Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 83

GARRETT H. BYRNE, ETC., ET AL.,	
Appellants	
vs.	
SERAFIM KARALEXIS, ET AL.,	
Appellees.	

Place Washington, D. C.

Date November 17, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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OCTOBER TERM

GARRETT H. BYRNE, ETC., ET AL., Appellants	)	
vs	)	No. 83
SERAFIM KARALEXIS, ET AL., Appellees.	)	

The above-entitled matter came on for argument at 10:05 o'clock a.m., on Tuesday, November 17, 1970.

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:

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Of Counsel for Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear the arguments first in Number 83, Byrne against Karalexis.

Mr. Quinn, you may proceed whenever you are ready.

ORAL ARGUMENT BY ROBERT H. QUINN, ATTORNEY GENERAL, STATE OF MASSACHUSETTS ON BEHALF OF THE APPELLANTS

MR. QUINN: Thank you, Mr. Chief Justice.

Mr. Chief Justice and may it please the Court: This matter is here on appeal from an interlocutory order of the United States District Court for the District of Massachusetts, under the provisions of 28 United States Code 1253. That provides for direct appeal from an order for judgment of a three-judge court granting temporary injunctive relief against enforcement of a state statute.

In our view this appeal presents two equally important issues which ought to be finally resolved by this Court. The first is whether the Court below abused its discretion in enjoining the District Attorney from prosecuting in the future on account of the showing of the film, "I Am Curious Yellow," which the Court below assumed to be obscene.

The second is whether under this Court's holding in Stanley versus Georgia, any state can constitutionally prohibit public, commercialized dissemination of pornographic matter, absent distribution to minors, nonconsenting adults or by

pandering.

The facts may be stated briefly as follows: on June 30, 1969, after preliminary proceedings not relevant here, the Appelles filed an amended complaint to the Court below, alleging the reason to believe that indictments would be sought against them by Attorney General Quinn's office under Massachusetts General Laws, Chapter 272, Section 28A.

Shortly thereafter the indictments were, in fact, sought and returned.

Appellees sought a declaration that the statute is unconstitutional and an injunction against prosecution thereunder. They alleged the statute was overbroad because, among other things, adequate adequately controlled commercial distribution of obscene material is protected bythe First Amendment.

The Court declined to grant injunctions or other relief but requested briefs on the questions regarding the scope of this Court's holding in Stanley versus Georgia, and the effect of that opinion on the Massachusetts statutes. Prosecution continued in the state court in its January session and the Appellees were convicted. Following their conviction the Appellees removed their request for injunctive relief.

After further argument, the majority of the Court below held that Stanley versus Georgia went so far as to prohibit state prosecutions with respect to adequately-controlled public distribution of obscene materials, and the Court decided

that the Massachusetts statute was probably unconstitutional as being overbroad on its face. Based on this opinion the majority of the Court below enjoined the Appellants from further prosecution with respect to showing the film, "I Am Curious Yellow."

This matter was argued before this Honorable Court on April 30th; was subsequently ordered for reargument. In the meantime the Appellees' appeal was taken to the State Court; oral argument in the Massachusetts Judicial Court has been delayed under motions for postponement filed by the Appellees here.

I address myself first to the question of whether the Court below abused its discretion in granting injunctive relief. Comity(?) and Federalism prompted a Federal Judge to be extremely reluctant to enjoin good faith enforcement of a state's criminal laws by that state's law enforcement officials. What have we here to contravene that fundamental principle? No monetary loss.

There is no evidence whatsoever of any financial loss on the part of the Appellees here. They had no proprietary interest in the subject matter; they are not the owners of a film; rather, they own a movie house. There is no chilling effect, either on the Appellees or their patrons. These are not political handbills, but commercial pornography, assumptively in the Court below and after a finding in a trial a subject matter assumed to be obscene, we submit; all the more

so a subject matter found in a trial below to be obscene, cannot be said to have any value within itself.

This film further shown for five-and-a-half months, pending the argument on the merits and the decision of obscenity on the facts in the trial in the Suffolk Superior Court in Massachusetts.

We have only been able to find one instance where this Court approved relief granted against a state law enforcement official; that is, of course, the decision in Dombrowski versus Pfister in 380 U.S. 479. The Dombrowski case was a matterof civil rights advocacy. Its record is replete with incidents of bad faith; for example: night raids made by law enforcement officials on the offices and the homes of individuals involved. We have none of that here.

Here we have, first of all, activities whose dominant theme is offensive to community standards of morality; whose appeal is to a prurient interest in sex; whose contents is utterly without redeeming social value.

Here we have no bad faith, either in the record or argued below, on the part of the prosecution or law enforcement officials. This has been a civil case pursued by the District Attorney of Suffolk County in the course of his work as the elected District Attorney of the people; pursued while the fimm showing by the Appellees in their theater, continued for five-and-a-half months.

Here, we submit, is a classic example for the application of the principle of abstention. If the statuts, Chapter 272, Section 28A of the Massachusetts General Laws, should be overbroad, and we do not concede this, thus far here, can be overcome by leaving the case to be resolved in the state courts or by giving the state court an opportunity to narrowly construe the law, and thus avoid any constitutional defects.

Q What is the status of the proceedings, if any, in the state court?

A The proceedings below have been stayed, Your Honor, pending -- or subsequent to a motion by the Appellees that the oral argument on this case be postponed until the decision in this court was made on the issue of obscenity generally.

Q There was a conviction in the Suffolk County Superior Court?

A There was a conviction in Suffolk County Superior Court.

Q Then appealed to the highest court in your state?

A And then appealed to the highest court of the state, the Massachusetts Superme Judicial Court. That argument, I believe, would have been made orally before the court in the first week of October, but sometime in September, I think

September 16th, the motion was filed by the Appellees here for postponement; postponement on the issue of whether obscenity can be proscribed any longer by any state court, a decision by this Court.

Q It is postponement of the oral argument?

A Postponement of the oral argument as far as that is concerned. We --

Q Postponement of the entire oral argument, I gather?

A That's what the Honorable Court decided that if there was going to be any postponement at all it would be a postponement of the complete oral argument; they would not separate the issues involved in one case.

Q And so that is -- is that by formal order of the Supreme Judicial Court of Massachusetts?

A I believe it has been by formal order, Your Honor; yes.

Q Postponed pending a decision by this Court in this case?

A Yes, sir; on the motion of the Appellees here.

Q Did you resist the motion?

A We did not; we assented to the motion provided that the issues not be divided, but the case be taken as a whole. We had no objection either to arguing the total case as a whole in October or to postponing the oral argument on the

total case until some decision should be made by this Honorable Court.

Q Was there anything in the order of the action of the three-judge United States District Court or any order or action of this court that prohibited the Supreme Judicial Court of Massachusetts from proceeding through judgment?

A None whatsoever, Your Honor; only the motion offered in the actual taking.

Q It fell on independent action on motion ofthe Appellees.

A And I respectfully submit that on notice by both parties I think that the Massachusetts Supreme Judicial Court would schedule the case for oral argument at the earliest convenient date.

Q They do so if what?

A I think if, pending a visit by the Appellees and the Appellants here to the Supreme Judicial Court of Massachusetts, the Court would immediately have scheduled that case for oral argument there.

Q Well, I understand as of now the oral argument has been postponed until after the decision of this Court in this -- in these proceedings.

