Vanderbilt Law Review

Volume 25
Issue 1 *Issue 1 - January 1972*

Article 17

1-1972

Obscenity -- Federal Statutes Prohibiting Importation and Mail Distribution of Obscene Materials Do Not Violate First Amendment

Law Review Staff

Obscenity—Federal Statutes Prohibiting Importation and Mail Distribution of Obscene Materials Do Not Violate First Amendment

I. INTRODUCTION

Near the end of the 1970-71 term, the Supreme Court considered two cases, *United States v. Reidel*[1] and *United States v. Thirty-Seven (37) Photographs*,[2] in which constitutional challenges were raised against federal statutes regulating the distribution and importation of obscene materials.[3] These challenges were engendered by the apparent irreconcilability of the Court's decisions in *Roth v. United States*[4] and *Stanley v. Georgia*.[5] In *Roth*, the Court held that obscenity is not within the scope of first amendment protection for speech and press. In *Stanley*, however, a first amendment right to possess obscene materials in one's home was recognized, and the Court added, by way of dictum, that a person has the right to receive these materials. Commentators thereupon speculated that *Stanley* had impliedly overruled *Roth*, because for the first time, obscenity was granted limited first amendment protection, and because a right to receive obscene matter would not be fully meaningful unless a constitutional right to commercially distribute obscene materials was established.[6] Although many lower courts followed the commentators' rationale,[7] the Supreme Court, in the instant cases, re-

---

1. 402 U.S. 351 (1971).

2. 402 U.S. 363 (1971).

3. The statutes involved are 18 U.S.C. § 1461 (1964) and 19 U.S.C. § 1305(a) (1964). Section 1461 states in part: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . .

Every written or printed card, letter, . . . advertisement, . . . giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . .

. . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." Section 1305(a) provides in relevant part: "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, . . . print, picture, drawing, or other representation. . . . [A]ll such articles . . . shall be subject to seizure and forfeiture as hereinafter provided: . . . *Provided further*, that the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for non-commercial purposes."

4. 354 U.S. 476 (1957).

5. 394 U.S. 557 (1969).

6. *See, e.g.*, Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203, 213; note 49 *infra* and accompanying text.

7. *See* notes 50 & 51 *infra*.

fused to recognize a right to distribute obscene matter, denied the right to possess obscene materials when incident to importation for commercial purposes, and expressly reaffirmed *Roth*. The questions thus presented by the Court's holding are whether there still exists a right to possess and receive obscene materials, and if so, what is its scope.

II. THE RIGHT TO POSSESS

The right to possess obscene materials, although not explicitly recognized until *Stanley*, had its origins in the landmark case of *Roth v. United States*.[8] In *Roth*, the Court rejected the traditional first amendment tests of clear and present danger[9] and of balancing individual and societal interests,[10] and held simply that obscenity is not within the area of constitutionally protected speech or press.[11] Thus, immediately after *Roth*, the only issue presented in obscenity cases was whether the material in question was obscene.[12] The definition of obscenity formulated in *Roth*,[13] however, lacked sufficient specificity to be consistently applied in different factual settings.[14] In attempting to formulate a comprehensive standard, the Court stated in *Memoirs v. Massachusetts*,[15] that for

8. 354 U.S. 476 (1957). Obscenity statutes were not attacked on the grounds of infringement of first amendment freedoms of speech and press until 1948 when a defendant's conviction was affirmed by an evenly divided Court. Doubleday & Co. v. New York, 335 U.S. 848 (1948). In the first important obscenity case, Butler v. Michigan, 352 U.S. 380 (1957), the Court found a state statute that protected children by restricting the reading and viewing freedoms of adults to be unconstitutional. *Roth*, however, was the first case in which obscenity regulation and the first amendment freedoms were clearly put at issue. Note, *First Amendment: The New Metaphysics of the Law of Obscenity*, 57 CALIF. L. REV. 1257, 1261 (1969).

