In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE JOSEPH ORITO,

Appellee.

No. 70-69

Washington, D. C.
November 7, 1972

Pages 1 thru 32

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UNITED STATES OF AMERICA, Appellant,	:	
v.	:	No. 70-69
GEORGE JOSEPH ORITO, Appellee.	:	

Washington, D. C.,

Tuesday, November 7, 1972.

The above-entitled matter came on for argument at 11:51 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; for the Appellant.

JAMES M. SHELLOW, ESQ., Shellow & Shellow, 222 E. Mason Street, Milwaukee, Wisconsin 53202; for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-69, United States against Orito.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is in some ways like the one just argued, and in some ways different. It is a prosecution under section 1462 of Title 18 of the United States Code, which would have been applicable in the prior case, because it makes it a crime to bring into the United States obscene material, but it is also applicable to any person who knowingly uses any express company or other common carrier for carriage in interstate or foreign commerce of any obscene, lewd, lascivious, and so on, book or other material.

This case started with an indictment, which appears on page 1 of the Appendix, involving a charge that a substantial amount, 68 reels of 8 mm color films, two 16 mm negatives, three 16 mm black and white films, and a number of other items were caused to be transported and carried in interstate commerce from San Francisco to Milwaukee by Trans-World Airlines and North Central Airlines.

There was then a motion to dismiss, and that motion

appears on page 3. This case has been thought to involve the same question as the previous case, namely, whether that statute can constitutionally apply to a private transportation.

But I would like to suggest to the Court that that question is not really here, and that the question which is here is one which was decided by six or seven members of the Court in 37 Photographs.

For the motion to dismiss, on page 3, "Comes now the defendant in the above-entitled action ... respectfully moves this Court for the entry of an order dismissing this indictment on the grounds that Section 1462 of Title 18 is unconstitutional" and then skipping a few lines, "defendant respectfully asserts that regardless of whether the transportation is for the purpose of commercial distribution or for the personal possession and enjoyment of the transporter, this statute violates rights guaranteed by the First and the Ninth Amendments."

And then at the bottom of page 3, six lines from the bottom, having dealt previously with the private transportation: "On the other hand, should this statute be construed to impose criminal sanctions only upon those who utilize interstate commerce for the purpose of the commercial distribution of obscene material, then this statute denies to the defendant the right to sell and distribute obscene material which is predicated upon the correlative right of an

intended recipient to purchase and enjoy this material."

Thus it seems to me quite clear that this case involves exactly the same questions as those in 37 Photographs, two questions: First, is the statute unconstitutional because it might apply to private importation? And the Court, in 37 Photographs, held that the statute should not be so construed, and that even though it might be invalid as applied to private importation in that case, that it would be valid as applied to commercial importation.

The result of the decision below is to deprive the United States of its opportunity to prove that this was a commercial transportation and not a private transportation. If it was a commercial transportation, United States v. 37 Photographs is clear authority for the constitutional validity of the statute.

QUESTION: Well, then, you're suggesting, Mr. Solicitor General, that we could not hold private use, in the preceding case, protected without making the situation you've just described?

MR. GRISWOLD: No, Mr. Chief Justice, the question which we argued in the last case is there. I have little more that I can say about that. All I'm saying is that that question isn't here. That question is not presented by this record.

QUESTION: This district judge struck down the

statute on its face, did he not?

MR. GRISWOLD: This judge cut down the statute on its face, held that it was unconstitutional entirely, and I think that is demonstrably wrong, because I think the Court has decided that it is constitutional, as applied to a commercial transportation in 37 Photographs, and I think that the Court has decided that, even though it might be unconstitutional as applied to a private transportation, that is not a sufficient basis for holding the entire statute unconstitutional on its face.

And in this connection I would point out two other decisions. The very district judge below who decided this case has subsequently decided, in effect, that his decision was wrong. Since this Court decided 37 Photographs, he has sustained a prosecution under this statute in United States v. Zacher, 332 Fed Supp 883.

Now, there was confusion at the earlier argument, where my associate, Mr. Greenawald, said 833, and the case couldn't be found; but it exists. It is 332 Fed Supp 883.

