as a rule, confined its investigation to the questionable material. Nevertheless, the Court here went on to "view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal." Ginzburg v. United States, supra at 466. (Footnote omitted.) This decision considerably modifies elements (a) and (c) of the obscenity test (see text accompanying note 160 supra) by stating that "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Ginzburg v. United States, supra at 470. (Emphasis added.) This statement and other statements throughout the opinion (and also in Memoirs), indicate that a publication not obscene by the Roth test may become obscene under certain circumstances. Specifically, the Court explained that if the material has prurient appeal and is patently offensive, then evidence of the commercial exploitation of the erotic parts of the work will override a finding of minimal social value. The Court did not propose to eliminate the third element of the test, that the book must be utterly without social redeeming importance, but rather meant that "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value." Memoirs v. Massachusetts, 383 U.S. 413, 420 (1966).

Evidence of the exploitation of the sexually stimulating parts of the publication will also be considered in determining the dominant theme of the material. Hypothetically, a book with little erotica, but marketed to the exclusion of any redeeming merits the work might have, could be suppressed as obscene, whereas a book largely erotic but marketed without reference to that erotica could be declared not obscene. In the Court's words "the deliberate representation of petitioner's publications as erotically arousing . . . stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." Ginzburg v. United States, supra at 470. This could be interpreted as establishing that the defendant's conduct will determine whether the material appeals to the prurient interest. However, it would seem better to limit evidence of the defendant's conduct to a determination of what the dominant theme of the material is, and not extend consideration of that evidence to the question of whether that dominant theme appeals to prurient interests. This conclusion is valid even in the face of such comments by the Court as, "they [defendants] proclaimed its obscenity; and we cannot conclude that the court below erred in taking their [defendants'] own evaluation at its face value and declaring the book as a whole obscene despite the other evidence." Ginzburg v. United States, supra at 472. (Footnote omitted.) Literally read, this statement leads to the undesirable conclusion that a publication lacking in prurient appeal could be condemned as obscene if portrayed by the disseminator as having prurient appeal. This indeed would be "an astonishing piece of judicial improvisation." Ginzburg v. United States, supra at 495 (Harlan dissenting). A further indication of the limited effect which the Court sought to give the defendant's conduct is found in Mr. Chief Justice Warren's and Mr. Justice Clark's dissent in Jacobellis (both justices were part of the Ginsburg majority). After observing that the defendant's conduct should be pertinent, they continued: "the advertisements published to induce the public to view the motion picture provide some evidence of the film's dominant theme . . . ." Jacobellis v. Ohio, 378 U.S. 184, 201 n.2 (1964) (Warren dissenting). (Emphasis added.)
B. Private Correspondence and the Definition of Obscenity

From the time of the Roth decision until the 1966 case of Redmond v. United States, the Supreme Court had not heard argument on a case involving private correspondence. Due to the fact that Redmond was decided per curiam on other grounds, the Court has yet to apply the constitutional definition of obscenity in a private correspondence case.

Employing the test of obscenity, as most recently expounded in Memoirs, it is manifest that the prurient appeal element may find full application to allegedly obscene correspondence. Admittedly, the element of "utterly lacking in redeeming social value" would also include the type of correspondence usually prosecuted. If these were the only necessary findings—that the material appeals to the prurient interest of the recipient, and is utterly without redeeming social value—most allegedly obscene private letters could be consti-

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164 The Court did, however, refuse to hear such a case. Cain v. United States, 274 F.2d 598 (5th Cir.), cert. denied, 362 U.S. 952 (1960), where the Fifth Circuit Court of Appeals affirmed a conviction under § 1461.
165 The defendants, Mr. and Mrs. Redmond, had been convicted of violating 18 U.S.C. § 1461 by sending photographs of themselves, in the nude, to a correspondence club to be developed. Subsequently, United States postal inspectors raided the club, seized its membership list, and found thereon the Redmonds' names. The husband was sentenced to nine months and the wife to six months in prison.

The Redmonds appealed to the Supreme Court, arguing that the obscenity statute was "directed solely at those engaged in the dissemination of obscenity to others." To apply it to private recipients, who "obviously outnumbered commercial disseminators many times over," would present enormous enforcement problems. Apparently the Justice Department had been aware of this enforcement problem. In 1964, prior to the Redmond case, the Department had sent a memo to all U.S. attorneys stating that private correspondence should be ignored in enforcement of 18 U.S.C. § 1461, except in "aggravated" cases. Consequently, the Solicitor General asked that the judgment of the court of appeals be vacated, and the cause be remanded to the district court with directions to dismiss the information. In its per curiam opinion, the Court cited the request of the Justice Department and also cited a case for the proposition that the Supreme Court will not decide a constitutional issue when it is not absolutely necessary to do so. In a concurring statement, Justices Stewart, Black, and Douglas stated that they "would reverse this conviction, not because it violates the policy of the Justice Department, but because it violates the Constitution." Redmond v. United States, 384 U.S. at 265.

