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Harvey L. Zuckman, *Obscenity in the Mails*, 33 S. CAL. L. REV. 171 (1960).

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OBSCENITY IN THE MAILS

Harvey Lyle Zuckman*

For nearly one hundred years the federal government has had as one of its functions the suppression of mail trade in obscene and pornographic matter.¹ The first federal enactment in this field provided that the mailing of an obscene book, pamphlet, picture, print, or other publication with knowledge of its nature was a misdemeanor.² The present postal obscenity law³ dates back to 1873 and is sometimes referred to as the Comstock Law because of the support given its passage by the notorious Anthony Comstock, agent for the New York Society for the Suppression of Vice. While its original wording would seem to suggest that the statute was purely penal in nature,⁴ the Post Office Department inferred from it independent civil authority to restrain the mailing of obscene matter.⁵ Thus, the federal government, by virtue of the Comstock Law, utilizes each of the two recognized means for the suppression of objectionable printed matter—criminal punishment subsequent to publication and administrative restraint prior to publication or distribution.

Until quite recently little legal or lay attention was paid to the federal government's two-pronged attack on mail pornography and obscenity. However, two recent obscenity cases, one construing and upholding the validity of the Comstock Law's criminal provisions⁶ and the other questioning the Post Office's system of administrative restraint,⁷ have created much interest in this field. This article is devoted to an analysis of the present status of postal obscenity law and makes recommendations for legislative change where such action seems necessary or desirable.

I. SUBSEQUENT CRIMINAL PUNISHMENT

Section 1461 of the Criminal Code of the United States⁸ declares "every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance" to be "nonmailable matter." Mailing of such matter with knowledge of its character is punishable by a fine of not more than 5,000 dollars or imprisonment for not more than five years, or both, for a first offense. Subsequent violations are punishable by a fine of not more

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¹See Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. PA. L. REV. 214, 217 n. 9 (1957).

²13 Stat. 507 (1865). The Senate intended the act to operate only as a criminal statute and not as an enactment authorizing postal censorship. Paul & Schwartz, *supra* note 1, at 217.

³18 U.S.C. § 1461 (1958).

⁴In 1876 the statute was recodified. In this form it declared that obscene matter was nonmailable and was not to be conveyed by the Post Office. 19 Stat. 90 (1876). The wording of the recodification is essentially the same as present § 1461 of the Criminal Code of the United States.

⁵Paul & Schwartz, *supra* note 1, at 217.

⁶Roth v. United States, 354 U.S. 476 (1957).

⁷Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959).

⁸18 U.S.C. § 1461 (1958).

than 10,000 dollars or by imprisonment for not more than ten years, or both. While first amendment problems are implicit in the statute, until recently little constitutional law had developed around it.⁹

A. *The Roth Decision*

The central constitutional issue raised by Section 1461 is, of course, whether obscene expression is within the protection of the first amendment guarantees of free speech and press. If it were, the government would likely have to prove in the particular prosecution that the obscenity created a "clear and present danger" of activity so inimical to the public interest that first amendment rights had to be subordinated.¹⁰ This would be a very nearly impossible task because of the necessarily subjective evaluation of allegedly obscene expression.¹¹ However, the Supreme Court had long assumed that obscenity was outside the pale of constitutional protection.¹² In 1957 the question was squarely presented to the Court in *Roth v. United States*.¹³

Roth, a well-known publisher and seller of books, photographs, and magazines emphasizing sex,¹⁴ was convicted in the Southern District of New York on four counts of violating Section 1461. His conviction was affirmed by the Second Circuit. Ignoring the jury finding that the matter sent by Roth through the mails was obscene, the Supreme Court stated that the dispositive question was whether obscenity is utterance protected by the first amendment. The Court answered this question in the negative, saying that "obscenity is not within the area of constitutionally protected speech or press."¹⁵ Therefore, there exists no constitutional infirmity in punishing individuals who send obscene matter through the mails, and Roth's conviction could not be set aside.

⁹In a sweeping dictum in *Ex Parte Jackson*, 96 U.S. 727, 737 (1878), the Supreme Court presumed to pass on the constitutionality of the act when it declared that "the only question for our determination relates to the constitutionality of the act; and of that we have no doubt." However, the sole issue before the Court was the authority of Congress under the postal power to establish post offices and post roads. No issue was raised or considered under the first amendment. Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 353 n. 379 (1954).

In *Rosen v. United States*, 161 U.S. 29 (1896), the Court seemed to hold that the statute was not void for vagueness.

¹⁰*Cf.* *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

¹¹"The unfortunate fact is that today relatively little information is available on the effect of sex literature on human conduct." Lockhart & McClure, *supra* note 9, at 385. See Paul & Schwartz, *supra* note 1, at 230-31 n. 43.

¹²*Near v. Minnesota*, 283 U.S. 697, 716 (1931) (dictum). In *Doubleday & Co. v. New York*, 335 U.S. 848 (1948), the Supreme Court affirmed by an equally divided vote without opinion a New York Court of Appeals decision, 297 N.Y. 687, 77 N.E.2d 6 (1947) (mem.), upholding the conviction of Doubleday for publishing an obscene book, "Memoirs of Hecate County," by Edmund Wilson. The sole question before the Supreme Court was whether the first and fourteenth amendments protected books attacked as obscene. Lockhart & McClure, *supra* note 9, at 299-301.

¹³354 U.S. 476 (1957).

¹⁴For an interesting background case, see *Roth v. Goldman*, 172 F.2d 788 (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949).

¹⁵*Roth v. United States*, 354 U.S. at 485.

This holding raises many difficult legal problems, some of which the Court anticipated. The Court neatly disposed of the argument that the statute punishes mere incitation to impure sexual thoughts not shown to be related to any overt antisocial conduct. Since obscenity is not within the area of constitutional protection, the "clear and present danger" issue is never reached. Hence, the federal government may punish any mailer regardless of the effect of the mailing so long as the matter is found to be obscene.