9. Dennis v. United States, 341 U.S. 494 (1951) (modified "clear and present danger" test).

10. American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (balancing of individual and societal interests).

11. The Court in *Roth* derived this "exception" theory to first amendment protection of speech and press from Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), in which "fighting words" were found not to be within the scope of the first amendment. Thus two levels of speech were created in *Roth*—the level of non-obscene speech that is shielded by the first amendment, and the vulnerable level of obscenity. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

12. *See* Kalven, *supra* note 11; Comment, *Stanley v. Georgia: New Directions in Obscenity Regulations?*, 48 TEXAS L. REV. 646 (1970). *See also* Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

13. "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 354 U.S. at 489.

14. *See, e.g.*, R. KUH, FOOLISH FIGLEAVES? 215 (1967); Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7. The Court itself has expressed dismay over its formulation of a workable standard: "[N]o stable approach to the obscenity problem has yet been devised by this Court." Memoirs v. Massachusetts, 383 U.S. 413, 455 (1966).

15. 383 U.S. 413 (1966).

matter to be obscene, it must be patently offensive to contemporary community standards, appeal to the prurient interest, and be utterly without redeeming social value.[16] During this definitional evolution, however, whenever the obscenity determination was a close one, the Court began to look beyond the material itself to such factors as the conduct of the defendant and the manner in which the allegedly obscene material was disseminated.[17] The Supreme Court, in *Redrup v. New York,*[18] summarized these determinative factors, deemed to be representative of legitimate state interests, when it reversed three obscenity convictions in which none of the allegedly obscene materials was thrust upon an unwilling audience,[19] sold to minors,[20] or "pandered."[21] The precise holding of *Redrup,* nevertheless, was difficult to ascertain, because the second part of the opinion contained various inapposite definitions of obscenity espoused by the members of the Court,[22] and ended with the cryptic phrase, "Whichever of these constitutional views is brought to bear upon the case before us, it is clear that the judgments cannot stand."[23] The ambiguity spawned in *Redrup* also emerged in subsequent lower court decisions. One line of cases assumed that the materials in *Redrup* were obscene under the *Roth* test, but reasoned that because no legitimate state interests were present, the convictions could not stand.[24] Thus the *Roth* principle, denying first amendment protection to obscen-

16. *Id.* at 418.

17. *E.g.,* Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing,* 68 MICH. L. REV. 185, 193-98 (1969); Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod,* 76 YALE L.J. 127, 142-48 (1966); Comment, *supra* note 12; *see* Ginzburg v. New York, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966).

18. 386 U.S. 767 (1967) (per curiam).

19. *Id.* at 769.

20. Ginsberg v. New York, 390 U.S. 629 (1968) (sale of materials, not obscene by adult standards, to minors can be constitutionally proscribed).

21. Ginzburg v. New York, 383 U.S. 463 (1966) (conviction sustained when defendant engaged in the commercial exploitation of materials which were close to being obscene under the *Roth* test).

22. Justices Warren, Fortas, and Brennan subscribed to the view espoused by the Court in Memoirs v. Massachusetts. 386 U.S. at 770-71; *see* notes 15 and 16 *supra* and accompanying text. Mr. Justice White adhered to the *Roth* standard. 386 U.S. at 771; *see* note 13 *supra.* Mr. Justice Stewart believed that the State's power in the obscenity area is "narrowly limited to a distinct and clearly identifiable class of material"—i.e. "hard core" pornography. 386 U.S. at 770; *see* Ginzburg v. New York, 383 U.S. 463, 499 & n.3 (1966) (dissenting opinion). Justices Black and Douglas consistently maintained that the State does not have any power to suppress or control materials on the ground of their "obscenity." 386 U.S. at 770; *see* Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting opinion). The views of Justices Harlan and Clark were not stated in *Redrup.*

23. 386 U.S. at 771.