The case cited by the Court was Petite v. United States, 361 U.S. 529 (1960), in which a similar motion for remand was granted in a case concerning double jeopardy. Mr. Justice Brennan, joined by Mr. Justice Black and Mr. Justice Douglas, in a separate opinion concurred with the reversal of the judgment, but would have reversed on the merits. Mr. Justice Brennan's words would seem equally applicable to the Redmond case. "I do not see how our duty can be fully performed in this case if our action stops with simply giving effect to a 'policy' of the Government . . . . Even where the Government confesses error, this Court examines the case on the merits itself . . . and one would not have thought our duty less in this case—particularly where the Government has reserved the right to apply or not apply its 'policy' in its discretion." Petite v. United States, supra at 533. (Citations omitted.)
tutionally suppressed. However, we have seen that Manual Enterprises requires that the material be patently offensive and affront the contemporary community standards in regard to the description or representation of sexual matters.

It is improbable that the Court would add this element of public affront unless it was concerned with the indiscriminately disseminated commercial obscenity which is displayed before the community at large in drugstores, hotel lobbies and bus stations, thereby becoming offensive to the community. This is further borne out by the general history of obscenity law, in which the crime of obscenity began as an affront to the public. By their very nature, private letters between consenting adults do not affront the public because they are not exposed to the community. One of the principal reasons for sending a letter through first-class mail is to render it private and separate from the view of the public. It is reasonable to apply a test involving community standards to actions with which the public is confronted, but it is not reasonable to extend such a standard to a means of communication which is theoretically supposed to be as much protected from scrutiny as the private conversation between two people. As confirmation of this idea, Mr. Justice Holmes once eloquently stated that:

The United States may give up the Post Office when it sees fit, but while it carries it on[,] the use of the mails is almost as much a part of free speech as the right to use our tongues . . . .

Thus, if the same standard of public offensiveness is applied to private correspondence between consenting adults, private letters as a class would seem to be excluded from the intended scope of the obscenity statute.

C. Private Letters and the Policy of Obscenity Law

Although the early history of obscenity law which came from England seemed to be an attempt to protect public morals, it is equally apparent that the congressional intent behind American obscenity statutes is to curtail pornography due to its suspected causal relationship to crime and juvenile delinquency.\(^\text{167}\) That this

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\(^{167}\) Since 18 U.S.C. § 1461 is a criminal statute, it should be strictly confined in its interpretation, and apply only to that conduct which it was strictly intended to correct. A comprehensive reading of the reports and debates incident to the various bills would lead one to conclude that Congress intended in particular to circumscribe
policy has been followed in spirit by the Supreme Court is evident from a perusal of Roth and the most recent cases.

The Supreme Court in Roth made it clear that it intended only a narrow interpretation of the obscenity law. Mr. Justice Brennan's opinion for the majority evidenced the caution with which the Court ventured into the area of restricting "speech":

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the states. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

In concurring with the result, Mr. Chief Justice Warren demonstrated even greater caution and emphasized the limitations which should be imposed on the Court's decision:

I would limit our decision to the facts before us and to the validity of the statutes in question as applied. . . . The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all that we need to decide.

It is worthy of note that Mr. Justice Harlan concurring as to one petitioner and dissenting as to the other, was disconcerted with what he considered to be too much freedom given to the federal government in the prosecution of the obscenity statute:

[T]he opinion paints with such a broad brush that I fear it may

"trafficking" or "business" in pornographic material, especially with respect to the rising juvenile delinquency problem. The most recent confirmation of this congressional intent is contained in the House reports accompanying the most recent amendment to the obscenity law. For example, one House report stated that, "Trafficking in obscene literature has been conclusively shown to be a corruptive force contributing to juvenile delinquency." H.R. Rep. No. 690, 84th Cong., 1st Sess. (1955). The report recommends changes in the law, and quotes for the basis of its recommendations a statement from the Department of Justice that the revision of the law is needed because a "void in the law is taken advantage of by those whose business it is to deal in pornographic and licentious material." H.R. Rep. No. 690, supra. See also S. Rep. No. 135, 84th Cong., 1st Sess. (1955).

168 354 U.S. at 488. (Footnotes omitted.)
169 Id. at 494-96. (Emphasis added.)
result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes. . . .