It then became imperative for the Court to attempt to set some standard by which obscenity could be distinguished from constitutionally protected expression. This problem has long troubled the courts because obscene expression must, of necessity, be measured by the subjective reaction of the audience to whom the utterance or writing is directed.¹⁶ For its standard the Court embraced the test, first laid down in *United States v. One Book Called "Ulysses,"*¹⁷ of whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.¹⁸ The Court made it quite clear that sex and obscenity are not to be treated as synonymous but that reference to sex is obscene only when made in a manner appealing solely to prurient interest.¹⁹

Finally, the Court held in *Roth* that while the wording of Section 1461 lacks precision, the statute would not be struck down as void for vagueness since the language of the statute gives sufficiently definite warning as to the type of conduct proscribed. Thus, today there is no longer any doubt

¹⁶The courts have not been the only organs of government so troubled. It is reported that the delegates to the Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications could not define obscenity. This prompted Aldous Huxley to write that "after . . . having triumphantly asserted that they did not know what they were talking about, the members of the Congress settled down to their discussion." HUXLEY, *VULGARITY IN LITERATURE* 1 (1930).

¹⁷5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); *accord*, Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156 (2d Cir. 1936).

¹⁸In accepting this test the Court rejected the English view as enunciated in Regina v. Hicklin, L.R. 3 Q.B. 360 (1868), that material had to be judged obscene by the effect of an isolated passage upon persons particularly susceptible to prurient appeal.

In its opinion in *Roth* the Supreme Court defined "prurient interest" by citing Webster's Dictionary. ". . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity or propensity, lewd." WEBSTER, *NEW INTERNATIONAL DICTIONARY* 1996 (unabr. 2d ed. 1949). The Courts cited § 207.10 of the Model Penal Code for its definition of obscenity. "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1957). *Roth v. United States*, 354 U.S. at 487 n. 20.

¹⁹*Roth v. United States*, 354 U.S. at 487. That the Court intended to define obscenity in very narrow terms seems apparent from its first definitive opinion in this area following *Roth*. In *Kingsley International Pictures Corp. v. Regents of the University of New York*, 360 U.S. 684 (1959), *reversing* 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958), it was held that the advocacy of an idea no matter how violently at odds with the prevailing moral code is protected by the first and fourteenth amendments, providing prurient interest is not appealed to.

that the portion of the Comstock Law which provides for punishment subsequent to the mailing of obscene matter is in all respects valid and enforceable. But very difficult questions of judicial administration and procedure, particularly at the trial level, remain to be resolved.

B. *Problems of Administration in the Wake of Roth*

The refusal of the Supreme Court in *Roth* to examine the jury finding of obscenity seems to imply that the question of what is obscene is a matter of fact to be found by the jury and is not subject to constitutional review.²⁰ While this is the implication of *Roth*, the Court made no pronouncement on this point. Mr. Justice Harlan, in his dissenting opinion in *Roth*, took strong exception to the idea that the jury should have the final word on what is and what is not obscene, thereby determining what is and what is not protected expression. He argued that every communication has an individuality and value of its own and that suppression raises an individual constitutional problem which necessitates that an appellate court determine for itself whether the communication is suppressible within constitutional standards.²¹ Some doubt as to whether the jury will be left as the final repository of wisdom on this question is raised by two recent per curiam decisions of the Supreme Court.²² In both cases the Court, without opinion, reversed lower court decisions finding certain mail matter obscene and upholding the Postmaster General's refusal to transmit it. In both decisions the Court simply cited *Roth*. As Judge Desmond of the New York Court of Appeals said, in reference to these cases, "Presumably, the court having looked at those books simply held them not to be obscene."²³ If this be the case, then unless the Court is willing to make a distinction based upon who the trier of fact happens to be, it would seem that the question of obscenity in individual cases is still open for constitutional review.²⁴ It should be noted, however, that if the Supreme Court does

²⁰Cf. *Eastman Kodak Co. v. Hendricks*, 262 F.2d 392, 398 (9th Cir. 1958), *reversing* 147 F. Supp. 337 (S.D. Cal. 1958).

²¹The late Judge Jerome Frank also opposed the idea of allowing the jury the final say on the question of obscenity. But his opposition was based primarily on a distrust of the jury system. Referring to Judge Learned Hand's words in *United States v. Kennerley*, 209 Fed. 119, 121 (S.D.N.Y. 1913), Frank said, "Judge L. Hand there said that a jury is especially equipped to determine the 'social sense of what is right' at 'any given time.' He repeated that idea in *United States v. Levine*, 2 Cir., 1936, 83 F.2d 156, 157. I have my doubts. For any particular single jury may not at all represent the 'average' views of the community, especially on such a subject [as obscenity]." *Roth v. Goldman*, 172 F.2d 788, 795 n. 30 (2d Cir. 1949) (concurring opinion), *cert. denied*, 337 U.S. 938 (1949).

²²*Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958) (per curiam), *reversing* 249 F.2d 114 (D.C. Cir. 1957); *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam), *reversing* 241 F.2d 772 (9th Cir. 1957).

²³*Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, 4 N.Y.2d 349, 368, 151 N.E.2d 197, 207, 175 N.Y.S.2d 39, 54 (1958) (concurring opinion). The books in question were a nudist magazine depicting nude men and women and a magazine devoted to homosexuality.

²⁴The most recent Supreme Court pronouncement on criminal prosecution for obscenity is *Smith v. California*, 80 Sup. Ct. 215 (1959). In this case the appellant, a bookstore proprietor, was convicted of violating § 41.01.1 of the Municipal Code of Los Angeles which makes it unlawful "... for any person to have in his possession any obscene . . . writing [or]

review local jury findings of obscenity, distortion of the standard of contemporary community feeling will result.²⁵

An evidentiary problem also exists. Under the rules of evidence of the common law, if a man is to be convicted of a crime, the evidence to support the conviction must appear in the record. As a general rule in obscenity prosecutions, the state or federal government merely puts the objectionable matter in evidence and shows that the proscribed act was done by the accused.²⁶ *Roth* requires that before communications may be condemned as obscene they must be found to be violative of contemporary community standards of decency. Query then whether the prosecution must attempt to place in evidence expert testimony as to what that community standard is.²⁷ If this is not required, the jury will have to furnish this finding without any evidence in the record.²⁸

Perhaps the most significant problem is the proper method of weighing allegedly objectionable matter as a whole to determine its character. In the *Roth* case the trier of fact had a comparatively easy time in finding that the matter taken as a whole had as its dominant theme the appeal

book . . . in any place of business where . . . books . . . are sold or kept for sale." A jail sentence was imposed on the appellant solely because of his possession of a book found to be obscene. The lower state courts construed the Los Angeles Ordinance as not requiring scienter, thus imposing strict or absolute criminal liability. The appellant contended below that the ordinance as construed conflicted with the fourteenth amendment to the Constitution. The United States Supreme Court agreed with this contention, reversing the conviction and striking down the ordinance.

