Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

THE UNITED STATES, Appellant vs. THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT, Appellees	**Docket No.** 133

Place Washington, D. C.

Date January 20, 1971

ALDERSON REPORTING COMPANY, INC.

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TABLE OF CONTENTS

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THE UNITED STATES, Appellant	
vs	No. 133
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The above-entitled matter came on for argument at 11:10 o'clock a.m., on Wednesday, January 20, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, SOLICITOR GENERAL
of the United States
Department of Justice
Washington, D. C.
On behalf of the Appellant

STANLEY FLEISHMAN, ESQ.
6922 Hollywood Boulevard
Hollywood, California 90028
On behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Number 133: United States against Luros, Claimant, and the 37 Photographs.

Mr. Solicitor General.

ORAL ARGUMENT BY ERWIN N. GRISWOLD,

SOLICITOR GENERAL OF THE UNITED STATES

ON BEHALF OF APPELLANT

MR. GRISWOLD: May it please the Court:

This case comes here on an appeal from the Three-Judge District Court in the Central District of California. The case is a Customs seizure case.

The claimant returned to this country by air on October 24, 1969, arriving in Los Angeles. During Customs inspection the 37 photographs involved here were seized, together with certain other items. All but the photographs have been returned, and only the seizure of the photographs is involved here.

It is stipulated that the photographs were intended to be incorporated into a hard-covered book and I quote from page 16 ofthe record in the stipulation, which book describes candidly a large number of sexual positions.

On October 31 -- I may say the photographs have been lodged with the Clerk of the Court. On October 31, 1969 the District Director of Customs, advised the claimant, Luros,

that the matter had been referred to the United States Attorney for forfeiture action.

On November 4th the Claimant's attorney demanded the return of the photographs. On November 6th, 13 days after the arrival in Los Angeles the United States started this action for forfeiture under Title XIX of the United States Code, Section 1305-A, a statutory provision which is printed at pages 2 to 4 of our brief.

Eight days later the claimant filed an answer and counterclaim, contending that the photographs were not obscene and that the statutory provision was unconstitutional. He moved for a three-judge court because he sought a declaration and an injunction against the enforcement of the statute and an order to convene a three-judge court was entered on November 20, 1969. The hearing was held on January 9, 1970 and the three-judge court's opinion was issued on January 27, 1970.

The Court treated the motion for an injunction as a motion to dismiss and assumed that the pictures are obscene. That issue has never been adjudicated and was directly involved here.

What the court did was to rule that the statute is unconstitutional on its face and as applied. It reached this conclusion by an application or perhaps one can fairly say, by an extension of this Court's decision in Stanley against

Georgia, in 394 US.

Although the claimant had stipulated that he had imported the pictures for commercial use the court held that he had standing to attack the statute on the basis of his application for importation for private use, to which it said the Stanley case applied.

The court also held the statute unconstitutional under Freedman against Maryland, in 380 U.S., because it failed to guarantee that any restraint on allegedly obscene material would be imposed for only a specified brief period prior to judicial resolution of the issue of obscenity.

The first question I wish to present is that with respect to Stanley against Georgia. That case was one as the court observed in the opinion, of first impression. The court wrote a careful opinion which was narrowly limited, but in less than two years it has proliferated in the lower courts far beyond anything that was presaged in this Court's opinion.

From protection to a man in his home it has blossomed out to cover the whole world. That extension is involved in this case, in the Reidel case which is the next on the calendar, and in several other cases which we have found it necessary to bring to the court, and in many others which are pending in the lower courts awaiting this Court's decision.

It's also involved in the case of Byrne against Karalexis, Number 83, which was argued last term and reargued

on November 17th.

Stanley against Georgia is obviously an important case, one that will be discussed for many years to come. It has roots in the Boyd case of 80 years ago and Justice Brandeis's dissent in the Olmstead case, in Justice Harlan's dissent in Poe against Ullman, in Justice Stewart's memorandum in Mapp against Ohio and in this Court's decision in Griswold against Connecticut.

It is not the worst for the fact that its conclusion has never been firmly bound to the text of any particular constitutional provision. That fact may indicate, however, that though sound in result, the verbalization may be subject to further refinement as applied to particular new situations.

In the Stanley opinion itself, the Court seemed to cover a case such as this. It distinguished earlier cases on the ground that they, and I quote: "Deal for the most part with the use of the mails to distribute objectionable material or with some sort of public distribution or dissemination." That appears on page 561 of 394 U.S.

It referred to other cases as dealing, and I quote: "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,"citing prosecution for sale and distribution. That likewise is on page 561.

It referred to this Court's decision in the Roth case as involving,and I quote: "The regulation of commercial distribution of obscene material." That's on pages 562 and 564.