Q That is correct.

Q May I ask you another question, Mr. Quinn?

A Yes, Mr. Chief Justice.

Q Does the record in this case show any proffer on the part of the State of Massachusetts of evidence tending to show pandering by the advertising news, to advertise and tout this film?

A It does not, Your Honor.

Q Does it show anything in the nature of evidence that, in fact, minors were not excluded; that there was no good faith effort to keep them from attending?

A It does not, Your Honor.

Q You are going narrowly on this one central issue, independent of either pandering or access of minors?

A That is correct, Your Honor. On whether, as I have said, whether in the second issue to be considered by the Court, whether under the Court's holding in Stanley versus Georgia, any state can constitutionally prohibit any public commercialized dissemination of pornographic matter without any consideration to this distribution being to minors or nonconsenting adults or by pandering.

And I have addressed myself to the first argument, which I believe is basic to my appearance before this Honorable Court, that of whether the Court below abused its discretion in enjoining the Prosecuting Attorney from prosecuting in the future on account of showing of a film which has been adjudged by a competent court as obscene.

Q But, if you are sustained you never get to the

merits of the film?

A That is true, Your Honor, unless the Court in its --

Q They got to the merits of the film up in the Maryland case.

A I think last week this Honorable Court heard a lot of arguments on the merits of that film and on the issue of proscribing obscenity; that is correct, Mr. Justice.

I have suggested that in this case pending we have the classic example for the application of the principle of abstention by this Court.

We further submit that if Statute 272, Section 28A should be read to be overbroad in the light of the most recent decisions of this Court in Stanley versus Georgia, that t at clause could be overcome by a decision and by a narrow construction made in that decision by our Massachusetts Supreme Judicial Court in the single case now pending before the Court. This would avoid the constitutional defects and it would further avoid any possible irritant to the Federal-State relationship which is a matter of grave concern to this Court and a matter of grave concern to all of us in the field of criminal justice administration in the United States of America.

Merely to assume that the statutory validity of the Massachusetts law is affected by Stanley versus Georgia. We think this Court ought to leave for the state in its court, to

interpret and to limit the application of the state statutes within that holding of Stanley versus Georgia.

Similarly, as this Honorable Court itself has subsequently limited the application of Stanley versus Georgia.

My brother, the Solicitor General, will discuss the substance of the second issue which we have touched upon in the questions put before me: that relating to the constitutional rights of any state or any government to proscribe obscenity within the framework of the First Amendment to our United States Constitution.

I respectfully submit again that this Court has heard many arguments in this issue, during this term as well as the term before, and I will leave the burden of that argument to my brother, the Solicitor General.

For these reasons it is respectfully submitted that the judgment below should be reversed.

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

MR. QUINN: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Strauss.

ORAL ARGUMENT BY PETER L. STRAUSS, OFFICE OF THE SOLICITOR GENERAL, ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE.

MR. STRAUSS: Mr. Chief Justice, and may it please the Court: as the Court knows, the Government appears here today only with respect to the issues in this case involving

the meaning of its decision two terms ago, in Stanley versus Georgia and as the Court knows, that decision has led to a good deal of ferment in this general area, including the invalidation of two central Federal statutes which we shall be appearing here later in the term to defend.

The facts of Stanley we think are significant. The police, almost by accident, searching through an individual's home for other purposes, came upon three reels of motion pictures and other items which no one knew were there. They looked through those films, concluded that they were obscene; arrested Mr. Stanley for possession of obscene matter under Georgia statute which permitted punishment for that purpose.

The case came here and the Court held in what I think was carefully limited language that the mere possession of obscene matter cannot constitutionally be made a crime. Excuse me.

Q Was there any showing in the Stanley case that the possession had been for or was intended for commercial profit or public showing?

A None whatsoever. To us the central fact in Stanley really was the very accidental nature: no one knew that Mr. Stanley had that material or certainly no one in the general public knew that, before it was discovered by happenstance in his desk. Well, not quite happenstance, the officers were there searching for other material. They certainly didn't

expect to find that.

Q So that the issue of public showing or pandering by advertising before public showing were not involved in the Stanley case at all?

A I don't think it's necessary, Mr. Chief Justice, to go so far as to be as gentle with Stanley as to say the issue of pandering wasn't in that case. I would put it: the issue of public knowledge was not in that case.

And this Court, I think was quite careful in its statement regarding that case, to indicate that it was simply a matter of private possession that was before it and that that was all that the holding meant. Lower courts, however, have not been so minded about the opinion and there is, as the Court knows, and I am sure this Court feels is a good deal of impatience about this very troublesome issue of obscenity and there are, in the opinion, here and there, remarks which could be taken in the way that the Courts below here have taken them; that if one is careful, if one is strict, access to the movie to those who want to see it and to those who are adult enough so that ordinary parens patria considerations do not come into effect and if one doesn't offend sensibilities byadvertising, why then one has the constitutional right to show the movies, to commercially exploit it.

And again, Mr. Chief Justice has brought it up, I want to stress that we don't -- we aren't talking here about

commercial exploitation in the sense of the Ginzberg case, in a pandering sense; simply public sale unadorned by any kind of special attention on the hypotheses of this case to the sexual aspects of the sexual provocative aspects of the film.

I should like to start my discussion a little way off from the obscenity question but in a way that I think again calls attention to the central character of public knowledge of what's going on.

Let us suppose that a traveling carnival should come to Washington, set up tents that are perfectly well enclosed and screened from public view and announce that in those tents for those who wish to pay and come and see it, there will be a bear-baiting contest in which five dogs and a chained bear will be set against each other until some or all of the participants are dead. Let's suppose that that could be done in perfect safety for all of the viewers.

I think that it may be perfectly clear that no one would leave that tent to commit an act of violence and I think it may also be clear that no one who would wish not to see the scene in the tent would be forced to do so, but I submit it's also clear that the community to which that carnival came, could prohibit it if it were so minded.

Now,that's a public policy question on which all might not agree but I think if the community decided to prohibit that show it could do so. The distress which is caused

to those who don't come, but who know what's going to go on in the tent, who know for a certainty what will appear, and that is a very real distress.

The long-term brutalization of society which the society may fear the result; the strain on social fabric through public tolerance of what is to many members of that society, utterly repellant. All of these factors, it would seem to me, to justify such regulations.

It has never been held that society lacks power to protect the sensibilities or to deal with these occurrences; that it must not only tolerate, but in the meaningful sense, legitimize these activities.

Q Do you think your hypothatical would be quite so clear if what were shown inside the tent were a movie of a bear-baiting contest or are you going to get into that?

A Yes; I think it would be as clear. It's inconceivable to me that the Court would extend less protection to a theatrical performance than it does to the firm just because the performance happened to be live, rather than preserved on acetate.

Q I suppose a community -- most communities do -- make bank robbery a criminal offense, but would a movie showing a bank robbery be a criminal offense on the part of the --

A No; but neither would a stage production. In a bank robbery, I think, and I tried to select the hypothetical--

Q We're talking about bears and dogs killing each other; aren't we?

A Well, that's no offense against the law.

Q Not an offense -- you hypothesized --

A For the bears and the dogs -- excuse me -- for the bears and the dogs, they commit no crime. There is this offense of cruelty to animals which I think is what you are referring to, but I think that is an entirely analogous offense to the obscenity offense. It is an offense designed to protect human sensibilities. The dogs and the bears that may survive the fighting aren't in any sense punished --

Q What about Bonnie and Clyde?