And also, at the same time that the case was coming through the Wisconsin court, there was another case in which the same defendant, George Joseph Orito, was convicted under the same statute in the United States District Court for the Central District of California. That conviction was affirmed, it being a commercial dissemination, and this Court

denied certiorari in 402 US 987, almost contemporaneously with the decisions in Reidel and 37 Photographs.

And so, this is my argument in this case, that the question involved in the previous case, 200 Reels of Film, is not in this case, is not properly before the Court, and that the only questions which are in this case have already been squarely decided by a clear majority of the Court in 37 Photographs.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

MR. GRISWOLD: Mr. Chief Justice, as I have already indicated, I do not think that the question of private use of pornographic or obscene materials is involved in this case, and I would rather hesitate to hazard that, shall we say, ultimate issue on this particular case.

I would like to observe, however, that even at best this is not a very private situation. The indictment here charges the shipping of a substantial quantity of material by air express, not personal luggage, not accompanying the traveler, but the transportation over a distance of some 2,000 miles within the United States.

If that is personal, then the underlying foundation of Stanley, which I take it to be thought control -- and I dislike thought control -- but it can be a kind of a shibboleth which serves to stifle further thought. If that is private, then Stanley, it seems to me, has little or no limitation.

And in that connection I would like to refer to another case, which was once before this Court, this is B. & H. Distributing Corporation, United States v. B. & H. Distributing Corporation, which was where an indictment was dismissed by the United States District Court for the Western District of Wisconsin, Judge Doyle in that case, Judge Gordon here.

The United States took an appeal, and this Court, on June 21, 1971, in 403 US 927, vacated the judgment and remanded it for consideration, for reconsideration in the light of this Court's decisions in United States v. Reidel and United States v. 37 Photographs.

Now, in Judge Doyle's first opinion in that case, he drew the distinction between private and public, he didn't make it between private and commercial. But he drew it between private and public, and he said: If the terms are employed, then public uses or conduct must be defined as those which are in conflict with the goal or interest of protecting children from exposure to obscenity, or with the goal or interest of preventing assaults on the sensibilities of an unwilling adult public. Private uses or conduct must be defined as those which are not so in conflict.

Now, that, you see, extends the private conception to everything except children and non-consenting adults; that seems to me to have no proper foundation in the concern about thought control which underlies Stanley.

I would point out that the decision that commercial distribution may be made criminal has a thought control element, because if the material is more difficult to obtain through commercial distribution, it becomes harder for these ideas, such as they are, to be communicated and thought about by individuals.

Now, this B. & H. case went back to the Western District of Wisconsin. The Court has again dismissed the indictment, relying on Stanley v. Georgia, and I have authorized the taking of a further appeal to this Court, not only because of the issue but because I feel a considerable obligation to lay before this Court any decision in which a court holds an Act of Congress to be unconstitutional.

It seems to me that if an Act of Congress is unconstitutional, it ought to be by decision of this Court, with full respect, of course, to the lower courts which must develop the cases for presentation here.

But --

QUESTION: I take it, Mr. Solicitor General, that that case does present the defect aspect of it?

MR. GRISWOLD: In this sense, Mr. Justice, that --

QUESTION: The same sense as this case?

MR.GRISWOLD: No. In the sense that it is private unless it involves children or non-consenting adults, which I think sometimes is put under the head of pandering.

QUESTION: No, really what I was trying to get at was whether that case, like this, has the defect that you see in this one, of this one really involving commercial.

MR. GRISWOLD: That I cannot --

QUESTION: I see.

MR. GRISWOLD: -- tell you, Mr. Justice. We do not

concede in that case that it was private.

QUESTION: Yes.

MR. GRISWOLD: What I am using the case to illustrate is that if you draw that line between private and commercial, item 1, it is a far from clear line, item 2, like so many ideas which have a tendency to expand, the private motion is already expanding in lower court decisions, and would apparently take over everything except pandering.

Now, I look at the --

QUESTION: Before you proceed, Mr. Solicitor General, looking just at the face of the indictment in the Appendix in the present case, is it clear to you -- it certainly isn't to me, offhand -- that this involved air express. It says that the defendant did knowingly transport and carry in interstate commerce from San Francisco to Milwaukee, and so on, these materials by common carrier, that is Trans-World Airlines and North Central Airlines; and I would suppose that those words could be even more readily read as that he took them with him on his own trip.