And finally, the Court specifically stated that, and again I quote: "Roth and the cases following that decision are not impaired by today's holding." That's the end of the quotation. This seems clear enough and it seems clearly applicable to the present case, which after all, involves importation, an area traditionally subject to close control by Congress and importation for commercial purposes.

The difficulty arises because of some passages in the opinion which, I think, must be regarded as passing references and not centralto the decision itself. The Court did say that, and I quote: "It is now well-established that the constitution protects the right to receive information and ideas." And a little later on in the same paragraph the Court said that, and I quote: "This right to receive information and ideas, regardless of their social worth, is fundamental to our free society." That is fairly strong language, but even that refers to the recipient and does not assert any such right to distribute.

A little later the Court referred to "the transmission of ideas." But the essence of this Court's decision we submit, is found in its concern for Mr. Stanley. It

referred to a man sitting alone in his house. It referred to his right to satisfy his intellectual and emotional needs in the privacy of his own home. The majority of the Court used some First Amendment language. Other members of the Court preferred to express the conclusion in Fourth Amendment terms.

Perhaps it could fairly be said here that the 14th Amendment would suffice, but it was Mr. Stanley who was protected in the privacy of his own home. It was not the materials; they are still expressly subject to Roth. Indeed, it was only last Thursday in the Mailbox case that the Court reiterated its previous determination that constitutionally protected expression is separated, and that is the word used by the Court in quoting from one of its earlier opinions, "is separated from obscenity."

Mr.Stanley was found to be protected within wide limits within the privacy of his own home. Even on that, however, there, I think, some limits and this may be shown by a case which crossed my desk last week and is before the Court. This is Biddle(?) against the United States, Number 6266 this term, where a man was legally arrested in his own apartment. Remember in Stanley there was a valid search warrant to search the apartment. At the time of his arrest a sawed-off shotgun was in plain view and this was seized by the police. His conviction for possession of an unregistered sawed-off shotgun was affirmed by the Eighth Circuit Court of

Appeals.

Apparently it is not privacy alone which is the test, but privacy in association with ideas, regardless of the character of the ideas. The significant point, I think, is that it is not the material which is protected by Stanley, just as the sawed-off shotgun was not protected in the Biddle case.

It is the man in his house; it was not the obscene film which was the object of this Court's concern; it was the knock on the door, the intrusion on privacy under a warrant which did not in any way refer to the material actually seized. This was, indeed, very closely parallel to the situation in Mapp against Ohio where a similar result was reached: quashing of the conviction, though by a somewhat different route.

As one author has said, quoted on page 13 of our brief: "The privilege recognized in Stanley is, in short, a shield for the private citizen, not a sword for the purveyor. There is, we submit, no right to be let alone in a Customs search at the Nation's borders. At that point a man is not in the privacy of his own home or sitting in his own house, to use the phrases used by the Court in the Stanley opinion. Mr. Stanley was accused of a crime. Here no crime is charged. The procedure is in rem against the merchandise. Congress is exercising its undoubted power to exclude what it deems

noxious to the nation as a whole and this in itself, can claim no First Amendment protection.

Once beyond the Customs barrier, materials cannot be retrieved, no matter how they are used. The importation here was for a commercial purpose, but this Court's decision should not turn on that fact. What is important here was that there is no invasion of privacy; no entry into a man's home in either case.

I now turn to the second question covered in our brief. The Court below did not hold that the statute was unconstitutional with respect to commercial importations; instead it held that it would be unconstitutional if applied to an importation for private use, relying on Stanley --

Q Mr. Solicitor General, before you leave Stanley, have all the lower courts been uniform in giving what you call this expanded view to Stanley?

A All but one, I believe, Mr. Justice. It's very widespread; it's recited at length in the appendices to the brief of the Respondent in this case. I believe there is one case which has narrowed the extension of Stanley. And it has been, from our point of view, a very insidious disease.

The court below held that it would be unconstitutional to apply the statutes in this case when importation for private use, relying on Stanley, and then held that the claimant here could attack the statute on that ground, even though

his importation was avowedly a commercial one.

As I have indicated, we think the Court was wrong in its decision as to importation for private use. I don't think that there is legitimately a difference between importation for commercial or for private use or that the Stanley case so requires. But that question is involved in the United States against 1200 Foot Reels of Film, Number 364 this term, and in United States against Various Articles of Obscene Merchandise, Number 706 this term, which are now pending on jurisdictional statements.

But there is no justification, we submit, for denying the application ofthe statute to an avowed commercial importer merely because there may be a question in another application of the statute. The statute itself has a clear and broad separability clause applicable not only to provisions of the statute, but to application to persons and places and this should be applied here.