A Well, I think --

Q Isn't that offense to some people? Isn't that offensive to most people?

A I really wouldn't say, Mr. Justice Marshall, and I suppose a -- it's not really important to do so, as I just stated. I don't think it would have made any difference whatsoever if Bonnie and Clyde were presented on the stage rather than in the form of a moving picture; that's part of my point.

Q Do you think that the state could ban it?

A I don't think it's necessary for me to say so. I personally wouldn't think so, but I don't think that's important here.

Q You don't see any problem with it?

A I'm afraid I don't see the direction -- I don't see what you're getting at.

Q Well, if I understand, you are at the point of saying that obscenity is against the people in the community's mores customs and beliefs, and I am merely asking you isn't Bonnie and Clyde also in that category? That's the only point I am making -- trying to make.

A I suppose such statutes have been generally thought to be more difficult to administer without saying whether it was Bonnie and Clyde in particular. I suppose it will lure a statute which could sufficientlyand carefully drawn as to which one could make the conclusion that was made in law regarding obscenity legislation that it is not vague; that a state could, indeed, prohibit the screen depiction of certain forms of carnage; yes.

Q Crime?

A Yes.

Q Mr. Strauss, it comes back to this earlier question: are there some forms of conduct which, if they occur in private, are completely innocent and protected, that if performed in public, are not protected?

A Well, I think that's a matter of the Court. At least the forms of conduct that are coming to mind may be a matter that the Court hasn't yet decided. I may say,

and it may be my fault; I have the feeling that having gotten into somewhat of an alley I am not trying to draw any distinctionhere between the conduct on the one hand and representations of conduct on the other hand.

Q My question is: precisely directed at that. Now, a perfectly simple example is that it's entirely proper and highly desirable to take a shower and you might find yourself arrested if you took a shower in the center of Pennsylvania Avenue.

A That's certainly true.

Q Now if you, on the other hand, you cannot rob a bank either in private or in public with impunity; can you?

A In terms of actual robbing of the bank; of course not.

Q The robbing of the bank is subject to penal sanctions, whether you do it in the utmost of privacy in the middle of the night or at high noon with --

A There are many who try to do it in private.

Q Well, that makes quite a difference between bank robbery and some of these other things; doesn't it?

A Yes.

Q Like taking a shower on Pennsylvania Avenue at high noon.

A Surely it does. I had had a different impression of what had been troubling the other justices. I think

I can say no more to it; and it may be, in a sense, twisting the court's language in Reynolds in Reynolds and Sims. The Court said that legislatures represent people, not houses, trees, or I might add: dogs or bears. And in giving that hypothetical it seems to me that if one thinks about it carefully one would reach the conclusion that those laws are there not to make the behaviorof the dogs and the bears criminals, but to protect certain human sensibilities and this is an area of traditional regulations, just as obscenity regulations is an area of traditional regulation.

And one then does get to the question: is it important that this is on film as distinct to an alive performance? And I think the answer there is: no; there is not. This Court's opinion last year in Schact gave no indication that it would have reached a different question and would have reached a different conclusion had that been a filmed gorilla theater episode than a gorilla theater episode. Indeed, if anything film performances can be even more intrusive in a sense to the society's sensibilities in a way -- one has to deal with, stage production one has to deal with a situation which is necessarily human and in a real sense remote. It's only so close that you can get to the stage in the film performance. But in a film performance the possibility of close-ups and what have you, are these difficulties, I think, substantially aggravated.

Then we come to the question how we're going to understand Stanley. The Government believes that the Court meant what it said when it said that Stanley was a holding limited to its facts; that it did not impair the validity of law for any commercial setting. As we have called to the Court's attention before: there is much reference in that opinion to notions of privacy and freedom from intrusion and we feel those references are central.

The opinion quotes at length from Mr. Justice Brandeis's dissent in Olmstead. It refers to the Griswold opinion: Griswold versus Connecticut where the Court put it this way: the present case concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees and it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goald by means of having a maximum destructive impact upon that relationship.

Stanley is an entirely similar case. It is a case in which the state sought to regulate in a manner having a maximum destructive impact and this Court, I think quite properly, said that it might not do so.

Q On what originallyin the United States Constitution do you understand the Stanley decision to have been based?

A Well, I think there were three, basically;

there are two whichhave been expressed: the First and the 14th Amendment and the Third, which was not expressed and the Fourth Amendment and I think the Fourth Amendment centrality is made clear by the reference to Olmstead by the reference to notions of privacy -- distress, really, on privacy as a co-ordinate part of the opinion in that case.

In a way I think it's central to the Stanley opinion, but unlike the other obscenity decisions in this Court, the opinion does not talk about the material. The opinion refers to the rights of the person and not to the protected character of the material or not. And when one starts talking about the individual, rather than what he may have and the individual's First Amendment rights. It wasn't that the material was protected under the First Amendment, but that the individual had First Amendment rights. Then it becomes, I think, clear that what we are dealing with, again, citation to Griswold is a kind of penumbral analysis which we try and set out in our brief, that to protect the individual's rights to read, to learn, it is necessary to afford that kind of penumbral protection in which matters which may not contain information, may not contain ideas, are nonetheless, ignored.

And again, I think the Court was very careful, while it did refer to a right to receive information and ideas, it never once said that the material which he had was material which contained information and ideas. If it had said that,

then it would have been saying that that material would have had First Amendment protection. It didn't say that.

Q I don't have the opinion in front of me, so I am relying on my recollection, but would you disagree that so far as explicit articulation went, at least, the decision was bottomed on the First Amendment, made applicable to the State of Georgia, through the 14th?

A Well --

Q Isn't that whatthe Court said?

A I would have to --

Q Isn't that the provision of the United States Constitution?

A I would have to agree that the Fourth Amendment was not mentioned. When, however --

Q And the First Amendment was.

A And the First Amendment was.

Q And mentioned as rather a euphemism.

A When, however, privacy of the home nad notions of privacy are referred to as frequently as they were in that opinion one must believe that the Fourth Amendment was resolved and in any event, when the opinion so carefully discussed the rights of the individual rather than the nature of the material, I think one must be quite clear that the holding was not a holding that these materials were in any sense protected by the First Amendment. It was a holding that the individual in

his home was protected by the First Amendment and that was -- is really central. Mr. Stanley did not advertise to the world what he had in his bedroom. As the facts of the case show the police had no reason to suspect what they might find; he kept it private. As long as he did so, society could claim no greater interest in what was there than the supervision of his own personal morals.

That, this Court said, was not enough, and I think the Court was quite plainly correct in doing so. But here there is no such privacy. Appellees proclaim to the world what may be seen in their theater, however discreetly they may do it and that notoriety in itself changes the issue from an issue of private morality to an issue of public morality because the contents of the film and its location are known to the public, the Government must not only tolerate, but in an important sense, legitimize that film. And if the film is obscene, and now we have to talk about the First Amendment protection of the materials, not the man. If the film is obscene we submit that the Government can't be required to do that.

Q What you're saying, I take it, is: if the same film that we're dealing with here is possessed by private persons in the homes with no indications that they have it for commercial purposes it would be completely protected under Stanley?