MR. GRISWOLD: I think you may be right, Mr. Justice. Sometimes it's not easy to separate what's in the record from what one --

QUESTION: So all we have in the record, I think, is the --

MR. GRISWOLD: I think all we have in the record is

that he did transport by means of a common carrier.

QUESTION: "Transport and carry". "Carry".

MR. GRISWOLD: Yes. That's because the statute says "transport and carry", I believe.

QUESTION: Yes.

MR. GRISWOLD: I would suggest that it's quite a lot of stuff to take along with you, 68 reels of --

QUESTION: Well, there's unlimited weight these days on domestic airlines.

MR. GRISWOLD: I'm sorry, Mr. Justice?

QUESTION: Well, one can carry a good deal on domestic airlines these days.

MR. GRISWOLD: Yes. I agree that the indictment is --

QUESTION: Anyway, it's not clear that this was a shipment. Yes.

MR. GRISWOLD: It is not clear that this was an ordinary shipment.

I read the First Amendment, of course, with great respect and, indeed, gratitude. I have been in places where there is nothing like the First Amendment, and I know the feeling that can be engendered in people who are subject to such a regime. But no matter how much I read it, I don't find anything in it about commercial or private; I don't find anything in it about children, non-consenting adults, or pandering. To the extent that these terms have come into

the discussion of these problems, they are obviously used to define or describe concepts or ideas which are derived out of the First Amendment in some way or another.

Obviously, the First Amendment cannot be limited to the precise words. One can speak by raising his finger or by shaking his head. It is not limited to actuation of the vocal chords.

On the other hand, there is very real room to question how far the expansion of the Amendment should be carried, how far matters of this sort should be left to legislative judgment when they do not involve any direct violation of anything which is contained in the Amendment.

And I mention these ideas about children and non-consenting adults, and private and commercial, to show how far the conception has expanded.

QUESTION: Actually, the New York Times is commercial; the Washington Post is commercial; the Christian Science Monitor is commercial.

MR. GRISWOLD: Yes, Mr. Justice, I argued that in the previous case. I don't think that the distinction between private and commercial can find any support in the Amendment. I can see some reasons, when one thinks in terms of thought control, but I don't find anything in the First Amendment that says anything about thought control.

If one thinks in terms of thought control, then I

think he can focus in on the man's library in his own home. It was extraordinarily unfortunate that those Georgia officials, who had power to, under a search warrant, to seize gambling equipment, took it upon themselves to take materials out of the man's private library and thereby create a case which came to this Court. And I have great sympathy with the conclusion which was reached, that it was not appropriate for them to prosecute him for the mere possession of materials in his own library, though I would have put it on Fourth Amendment grounds rather than on First Amendment grounds.

I suggest, to say that that establishes a doctrine that the First Amendment prevents thought control and therefore this right of privacy must be extended to a man no matter where he is, no matter what he does, to his luggage, to his importations into the United States, is to erect a very large structure on a very narrow base.

QUESTION: But if you put the standard on the Fourth Amendment, then, concededly, they could get a search warrant and seize it?

MR. GRISWOLD: Yes. Yes, I suppose you could. And that, it seems to me, might conceivably involve a question under the Fourth Amendment, which allows only reasonable searches and seizures, and a search for printed material, a man's diary for example, in the privacy of his own home might well be established by decisions of this Court. The Boyd case

approaches it, it doesn't quite get there, long ago, as being beyond the scope of a reasonable search and seizure.

Thus, if this case does involve any question of the applicability of the First Amendment to private possession of obscene material, we would make the same argument here that we made in the previous case, that there is no appropriate basis for construing the First or, shall I say, expanding the First Amendment to make it applicable here, and that the decision below should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Shellow.

ORAL ARGUMENT OF JAMES M. SHELLOW, ESQ.,

ON BEHALF OF THE APPELLEE

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

Let me at the outset correct, if I may, a few impressions that may have been left with this Court by the Solicitor.

The opinion of Judge Doyle in B. & H. Distributing Company, rendered on September 14, 1972, after remand by this Court, held only one thing, and that is, it held that Section 1462 is overbroad. It did not have anything whatsoever to do with children, it had nothing whatsoever to do with non-consenting adults, it had nothing whatsoever to do with pandering. It merely held that Section 1462, as enacted, can be applied to constitutionally protected activity; and, for

this reason, is overbroad and is therefore void.