It would be improper to strike down the entire statute, we submit, as the court below did, at the behest of one to whom it validly applies.

And fourth, I come to the question arising under Freedman against Maryland and under the recent application of that decision in the Mailbox case of last week --

Q Before you go on to that, Mr. Solicitor General, let me see if I can clarify that last point. Your

statement was that there is no difference in an importation case, ourput it another way: the purpose, the intended use is irrelevant in an importation case. I take it that --

A That is our position although we don't have to sustain that in this particular case.

Q Then the casual tourist coming back with the same material for his private use in his home is not protected by Stanley at least, you argue, because Stanley protected it only when it was in his home?

A When it was in the privacy of his own home, sitting by his own fire. The man's home is his castle idea, it seems to me to be similar to the Stanley decision. However, I point out that that issue was not involved here directly, because this importation was avowedly for commercial purposes.

Q Well, what you are saying is that Stanley isn't an obscenity case at all.

A I am saying that Stanley is not an obscenity case almost at all, but I put in the sawed-off shotgun to show that Stanley wouldn't protect everything in the home, and what it really proves is that Stanley wouldn't protect the material.

Q You'd have to do a lot of editing to get the references to the First Amendment out of Stanley there, wouldn't you?

A Yes, Mr. Justice --

Q What you're doing, is you are embracing the concurring opinion of three Members of the Court who put it on a --

A No, Mr. Justice, I don't think that -- I repeat, there is a lot of First Amendment language in Stanley, but I don't know that the case has been rested on the First Amendment and if so, I don't know the form or the wording in the First Amendment which is applicable to it and which covers it.

It can be rested, it seems to me, only on some sort of a penumbra of the First Amendment, and I find penumbras rather cloudy, I think. It is clear to me, and I am satisfied with the results in Stanley, but it isn't clear to me just what the verbalization is which firmly supports me.

Q Did you say, Mr. Solicitor General, that we have two cases pending on jurisdictional statements that raise the question which would come under the Chief Justice's hypothetical?

A With respect to importations for private purposes. There may be even more than two. I have been trying to hold these off, but when lower courts won't grant injunctions and won't grant stays, and the consequence in our matter is that it is imported and you lose jurisdiction. I have found it necessary to file a number of jurisdictional statements, which I hope can simply be held in abeyance until the issue is

determined.

With respect to the Freedman problem the procedural system involved in this case affords, we submit, the protection which Freedman and its progeny require. The Government bears the burden of proof throughout; not merely the burden of proof, but the burden of taking action. It must secure judicial condemnation of any material it seeks to bar. The periods of time involved are the shortest which are compatible with sound resolution of the question of obscenity. That is shown by the situation in this case where the importation was on October 24, 1969; one week later the matter was referred to the United States Attorney for forfeiture action and to get this Government to move within one week is a remarkable achievement and the claimant was so advised.

And on November 6th, or 13 days after the importation the United States commenced the present action in court. Any further delays have been required by judicial proceedings and have been affected by the fact that the claimant sought a hearing by a three-judge court. If the claimant had been willing simply to go to trial on the issue of obscenity, as a case cited in a footnote in our brief shows, the whole matter could have been disposed of within two to three months at the outside.

Although fixed time limits are not prescribed by the statute, statutory provisions do require customs agents to

report their actions on these matters "immediately," to the Collector. And when the matter is referred to the United States Attorney another statutory provision directs him to start and prosecute the proceedings "forthwith, and without delay." The latter provision is Section 1604 in Title XIX of the U. S. Code.

The only gap in this procedure is with respect to the Collector's transmission of the case to the United States Attorney. This is, however,covered by a Bureau of Customs circular, cited in the footnote to page 26 of our brief, which was developed by the Customs Bureau and the Department of Justice for the purpose of eliminating delays.

Now, that circular provision, it seems to me, is worth looking at; it's the footnote on page 26. It provides that the first examination shall be made "as soon as possible" after it's available for Customs examination.

If the first examining officer concludes that it is something that should be looked into it shall be reviewed by the District Director or his delegate "no later than the following business day."

If at any review the material is determined not to be obscene, it shall be released. If at any review the material is determined to be obscene and is sent to forfeiture, shall be solicited "forthwith." If assent is not forthcoming "within one week" or if dissent is declined, the material

shall be referred to the United States Attorney immediately; and if it is felt that the material is probably obscene, that there is no clear precedent for the determination, the material shall immediately be forwarded for review by the Bureau by the most expeditious means.

This procedure worked well in this case, both administratively and judicially. Moreover, the materials here have a sort of timeless quality. They are not like news or even like a current motion picture film. I have no doubt that they have commercial value if they can be used commercially and I do not think that value can be said to be lessened by the lapse of time.