A Those persons would be completely protected

under Stanley; the film would not be protected.

Q Well, but if the persons were, they can't reach the film as long as it remains in the house.

A Well, that's true, but while these matters are subtle, I think that one has to be very careful just because of the risk of the kind of emanations with which one finds in the lower court opinions today. The lower courts rather carelessly, I think, have treated that opinion as going to the material and treating the material as going to the material, they have said, "Well, if an individual can have the material then somebody has to have the right to sell it to him and therefore, as long as he sells it to him in a proper way, everything is all right."

Now, I think as we read the opinion, rather, one would say: "In the circumstances of an" --

Q Are you referring to the Stanley opinion now?

A That's right. As we read the Stanley opinion one would have to say, rather, that in the circumstances of an individual having a book or a film in his house which no one knows about; the only interest in the state in regulating his conduct is an interest in private morality and that, in no circumstances, in the context of the First Amendment in the necessity under Griswold of the penumbral protection for those rights, simply is not enough.

Thank you.

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

Mr. Leewin.

ORAL ARGUMENT BY NATHAN LEWIN, ESQ. ON BEHALF OF THE APPELLEES.

MR. LEEWIN: Mr. Chief Justice and may it please the Court: When this case was argued last term among those argued with it was Gunn versus University Committee, Number 7 last term, in which the Court dismissed the appeal on the last dayof the term when it set this case and its other companions over for reargument on the ground that the three-judge district court in Gunn had failed to enter any injunctive order whatever and it was therefore, according to the Court's language,"not possible to know with any certainty what the Court has decided."

In this case, by contrast, the appeal order is short and specific and it clearly discloses what the court below has decided, and we submit that if that injunction if analyzed in terms of what it does not enjoin as well as in terms of what it does, it emerges as a permissible and proper action by the Federal District Court seeking to preserve for state prosecutors and courts their proper role in the enforcement of restrictions upon the distribution of obscenity, while retaining the First Amendment rights of motion picture exhibitors and distributors in the interim.

To the extent, I would submit, that the opinion of

the court below goes beyond the terms of the preliminary injunection and expresses views concerning the constitutionality oft he statute as an ultimate decision, it's nothing more than an advisory opinion or, as we suggested in some of the cases argued before the court yesterday, in terms of declaratory judgment, which may be appealable by the state if it views it as such, tothe Court of Appeals.

But the issue here, we submit, is framed by the injunction which appears at pages 44 and 45 of this record. Now, what does it enjoin? The injunction prohibits and enjoins the defendants, the state prosecutors, local district attorneys and the State Attorney General's office from pursuing, civilly or criminally or other wise interfering with the Appellees' exhibition of the film, "I Am Curious Yellow," so long as that exhibition is conducted under certain specific circumstances, which cover the areas of pandering and intrustion and it provides, in addition, that the order is not to prevent or inhibit in any way the prosecution of a then-pending criminal proceeding in the Masachusetts State Courts which was then on appeal from the judgment of conviction which the motion picture exhibitors, who were perfectly legitimate theater owners and who have shown award-winning films in the past, were sentenced to one year in jail for having shown this film.

Now, let me, if I may, just clarify for a moment, digress just to clarify the status of that case in the

Massachusetts State Court, in supplement somewhat of what Mr. Quinn has advised the Court.

That case, those convictions were appealed to the Massachusetts Supreme Judicial Court. Briefs were filed. In the State's brief, which was the response to the Appellee's brief in the State Court, the State concluded with the following language: "Since," speaking of this Court, "that Court's adjudication in the Maryland case, which was argued here last term, will bind the Commonwealth, it is respectfully suggested that this Court, the Massachusetts Supreme Judicial Court, hold its decision upon the obscenity of the film in abeyance pending that adjudication; not the adjudication of this case, but the adjudication of the Maryland case, in which the obscenity of the film was an issue."

Pursuant to that suggestion these Appellees, feeling that that issue would be resolved ultimately by this Court, even, irrespective of how it would be resolved by the Massachusetts Supreme Judicial Court, moved that the issue of obscenity and that issue alone, await the decision of this Court in the Maryland case, but that the other issues be considered by the Massachusetts Supreme Judicial Court.

The Massachusetts Supreme Judicial Court, acting on that motion, stayed the entire argument of the case. So the entire argument is stayed, true, in form on our motion, but really at the suggestion of the state that the Maryland case

would be dispositive of the issue of obscenity, which I think is plainly true. There are other issues in the Maryland case, that assumes that the Court would reach the issue of obscenity in the Maryland case and would decide that question one way or the other.

Of course, resolution of that issue, I might say, might very -- if it were resolved in favor of the film, might very well have the effect of mooting out this very case, as well, because the sole issue here is whether these exhibitors may continue to exhibit this film in the interim.

Now --

Q May I ask you this question? if the conduct which is the target of the State of Massachusetts in this case, occurred on Pennsylvania Avenue, would you think that the principals would have First Amendment rights or would they be subject to arrest, trial, conviction and punishment?

A Mr. Chief Justice, I agree they would be subject to punishment. I think -- let me just say, for purposes of our own argument, and with the Court's permission, the matters of the issues discussed by the Assistant to the Solicitor General: the Stanley issue and all that, all those ramifications of that issue, were to be covered in our argument by Professor Dershowitz, my colleague who will be arguing the second half of the argument.

Now, I -- we will definitely address ourselves to

those questions. In this portion of the argument I would limit my argument to, as it were, the Dombrowski, the abstention, the Federalism issues.

Q I'll defer my question to Professor Dershowitz.

A Thank you very much.

I'm afraid that on the question of Federalism and the Federal Court's role in this case, some confusion may have been engendered by papers which we filed at, upon the application of the State for a stay last term, when it appeared, I believe, just from those papers, as if in some way the Federal District Court in this case was barging into a a state prosecution.

If anything, the record in this case demonstrates, we submit, that what the District Court below did was, at successive stages of this litigation, deferred and refused to act until the juncture was reached at which if it failed to act, speech which was imminent, pending and in fact, had continued until the date of this action, would not merely be chilled, if I may proceed from the Court's metaphor, would in fact, be put in the deep freeze. Because, the consequences of the action which caused the Federal District Court to issue the preliminary injunction which it did, was the withdrawal by the prosecutor in the state courts of an agreement under which he would permit the film to continue to show while the various

issues were being litigated through the Massachusetts courts.

In fact, what did the Court below do? Its order finally demonstrates that the Court permitted the one pending state prosecution to go on. In addition to that, the opinion of the Court below and the language of Judge Aldrich who wrote the opinion, which appears at page 37 of the record, concludes with an explicit caveat to these Appellees, stating that the Court voices no opinion as to the legal consequences if plaintiffs exhibit their film under the protection of our injunction and it is ultimately determined that our view was mistaken and that such exhibition is properly considered ilicit.

In effect, what that language in Judge Aldrich's opinion states, is that the continued exhibition of the film, even under the protection of the injunction is still subject to the risk that at the conclusion of whatever ultimate decision is reached on the various constitutional issues, these Appellees may be prosecuted, in fact, retrospectively, for the showing of the film which they engaged in during the entire period of the litigation.