The Court reasoned that "by dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally-protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." *Id.* at 218.

²⁵The test laid down in *Roth* seems to require that the final determination be left to the local jury. The only reasonable contemporary community would seem to be one delineated either by the particular audience to whom the objectionable material is directed or by the geographical area from which the material is mailed. The contemporary community standard of a small rural town is likely to be quite different from that of a sophisticated urban area such as Washington, D. C. It would be a rare judge, indeed, who, while living elsewhere, could accurately gauge the contemporary community standard of decency of the place where the case arises.

²⁶*Cf.* *Roth v. Goldman*, 172 F.2d 788, (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959).

²⁷In *Grove Press, Inc. v. Christenberry*, *supra* note 26, at 502, it is suggested that certain other expressions of the contemporary community standard might be admitted. "Surely expressions by leading newspapers, with circulations of millions, are some evidence at least as to what the limits of tolerance by present day community standards are, if we must embark upon a journey of exploration into such uncharted territory." It must be noted that this case involved an administrative determination of obscenity. In administrative proceedings the rules of evidence are greatly relaxed. To admit such evidence in a federal court would require another exception to the hearsay rule.

²⁸Frank, J., has protested this type of procedure. "[H]e [the Postmaster General] made no express finding about that attitude.

"We thus do not know how he arrived at his conclusion as to obscenity. To sustain his order, we must, at a minimum, read into the record an implied . . . determination that the book is at odds with the 'average conscience of the time.' . . . In effect, we are asked to infer that he invoked something like judicial notice." *Roth v. Goldman*, 172 F.2d 788, 795 (2d Cir. 1949) (concurring opinion), *cert. denied*, 337 U.S. 938 (1949).

to prurient interest.²⁹ The material was commercially produced solely to titillate and arouse sexual desire. Condemnation of so-called "hard core" pornography should prove to be no problem. But the *Roth* standard will provide difficulty when applied to "mixed" matter. For example, what will be proper bases for a jury to decide the nature of a magazine or anthology containing certain features or stories, condemnable as obscene in isolation, and also containing other features or stories which are not objectionable? If the jury condemns the magazine or anthology as a whole because of the presence of a certain amount of obscenity, material otherwise protectible under the first amendment will tend to be suppressed. Certainly a publication's character should not be decided by comparing the number of "clean" pages to the number of "dirty" pages and then absolving or condemning the publication on the basis of the count. Something more appears to be needed. That something should be the factor of the author's or publisher's sincerity. The *Roth* standard seems concerned only with audience reaction and not with the purpose of the author or publisher. If an otherwise innocent publication is purposely used as a vehicle for the dissemination of one obscene passage or story, then a jury should be justified in finding that the dominant theme of the publication taken as a whole appeals to prurient interest. At least three important lower federal court cases have emphasized the propriety of investigating the sincerity of the author or publisher.³⁰

II. PRIOR ADMINISTRATIVE RESTRAINTS

From the time man first began to communicate with his fellow man others have attempted to stifle at its source expression which to them was dangerous or hateful. Licensing and censorship prior to publication are far more effective means of suppressing expression than criminal punishment subsequent to publication, for in the former case the expression proceeded against never sees the light of day.³¹ It seems natural then that the Post Office Department should seize upon this powerful weapon of prior administrative restraint to suppress the mail flow of supposedly obscene and pornographic matter.

²⁹While the trial judge's instructions in this regard were not exactly in the terms employed by the Supreme Court in its opinion, they were sufficiently similar to justify affirmance of *Roth's* conviction.

³⁰*United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930) (prosecution for violation of now § 1461 of the Criminal Code); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (libel under § 305 of the Tariff Act of 1930). See *Lockhart & McClure, supra* note 9, at 349-50.

³¹So great a poet as John Milton felt the sting of the censor's pencil. His famous essay, "Areopagitica," published in 1644, was a plea for a free and uncensored press. But as late as 1923, the Minnesota legislature attempted to set up a system of prior restraints on the press of the state. In the landmark case of *Near v. Minnesota*, 283 U.S. 697 (1931), the Supreme Court struck down the Minnesota legislation.

A. Legislative Authority for Administrative Restraint

In setting up an elaborate procedure to prevent the mailing of obscene and pornographic matter,³² the Post Office Department cites Section 1461 of the Criminal Code for its authority. But whether Congress intended to give the Department this authority is not free from doubt. The Comstock Law as originally enacted said only that obscene matter was not to be carried in the mails. It provided criminal penalties for persons who knowingly sent or received such matter.³³ Its wording is similar to that of the act of 1865³⁴ which was intended to operate only as a criminal statute.³⁵ Because of the absence of any express suggestion in the legislative history of the 1873 act that the Post Office was to exercise censorial power to restrain suspected mail,³⁶ it can be argued that this statute, too, was intended to operate only as a penal statute and, therefore, the Post Office does not presently have authority to restrain mail on the ground that it is or may be obscene.³⁷ Judicial opinion on this subject is sharply divided.³⁸

B. The Constitutionality of Administrative Restraints

Assuming the existence of authority from Congress, it becomes necessary to examine the constitutionality of the system of mail restraint created by the Post Office Department. For many years following the enactment of the Comstock Law the Post Office exercised in summary fashion its assumed power to restrain the mailing of obscene matter.³⁹ Notice and the right to be heard were not extended to senders, whose mail was rejected

³²See 39 C.F.R. §§ 14.1, 14.3 (1955); 39 C.F.R. §§ 14.10, 203.1-203.14 (Supp. 1959).

³³"[N]o obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character . . . shall be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things . . . shall be deemed guilty of a misdemeanor. . . ." 17 Stat. 599 (1873).

³⁴13 Stat. 507 (1865).

³⁵See CONG. GLOBE, 38th Cong., 2d Sess. 450, 654, 660-66, 965-66 (1865); Paul & Schwartz, *supra* note 1, at 217 n. 9.

³⁶See CONG. GLOBE, 42d Cong., 3d Sess. 1240, 1307, 1358, 1371, 1436, 2004 (1873).