Secondly, -- incidentally, Judge Doyle, in that opinion, assumed for the purposes of that opinion that the defendants in that case were engaged in the commercial distribution of obscenity, and he assumed that on the basis of the fact, among other things, that a large number of magazines were involved, that it was not -- it was transportation by an express company and, further, that one of the defendants was the B. & H. Book Distributing Company. And he figured that it was a reasonable assumption that it was a commercial venture.

Second of all, the Zacher case, which has been alluded to by the Solicitor, is the companion case to Orito. Zacher and Orito, while charged in different indictments, were charged with the same transportation. And so the record in Zacher flushes out the facts that are of course absent here, for we are here on an indictment and its dismissal only.

And in that, in the hearings in Zacher, it is quite clear that Mr. Justice Stewart's inference is quite correct, and that is, that the luggage was with him. This was personal hand luggage, carried on an airplane in the cargo compartment.

So, with those two matters out of the way, I can address what I conceive to be as the logic of our position.

We approach the Court and ask the Court to look at

Stanley, and if Stanley means anything it means that in our society today a person can read what he wants, can look at what he wants, can enjoy the kind of material he wants to enjoy, regardless of whether it has social value or not; that the private consumption of ideas is beyond the criminal sanctions of the Federal Government and beyond the criminal sanctions of any State, including Georgia.

The question then arises, does it really make any difference whether I am reading the obscene magazine in my home or whether I am reading it on an airplane, or whether I am taking it from my home to my summer home on an airplane or in a train, and we assert it clearly does not.

That the statute, by its terms, explicitly applies to the kind of reading to which I referred. It refers to persons who carry obscene material by common carrier. There is no exception; there is no exclusion. The statute, as it is written, is overbroad and I think the question is: What do we do now?

I think, in its last argument, the last time we were here, and again today the Solicitor suggests that what you do if you give this statute a limiting construction, and you limit this construction to apply only to transportation in aid of or in furtherance of some commercial venture or distributive process.

Without arguing what the merits of such a statute

would be, and I have serious questions whether such a statute would be constitutional, it certainly would be a better statute than the one we have. And the question then is: Can this Court do it?

Can such a limiting construction be placed on Section 1462, so that the statute, instead of reading "transports in interstate commerce by common carrier" would read "transports with intent to sell or distribute". That's what would have to be done to this statute, and I submit you can't do it, and you can't do it for several reasons.

The first reason you can't do it is that Congress did it and did it in 1894, and the legislative history of this statute shows that in 1894, in 1896, in 1897, and all the way up to 1909, this statute included the words "with intent to sell".

In 1909 there was a general revision of the Penal Code, and in the general revision of the Penal Code the issue came up, whether or not we should include in this statute the phrase that had been there for 15 years. That is, should we include in this statute "for intent to sell or distribute".

And the congressional history and the comments of those who addressed themselves to this bill in the revision in 1909 and 1910 show quite clearly that it was the intent of those who changed the statute to make the statute now encompass personal possession, non-commercial possession, non-distribu-

tive possession. And why?

Assemblyman, Congressman Shirley said: We want to do it so that it's consistent with Section 1461. It wasn't 1461 then, it was a different number, I think perhaps 212.

He said, "We want to do it so it's consistent with the Comstock Act. The Comstock Act doesn't have any exemption, doesn't exclude personal distribution by the mails, therefore, we don't want this one to do it." Sort of an abstract symmetry. That's one.

Secondly, it was pointed out that if this only covered persons who transport with intent to sell, it would be impossible to enforce; that nobody could ever prove up a case under this statute, that we have to have a statute that covers both personal and commercial transportation, or we'll never get any conviction.

The statute was changed in 1909, the intent to sell was dropped out: we have essentially, today, with some changes, albeit, but not in pertinent parts, the statute that was adopted in 1909.

And perhaps the argument could be made: Well, Congress didn't know the kind of reasoning that would come up in Stanley. The statute was tinkered with again last year. Certainly Congress knew Stanley had been decided by last year; and last year, when Congress withdrew from the reach of the statute persons who shipped material advising

others to use contraceptive devices, certainly could have tinkered with the statute in this area as well. It's not as though the statute has never been fussed with; the statute was changed in 1920 to include motion pictures. It was changed, as I say, last year to exclude contraceptive devices.