There will no doubt always be audiences for such items, as there were in Greece and in Pompeii. I do not say this to excuse delay because I do not think there was, in fact, inappropriate delay in this case or any delay that is held invalid by the Freedman case. It is simply that I think that the time pressures on these facts may well be less than they would be in some other case not now before the Court.

The period here was, we submit, completely consistent with prompt, yet responsible administrative and judicial proceedings on the issue of the obscenity of the materials seized.

And for these reasons, and because Stanley against Georgia does not apply to this case, where no privacy of the

home is involved and because the importation here was commercial and the claimant should not be allowed to assert any defect in the statute if there is none in its application to importation for private use, and because the requirements of Freedman against Maryland were met here, the judgment below should be reversed.

Q May I ask, Mr. Solicitor General: under this circular, the review for obscenity, I gather is simply an ex parte unilateral sort of thing; isn't it?

A This is an administrative within the --

Q Then it's nothing like the administrative review we dealt with in --

A Nothing like that at all, and it was solely for the purpose of making the necessary and appropriate administrative determinations as to whether the matter shall be referred to the United States Attorney for starting judicial proceedings forthwith.

There is no more binding determination of any sort within the Treasury except that the matter shall be forwarded to the U. S. Attorney.

Q I suppose the obscenity of these books, of these pictures is not involved in this posture of the case?

A No, Mr. Justice; the obscenity has not been passed on by the lower court and it is not involved here.

Q If you prevail in this case it goes back --

A It goes back to the trial court, presumably a one-judge District Court then for determination of that issue, as it was done in another case which is cited in one of the footnotes in our brief.

MR. CHIEF JUSTICE BURGER: Mr. Fleishman, you may proceed whenever you are ready.

ORAL ARGUMENT BY STANLEY FLEISHMAN, ESQ.

ON BEHALF OF RESPONDENTS

MR. FLEISHMAN: Mr. Chief Justice, and may it please the Court:

This case arose when Mr. Luros was returning from Europe. He had in his luggage the 37 photographs involved in this case. He also had the two art books: one of Rollinson's and one of Peter Fande and he also had a girlie magazine.

The Customs Inspector made his snap judgment and found all of these items to be obscene. After we entered in in the case, the Government did, as the Solicitor General said, did return everything except the 37 photographs.

It was stipulated that the photographs were intended to be used in the Kama Sutra, a book which the Customs used to think was obscene, but no longer believes to be obscene. We called to the attention of Customs at the time our letter that the use of the book would be private in the sense that it was to be distributed only to consenting adults under such circumstances that it would not offend the general public.

This was not to be distributed broadside.

Q How was that to be accomplished?

A Well, it can be accomplished by inviting people who are interested in buying an illustrated Kama Sutra to write in and say that they would like to purchase such a book and to have adequate safeguards that the person is an adult. Under those circumstances it's a private person who privately elects to read a book, illustrated.

Q The certification that you speak of, the protection is that the purchaser must certify that he's 21 or over?

A An adult. It differs. Of course, that's not in the case, although what's in the case is our letter to Customs and our pleadings.

Q I was just relating that to Justice Stewart's question to you, when you called it protection.

A Well, Your Honor, one can protect in a lot of ways. I have clients who require adults to send in a statement with some kind of proof as to their age. Some clients require, for example, that they send in a copy of their driver's license so that there are ways where you can assure yourself that it will, in fact, be to consenting adults only.

The point that I'm making is that this case really is a privacy case in the same sense, if you will, that it was privacy in Mr. Stanley's situation.

Q Well, where is that in the stipulation or anywhere else in the record?

A Page 19, Your Honor; there is a copy of my letter and it states that it was to be distributed in the fashion that I indicated.

Q I know, but that's just --

A The material is not being imported for distribution to minors nor is it to be thrust upon unwilling users. And it is spelled out a little bit more fully in our answer to the complaint and our cross-complaint, which also sets forth the intention.

Q WEll, that's the pleading and that's the letter from counsel one of the parties. There is nothing in the stipulation --

A Well, the letter was part of the stipulation; yes. That was attached to the stipulation and --

Q As an exhibit or was it incorporated on the basis that all the allegations were true?

A Well, this is Appendix C, Your Honor, to the stipulation. The stipulation said that I wrote this letter and that this was the contents.

Q All right.

A So as we come now to this case, it's stipulated that Customs was told that this was the intended purpose of this distribution.