³⁷This argument is made in *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 121 (D.C. Cir. 1957) (dissenting opinion), *rev'd per curiam*, 355 U.S. 372 (1958) (citing *Roth v. United States*), and in Paul & Schwartz, *supra* note 1, at 217. However, the argument loses some force because the undebated recodification of the 1873 act declared obscenity to be nonmailable and prohibited its conveyance or delivery by the Post Office. 19 Stat. 90 (1876). This clearly implies authority in the Post Office Department to restrain the mailing of obscenity and the language of the 1876 act has been retained in the present statute. See 18 U.S.C. § 1461 (1958).

³⁸Cases holding for such authority in the Post Office Department include *Sunshine Book Co. v. Summerfield*, 249 F.2d 114 (D.C. Cir. 1957), *affirming* 128 F. Supp. 564 (D.D.C. 1955), *rev'd per curiam*, 355 U.S. 372 (1958) (citing *Roth v. United States*); *Roth v. Goldman*, 172 F.2d 788 (2d Cir. 1949) (by implication), *cert. denied*, 337 U.S. 938 (1949); *Glanzman v. Christenberry*, 175 F. Supp. 485 (S.D.N.Y. 1958); *Monart, Inc. v. Christenberry*, 168 F. Supp. 654 (S.D.N.Y. 1958). Judicial opinion denying the existence of such authority includes *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 120 (D.C. Cir. 1957) (dissenting opinion by Washington, J.); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959) (dictum).

³⁹See *Walker v. Popenoe*, 149 F.2d 511 (D.C. Cir. 1945); de Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 LAW & CONTEMP. PROB. 608, 609 (1955).

or destroyed. Finally, in *Walker v. Popenoe*⁴⁰ the District of Columbia Circuit held that this summary procedure violated fifth amendment due process. The court said that due process could only be satisfied by according notice and an opportunity to be heard *before* the mailing privilege is suspended. The court was not impressed with the Post Office's argument that notice and hearing before restraint would permit the distribution of obscene matter until the hearing could be concluded and a decision rendered and pointed out that the sender of obscene mail could be arrested immediately pursuant to Section 1461 and that if he were released on bail the conditions of that bail should be sufficient to discourage repetition of the offense before trial.

This case should have made clear to the Post Office that it was treading on dangerous constitutional ground. However, several years elapsed before the Department promulgated regulations to govern procedure in restraining supposedly obscene mail.⁴¹ These regulations provide for detailed notice to the mailer,⁴² the mailer's right to answer the notice,⁴³ opportunity for the mailer to seek an informal compromise with the Department,⁴⁴ and fair hearing for the mailer,⁴⁵ with the burden of proof placed upon the General Counsel of the Post Office Department.⁴⁶ Significantly, however, the regulations do not meet the one requirement of procedural due process stressed in the *Popenoe* case. The regulations specifically provide that when there is doubt as to the mailability of any matter "it shall be withheld from dispatch or delivery and a sample, or a complete statement of the facts submitted to the General Counsel for instructions."⁴⁷ If the General Counsel believes that the mail matter may be obscene, the restraint is continued and notice and hearing are then accorded.⁴⁸ Thus, the Post Office continues to restrain the mail *prior* to notice and hearing contrary to the holding in *Walker v. Popenoe*. This procedure was recently protested by a minority of the court in *Sunshine Book Co. v. Summerfield*,⁴⁹ another decision of the District of Columbia Circuit. But the majority implicitly endorsed the present procedure and one concurring judge specifically stated that such procedure was permissible.⁵⁰

⁴⁰*Supra* note 39 (concurring opinion concurred in by entire court).

⁴¹See de Grazia, *supra* note 39, at 610.

⁴²39 C.F.R. §§ 203.2, 203.3 (Supp. 1959).

⁴³*Id.* §§ 203.4-203.6.

⁴⁴*Id.* § 203.7.

⁴⁵*Id.* §§ 203.8-203.14.

⁴⁶*Id.* § 203.7.

⁴⁷39 C.F.R. § 14.10 (Supp. 1959).

⁴⁸39 C.F.R. § 203.1 (Supp. 1959).

⁴⁹249 F.2d 114 (D.C. Cir. 1957), *affirming* 128 F. Supp. 564 (D.D.C. 1955), *rev'd per curiam*, 355 U.S. 372 (1958). "Another aspect of the case is equally disturbing. More than a decade ago we held in *Walker v. Popenoe* . . . that a hearing must precede the barring of published matter from the mails. Here, the Department refused to accept the magazine for mailing, and held a hearing after its refusal had become effective. We expressly condemned such an interference with freedom of the press in the *Walker* case. . . ." *Id.* at 122-23 (dissenting opinion).

⁵⁰*Sunshine Book Co. v. Summerfield*, *supra* note 49, at 120 (Fahy, J., concurring).

This, of course, does not settle the matter. Only the Supreme Court's view of what is and what is not procedural due process will be decisive. It can be argued that the Supreme Court will uphold the present procedure by analogy with its recent holding in *Kingsley Books, Inc. v. Brown*.⁵¹ In that case a narrow majority upheld the constitutionality of a New York statute allowing law enforcement officers to obtain court orders enjoining the sale or distribution of any publication or writing alleged to be obscene before a trial of the legal issues is held. Certainly the effect of the New York statute is the same as that of the questioned postal regulation—it authorizes administrative restraint prior to hearing.

While the analogy seems to be a reasonable one, the closeness of the vote in the *Kingsley Book* case precludes any definite conclusion on this issue. It must be noted that Mr. Justice Harlan was counted among the majority in *Kingsley Books*. In his concurrence in *Alberts v. California*⁵² and in his dissent in *Roth*, he distinguished between the state's power to move against obscenity and the federal government's power. Mr. Justice Harlan would more narrowly circumscribe the federal government's power because of its potential to infringe freedom of expression throughout the entire United States.

Furthermore, the New York statute⁵³ is distinguishable from the postal regulations in that it provides for trial very shortly after the injunction pendente lite is issued. The postal regulations provide only that a hearing shall be held within ten days of notice,⁵⁴ but there is nothing in the regulations requiring expeditious notice. Mr. Justice Frankfurter, speaking for the majority in *Kingsley Books*, made it clear that the holding was to be closely confined ". . . so as to preclude what may fairly be deemed licensing or censorship."⁵⁵

While the Post Office Department's procedures may meet the standards of procedural due process, the question of whether the administrative restraints on the mail violate first amendment guarantees must also be considered. Superficially, it might seem that no problem exists in this realm because of the *Roth* holding that obscenity is not a protected form of expression. And if this were not enough, the Court also held in *Kingsley Books* that at least one limited form of prior restraint by the state did not violate the first and fourteenth amendments. However, it must be remembered that *Roth* was a criminal prosecution and *Kingsley Books* a very narrow holding. Following these decisions Judge Fuld of the New York Court of Appeals asserted that prior administrative restraint over motion

⁵¹354 U.S. 436 (1957) (five to four decision). This was the position taken by Judge Fahy in the *Sunshine Book* case.