[I]n no event do I think that the limited federal interest in this area can extend to mere "thoughts." The Federal Government has no business whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of "thoughts." 170

The opinion by Mr. Justice Warren in Roth was relied on by the Court in Ginzburg v. United States. 171 Despite the wide division of the Court in this case, at least two factors of particular importance can be gleaned from the majority opinion. First, the Court voiced concern with indiscriminate distribution of the obscene material. Thus it may be inferred that a similar factual situation involving discriminate distribution would give rise to greater hesitation, and perhaps judicial reluctance, to affirm a lower court conviction. Second, the overt concern with the commercial nature of the objectionable material resulted in the finding that defendants were involved in "pandering" which leads to a similar inference that the lack of commercialism in any suspected material would be a weighty factor in future decisions. That the question of whether the material was obscene was so enveloped by a consideration of, and ultimately a reliance upon, the pandering aspects of the distribution, lends support to the general policy of the legislature's intent. The Court's finding—that the "titillating" advertisements by the defendant constituted pandering, all of which evidenced the utter commercialism and exploitation of sexual tensions, thereby accomplishing the very evil which the statute was designed to prohibit—should serve as additional support.

Further evidence of the Court's recognition of the commercialism element may be derived from the fact that in Roth the Court cited with approval the American Law Institute's Model Penal Code definition of obscenity. 172 The comments to this section of the model code are as follows:

Psychiatrists and anthropologists see the ordinary person in our society as caught between normal sex drives and curiosity on the one hand, and powerful social and legal prohibitions against overt sexual behavior. The principal objective of [the proposed section] is to prevent commercial exploitation of this psychosexual tension.

170 Ibid. at 496. (Footnote omitted.)
Society may legitimately seek to deter the deliberate stimulation and exploitation of emotional tensions arising from the conflict between social convention and an individual's sex drive. . . . The gist of the offense we envisage, therefore, is a kind of [commercial] pandering.173

The *Ginzburg* decision has clearly adopted this philosophy. In order to prosecute these so-called panderers, the Court was willing to create a new rule by which material that was not obscene under the *Roth* test could become obscene under the statute as a result of the actions and motives of the publisher. Such a policy, directed as it is at the public exposure of certain material, cannot logically be extended to an area which is cloaked in privacy.

V. Conclusion

This note has emphasized particular factors as forming the underlying basis of obscenity legislation. However, it would be unwise to assert that these factors constitute an exclusive list, since legislative intent, particularly in the realm of obscenity, is often quite illusive. Nevertheless, it seems clear that obscenity legislation has emerged from its religious and moralistic origins, and has become justifiable on the functional grounds of the alleged connection between obscenity, juvenile delinquency and crime. Similarly characteristic of the development of obscenity legislation has been the concern with commercial exploitation and indiscriminate public dissemination, both of which, by their very nature, may constitute a nuisance or affront to the general public.

As has been pointed out, the early cases dealt with the problem of whether private letters were within the obscenity statutes, and if so, what kind of letters came within the subjective *Hicklin* rule. With the *Levine* case, the subjective test for obscenity was replaced by the “average man” test. However, the confusion and difficulty in administering this test prompted the courts to revert to applying the “conditional privilege” doctrine, thereby avoiding the injustices of the “average man” standard.

With the *Roth* decision the Court set up the only standard which could be constitutionally applied in federal obscenity prosecutions. Thus, obscenity standards appeared to coalesce. It has been argued in this note that the class of letters containing no obscene language

173 Model Penal Code, § 207.10, comment (Tent. Draft No. 6, 1957). (Emphasis added.)
but rather soliciting "immoral" conduct would not come under the Roth standard, and in any event, should not be prosecuted for policy reasons. Since filthy letters were shown not to be a separate class of nonmailable matter, they too must be shown to be obscene under Roth in order to sustain a conviction. The Roth case, and the later cases expanding the Roth "test," Ginzburg, Mishkin, and Memoirs, gave emphasis to the circumstances of commercial exploitation and indiscriminate dissemination to youth. This note has pointed up the importance of those factors, and has shown that the modified Roth test is unacceptable as applied to private letters between consenting adults, because private letters do not fit the elements of being public, commercial, and detrimental to youth.

It is arguable that in view of the result of the Redmond case the problem has been solved, but in reality the Court sidestepped an opportunity to speak on the question by enforcing the government's "policy" in this matter. This means little since government policy may change from day to day. Therefore, there continues to exist a problem which demands a solution. In the event that the Court is confronted with a private letter case, section 1461 will probably be found not to have constitutional application to private letters. Such a result would be a logical culmination of the Court's trend in this direction. This conclusion is further buttressed by the Court's continued cognizance of the Model Penal Code, which specifically excludes private noncommercial correspondence from criminal prosecution.

However, to allow the issue to lie dormant until another private letter case comes before the Supreme Court, is really no solution at all. A real solution would be to amend section 1461 in accordance with the exemplary Model Penal Code. If allegedly obscene letters are sent through first-class mail between consenting adults, it should be provided as a defense to a prosecution under section 1461 that the letter was noncommercial in nature, and that it was sent to personal associates. Although this solution is little more than a positive enactment of what is supposedly the government's policy of not prosecuting obscene-letter senders except in aggravated cases, it is a necessary amendment. If enacted, such a defense would preclude prosecutions typified by the Redmond case, and would spare the accused much unwarranted expense and humiliation.

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