Now, the case, Your Honors, is not the case, as set forth in the Government's brief of the power to regulate customs and foreign trade. We concede that, of course; Government does have a broad power to exclude materials. All we say is that Government in this area, as in all areas, is circumscribed by the First Amendment and that it may not pass a shotgun law, such as the Customs law here which prohibits an adult from bringing in material which satisfies his emotional needs or satisfies some informational needs that he might have; nor does it permit, we submit, the Government to keep such materials from circulating under the controlled circumstances that we have here.

The Government's argument really comes down to this: the Government states that Roth held in the first instance, that obscenity was outside of the protection of the First Amendment, and then he said nothing else has happened since Roth, as if there hadn't been really dozens and dozens of cases with refinements and nuances and cutbacks, as if nothing had happened since Roth. They mechanically argue that obscenity is outside the protection of the First Amendment and can be handled exactly as any other merchandise. That is the burden of the Government's argument.

The Solicitor General here, interestingly, calls to our attention the Biddle case, which seems to me to show what is obvious: that a book or other manner of communication

cannot be treated and never has been treated by this Court the same as shotguns or gambling devices or the like.

I would like to spend, if I may, a moment in terms of Roth and what has happened since Roth, because I think that we cannot fairly evaluate Stanley without such a background. And I would agree completely with the Solicitor General that Stanley is a very important case and a case which will be looked at for many years to come.

As I stated, in my --

Q Do you mean that in the sense that it's important in its impact in the obscenity, per se?

A Yes; important in an obscenity case.

Q I don't think that's what the Solicitor General said; at least I didn't hear him say that that was an important case in obscenity.

A Well, I believe he was suggesting that it was an important case in that it would be debated for a long period of time. I think it will be discussed for a long period of time and I think that just as the lower courts have embraced it as holding, essentially, that consenting adults have the right to read what they want to, that it will be important for that reason, too.

Q Would you limit that to: he has a right to read what he wants in his own boudoir alone?

A No, I would not --

Q Well, what else is in Stanley other than that? This is a bachelor; only one person in the home.

A That's --

Q And it was found in the desk drawer of his bedroom.

A It was; it was, Your Honor. But, I would submit, in all deference, Mr. Justice Marshall, that just as a bachelor can get some information and can satisfy some of his emotional needs by viewing such a film, a married person may also get it, and I suspect that Stanley is not limited to bachelors reading or viewing such material.

The Government in Byrne, initially stated thatit was not only in the privacy of one's home, but also in an office. That's what Byrne says. When the Government wrote Byrne they said it was the privacy of a home and office.

Well, I would suspect that a person could take a book and go to the park and get whatever information or emotional satisfaction there, just as well. The crucial point, as I read, and read Stanley, is that Government does have legitimate interests and those will be protected completely, but that those legitimate interests are narrow. One of those legitimate interests is not ever to tell adults what they should read or what they should see and it doesn't matter whether they see it in a private boudoir; if they see it in their friends' homes; if they see it in their office; the

important thing is that it's not thrust upon an unwilling audience and that we have an adequate protection to see that the material is not distributed to minors.

And those are, we submit, the synthesis of all that has happened since Roth. Now, at the time of Roth, the Court was faced really with choices that the Court is always faced with. There were three arguments that were being put forward and I was here then and I was making an absolutist argument. I was saying that obscenity was absolutely protected.

There was before the House the old Hicklin argument that obscenity had a very broad reach in terms of minors or portions of a book condemned the whole world. And what the Court did, it seems to me was to strike a balance and I must say in retrospect the balance was one that, although I didn't agree with it then, as I look back, it has a logic to it.

The balance that was struck was to try and get at the legitimate interests of society in this whole area and there was an enormous amount of protection given to such material in the Roth case even as the Court said that obscenity was outside of the protection of the First Amendment. And almost everything that this Court has done since Roth, with a few unhappy exceptions, but almost everything that has been done since then has been to furthermore narrow the reach of

the obscenity laws and secondly to expand and, and -- to expand the First Amendment protection afforded to sex material.

Cases came down procedurally; searches and seizures were narrowly cut back so that a lot of material would not be suppressed under Roth. The scienter requirement was found necessary in Smith. In case after case this Court has said that this person or that person, this organization or that organization is not a fit party to determine what is and what is not obscene. Until finally in Rowan the Court came down and really said; yes, you are entitled to have censorship but it's censorship by 200 million people; each person is his own censor and responsible to himself and we don't need postal inspectors or Customs inspectors or district attorneys or police officers to make this determination.

The truth of the matter is that this Court has said even that, or suggested -- now, I know that Mr. Justice Brennan suggested in the earlier case: the Kingley Book case, that a judge without a jury wasn't qualified. There was a thought they would need juries; and yet we see with many jury cases coming up that the juries also are not able to make this sensitive judgment, so jury verdicts have been overturned by this Court, which was necessary then, of course, to act as a supercensor to everybody's discomfort and so this Court has been attempting, I submit, and properly, to extricate itself

from having to sit as a board of supercensors.