24. *E.g.,* United States v. 127,295 Copies of a Magazine Entitled "Amor," 295 F. Supp. 1186 (D. Md. 1968); United States v. 4,400 Copies of Magazines, 276 F. Supp. 902 (D. Md. 1967).

ity, was repudiated and the balancing of interests test reinstated. On the other hand, several courts[25] viewed *Redrup* as being consistent with *Roth*, but restricted the definition of obscenity to essentially "hard core pornography."[26] An apparent resolution of the dilemma, which brought obscenity within the scope of first amendment protection, occurred in *Stanley v. Georgia*.[27] The defendant in *Stanley* was convicted under a Georgia statute for possessing obscene materials in his house. The Supreme Court reversed his conviction on the grounds that the first and fourteenth amendments guarantee a person the right to receive and possess material, irrespective of its lack of redeeming social value, within the privacy of his own home. The "narrow" holding of *Stanley*—only private possession of obscene matter is constitutionally protected—has rarely been considered in the context of criminal prosecutions, and those courts considering the issue have failed to reach consistent interpretations of *Stanley*. The courts either have narrowly restricted first amendment protection to possession within one's own home[28] or have broadened first amendment protection to private possession without regard to location.[29] The latter non-locative test was utilized in *United States v. Various Articles of "Obscene" Merchandise*,[30] a case involving the importation[31] of obscene material for private, noncommercial purposes.[32] The district court relied on *Stanley* as authority to distinguish vulnerable public uses of obscenity from private uses, which are protected by the first amendment as long as the material does not fall into the hands of children, is not "pandered," or is not thrust upon an unwilling public.

25. *E.g.*, Luros v. United States, 389 F.2d 200, 205 (8th Cir. 1968); People v. Stabile, 58 Misc. 2d 905, 296 N.Y.S.2d 815 (N.Y.C. Crim. Ct. 1969).

26. "I shall not today attempt further to define the kinds of material . . . embraced within that shorthand description . . . . But I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The situation was complicated further by the Supreme Court itself when numerous obscenity convictions were subsequently reversed in per curiam decisions that cited *Redrup* as authority without any explanation. *E.g.*, Aday v. United States, 388 U.S. 447 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); *see* Teeter & Pember, *The Retreat from Obscenity: Redrup v. New York*, 21 HASTINGS L.J. 175 (1969).

27. 394 U.S. 557 (1969).

28. State v. Reese, 222 So. 2d 732 (Fla. 1969).

29. Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated on other grounds sub nom.*, Dyson v. Stein, 401 U.S. 200 (1971) (per curiam).

30. 315 F. Supp. 191 (S.D.N.Y. 1970).

31. 19 U.S.C. § 1305(a) (1964) forbids the importation of obscene materials.

32. Most of the cases decided under § 1305(a) involved commercial distributors of pornography. *Cf.* United States v. 392 Copies of a Magazine Entitled "Exclusive," 373 F.2d 633 (4th Cir.), *rev'd on other grounds sub nom.*, Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967) (per curiam); United States v. A Motion Picture Film Entitled "Pattern of Evil," 304 F. Supp. 197 (S.D.N.Y. 1969).

Finding the materials in question to be protected from seizure by customs officials, the court impliedly held that first amendment protection of private possession of obscene matter was not confined in location to one's home.[33] Although the Supreme Court did not hear the *Various Articles of "Obscene" Merchandise* case,[34] it was able to rule definitively on virtually identical issues in *United States v. Thirty-Seven (37) Photographs*.[35] In that case, United States customs officials, pursuant to section 1305(a) of title 19, United States Code, seized 37 admittedly obscene photographs from claimant's luggage during an inspection. Subsequently, the government instituted forfeiture proceedings[36] to which claimant answered and counterclaimed. Conceding that the photographs were to be published in book form, claimant contended that section 1305(a) is unconstitutional because the first amendment, as construed in *Stanley*, protects the right of an adult to import obscene material for private use or to receive it from a commercial distributor after importation. The Government maintained that this interpretation of the first amendment would completely impair congressional power to regulate the importation of obscene matter. In adopting the Government's position,[37] the Supreme Court distinguished *Stanley* by finding first that a port of entry is not the same as one's home, and secondly, that the right to be left alone in one's home does not prevent customs inspections or the seizure of illegal articles.[38] On these two bases, as well as *Roth's*

33. "Where, as here, a federal statute by its terms prohibits importation by an individual of obscene material for his own private use and enjoyment in his home, such a broad prohibition offends the First Amendment and must be held unconstitutional." 315 F. Supp. at 196.