⁵²354 U.S. 476 (1957) (decided with *Roth v. United States*).

⁵³N.Y. CODE CRIM. PROC. § 22-a.

⁵⁴39 C.F.R. § 203.3 (Supp. 1959).

⁵⁵*Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957).

pictures still violated the first and fourteenth amendments.⁵⁶ Judge Fuld's position is that a distinction has been drawn by the Supreme Court between criminal prosecutions following publication and restraints prior to publication.⁵⁷ For support he relies on a number of motion picture censorship cases in which the Court, in every instance, reversed lower court approval of prior licensing.⁵⁸ Significantly, the Supreme Court has never approved prior state restraints on supposedly obscene motion pictures⁵⁹ or federal restraints on supposedly obscene mail.⁶⁰

If a distinction does exist, the underlying rationale must be that prior restraint is much more destructive of freedom than subsequent punishment. Men are free only so long as they may choose to remain silent or to express what they believe to be true regardless of the consequences. This choice is denied them when effective prior restraints are employed. Thus, while obscenity is not protected utterance, the method chosen to root it out may be so corrosive of a free society that the method itself violates constitutional guarantees.

One further possibility of unconstitutionality presents itself. In *Roth*, a criminal case, the Supreme Court held that the wording of Section 1461 was not too vague and uncertain to apprise individuals of acts which the statute proscribes.⁶¹ But the Court did not have before it the question of whether the statute provides sufficient standards for the guidance of the Post Office in its censorial activities, assuming the statute gives authority

⁵⁶*Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, 4 N.Y.2d 349, 373-74, 151 N.E.2d 197, 211, 175 N.Y.S.2d 39, 59-60 (1958) (dissenting opinion), *rev'd*, 360 U.S. 684 (1959).

⁵⁷Judge Fuld limited the significance of the *Kingsley Book* case in the following way. "In reaching the conclusion that a system of prior administrative censorship is unconstitutional, I have in mind that even the limited injunctive process, with provision for prompt trial by the court, was recently regarded by four justices of the Supreme Court as an impermissible prior restraint. . . . Indeed, the majority of the court as well . . . went on, significantly, to say, 'the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship.'" *Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, *supra* note 56, at 373, 151 N.E.2d at 211, 175 N.Y.S.2d at 59. For other judicial opinion subsequent to *Kingsley Books* that this distinction may still exist, see *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 121 (D.C. Cir. 1957) (dissenting opinion), *affirming* 128 F. Supp. 564 (D.D.C. 1955), *rev'd per curiam*, 355 U.S. 372 (1958); *Paramount Film Distrib. Corp. v. City of Chicago*, 172 F. Supp. 69, 70 (N.D. Ill. 1959).

⁵⁸See *Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, 360 U.S. 684 (1959); *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957) (per curiam); *Holmby Prod. Inc. v. Vaughn*, 350 U.S. 870 (1955) (per curiam); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954) (per curiam); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam). However, all of these cases can be explained either on the ground that the licensors attempted to censor unpopular ideas protected by the first amendment or that the Supreme Court independently decided the films were not obscene.

⁵⁹*Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, 4 N.Y.2d 349, 368, 151 N.E.2d 197, 207, 175 N.Y.S.2d 39, 54 (1958) (concurring opinion), *rev'd*, 360 U.S. 684 (1959).

⁶⁰See *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958) (per curiam); *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam).

⁶¹All the statute provides in this regard is that obscenity is nonmailable matter ". . . and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." 18 U.S.C. § 1461 (1958).

for such activity.⁶² The Court could read the *Roth* standard into that part of the statute purporting to confer authority on the Post Office and say that this is a sufficient guide. But on the other hand, the Court could either refuse to do this or could hold that the broad generalized standard of *Roth* is not sufficiently precise and definite for cases involving prior restraints on expression. Indefinite or nonexistent standards for the suppression of unprotected utterances would be violative of the first amendment because of the danger created that protected expression might also be suppressed.

In spite of the strong arguments that can be made against the constitutionality of administrative restraint on the mails, it is submitted that the present state of constitutional law, reading the *Roth* and *Kingsley Book* cases together, compels the conclusion that some limited form of prior restraint is permissible. Under the postal power Congress would appear to be empowered to authorize the Post Office to restrain obscenity in the mails. But the present law is too broad and indefinite. If Congress wishes to insure continued postal activity in this field, it should consider legislation which would embody the standard for obscenity laid down in *Roth* and, if at all possible, should establish more specific guides for the Post Office.⁶³ As a sweeping change, Congress might consider the feasibility of taking administration from the Post Office. This could be done by requiring local postmasters to seek orders pendente lite from United States District Courts restraining the mailing of questionable matter until obscenity hearings could be held in the district courts. Congress could require the presence of a jury if requested by the mailer. To insure procedural due process, the legislation should require that expeditious notice and hearing be accorded the mailer.

C. Problems Created by *Roth* in Administration of Postal Restraints

As in the case of criminal prosecutions under Section 1461, an evidentiary problem arises in the administration of postal restraints. At the administrative hearing in the case of *Lady Chatterley's Lover*,⁶⁴ the General Counsel for the Post Office merely introduced the book in evidence without offering any additional evidence as to whether the controversial novel "taken as a whole" violated "contemporary community standards" of

⁶²But such attempts have generally been unsuccessful. See, e.g., *Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, 4 App. Div. 2d 348, 165 N.Y.S.2d 681 (1957) *rev'd* 4 N.Y.2d 349 (1958) (discussion of the word "immoral"); *State v. Smith*, 108 N.E.2d 582 (Ohio Mun. Ct. 1952) (discussion of the standard that motion pictures must be "moral, educational, or amusing and harmless in character"). In the *Kingsley Pictures* case the appellate division of the New York Supreme Court said that "adding more adjectives or more words which are likewise open to different opinions helps little." *Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, *supra* at 349-50, 165 N.Y.S.2d at 683.