And what has come down out of all this, it seems to me, is to get away from this business of reading a book and looking at a movie and saying: this is good or this is bad. It's futile and I think in that sense that the Stanley opinion really synthesizes all the legitimate interests and says a number of things: first of all it says that Government simply has no business telling people what to read or view. All of the traditional arguments are no good: protect his morality -- that's his business; Government shouldn't protect the morality of individuals. Anti-social conduct: no proof of that at all, and besides when the conduct appears it's time enough to act.

In short, the Court seems to have said -- now, let's get to it, and what is it that we're concerned with? We're concerned with minors. We have said so in the Ginzburg against New York Times. Minors can be protected. We're concerned with thrusting it upon unwilling audiences because the truth of the matter is that for many people to have strong, explicit sexual materials thrust upon them is very offensive; not too unlike, perhaps, the analogy in Chaplinsky, which is thrusting and has some kind of a physical,emotional reaction.

But, beyond that, to say that Government has the right to tell adults that they ought not to read this because

they may become aroused sexually or because they may have some fantasies. We know not that that was a futile task which really bred a great deal of lawlessness. It bred a great deal of lawlessness below because the standards were always impossibly vague and there was always an enormous amount of hypocrisy.

And so it was that after some 14 years of dealing with Roth and with a number of suggestions as to where wewere going. Mr. Justice Brennan in Jacobellis suggested back in 1964 that perhaps it would be wiser and better if the states were to pinpoint there legislation at minors, when then seemed to be the major concern of society.

Then in the Ginzburg case, Ralph Ginzburg, another legitimate state interest, governmental interest emerged, and that was the business of thrusting it upon an unwilling audience. And then finally in the Sam Ginzburg case the Court said that minors could have a different standard.

So that this Court, before Stanley, had carved out, it seems to me, and had suggested most of it in Redrup, had carved out legitimate state interests and had said that here the Government has a legitimate concern and the other side of the coin, we submit, is that beyond that there is no legitimate concern.

And that I believe is where Rowan also seems to have a relevance to this, because Rowan -- it's not mentioned

by the Government at allhere, but Rowan also has these two sides. Rowan says that if a person doesn't want something to cross the threshold of his home by mail, he can say no to that; that has the broadest power in saying no.

Q Well, did the Court say that or did the Court merely indicate and hold that Congress could permissibly pass such a statute?

A Well, the Court foresaw that Congress might permissibly pass a statute, but the opinion said that the right of a mailer to send into a home ends at that point where the mailer says no. Beyond that it has a right to communicate --

Q The point I am making is: the Court didn't invent that concept; Congress did. The Court said it didn't violate the constitution.

A Although, in all fairness, I think the Court did kind of invent it in Ginzberg, which preceded the legislation that was somewhat comparable. But, of course, it's true that Section 4009 was enacted by Congress and this Court merely said that that was a permissible exercise of the rights.

Now, it's within this framework, as I say, that we come to Stanley and the Solicitor General says he doesn't know what provision of the First Amendment is applicable. Over andover again the Court said it was the First Amendment

and we're dealing with pure speech. We're really dealing with pure speech; we're talking about the right of a person to just read. It's got nothing to do with any of the conduct cases in any way. We're not talking about anything that's peripheral. We're saying that the Court has said that a man has a right to satisfy his curiosity; to get information and special material by reading what is explicit, as explicit as it can be.

So that I don't see how the opinion really could have been any clearer that it was bottomed on the First Amendment. The entire argument about the right to receive information and ideas, the Court wasn't talking abstractly, I suppose. They were talking within the framework of Stanley. Stanley had a film which was explicitly sexual and the Court said he had the right to possess it; he had the right to view it and he had the right to receive it. All of that is traditional, clean First Amendment arguments.

So that the attempt of the Government now to bootleg in a Fourth Amendment argument is really, as has been suggested before, an attempt on the part of the Solicitor General to make the concurrent opinion the majority opinion. It was before the Court. Mr. Justice Stewart wanted to go off on the search and seizure, privacy aspect, but the Court didn't. The Court went off absolutely on the First Amendment. The text which precedes footnote 11 of the opinion states that

this case is decided under the First and 14th Amendments and then the footnote points out the kind of illustration that the Solicitor General gave and that is: Mr. Justice Marshall said that does not mean that a person has the right of privacy in his home to have such things as sawed-off shotguns or dope or other things, but he does have a right under the First Amendment to have books and films because they are protected expressions.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fleishman.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was recessed to be resumed at 1:00 o'clock p.m. this day)

NHAM

1:00 o'clock p.m.