Sotthat if there is anything that is clear from the terms of the order, it is that it in no way forecloses any state court determination of any relevant issue and in fact, does not, not only under Dombrowksi, doesn't enjoin any state [illegible] but -- a pending state prosecution, but doesn't

even enjoin future state prosecutions. At most it defers them, if they are legitimate, to some ultimate date at which, if they can properly be brought they can then be instituted.

Q You say it doesn't enjoin future prosecution?

A No, Your Honor; we think it does not.

Q What does the language on page 44 mean?

A What it means is that the prosecutor may not, in the period of time until the issue to resolve, institute civil or criminal proceedings or seize that film, but the language of Judge Aldrich that appears on page 37 --

Q Now you're referring us to the order --

A I'm referring to the order.

Q And you made a statement to which I fully agree: it is the order that is being reviewed here.

A That's right. And the order enjoins the institution of proceedings. It does not, however, say that if the film was finally found obscene these Appellees may not then be prosecuted for having shown the film in the interim.

This case, if viewed as we think it properly should be, as to what are the appropriate steps for a Federal District Court to take when it has before it a case in which there is some doubt as to the constitutionality of the statute under which the state is proceeding; where the state has no injunction power and I think that's important in this context.

The State of Massachusetts has not authorized its

prosecutors to go to the court and obtain injunctions against the showing of films. It has an interim proceeding applicable to books, but none with respect to films.

So, it authorizes criminal prosecution. Now, there is a criminal prosecution with respect to the film under a statute which is of questionable constitutionality, with respect to a film which a Federal District Court has found prior to its opening to be not obscene, and Judge Aldrich took notice of that, too, and that appears in his opinion. And the film was shown in a very careful -- safeguards to avoid pandering, in showing to minors and any intrusion of the upblic. In those circumstances the Federal Distritt Court said, "In the interim until the issues are resolved, we think you have a First Amendment right to show that film, subject possibly to future prosecution for having shown it, but you will not be hauled into Court every day and have the film seized every day because you have shown it," because that would, in effect, be a form of censorship, a form of censorship by threat, to be sure, but it would be a form of censorship.

Now, we submit, that that's, under all doctrines of nonintervention or abstention or whatever Federal policy applies, we think that's appropriate. The Court below stayed its hand until that point with the threat of the prosecutor to continue to prosecute and to indict and seize the film, had the effect of an effect of closing it down.

Now, let me --

Q What's the statute of limitations on these obscenity prosecutions in Massachusetts?

A Six years.

So that there is no question but that it will be within the statute if prosecutions were subsequently brought.

Q That would mean six years from the last showing?

A Well, I think six years from any criminal act which would be any showing. If they are to be prosecuted.

Q What I am concerned about is that it is six years from the last one; isn't it?

A Well, I think this should be true, Mr. Chief Justice, but there is one that is already a prosecution. The problem that this case presents is that a showing of the film can be subject to multiple prosecutions. These Appellees have assumed the risk of a single prosection and indeed, they are prepared to assume even the risk of multiple prosecutions if they are proved wrong.

The only thing that they seek and that they obtain from the -- the sought more but the only thing they obtained from the District Court is an order which prevented multiple prosecutions while the film was being shown, while the litigation was going on and while the rights were still an issue. At that period of time, we submit, they are entitled to

Federal relief to permit the film to show in the interim, untilthat date when it is finally decided whether they are right or wrong.

Q Any way you cut it it's an inferference with process of state-criminal prosecution to the extent that it prevents prompt prosecution by the state. You can't escape that.

A To that extent we agree, Mr. Justice Harlan.

Q Well, that's what the whole issue is; so that I don't quite understand your argument, frankly.

A No; because it is interference with the state criminal process to obtain rights which could not be obtained in a state criminal process.

In other words, assuming, even assuming that the law was, which I think this Court's cases conclusively established otherwise, but even assuming the law were, that one had to exhaust state remedies as it were to obtain relief from a Federal District Court in a free speech case, in these circumstances there is no way for these Appellees to say and in fact, obtain the right to show the film which its obscenity was being -- the matter of its obscenity was being litigated. They couldn't obtain that in a defense to a state criminal prosecution; there just was no way they could. They could defend the state criminal prosecution; they can say they are not guilty, put the state to the test of proving the obscenity

of the film, but when they want to show the film on November 12, 1969 and thereafter the only remedy they had was to go into a Federal District Court at that point and say, "We," and institution this action and seek relief. We have a right to show the film on November 13th and 14th and 15th while its obscenity is being tested under the state criminal process.

Now, that, we submit, is a permissible interference. What the cases prior to Dombrowski and what the general principle of nonintervention of Federal Courts in state criminal process involves, we submit, are only those instances where the same relief or the relief that the plaintiffs are seeking could be obtained from the state process. Here that's just not possible. These Appellees, so far as trying to show the film in the interim, could not obtain any relief from the state courts. They could defend the criminal prosecution.

If the state had had an injunctive procedure under which the state prosecutor would go into state court and seek an injunction, then they had that remedy in the state court. They could defend against that injunctive proceeding. Of course, if the state prosecutor decided not to institute it they would never have it. But, assuming if it did, they could defend and litigate the right of showing the film in the interim. There was no such procedure.

Q Does Massachusetts have a declaratory judgment procedure?

A It has a declaratory judgment procedure, Mr. Justice. However, the standards that the Massachusetts Supreme Judicial Court applies in the declaratory judgment cases indicate that this issue could not be raised. There is pending on this Court's docket now, I think, is the case involving the obscenity of the stage play, "Hair": PBIC versus Byrne, which involved an attempt to obtain a declaratory judgment from the Massachusetts Supreme Judicial Court which was subject to various state objections that the state raised in that case. And that case demonstrates how hard it would be even to obtain a declaratory judgment on the initial question, which is the obscenity of the film.

But, certainly in terms of the right to show it in the interim, which is really what we say is at stake here and all that is involved in this injunction, that right could not be asserted in the state courts and it certainly could not be asserted in defense to a criminal prosecution, because the only issue in the criminal prosecution would be whether the film is obscene or whether all the other constitutional or statutory standards are met and the judgment of conviction, and not whether the film would be shown on the 13th or any other days.

On the general principle of nonintervention, if I may just address myself to it briefly, this Court's decision, ranging way back, and certainly culminating in Zwickler and

Koota, have made it clear. I think Zwickler and Koota the Court quoted from a District Court opinion which made it -- and I just quote that briefly -- the Court said, "We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other form.

Now, here, this case, we submit, follows a fortiori from Zwickler and Dombrowski and all the others because the right that's covered by this preliminary injunction -- and let me emphasize it is a preliminary injunction, and therefore the standards that would only apply to preliminary injunctions, we submit, should be applied.

In other words: District Courts have broad discretion to decide on the probability of success of the ultimate outcome of the litigation and issue preliminary injunctions in those terms. Here we deal with a preliminary injunction and we submit, for that reason, certainly rights which couldn't be asserted in a state court and which these Appellees had no way of asserting in a state court should properly -- were properly protected by the Federal District Court and should be affirmed here.

Now, I would like, if I may just briefly to go to the question of the effect of the decision of the Court of

Appeals for the Second Circuit which was raised also in the argument last week before this Court and which we think applies to these circumstances, as well. One has here a set of facts in which whatthe state prosecutors have sought to do was to prevent the exhibition of a film under the statute which the Court below found, and we submit properly the subject of constitutional challenge -- when that film itself had, prior to its opening, been found to be constitutionally protected by a United States Court of Appeals.