⁶³See dissenting opinion of Brennan, J., in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

⁶⁴*Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959).

decency. And when the senders, Grove Press, Inc., and Reader's Subscription, Inc., attempted to introduce favorable newspaper stories and editorial comment on the publication of the book to show contemporary community acceptance of the novel, this material was excluded.⁶⁵ Thus, when the Postmaster General decided that *Lady Chatterley's Lover*, to the average man, violated contemporary community standards of decency, he had no evidence before him as what that standard was. Obviously, the Postmaster must have supplied, sub silentio, an implied determination, based on his own knowledge and experience, that the book violated the prescribed standard. This type of off-the-record decision-making has been severely questioned by members of the federal judiciary.⁶⁶ Such procedure seems entirely at odds with the common law ideal of decision-making only on the basis of the record before the decision-maker. While it might be concluded that the Supreme Court in *Roth* intended to put its faith in local juries to make such secret determinations,⁶⁷ there is nothing in the cases to indicate that the Court intended to repose such trust in one administrative official.

A more subtle, but nonetheless important, conflict between the standard laid down in *Roth* and present postal practice arises from the rather amorphous concept of the "variable audience." As yet, there has been no elaboration by the Supreme Court as to how the particular community is to be isolated for purposes of applying the *Roth* standard to specific individual obscenity cases. When the Court used the word "community," did the Justices have in mind a general American community, or did they mean the local community in which the matter was published or mailed? Or did they mean that the community should be defined in terms of the potential audience to be reached by the mailing?⁶⁸ If this last possibility involves the correct way to define "community," then distortion of the standard is inevitable when final administrative determinations of obscenity are made outside the relevant community by persons in Washington, D.C.⁶⁹ Suppose the mailer wishes to send his publication only to people in rural Midwestern areas. Theoretically, then, the community standard to be

⁶⁵Expert literary testimony of Malcolm Cowley and Alfred Kazin was admitted. These men testified to contemporary acceptance of literature dealing with sex and gave their own opinions as to the acceptability today of the unexpurgated version of *Lady Chatterley's Lover*. See *Grove Press, Inc. v. Christenberry*, *supra* note 64.

⁶⁶See note 28 *supra* and *Grove Press, Inc. v. Christenberry*, *supra* note 64.

⁶⁷So great a judge as Learned Hand believes that juries should have this responsibility. "[O]bscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss [sic], but really a small bit of legislation ad hoc, like the standard of care." *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936).

⁶⁸This third possibility has been suggested by Palmieri, J., in *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957) (libel under § 305 (a) of the Tariff Act of 1930). "I believe . . . that the more inclusive statement of the definition is that which judges the material by its appeal to 'all those whom it is likely to reach.'" *Id.* at 354.

⁶⁹The hearing is held and the decision rendered in Washington, D. C. 39 C.F.R. § 203.8 (Supp. 1959).

applied in determining the character of the mailing must be that of the mailer's potential audience—the standard of decency of the rural Midwestern farm community. Only persons within the potential audience-community would be qualified to apply this standard. But under the postal regulations the local postmaster, who might himself be within the audience-community, must send the matter to the more sophisticated Eastern urban center of Washington, D.C., for judgment by officials outside the potential audience-community. If the community is to be defined in terms of potential audience, the more localized the determination the less the distortion of the standard.⁷⁰ Much distortion would be eliminated by legislation providing for local jury hearings on the character of questioned mailings.

*E. Scope of Judicial Review of Administrative
Decisions on Nonmailability*

Before a federal district court may review a Post Office determination that particular matter deposited for mailing is obscene, the court may be faced with the contention that the proper scope of review of administrative decisions precludes a de novo determination by the district court on this issue. Such was the government's position in *Grove Press, Inc. v. Christenberry*,⁷¹ the *Lady Chatterley's Lover* case. The government contended that the Postmaster's finding that the book was obscene was one of fact made by an administrative body, and as such could not be questioned in the district court. In dismissing this argument, Judge Bryan reasoned that since an obscenity ruling did not depend on a fair estimate of the worth of testimony before the administrative body or an informed judgment by the body on matters within its special competence, such a ruling did not fall with the doctrine of *Universal Camera Corp. v. NLRB*.⁷² This case requires a hands-off policy by the district courts on certain agency rulings and findings. Judge Bryan's reasoning appears persuasive in light of the fact that the only evidence generally offered at these Post Office hearings is the suspected mail matter itself. Thus, a district court judge is in as good a position to evaluate the character of the mailing as the Postmaster. Furthermore, it can hardly be argued that the Post Office Department has the same kind of technical competence to evaluate literary endeavor and contemporary moral standards as the Securities and Exchange Commission has in evaluating security transactions or the Federal Communications Commission has in regulating the allocation of radio frequencies. The Post Office's only special competence would seem to lie in

⁷⁰It has been recognized by law enforcement officials that community standards of decency may vary widely even within a single state. See Los Angeles Mirror News, Nov. 9, 1959, § 1, p. 4, col. 1.

⁷¹175 F. Supp. 488 (S.D.N.Y. 1959).

⁷²40 U.S. 474 (1951).

the field of physical transmission of the mail.⁷³ Hence, the district courts, particularly in view of the important constitutional questions implicit in banning printed matter from the mail, would seem to have the duty to consider the question of obscenity *de novo*.⁷⁴

F. Obscenity Determinations Under Present Law

Once the question of obscenity is reached, few if any generalizations are possible. It might be stated that "hard core" pornography may always be proscribed. But then the question is presented as to what is included within the generic term "hard core" pornography.⁷⁵ No one can really be sure, particularly in view of the recent trend of the federal courts to keep within very narrow bounds expression which can properly be denied constitutional protection. Three recent mail obscenity cases illustrate this trend.