MR. CHIEF JUSTICE BURGER: Mr. Fleishman, you may proceed.

ORAL ARGUMENT (Continued) BY STANLEY FLEISHMAN, ESQ.

ON BEHALF OF APPELLEES

MR. FLEISHMAN: Mr. Chief Justice.

Comment was made earlier of the fact that most of the lower courts considering Stanley have concluded that it has the meaning that we attribute to it here. And I believe there is good reason for that. I believe, truly, that Stanley as we interpret it, represents an idea whose time has come. Virtually every one of the thoughts expressed in Stanley have found reflection in the Lockhart Commission Report, which was a study, as Your Honors know, of some two years.

For example, in Stanley it was stated that there was no evidence that the reading or viewing of obscene material had any anti-social effect. That's exactly what the Commission concluded. The Commission stated:Emperical investigation supports the opinion of a substantial majority of persons professionally engaged in the subject, that exposure to sexually explicit materials has no harmful cause or role.

They go on to say that it appears to be a usual and harmless part of the process of growing up in our society and a frequent and nondamaging occurrence among adults. The Commission Report also stated that this material, this explicit

material which was felt to be totally valueless; in fact, does have a great deal of value that many persons find that they are benefited by having exposure to this material.

I suspect that this was part of what was meant in Stanley when the Court said that Mr. Stanley had the right to satisfy his emotional and his intellectual needs by viewing this motion picture film which was plainly, extraordinarily explicit.

The Commission also found that a majority of people in this country believe that adults ought to be able to read and review this material, this explicit material if they so choose.

The Commission also found that a majority of the people believe that minors ought not be exposed to such material. The Commission addressed itself to the question of morality, which has been discussed here, and also came up with the conclusion and with some arguments I think are persuasive, that historically and consistent with the First Amendment there simply is no power in government to try and control the morality of individuals or society by reason of what goes into their heads as opposed to the conduct of persons.

The argument has been made here in the brief and by the Solicitor General, that you have to have a stopping of this material at the border because otherwise you don't know

how the material will be used. That's exactly the argument that the state made in the Georgia case. Georgia argued that if the state was powerless to get the materials while it was at the home, then there would be difficulty of law enforcement and this Court said that has never been thought to be a sufficient reason to interfere with the great rights that were being asserted in Stanley. And those great rights, again, were the rights to satisfy an intellectual and an emotional need of the individual.

Now, there is the statute an interesting provision which I believe also supports the argument we are making here although the Government has sought to use it somewhat differently. The provision I have reference to is the so-called "discretionary" clause. There is in this Customs law a provision which says that the Secretary of the Treasury, in his absolute discretion, can permit the so-called classics to be brought into this country if they are brought in for non-commercial purposes. There is no limits on the discretion. that can be exercised.

Now, the Government argues: of course that provision doesn't mean anything now because under the opinions of this Court if the obscenity is a classic it has redeeming social value and therefore is protected so there is no need for the exception.

Q If it's a what?

A If it's a classic. There is a provision in the statute which says that classical obscenity may be brought in. That is to say: if it's obscene for an intellectual it's all right, but if it's obscene for a truck driver, presumably it's not.

Q That's in the statute?

A The statute says that the Secretary of the Treasury may permit obscene classics to be brought in for --

Q Does it give a definition of a classic?

A It does not; it does not. And the way it's been applied really, has been strictly on a class basis, Mr. Justice Black. That is to say if the Secretary of the Treasury and his friends think it's good then it can be brought in, but if it's below their intellectual standards then presumably it's not a classic and it may not be brought in.

Q Don't you think you could have a little more precise definition of a classic than that in the abstract?

A Not really the way it's been applied by the Secretary of the Treasury.

Q Perhaps not for a criminal statute, but I think -- don't you think it could be a little bit less expansive than you have contested?

A Perhaps; perhaps this was broad argument, Mr. Chief Justice.

The argument has been made by the Solicitor General

that the Appellee here does not have standing to attack the statute on its face, because as he quite properly points out, we did stipulate that the material was to be used commercially under the limitations that we have spoken about.

The Solicitor General doesn't deny the general rule that whether the statute would affect First Amendment rights that you don't have to show that the particular conduct is covered by the person who raises the fact that the statute is unconstitutionally broad because of its possible chilling effect upon freedom of speech, but the Solicitor General says that there is an additional requirement: the statute must not only be overbroad but it must be vague, and he says this fact, of course, is a model of clarity and there is no vagueness in this customs law.