Now, we don't argue, and of course we couldn't argue that the finding of the United States Court of Appeals was bindings on the State of Massachusetts as a matter of res adjudicata. What we do argue and we elaborate -- and the distributor, who was the Appellant in the Mullin case, elaborates at some length in our brief in that case and we think it applies here as well, is that in terms of protecting and giving wide scope to free expression, the decision of the Second Circuit and the decision of the Court of Appeals, or indeed, any decision which is binding on the United States should, as a matter of First Amendment law, be applied by this Court to bar other proceedings to prevent the exhibition of the very same material.

Now, that's just the very -- in terms of the practical consequence on distributors and exhibitors of films and books, that's just a very important rule. This Court has on

docket right now, pending in one form or another, five cases involving the exhibition of this film. The five cases are in the States of Alabama, Florida, Massachusetts, Maryland and Ohio, all involving the exhibition of this film.

As was stated in the brief in the Maryland case, there are 144 lawsuits in the country involving the exhibition of this film. Essentially, the distribution of films and books throughout the United States, to put a distributor or an exhibitor who has established to the satisfaction of the Court of Appeals in a judgment binding on the United States, which could have been joined by states throughout the United States, that a film or a book is constitutionally protected, must, we submit, act to prevent future harrassment, multiplicitous litigation, which otherwise makes the distribution of such First Amendment material, or argue the First Amendment material, close to impossible. And that's why the argument made is essentially that that judgment, although not operative as a matter of res adjudicata, should, like various other decisions of this Court which have found judgments binding on the United States: in the search and seizure area; in the self-incrimination area, to, in effect, have operative effect on state prosecutors and state bodies, but that very same rule should be applied in the field of arguable obscenity, in the field of books or movies that are distributed nationwide that go through a Federal proceeding that are conclusively adjudicated by a

Federal Court as being constitutionally protected and should be, we submit, free of multiplicitous and repeated suits in various local jurisdictions.

Q The only theory is that the SecondCircuit Court of Appeals proceedings gave it kind of a license, a Federal license that under the supremacy clause o for some other reason, had to be honored in every state and locality. Is that basically your theory?

A A license in a sense that it gave it a First Amendment shield. We think that this is -- one needn't --

Q Well, I'm just asking about your theory --

A Right; yes. The history of this case shows and this movie, shows that -- what the contrary result -- the absence of such a rule really results in, which is --

Q Well, what does your rule depend on; that's my question?

A The rule --

Q The rationale that supported --

A The rationale is that if vis-a-vis the United States, material is found to be constitutionally protected under the First Amendment, states which have had an opportunity to enter that litigation, assuming it's a judgment, if it had an opportunity to enter that litigation, should not, thereafter, as a matter of First Amendment law, be able to inhibit its distribution, sale and publication by -- under local --

Q Why?

A Because, if the right to free speech, the First Amendment right, is to be given the breathing space it needs, which this Court has referred to on various occasions, the danger to it of threats of multiplicitous litigation must be prevented. And it's simply, as it were, a preventive rule, a prophylactic rule that, we submit, the Court should adopt to prevent the very kind of situations that have arisen with regard to this film.

Q I have a little trouble understanding the rationales for the rule. I understand the rules you submit, but I don't understand the reasoning that supports it, apart from what I'm trying to verbalize. It's sort of a Federal license that is paramount with any attack of the state --

A I prefer to call it a Federal --

Q A Federal pilot's license and then you can go in all directions -- in every direction all through intrastate waters --

A I would prefer that there were a Federal -- but that's exactly what it is; that's right. But only in a litigation. Let me say Federal license can't just be granted unilaterally, but only in litigation, where the state has the opportunity to come in; that's really our argument. We think it is --

Q Suppose the Second Circuit had said --

suppose the doctrine operates in reverse -- suppose the Second Circuit had said the film was obscene --

A Well, if the Second Circuit had said the film was obscene I wouldn't be here, Mr. Justice; it would be out of the country, and we couldn't have brought it in. Of course we would have taken it up to this court, but it just wouldn't be here.

Q How would you know that this is the same picture?

A I think that could be contested. I think if a state were to say they added things to the movie, I think that's an appropriate issue that a state may consider.

Q That would be a fact question in each case; wouldn't it?

A That would be -- I think in this case and it's totally undisputed that the very same versions of the film were being shown all over the country, but --

Q What worries me about the chilling effect is that it has been shown to four or five million people. That's a little warm, rather than chilly.

A That's true; that's true, but it's awfully cold in Maryland, Massachusetts, Alabama, Florida and Ohio.

Q It's not totally cold in Maryland for people who can't drive to the District.

A The problem with that, Mr. Justice, is that you

are imposing an added burden to attend material which is subject to constitutional protection. We think that's not proper; you can't just say, "Well, if we allow it in various regions of the country where people can reach it by traveling, that's good enough."

Q I just don't understand your answer to my Brother Stewart, that you don't have some obligation to litigate; now you don't even want to litigate, except in one court.

A We think --

Q Isn't that what you're saying?

A That is what we are saying. We don'thave an obligation to litigate if we litigate against the United States in a case where -- in a Federal Court where the states and local jurisdictions could come in if they wanted.

Q You mean the STate of Hawaii could come into New York?

A Yes; if it wanted to claim that the film should not be shown in Hawaii; yes.

Q You wouldn't consider that a burden on Hawaii?

A We think when the burden --

Q You say it is a burden on you if it didn't -- I'm just worried about this shift in the burden.

A The difference is that the State of Hawaii has no constitutional right not to be in a New York Federal District

Court. What we maintain and I think what the decisions of this Court in Dombrowski and prior to it have said, is that what the First Amendment requires in terms of breathing space, is prevent where necessary, even unnecessary multiplicitous repeated litigation.

Q What do you see in Dombrowski that says that that applies to other people other than Dombrowski?

A Well, I think what the Dombrowski --

Q What do you find in Dombrowski that says that?

A Well, I think that what the Dombrowski opinion does say is --

Q Are you saying that the Dombrowski opinion is enough so that if somebody started to search somebody in New York they can't do it?

A No; but what the Dombrowski opinion does say is that the threat of sanction and that the -- by imposing on a party who is exercising a First Amendment right, the obligation to go through repeated litigation. That in itself would deter speech and I think Your Honor adverted exactly to that in the Interstate Circuit case. There is language in the Interstate Circuit case which talks about the fact that the ordinance of the City of Dallas, if other cities do the same thing, will have an inhibiting effect on the motion picture industry and Hollywood.

Q I thought we said in there it was all right

regarding children; that you could prohibit children from seeing the picture; I thought that that's what we said.

A But the licensing statute in that case was struck down and Your Honor referred to the fact that if Dallas could do what it does then every other city could do what it wanted to do and the result would be that those who produce films would not produce anything that's even close to the line.

That's exactlywhat we're talking about here. If this film can be subjected to 144 lawsuits and five trips to this Court, then people are obviously deterred from producing any film which may be subject to litigation.

Q Have you any figures to show that these motion pictures are dropping off in numbers?

A In terms of --

Q Because I think there are some who would say the opposite.

A You mean motion pictures that are close to the line or that -- I think the real test is whether the effect of litigation is inhibiting --

Q I hope you are not saying that it's been chilled?