In *One, Inc. v. Olesen*⁷⁶ the Supreme Court reversed a Ninth Circuit ruling affirming a district court denial of a mandatory injunction to require the Los Angeles postmaster to mail a particular issue of "One," a magazine devoted to a "scientific, historical and critical study of homosexuality." The Ninth Circuit found offensive an article entitled "Sappho Remembered," which detailed a lesbian's influence on a young woman's struggle to choose between normal married life and lesbianism. The final triumph of lesbianism particularly incensed the court. In its *per curiam* reversal the Supreme Court cited only the *Roth* case in explanation. It would seem, then, that the Court was holding either that the article was not obscene or that the magazine taken as a whole was not obscene.⁷⁷

⁷³"[H]e [the Postmaster General] has no special competence to determine what constitutes obscenity within the meaning of Section 1461 or that 'contemporary community standards are not such that this book should be allowed to be transmitted in the mails' or that the literary merit of the book is outweighed by its pornographic features. . . . Such questions involve interpretation of a statute . . . and its application to the allegedly offending material. The determination of such questions is peculiarly for the courts. . . ." *Grove Press, Inc. v. Christenberry*, 175 F. Supp. at 495.

⁷⁴The action of the Supreme Court in *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (*per curiam*), and *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958) (*per curiam*), tends to support this conclusion. See also *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 120 and n. 4 (D.C. Cir. 1957) (dissenting opinion), in which it was said that broad authority exists to review even purely factual matters when freedom of speech and of the press is involved. *But see Roth v. Goldman*, 172 F.2d 788 (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949).

⁷⁵No less a controversial literary figure than D. H. Lawrence has said that pornography must be censored rigorously. He has said that "pornography is the attempt to insult sex, to do dirt on it. This is unpardonable. Take . . . the picture post-card . . . What I have seen of them have been of an ugliness to make you cry. The insult to the human body, the insult to a vital human relationship! Ugly and cheap they make the human nudity, ugly and degraded they make the sexual act, trivial and cheap and nasty." LAWRENCE, *SEX, LITERATURE, AND CENSORSHIP* 69 (1959). That his definition may be too broad is seen by the speculation of a Lawrence scholar that Lawrence would have included James Joyce's "Ulysses" within this classification. *Id.* at 25 (introduction by Harry T. Moore). "Ulysses" was approved for general importation into this country by Judge Woolsey in *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F.2d 705 (2d Cir. 1934).

⁷⁶355 U.S. 371 (1958), *reversing per curiam* 241 F.2d 772 (9th Cir. 1957).

⁷⁷See concurring opinion of Desmond, J., in *Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, 4 N.Y.2d 349, 368, 151 N.E.2d 197, 207, 175 N.Y.S.2d 39, 54 (1958), *rev'd*, 360 U.S. 684 (1959). A slightly different view of this reversal was taken

In *Sunshine Book Co. v. Summerfield*,⁷⁸ a case similar to *One, Inc.*, the Supreme Court reversed a District of Columbia Circuit decision affirming a district court denial of a mandatory injunction to require the Postmaster General to order the transmission of particular issues of "Sunshine & Health" and "Sun," magazines espousing the cause of nudism in America. In its opinion the majority of the District of Columbia Circuit made a page-by-page analysis of the two magazines. The court began by admitting that the texts of the magazines, which described the nudist way of life, were not offensive. What caused the majority to hold as it did were several photographs of nude men and women, depicted either separately or together with their generative organs visible. According to the majority, the illustration of male and female genitals was sufficiently indecent as to taint the magazine as a whole. The Supreme Court again reversed per curiam citing *Roth*. Thus, though it might once have been thought that the mere depiction of human genitals by photography was pornographic per se, that view can no longer be accepted.⁷⁹ Today, the context in which the photographs appear must be carefully examined to determine whether the publication as a whole has for its dominant theme the appeal to prurient interest. The Supreme Court's decision here may well have turned on the fact that the textual material in the magazines was inoffensive.⁸⁰

Finally, in *Grove Press, Inc. v. Christenberry*,⁸¹ the most publicized of the recent obscenity cases, a district judge granted a permanent injunction requiring the New York City postmaster to transmit through the mails the unexpurgated version of D. H. Lawrence's *Lady Chatterley's Lover*.⁸² Grove Press and Readers Subscription had attempted to send circulars proclaiming publication of the novel and the novel itself through the mail. The New York postmaster restrained dispatch of this material and sent samples to Washington where, after notice and hearing pursuant to regu-

by Chambers, J., in *Eastman Kodak Co. v. Hendricks*, 262 F.2d 392, 396 (9th Cir. 1958), reversing 147 F. Supp. 337 (S.D. Cal. 1958). "This court simply takes the view that the only sensible explanation of the reversal of *One, Inc.*, is the Supreme Court decided 'the wrong yardstick' was used."

⁷⁸355 U.S. 372 (1958).

⁷⁹The idea that certain things could be obscene or pornographic per se without reference to their use or potential audience has been generally discredited in the federal courts. See *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957).

⁸⁰This again raises the question as to how juries or administrative officials are to weigh material which may be partly offensive and partly innocent. The question of the author's or publisher's sincerity of purpose would seem to be an important factor here. In the *Sunshine Book* case the Court might have believed that the depiction of healthy bodies simply served to promote the idea of nudism—an idea protected by the first amendment. Cf. *Kingsley Int'l Corp. v. Regents of the University of New York*, 360 U.S. 684 (1959).

One highly significant implication of the reversals in *One, Inc.* and *Sunshine Book* is that the Supreme Court has undertaken constitutional review of judge-made determinations of obscenity in injunction cases. The question is still open as to whether the Court will undertake such review of jury determinations in criminal cases. Mr. Justice Harlan believes that the implication in *Roth* was that the Court would not.

⁸¹175 F. Supp. 488 (S.D.N.Y. 1959).

⁸²For the fascinating legal and literary history of this novel, see LAWRENCE, SEX, LITERATURE, AND CENSORSHIP 7-30, 82-111 (1959).

lations, the Postmaster General ruled that the circulars and books were nonmailable matter within the meaning of Section 1461 of the Criminal Code. In his findings the Postmaster General analyzed certain frank passages concerned with the adulterous relationship between Lady Chatterley and her husband's gamekeeper. He also examined Lawrence's choice of certain "four-letter" anglo-saxon words describing functions of the genitourinary tract. From this analysis the Postmaster concluded that the novel taken as a whole appealed to prurient interest. He then ordered the New York City postmaster to refuse to transmit either the books or the circulars.⁸³ In granting the injunction requiring the New York postmaster to ignore this order, District Judge Bryan said that the Postmaster General had done what the Supreme Court in *Roth* said should not be done. He had lifted isolated passages and words, found them to be obscene, and had condemned the book as a whole without regard to its dominant theme and purpose. In appraising a book as a whole, the appraiser must look to the sincerity and honesty of purpose of the author. Judge Bryan found Lawrence's purpose to be the serious expression of a deep and bitter dissatisfaction with the stultifying efforts of an advancing industrialization together with a demand for a return to "naturalness" in all of life's functions including sex. From the holding in this case it would seem that the use of "four-letter" words, no matter how vile, and the description of sexual relations, no matter how frank, will not cause a publication to be banned from the mails if the Postmaster or the courts determine the author's or publisher's purpose to be serious.