Now, I submit that if we do have to have both overbreadth and vagueness, we have overbreadth and we do have vagueness. I doubt that there is a Federal statute that is more vague than the obscenity statute, plus the fact that the line that the Government suggests, is a line between commercial and noncommercial, without any attempts to refine how that might be applied. For example: there are cases which say that it's really not commercial if a person just charges what it cost him, for example. One would look at that as possibly commercial or possibly not commercial.

The truth of the matter is that the obscenity --

this customs obscenity law is vague, rather than being overbroad, and that the Appellee does, in fact, have the standing to challenge it and that the court below was quite proper in stating that if there is any way that the statute could be applied in violation of constitutional rights then it should be stricken down.

I hasten to add that we also contended below and we contend here that the court below should have reached the other view, also: that it was not only unconstitutional for the reason given, that it would interfere with the right of consenting adults to import obscene material, but it was also unconstitutional, we contend, because it interfered with the specific conduct that Appellee was talking about; that is to say, to put the pictures into a hard cover book for distribution to consenting adults only. That, we believe is the correct construction, the limitations, rather than Congress has and that the -- any statute that went beyond that would be unconstitutional.

So that it is our position that the court below was plainly right on the ground that it decided the case and that it was also an order to go beyond that. I think my time is up and I can only say that the point of procedure in the Freedman versus Maryland, the vice that this Court found in the Mailbox case with regard to time, is equally applicable in this case.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you have about three minutes left.

REBUTTAL ARGUMENT BY ERWIN N. GRISWOLD,
SOLICITOR GENERAL OF THE UNITED STATES
ON BEHALF OF APPELLANT

MR. GRISWOLD: In the time I have available I want to make only two points. First, in my principal argument I said that I was not aware of any cases which had taken our view with respect to Stanley. On that I was wrong; I think it is a mechanic of the Solicitor General's office that I see the cases we lose and don't see the cases we win.

There are, in fact, three decisions of Courts of Appeals, all of which I think can be distinguished somewhat on their facts. One of them is a clear case of pandering and another could be said to be pandering, but the First Circuit, the Fifth Circuit and the Ninth Circuit have all held that Stanley should not be enlarged, and with the Court's permission I will submit a memorandum to the Clerk which gives the citations in these cases. I would like only to read in Judge Soboloff's opinion in United States against Melvin in 419 U.S.:

"The case of Stanley against Georgia, decided this year and relied upon by the Appellant is not to the contrary. There the Supreme Court merely struck down the statute as unconstitutional insofar as it made criminal the mere private

possession of obscene material in one's own home. The decision did not deal with Congressional power to regulate interstate transportation of obscene material by common carrier."

And then finally there is a three-judge District Court decision in --

Q Was that a Customs case?

A No; that happens to be a transport by common carrier case, which is like the next case we are going to present to the Court, which is Mailer, but I think the principle of the extent of Stanley is exactly parallel in all of them.

Q You have got the citations in the three cases?

A Yes, Mr. Justice. The United States against Melvin, the one to which I just referred: 419 Fed 2d, 136, a Fourth Circuit decision; Fragus against the United States, 428 Fed 2d; 1211, a Fifth Circuit decision and plainly involving pandering; and Miller against the United States, 431 Fed 2d, 655, a Ninth Circuit decision.

And then I would like to refer to the decision of the three-judge District Court in Georgia: Gable against Jenkins, 309 Fed Supp. 998, which also took a narrower a non-expansive view of Stanley. It was appealed to this Court and this Court affirmed the decision below per curiam in 397 U.S. 205. And that should surely have been cited in our brief.

I would like only to say in conclusion that I think there is a verbal explanation for these words in the Stanley opinion which have caused us trouble. The Court in Stanley said, it spoke twice of the right to receive information or ideas, but in the Roth decision the Court said that obscenity is not ideas or information and so that language in Stanley may have been very carefully chosen to exlud- the right to receive obscenity.

It's true that in the Stanley case the Court said--

Q May I have that citation? I didn't quite catch it. The affirmance here in 397?

A The affirmance, Mr. Justice, is in 397 U.S. 205.

Q I thank you.

A Two Members of the Court thought that probable jurisdiction should be noted, but the Court affirmed the decision.

Q Thank you.

A In the Stanley case it is true that the Court said it would not decide whether the movies in Stanley had ideational content; that is: constituted information and ideas, under the facts of that case because of the risk of Stanley's First Amendment rights inherent in that inquiry.

But that again returns one to Stanley's right not to have his thoughts pried into. We need not concede, and do

not, that the right to receive information and ideas referred to in the Stanley opinion included the films there involved.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. Thank you, Mr. Fleishman. The case is submitted.

(Whereupon, at 1:15 o'clock p.m. the argument in the above-entitled matter was concluded)