A Well, I think, Your Honor, with all respect, I think that it has been shown with regard to legitimate distributors and exhibitors.

Q Can you show me one distributor of obscene

pictures that's bankrupt?

A Well, I can only say that the distributor of this film has incurred very, very substantial costs in litigating these issues through the various courts and in fact, it is bound to be an inhibitory --

Q I assume that the profit, if there are four million that have been it at $5 a head, my arithmetic would get in trouble -- What I'm trying to say is: I wouldn't get into the point about trying to get this license; you don't need that for your case, do you?

A No; I don't think so, but it's an alternative ground that we have relied on in the brief and I just wanted to discuss somewhat on oral argument.

ORAL ARGUMENT BY ALAN M. DERSHOWITZ, ON BEHALF OF APPELLEES

MR. DERSHOWITZ: Mr. Chief Justice, and may it please the Court: simply in response to that it may be relevant, though of course it's not in the record, that at the stock of this distributor of this film, who was not a commercial pornographer, has dropped from 39 to 3, in great part as a result of the cost for this particular litigation. So, it certainly does have a chilling effect, not only on the distribution of films that are close to the line, but on the distribution and operation of a company which decides to distribute films which run the gamut and which may run afoul of state

conceptions of immorality.

Q Now, General Motors would not make that claim with reference to the drop in its stock?

A No, but we do with reference to the drop in this stock; at least in part.

Q That's pretty speculative; isn't it?

A Well, it's speculative, but I think it's supported by the information that we have at hand, but I didn't want to dwell on that.

Q I'm sorry to have to interrupt you again, Professor Dershowitz. Let me ask you: would you accept the postulates I think advanced by the Solicitor General on the bear-baiting, the right of the state to prohibit bear-baiting contests for public exhibition, or otherwise?

A Well, I think the Solicitor General suggested the only possible distinction between the Stanley case and the -- cases that preceded it, and the case that's before this Court now. That is the distinction which rests on public sensibilities; that is: the public knows what's going on in the theater whereas the public does not know what's going on in a private home. I submit that that distinction was rejected by this Court in the case of Griswold versus Connecticut.

In that case, you will recall, the prosecution was not directed against the users of birth control, the married couple; it was directed against clinics, "centers" they were

called. They were open centers; they were visible; they were, so to speak, on Pennsylvania Avenue. They were, of course, discreet and yet they disseminated the information and materials necessary for birth control. The public knew that birth control information was being disseminated and the public in Connecticut were offended by that fact alone, as reflected by its legislation; yet this Court decided not only to protect the rights of those who would use those birth control materials and information, but also necessarily by its holding: the right of a clinic, though it's public in some senses, to discreetly give out the information and materials necessary for the effectuation of a primary right.

Now, in an important respect this case is a fortiori from the Griswold case. The Griswold case involved purely a Fourth Amendment right. The Constitution is neutral on whether or not couples practice birth control. There is no First Amendment right involved there; indeed, it's an activity, rather than any arguable speech. So, that case relied exclusively on the Fourth Amendment. This case, although it may conceivably have Fourth Amendment overtones, we concede it cited the Olmstead case; certainly also the Government would concede, has important First Amendment overtones. The primary right, the right to satisfy one's emotional and intellectual needs in the privacy of his home is a First Amendment right, centrally.

And so one would think -- I certainly would argue -- that the decision of this Court permitting dissemination of material necessary to the use of birth control in the Griswold case, would necessarily require a limited, discreet opportunity to obtain materials which are necessary to satisfy the intellectual and emotional needs described in the Stanley case.

Q Would you mind coming back now to the bear-baiting that we were talking about?

A Right. Now, on the bear-baiting I would think there would be no constitutional protection for bear-baiting; bear-baiting is an act, of course; it's a real act; animals are killed. The constitution certainly permits the states the right to protect the interest of animals as distinguished from the interest of the sensibilities of those people who were concerned about the rights of animals --

Q Aren't both factors involved in a statute that prohibits that kind of conduct?

A WEll, I think the example would be better if it were a film, as you put it, a film of bear-baiting.

Q Let's not go beyond the reality, first; let's stay on the line of --

A Well, I think I would have to say, then, tthat the constitution does not permit individuals to choose to have their sensibility offended. Perhaps that's a contradictory term, "to choose to have your sensibility offended," but the

constitution would not permit prohibition of an event. If it were protected by the First Amendment, then arguably, bear-baiting itself might not be, though a film or an exhibition of it might be, and would protect that right.

If the only interest at stake were a desire to protect people against sensibilities which they have voluntarily decided not to be protected against.

Q Then are you saying it's all right to kill one bear and five dogs in a filming process, but it isn't all-right to kill many more of them in the live showings, then?

A No, I wouldn't say that; I would say that they would have the right to prohibit the killing of dogs and bears, whether for film or other purposes. The protection of animals is, perhaps arguably, a constitutional right.

Q Since we agree on that, suppose it developed in a particular case that -- there is no use naming the states, but let's say 14 states have not enforced, not sought to enforce or didn't have any statute against bear-baiting and four-and-a-half million people have watched bear-baiting or the filming of bear-baiting; would that have the slightest relevance in your judgment, on whether the showing of bear-baiting in Boston, Massachusetts could or could not be estopped under a Massachusetts statute prohibiting it?

A The fact that many people have seen it -- No; the First Amendment protects the individual rights to

receive information necessary to satisfy the emotional intellectual needs. The fact that some people in Baltimore might come to see it in Washington; the fact that some other people in the United States have seen it, to me, to our argument, is not necessarily relevant. In fact, there are many people who would love to participate in an activity which has First Amendment ramifications and which the state is forbidding it to participate in; that is to watch, to exercise a First Amendment right, for no arguable, for no presentable reason.

Now, certainly we would argue that if a person takes a shower on Pennsylvania Avenue that certainly is proscribable in a number of grounds. First of all, it is not speech, but more important it offends people; people don't want to see other people taking showers on Pennsylvania Avenue.

The thrust of our opinion would give the prosecutors great powers to look at what's offending other people. It would take them from within the private theater, the theater thatis attended only by people who want to go and would put them outside the theater to protect you and me from the intrusion on our sensibilities that would occur if movies opened on Pennsylvania Avenue and advertised in a pandering way, thrust its advertisements or its pictures or commercials on unwilling viewers; that is clearly not involved in this case. The State conceded on July 14, 1969 in open court that there was nopandering; the advertising was discreet; no children were

permitted into the theater. The theater was policing; that the public was forewarned, and yet not forewarned in a way as is so typical of many movies: not forewarned in a way which titillates; it was forewarned in a discreet way.

So that what is involved in thise case is the classic instance of only adults who choose to see an exhibition which the Second Circuit has held to be with socially redeeming value; only those adults are being denied the right to see that First Amendment protected material we argue, simply because of some tenable claim that public sensibility may be offended because others outside the theater know that people inside the theater are viewing this kind of film.

Q Let me go back to something you said earlier: are you suggesting that it is a universal rule that everybody is offended by bear-baiting, for example?

A No.

Q I suspect many people would like to go to see it; wouldn't they?

A By all means.

Q You are not suggesting, either,that everyone 100 percent would be offended by a public showering on Pennsylvania Avenue?

A That's right.