So the legislative history is squarely against any rewriting of this statute. In order to rewrite this statute, you would have to rewrite it back the way it was in 1894 and 1897, and essentially you'd have to be telling Congressman Vilas, Congressman Shirley, Congressman Houston that you didn't mean what you said. And really, the statute, as you originally enacted it, should be permitted to stand.

I submit that's legislation, that's not adjudication.

Secondly, the second reason that you can't draft this statute is because one limiting construction won't save it. Shall we have a statute that we are going to draft which will prohibit, as was suggested in our last argument some months ago, my delivering by interstate carrier my library of obscenity to the Library of Congress? Shall we have a statute that excludes gifts? Shall we have a statute in which we will write in a presumption, such as is written into 1465, so that those in the Attorney General's Office in the Department of Justice have a chance of winning a prosecution under it?

1465 needs a presumption because without the

presumption, nobody would ever get a conviction.

Must you also then write a presumption into 1462?

Yet still another problem: What shall you do if you're going to rewrite this statute for Congress, if you're going to rewrite this statute for us all, about those jurisdictions in which it's now lawful for adults to buy, sell, possess, and transport admittedly obscene material?

I know that Oregon is such a State now. I'm advised that Hawaii has recently enacted similar legislation.

Shall you draft into this statute, as has been drafted into a number of other federal statutes, exemptions, to exempt those who ship this material into jurisdictions in which it is not contraband?

I submit this is not such a statute that you can, that you can rewrite it. You are not dealing with the procedural problems of Loros, you are dealing with the whole fabric of the statute, as you were in Blount vs. Rizzi.

The statute must go back to Congress. It cannot -- it cannot, I submit -- be given a limiting construction by this Court consonant with any of the principles which you have previously expressed concerning limiting statutes and interpreting congressional enactments.

This is not a question where you can sever out an offending word from a statute, there are no offending words. What you must do is you must take the language of the statute

itself and add clauses to it.

Now, in Loros you had a severability statute that permitted you to sever out certain applications, and perhaps you could do so. You don't have the same severability statute in Title 18.

Now, regardless of how you see the roots of Stanley, I think it's possible perhaps to see Stanley having its roots as a First Amendment problem, as a First Amendment right; the right, perhaps, to read, the right to acquire ideas. Perhaps it's a Fourth Amendment right in kind of a strange sense: that the home gives the whole problems of Stanley an added dimension.

Perhaps also it's a Ninth Amendment right, just the right to be let alone, the right to read and enjoy what you like.

And if Stanley has Fourth Amendment, Fourth Amendment dimensions, so Orito also has added dimensions. Although Orito is on an airplane with his luggage, and Mancusi and Katz tell us that where one has a reasonable expectation of privacy, the Fourth Amendment gives him such privacy, other cases speak to the same issue.

If you look at Edwards vs. California, a long time ago, back in 1941, and more recently Dunn vs. Bloomstein, and still more recently, I think, Shapiro vs. Thompson, we have another right. Somehow Mr. Orito has a right to travel within

the continental United States and no one can place a burden on that right. I don't know that this Court has ever set forth clearly what the roots of that right are. But somewhere, somewhere in the fabric of our Constitution is Mr. Orito's right to go from Washington to Milwaukee, and if he can go from Washington to Milwaukee, if he can go one place to another, then he can go carrying something, as long as it's not contraband, as long as it's not goods made with convict-made labor, as long as it's not goods made with children, as long as it's not contaminated food.

What Mr. Orito can read in the privacy of his home in Milwaukee, Wisconsin, he can carry with him to California, for he has the right to read and the right to travel, and the two of them come together in much the same way as Stanley's right to read, and his right to be let alone in his own home sort of come together.

QUESTION: But he had nine copies of the same film, and ten copies of another one, and eight copies of another one.

MR. SHELLOW: And what we do is we look to overbreadth. Perhaps Mr. Orito is transporting this material in his luggage as a commercial venture. Nonetheless, he has standing to raise the overbreadth of the statute, as you recently said in Gooding v. Wilson. He raises the application, even if you infer from this that it's a commercial venture, he has the right to raise those whose transportation is purely personal.

QUESTION: Well, how could I imagine having nine copies and ten copies of something to be other than commercial? My imagination doesn't go too far, but how could it?