34. When *Various Articles of "Obscene" Merchandise* was appealed, probable jurisdiction was noted, 402 U.S. 971 (1971), but the Supreme Court was precluded from hearing the case, because the Justice Department voluntarily dismissed under SUP. CT. R. 60. 403 U.S. 942 (1971).

35. 402 U.S. 363 (1971).

36. 19 U.S.C. § 1305(a) (1964) provides that: "Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney . . . who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character that entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed."

37. The Court's consideration of the right to import obscene materials was confined to the second part of the opinion. In the first part, Mr. Justice White dealt with the issue whether the lack of time limits for instituting forfeiture proceedings violated first amendment procedural safeguards. The Court found that § 1305(a) could withstand a constitutional attack by construing it as requiring judicial forfeiture proceedings to be instituted no more than 14 days after seizure of allegedly obscene materials, and requiring a final decision in the district court no more than 60 days after filing of action unless delays are caused by claimant or by a 3-judge court's being convened to hear a constitutional challenge. Since in the instant case, proceedings were instituted 13 days after seizure, the Court held that the Government did not go beyond the procedural limits of § 1305 and infringe claimant's first amendment rights.

38. The Court also stated that the right to possess obscene material in one's home, announced in *Stanley*, did not imply a right to import obscene matter from abroad.

holding that obscenity is not constitutionally protected, the Court[39] concluded that Congress had the power to declare that obscenity is contraband and to exclude it from entry into the country, whether it was intended for private use or commercial distribution. *Thirty-Seven Photographs* thus casts doubt on the right to possess and as a consequence places in question the vitality of the right to receive obscene materials.

III. THE RIGHT TO RECEIVE

The right to receive information and ideas and to distribute them to willing recipients was first recognized by the Supreme Court in *Martin v. City of Struthers.*[40] In that case, the defendant, who had been handing out religious literature, was convicted of violating a city ordinance that prohibited door-to-door distribution of handbills, circulars, and advertisements. In holding the ordinance unconstitutional, the Court weighed the social value of the city ordinance against the first amendment freedoms of speech and press and found that an individual's right to distribute information and ideas was "so clearly vital to the preservation of a free society that . . . it must be fully preserved."[41] The Court further declared that the first amendment right to distribute information necessarily implies a right to receive. This implied right to receive was expressly reaffirmed in the concurring opinion of Justices Goldberg and Brennan in *Lamont v. Postmaster General,*[42] in which petitioner solicited from a foreign country material that was adjudged by the Post Office to be communist political propaganda. Pursuant to section 305(a) of the Postal Service and Federal Employee's Salary Act of 1962,[43] the Post Office notified petitioner that in order to receive this material he would have to request delivery by returning an attached reply card. The majority opinion held that this government-imposed obligation was an unconstitutional limitation on the unfettered exercise of petitioner's first amendment rights.[44] Justice Brennan added that to fully effectuate the first amendment right to distribute ideas, as recognized in *Martin,* there

39. The majority opinion represented the views of only 4 Justices. Three Justices dissented, and Mr. Justice Stewart concurred with Part I of the Court's opinion, but rejected the Court's dictum that the Government may lawfully seize material intended for the private use of the importer. Mr. Justice Harlan likewise concurred in Part I, but refrained from committing himself on the issue of private possession of obscene materials.

40. 319 U.S. 141 (1943).