When the *Roth* case was first decided it might have been assumed that authors and publishers would have to be more guarded than ever in their utterances concerning sex. Since obscenity was not protected expression, too frank a discussion of man's sexual nature might bring down the wrath of the censors, both official and self-appointed.⁸⁴ But the cases of *One, Inc.*, *Sunshine Book*, and particularly *Grove Press, Inc.*, seem to indicate that *Roth* may be a great liberating force, freeing the serious writer to describe life as he honestly sees it, without fear of censorship or criminal punishment.⁸⁵ If man's conduct deviates from his moral codes, then reality should be portrayed and portrayed by those most competent to portray it—the serious writers and artists of contemporary society. The truth may hurt, but the recent cases seem to say that truth will be served. Thus, perhaps

⁸³Section 1461 also declares material designed to give notice where obscenity may be obtained to be nonmailable matter.

⁸⁴For an excellent discussion of extralegal censorship, see Note, 33 N.Y.U.L. REV. 989 (1958).

⁸⁵While this question of the liberating force of *Roth* may never be fully settled, it has been raised. "It may be . . . that if a work is found to be of literary stature and not 'hard core' pornography, it is *a fortiori* within the protections of the First Amendment." *Grove Press, Inc. v. Christenberry*, 175 F. Supp. at 503.

only the commercial purveyors of smut and filth, those who would lie about the human spirit, need fear the *Roth* decision.⁸⁶

III. CONCLUSION

While there is no longer any doubt as to the legality of prosecutions and convictions under the criminal provisions of Section 1461, serious questions are raised at every turn with regard to the power of the Post Office Department to restrain the mailing of supposedly obscene matter. There is doubt as to the grant of this power by Congress in the first instance. This doubt could, of course, be eliminated by legislative action. But then the question arises whether Congress itself has constitutional authority to grant such power. This, as has been pointed out, is a very close question. Reading *Roth* and *Kingsley Books* together, it would seem that Congress has power in this field. But it is submitted that *Kingsley Books* itself is a highly questionable decision because it represents a sharp break with the Anglo-American tradition of opposition to censorship and prior restraint.⁸⁷ It may well be that the Supreme Court, upon further reflection, will limit this case to its facts and refuse to extend the rationale to cover other prior restraints. Until such time as the Court makes further pronouncement on this issue, the Post Office's constitutional authority to restrain the mail is in doubt. Questions are presently raised also concerning whether procedures under the postal regulations accord with procedural due process as required by the fifth amendment.

Because of the shaky structure of the present system of postal regulation, Congress should attempt a thorough study of the field. But before any new legislation is proposed Congress should first question the wisdom of any postal censorship. Not only do prior restraints suppress material already printed, but they also tend to dull or discourage the literary creativity of those who might have spoken out but for the fear of censorship.⁸⁸ One might be willing to endure criminal punishment if he has some assurance that what he expresses will be disseminated. But where prior restraints bar the way, the serious writer or publisher may be dissuaded by the futility of the endeavor. Another reason for questioning the wisdom of postal censorship is that the Post Office Department seems hardly qualified to weigh literary merit against modern moral standards. The foregoing may be sufficient reasons in themselves to discard the present system, but the most penetrating question as to the desirability of administrative restraint involves fundamental democratic theory.

⁸⁶For a similar conclusion see Lewis, *Power to Censor is Still Unclear*, New York Times, Dec. 20, 1959 § 4, col. 5, p. 8E.

⁸⁷Compare *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) with *Near v. Minnesota*, 283 U.S. 697 (1931).

⁸⁸See *Roth v. Goldman*, 172 F.2d 788, 790 (2d Cir. 1949) (concurring opinion by Frank, J.), *cert. denied*, 337 U.S. 938 (1949).

The "comstockian mind" demands that the government censor obscene literature and art on the ground that only by such censorship will *the* [normal] *reader's* mind be saved from libidinal moral depravity. The question is never asked how it can be a proper function of a democratic government to intrude upon individual morality and compel the individual to be saved from himself. The individual reader is never asked whether he *wishes* to be "saved" by governmental intervention. Nor is the question asked whether the reader might not prefer to be rescued, if at all, by his priest or psychoanalyst. Such questions are not asked because they are basically irrelevant to the pressure for postal censorship; the psychological need of the "comstockian mind" to save *itself* from libidinal corruption.⁸⁰

It is submitted that no great void would be left were Congress to end postal censorship. The Post Office Department would still have the power to ask the Justice Department to arrest and prosecute those who attempt to use the mails to trade in obscenity. Speedy arrest and bail conditioned upon the cessation of further mail operations should be sufficient to protect the public against commercial pornography. Furthermore, the Post Office Department has another string to its bow. In 1950 Congress enacted what has since come to be called the "mail block" statute.⁹⁰ It provides that upon satisfactory evidence that a person or corporation is engaged in the mailing of obscene matter the Postmaster General may instruct local postmasters to withhold matter directed to such person or corporation and to return the mail to the senders marked "Unlawful." It also forbids postmasters to pay money orders or postal notes drawn to the order of such person or corporation.⁹¹ This is a powerful weapon because it hits the commercial purveyor of obscenity where it hurts him most—in his pocketbook. With the weapons of criminal prosecution and "mail block" at its disposal, there seems little reason why the Post Office should be allowed to resort to the essentially antidemocratic procedure of prior censorship to protect a democratic citizenry.

⁸⁰de Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 LAW & CONTEMP. PROB. 608, 618 (1955).

⁹⁰64 Stat. 451 (1950), 39 U.S.C. § 259(a) (1952).

⁹¹This statute has been construed to "block" only such return mail and payments as are connected with the mailing of nonmailable matter. *Summerfield v. Sunshine Book Co.*, 221 F.2d 42 (D.C. Cir.), *affirming* 128 F. Supp. 564 (D.D.C. 1954), *cert. denied*, 349 U.S. 921 (1955).