MR. SHELLOW: All right. Let us, if you wish --

QUESTION: Why don't you go --

MR. SHELLOW: -- I suggest that we did not stipulate, as Reidel did, and as Loros did, we stipulate no commercial venture; we look to the indictment and say the statute is overbroad.

But even, even if this is a commercial venture, he has the right to assert the overbreadth of the statute, for it would apply to non-commercial transportation. So said this Court in Gooding most recently. Orito asserts this standing. He comes before the Court and says this statute's no good, and you can't construe it so that it is any good.

And that's why it doesn't make any difference if, in this case, Mr. Orito has one copy of one dirty magazine, ten copies of films, or 150 copies.

Incidentally, there is nothing in this indictment which tells us the films are the same. That is, we don't know they are copies, I don't think. But let's -- I'm willing to infer it. I don't think it's central to my argument, and I don't think it's central to Mr. Orito's rights.

QUESTION: You say "nine copies labeled number 5", other than that they are duplicate copies?

MR. SHELLOW: I read United States vs. Ross, in which this Court held you cannot pile one inference upon another.

QUESTION: But what is there in Roth that had an indictment in it?

MR. SHELLOW: Not Roth, Ross, Your Honor.

QUESTION: Or any other one? This is "nine copies labeled".

MR. SHELLOW: Fine. Let us assume -- I'll concede that for you, if you want, to you for the purpose of this argument alone, that they're the same. Must we conclude from the fact that they are the same that he's in the business? I'll even give you that inference. And yet he has the right to assume that this prosecution would lie if he had one deck of playing cards in his pocket on that airplane.

You cannot restrict Mr. Orito's right under a statute which would restrict my right to bring exhibits to this Court.

QUESTION: Well, do you agree that you do not have the personal right in your case, that you had in the case just before this?

Do you agree with that?

MR. SHELLOW: There is no stipulation in this case that it was for commercial venture. If you wish to draw the inference, and feel the inference is not so attenuated that it

can be drawn --

QUESTION: At least you don't have an admission by the U. S. Government that it's for private purposes, do you?

MR. SHELLOW: I have no admissions from the United States Government in this case whatsoever. And we have no concessions by the defendant, either.

We stand before the Court and say the statute's no good, it can't be applied to Mr. Orito, and it can't be applied to Mr. Zacher, and it can't be applied to me if I happen to have the exhibits in this case, one copy of them, as I go back on the plane to Milwaukee. That is not an indictable offense, and it can't be made an indictable offense. And for carrying exhibits to this Court, I can't go to the penitentiary for five years. And you've got to figure out some way of making the statute say that. And you can't do it, because the legislative history is against you.

You throw the statute out and give it back to Congress, and say, Give us a statute that comports with the First Amendment, the Fourth Amendment, the Ninth, and maybe the Fourteenth. And maybe the right to travel may be somewhere woven in there as the right that -- let me suggest to you that maybe, maybe the way to distinguish away Reidel and Loros, and I'm not awfully happy with this distinction, but maybe the way to distinguish it is: if you're transporting

on a common carrier obscene material, you seek no one's aid but the common carrier, whereas Mr. Reidel sought the aid of the United States Government in purveying his stuff, as did Mr. Loros seek the affirmative assistance of our customs agency. Those who are prosecuted under 1462 seek no one's help; we do not seek to make the government a partner in this enterprise, we just seek to be left alone.

And maybe that's the distinction. The historic interest this government has taken and this Court has taken in the mails, in the customs, we have different rules. A reading of the border search problems convinces anyone that customs problems are sui generis, even in the criminal field. And yet, I submit to you, that's a distinction that's a viable one, perhaps, in this area of obscenity.

For Loros was a customs case, and he sought the government's help, as Reidel sought it, to use the mails.

I suggest one further problem, that if this statute is rewritten by this Court, to add the phrase that was deleted in 1909, and to take us back to the statute that was enacted in 1894, that would we then not be confronted with a statute that had no determinable limits? How can I advise anyone as to what are the elements of a crime, if all that's necessary is the intent?

I suggest to you that you said in Compos Sorrano, not too long ago, that the principle of strict construction of a

criminal statute demands that some determinable limits be established, based upon the actual words of the statute. That's what Mr. Justice Stewart said. The actual words of the statute don't place determinable limits on it. The actual words of this statute make me criminally liable for taking these exhibits to Milwaukee. The actual words of the statute actually conform to what Congress wanted to enact.