41. *Id.* at 146-47.

42. 381 U.S. 301, 307 (1965).

43. Pub. L. No. 87-793, § 305(a), 76 Stat. 840.

44. 381 U.S. at 305.

also must exist a constitutional right to receive information.[45] Thus the official act required by the statute was viewed an unconstitutional infringement of petitioner's first amendment right to receive information and ideas. Because *Martin* and *Lamont* both assumed that the materials in question were protected by the first amendment[46] the rationale of these cases would not apply to obscene material, for under *Roth* such material was beyond the protection of the first amendment. Nevertheless, the Supreme Court in *Stanley* relied upon the dicta in *Martin* and *Lamont* for the proposition that an individual had the "right to receive information and ideas, regardless of their social worth."[47] The Court's emphatic statement of that proposition[48] created immediate speculation among legal scholars that some constitutional protection under the first amendment also must exist for the distribution of pornography.[49] Because of the Supreme Court's ambiguity on this point a split developed among the courts. Some adopted the view that distribution itself is protected and declared many federal[50] and state[51] obscenity regulations unconstitutional. On the other hand, some courts restricted *Stanley* to first amendment protection for possession only,[52] creating the need for Supreme Court clarification of the scope of *Stanley*. In *United States v. Reidel*,[53] defendant sent concededly obscene materials through the mails in viola-

45. 381 U.S. at 308 (concurring opinion).

46. In both cases the Court weighed the individual and state interests involved, and in finding no compelling state interests, held the statutes involved unconstitutional. 319 U.S. at 143 (*Martin*); 381 U.S. at 301; *id.* at 308 (Brennan, J., concurring) (*Lamont*).

47. 394 U.S. at 564.

48. "This right to receive information and ideas . . . is fundamental to our free society." *Id.*

49. *See, e.g.*, Engdahl, *supra* note 17, at 198-201; *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 151-52 (1969); Note, *Obscenity from Stanley to Karalexis: A Back Door Approach to First Amendment Protection*, 23 VAND. L. REV. 369 (1970).

50. Two federal district courts in California invalidated § 1461, which prohibits the knowing use of the mails for distribution of obscene materials. United States v. Lethe, 312 F. Supp. 421 (E.D. Cal. 1970); United States v. Reidel (C.D. Cal., June 8, 1970) (unreported). Two federal district courts in Wisconsin held unconstitutional § 1462, which forbids the interstate transportation of obscene matter. United States v. B & H Dist. Corp., 319 F. Supp. 1231 (W.D. Wis. 1970), *vacated*, 403 U.S. 927 (1971); United States v. Orito, No. 70-CR-20 (E.D. Wis., Oct. 28, 1970), *appeal docketed*, 40 U.S.L.W. 3006 (U.S. July 13, 1971) (No. 1276, 1970 Term; renumbered No. 69, 1971 Term).

51. Hayse v. Van Hoomissen, 321 F. Supp. 642 (D. Ore. 1970), *vacated on other grounds*, 403 U.S. 927 (1971); Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), *vacated on other grounds*, 401 U.S. 216 (1971) (per curiam); Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969).

52. *E.g.*, Miller v, United States, 431 F.2d 655 (9th Cir. 1970), *appeal docketed*, 40 U.S.L.W. 3006 (U.S. July 13, 1971) (No. 1014, 1970 Term; renumbered No. 43, 1971 Term); United States v. Fragus, 428 F.2d 1211 (5th Cir. 1970); United States v. Melvin, 419 F.2d 136 (4th Cir. 1969) (dictum).

53. 402 U.S. 351 (1971).

tion of section 1461 of Title 18, United States Code, which prohibits the knowing use of the mails for delivery of obscene matter. A postal inspector, who had ordered the materials in response to defendant's newspaper advertisement, complied with the advertisement's requirement that the recipient be at least 21 years old and so stated in his order.[54] Defendant contended that section 1461 is unconstitutional as applied because the first amendment protects the act of mailing obscene materials by virtue of the recipient's right, as set forth in *Stanley*, to receive and possess these materials when they are not directed at minors or unwilling adults. On the basis of *Roth*, the Government maintained that the first amendment offers no protection for the distribution of obscene materials. In its opinion in *Reidel*,[55] the Supreme Court found that there was no factual distinction between the instant case and *Roth*, since both involved the sale and distribution of obscene matter in violation of section 1461. It concluded, therefore, that *Roth* would control the instant case unless *Stanley* compelled a different result. The *Stanley* decision, according to the Court, was grounded on the individual's freedom of thought and right of privacy in his own home. Observing that these rights were independently saved by the first amendment, the Court stated that it was unnecessary to create a constitutional right for the distribution of obscenity in order to protect them. Moreover, since the facts in the instant case did not involve a question of privacy, but rather the question of obscenity distribution, *Stanley* was held to be inapplicable. *Roth*, therefore, was found to control the instant case and the Court held that section 1461 as applied did not violate defendant's first amendment rights of speech and press.

IV. Analysis of the Underlying Principles of the Right To Possess and To Receive

Viewing *Stanley* in light of the instant cases, the right to possess and receive obscene materials has been greatly restricted, but has not

54. The advertisement was as follows: "Imported Pornography—Learn the true facts before sending money abroad. Send $1.00 for our fully illustrated booklet. You must be 21 years of age and so state. Normax Press, P.O. Box 989, Fontana, California, 92335." 402 U.S. at 353 n.3.

55. In deciding the case, the Court assumed the materials in question to be obscene and, because the Government could produce no evidence to the contrary, likewise assumed that defendant had mailed only to willing adult recipients. As such, the legitimate state interests enunciated in Redrup v. New York, 386 U.S. 767 (1967), were not present. The majority opinion represented the views of 5 Justices. Justice Harlan concurred, 402 U.S. at 357, and Justices Black and Douglas dissented, 402 U.S. at 379. Mr. Justice Marshall, who authored *Stanley*, concurred on the grounds that the mail-order distribution of obscene materials in the case at bar did not have sufficient safeguards against receipt by unwilling adults or minors. 402 U.S. at 360.

been completely extinguished because there still remains an area of constitutional protection for obscenity. In *Stanley*, the Supreme Court declared that *Roth* and its progeny did not control private possession of obscene materials in one's home because *Roth* "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public actions* taken or intended to be taken with respect to obscene matter."[56] The opinion stated further that "*Roth* and the cases following it discerned . . . an 'important interest' in the regulation of *commercial distribution* of obscene materials."[57] It thus appears from *Stanley* that the Supreme Court has separated obscenity cases into two distinct areas: public activity, which is outside the scope of the first amendment, and private actions, which are constitutionally protected.[58] This distinction can be supported on five bases. First, the overwhelming majority of courts applying *Stanley* acknowledged the dichotomy, often by way of dictum, between private and public actions involving obscenity.[59] Cases dealing directly with this issue have resulted in decisions that narrowed the scope of the criminal sanction under section 1461 by allowing consenting adults to exchange obscene matter through the mails,[60] and that construed section 1305 to allow importation of obscene matter for private purposes.[61] Secondly, the legislative history of the federal obscenity statutes[62] impliedly removes consensual, noncommercial ex-

56. 394 U.S. at 561 (emphasis added).

57. *Id.* at 563-64 (emphasis added).

58. *See id.* at 562 n.7; Comment, *Private Morality and the Right to be Free: The Thrust of Stanley v. Georgia,* 11 ARIZ. L. REV. 731 (1969). *See also* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 354-60 (Bantam ed. 1970).

59. *E.g.,* United States v. Fragus, 428 F.2d 1211 (5th Cir. 1970) (dictum); Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969) (dictum).