Congress wanted to enact a statute that covered the transportation of material by private persons, not for gain, not for hire, not for distribution; and Congress enacted such a law. And the law is unconstitutional.

And we can't say that, as much as we would like to.

I submit that the language that appears in 37 Photographs, where the Blount case is discussed, is apposite. Where the Court said that in Blount, and I submit as in Orito, you're dealing with a federal statute and you have a power to give it an authoritative construction. However, in this case, as in Blount, salvation of the statute would have required a complete rewriting of it in a manner inconsistent with the expressed intentions of some of its authors.

The language was from Blount, but the application is crystal clear to Orito. There is absolutely no way of escaping the fact that a rewriting of this statute flies in the face of what its authors wanted, of what they explicitly said they wanted, and in this case even more so

they had the statute that you'd have to rewrite, and repealed it or amended it.

So I suggest that we seek not an extension, really, of Stanley. Stanley doesn't say much more, I don't think, than that an individual has a right to read what he likes and where he likes. Stanley wanted to read it in his home, perhaps I want to read it on an airplane. As long as I don't show it to kids, and don't poke the person next to me and say, "Hey, look at my magazine", I think I have a right to read it.

QUESTION: What statute or what part of the First Amendment brings in that last fact?

MR. SHELLOW: My right to read? My right to read on an airplane?

QUESTION: The prohibition, at least; as long as you didn't interrupt another, where does that prohibition arise?

MR. SHELLOW: I think just as I have a right to be let alone, so perhaps does everyone else. And somehow my right to read that which may offend others does not extend to my right to offend them. And perhaps this Court can't enact or this Court can't adjudicate good manners. And maybe that's all I'm saying.

QUESTION: Well, can't you -- in cases like Pollock and so on, indicate that there is an affirmative right that

your neighbor on the airplane has, or anybody else has not to read, doesn't the First Amendment include the right not to read, not to listen to what you don't want to read or don't want to listen to?

MR. SHELLOW: Of course it does. Of course it does.

QUESTION: More than just --

QUESTION: Well, that was the dissent in Pollock, not the opinion.

MR.SHELLOW: I think that --

QUESTION: In any event, it's been suggested that the Amendment does include the right not to read.

MR. SHELLOW: The right not to be exposed to loud speakers in a bus, perhaps.

QUESTION: Well, Mr. Shellow, when you poke your neighbor on the airplane, that's not the United States Government imposing any burden on him.

MR. SHELLOW: I understand. That's why I suggested that there it may be nothing more nor less than good manners.

QUESTION: Well, yet you suggested, in response to a question by the Chief Justice, that this is some sort of a limitation on the First Amendment argument.

MR. SHELLOW: No. I suggest that the individual's right to -- maybe the individual who rides next to me, and the zone of privacy which surrounds him and his expectation of privacy, maybe that imposes upon me, under the Constitution,

a correlative obligation not to invade it. Maybe.

QUESTION: Where is that in the Constitution?

MR. SHELLOW: I don't know. I can't -- maybe it's First Amendment, maybe it's the Ninth; I can't say.

QUESTION: What it does is authorize the government to prevent you from poking your neighbor and shoving this under his nose.

MR. SHELLOW: I'll buy that.

QUESTION: And that's the First Amendment.

MR. SHELLOW: I'll buy that. I think that -- thank you -- that's the way I'll look at it.

QUESTION: Well, Mr. Shellow, at least the government has taken sides, and that right does come to life under it.

MR. SHELLOW: Unless the government takes some action, or unless Congress enacts a statute that says that "he who thrusts obscene material upon his neighbor on an airplane shall be subject to five years imprisonment and a fine of ten thousand dollars", then maybe that statute would be constitutional.

QUESTION: But, short of some affirmative congressiona action, it's hardly (inaudible) -- to bring it under the First Amendment.

MR. SHELLOW: Short of congressional action, it's good manners. With congressional action, it may be constitutional. Under neither circumstance does 1462 withstand analysis

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, do you have anything further?

MR. GRISWOLD: No, no reply.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:41 o'clock, p.m., the case in the above-entitled matter was submitted.]