60. United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970).

61. United States v. Various Articles of "Obscene" Merchandise, 315 F. Supp. 191 (S.D.N.Y. 1970), *appeal dismissed,* 403 U.S. 942 (1971).

62. 18 U.S.C. §§ 1461-65 (1964). For an in-depth study of the legislative history of § 1461 see Paul, *The Post Office and Non-Mailability of Obscenity: An Historical Note,* 8 U.C.L.A.L. REV. 44 (1961).

Section 1462 prohibits the knowing use of a common carrier for transportation of obscene matter in interstate commerce. For legislative history of § 1462 since 1950 see H.R. REP. NO. 2017, 81st Cong., 2d Sess. (1950), 1950 U.S. CODE CONG. & AD. NEWS 2438 and S. REP. NO. 1839, 85th Cong., 2d Sess. (1958), 1958 U.S. CODE CONG. & AD. NEWS 4012.

18 U.S.C. § 1465 (1964) states in part: "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, . . . book, pamphlet, picture . . . or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." For legislative history of § 1465 see notes 63 & 64 *infra.*

For the legislative history of 19 U.S.C. § 1305 see H.R. REP. NO. 1326, 71st. Cong., 2d Sess. 105 (1930) (amend. No. 1116).

change of obscene materials from the scope of these sections. For example, when section 1461 was amended in 1955 to broaden its application, the major congressional concern was to "prevent the use of the mails in the trafficking of all obscene materials."[63] At the same time, section 1465 was added to patch the loophole in the law that allowed distributors to transport obscene material by private conveyance. In proscribing this activity, however, section 1465 was expressly restricted to interstate transportation for "sale and distribution." If the avowed purpose of the legislative action was "to complete the pattern of control over obscenity,"[64] the exclusion of interstate transportation of obscene materials for private use from the purview of section 1465 indicates that Congress intended only commercialized obscenity to be proscribed by the "pattern of control" of all of these regulations.[65] Section 1305 also grants to the Secretary of the Treasury the discretion to admit classics or other material of literary merit, even though admittedly obscene, but "only when imported for noncommercial purposes." Thirdly, the American Law Institute's Model Penal Code has proposed to exclude private, noncommercial possession or transfer of obscene material from criminal sanction,[66] in order to be consistent with the basic purpose of its approach to pornography regulation, which is to penalize the panderer and not the customer-victim, and with the literal congressional exemption in section 1465.[67] Fourthly, the present policy of the Justice Department is not to prosecute private individuals who exchange obscene materials through the mail unless the case involves repeated offenders or aggravated circumstances.[68] Lastly, the Supreme Court's decisions in the instant cases do not preclude first amendment protection for private obscenity activity. In *Reidel,* since the Court was concerned solely with the alleged constitutional right to commercially distribute obscene materials, it left unanswered the question whether there is a constitutional shield for noncommercial distribution or postal correspondence. Despite the

63. S. REP. NO. 113, 84th Cong., 1st Sess. (1955), 1955 U.S. CODE CONG. & AD. NEWS 2210.

64. H.R. REP. NO. 690, 84th Cong., 1st Sess. 2 (1955).

65. *See* Note, *Private Correspondence & Federal Prosecutions,* 4 SAN DIEGO L. REV. 76 (1967); 1966 UTAH L. REV. 717 (1966).

66. MODEL PENAL CODE § 207.10, Comment (4) at 13-14 (Tent. Draft No. 6, 1957).

67. Other reasons put forth by the ALI for this section were that noncommercial activity would be restricted in scope thus minimizing potential harm, and that this provision would be consistent with the other code sections that made private illicit sexual acts noncriminal. *Id.* Section 207.10 was amended in the proposed official draft of the Model Penal Code to eliminate the burden of proof placed on the person asserting the defense and remove the apparent criminal sanction against parents for dispensing obscene material to their children. MODEL PENAL CODE § 251.4(3) (Proposed Official Draft 1962).

68. *See* Redmond v. United States, 384 U.S. 264, 265 (1966).