Q Well, then, the fact that there is a differing view on these matters doesn't really enter into it; does it?

A Yes, it does. Wewould argue that the constitution gives greater protection to the right of privacy in this regard than the right to offend people by thrusting upon them stimuli. That is, everybody who wants to see somebody shower -- assuming that would have some First Amendment protection, could do it in a closed, private theater, there is no need to do it on Pennsylvania Avenue where innocent people would be offended.

And so I would say all doubts must be resolved in favor of privacy, but this case presents no doubts. There is nobody, not a single human being who was being offended because a stimuli was being thrust on him. The only claim was that human beings were being offended by passing by the Symphony Cinema Theater and seeing the discreet sign saying: "I Am Curious Yellow," is playing inside. We submit that kind of offense, which is identical to the offense of a person passing by a birth control clinic, does not deserve constitutional protection, when pitted against an arguably First Amendment protected right.

Q -- introduced an element that's new; at least to me. Suppose the prosecution could demonstrate that half of the people who saw the movie performance, were offended by it, and so testified.

A Judge Aldrich addressed himself to that question in oral argument and he said that there must be adequate

warning before and an opportunity, indeed, to leave in the middle at any given time. Indeed, there was no evidence the state might have sought to introduce, but there was no evidence of a single complaint whereby single persons, of course, other than policemen, who went to see the film, nobody complained about its offensive character. One can imagine a constitutional statute which punishes a film which deceptively lures people into the theater on the assumption that it's something else and then it turns out to be an offensive or an obnoxious film and complaints are filed. That is not this case.

Q Well, if I follow your thesis on, how about moving the bear-baiting into a theater and charging $5 admission for it?

A Well, of course the admission charge would be, we argue, irrelevant under this Court's holding in the Times case in Interstate Circuit. Under our system people simply must make money for an activity to go forward and First Amendment activites must be operating within our capitalistic system as well as other activities, if they are, in fact, to occur.

Bear-baiting, I stated previously, bear-baiting is not now being protected by the constitution because it is (a) an act; (b) it hurts animals. But, if it were a movie that were being played inside; yes, we would have to argue that a movie played in a discreet theater, and remember, I would like

to remind this court simply that it need not necessarily reach the issue of hard-core pornography in this case because there was no assumption that this film was hard-core pornography; no claim it was hard-core pornography, and the Second Circuit decision can at least be relevant to the extent of allowing this Court to decide this case on a record other than a hard-core pornography exhibition in a closed, controlled movie theater.

Q I don't want to overwork you on the bear-baiting, but in order to have a film of bear-baiting you have got to go through an unlawful process in the first instance.

A If the process is unlawful, then there is no right to make the film.

Q Is it unlawful?

A The process of bear-baiting? The state has the right to make bear-baiting unlawful.

Take another hypothetical: a film being made of a bank robbery in process. We know that these things now occur. Surely there was a right to exhibit that film in a public-controlled theater, even though it might be offensive to many.

Q A bank robbery is illegal, whether privately performed or any other place; isn't it?

A Right; and I would think that bear-baiting would be illegal, whether privately performed or otherwise, because it results in the killing of animals.

Q And you think that analogy is valid?

A I think the analogy of bear-baiting is not valid in the sense that bear-baiting, which is a fact, and which is a legal act and which hurts animals, is different from the film made of acts legally committed, in fact, in this case, being presented upon a screen to a public who has chosen to view them.

Q The difference between showering on Pennsylvania Avenue and the bank robbery of the Riggs Bank is that the showering on Pennsylvania, you say, is illegal but the showing of it is legal?

A But not on Pennsylvania Avenue. The showing of the film of people showering on Pennsylvania Avenue would be illegal; indeed, the showing of the film of people showering in their homes would be illegal if the curtains weren't drawn down.

We would argue that a theater with the curtains drawn down deserves more constitutional protection than a home with the shades drawn up; that one must look at the functional definition of privacy and functionally, the theater which is closed is more private than the home in which the shades are open.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Professor Dershowitz.

Mr. Quinn.

REBUTTAL ARGUMENT BY ROBERT H. QUINN,

ATTORNEY GENERAL OF MASSACHUSETTS, ON

BEHALF OF THE APPELLANTS

MR. QUINN: Mr. Chief Justice and may it please the Court: very briefly I choose to touch upon three items which I think have been a part of the Appellees' argument.

The first relates to what I think has been referred to as a "novel" approach for law enforcement in the field of obscenity. The suggestion is, of course, that a customs case in the Second Circuit is one that ought to invite the interest of every state law enforcement official. This, I respectfully submit, is one aspect of an approach to law enforcement of which I want no part whatsoever.

For the first reason, I don't know how a state could intervene into a Federal customs case. I know of no provision that would entitle any of us who might be States Attorneys General or District Attorneys, to step into this Court to be ultimately bound.

For another reason: I am not prepared any more than any other individual in this courtroom to make the assumption that some imported film or other item is obscene and ought to have my supervision immediately on its importation, to be obscene.

I think first any one of us in law enforcement,

would have to have an opportunity to make a judgment on the facts, would have to see the film, as in this case, in our jurisdiction. We should not be asked either to come in out of curiosity to another jurisdiction or another court, or to ????? commit our motives on any binding effect of that particular decision.

On the contrary, in this particular case, there must have been some assumption to the validity of the particular act, which is the showing of the film, until there was a contrary decision made, and this is exactlywhat occurred in the jurisdiction of the Commonwealth of Massachusetts.

Here is an allegation; a complaint, an indictment; one single action taken by a qualified law enforcement official of Suffolk County. There were many arguments, and there was a hearing; there was a trial conducted, and this covered a period of five-and-a-half months when the particular film in question showed. Then there was no chill, whatsoever on any citizen's rights, whether the Appellees here, or any viewers, as far as their opportunity to observe the film, "I Am Curious Yellow," which two judges out of three in the Second Circuit Court determined was not obscene.

Q Mr. Attorney General Quinn, it's not entirely clear in my mind as to when this five-and-a-half-month period came, chronologically in this litigation. When do you say this film was freely shown?

A From the beginning of the -- from the spring of 1969, Mr. Justice Stewart, which I think was probably in May, and then the indictment was sought sometime around the last week of June, by the District Attorney of Suffolk County and there was action then taken by the Appellees in the Federal Court, but there was no controlling action taken by the Federal Court, nor was there any other action taken by the District Attorney of Suffolk County; just one single indictment and during the time when these arguments ensued and when the trial on the issue was held, in a jury-waived session in Suffolk Court, that covered a period of five-and-a-half months.

Q It was that period, and I understood Mr. Lewin to say, and you agree, if I understood him correctly, that with respect to a moving picture film there was not, in Massachusetts, available a civil in rem action available to the prosecutor, as contrasted with a book?

A That is correct, Your Honor. There is not that remedy available to the prosecutor, but there is a remedy of declaratory judgment which was at once endorsed by the Massachusetts Supreme Judicial Court in its decision in Commonwealth versus Baird, where these First Amendment issues are brought into focus; and there has been other precedent in the Massachusetts Court system for active approach taken by anyone asserting his individual rights.

So, this film showed for five-and-a-half months in

the Massachusetts jurisdiction, notwithstanding the District Attorney of Suffolk County had no opportunity to appeal in the Second Circuit.

Of course, implicit in this is the fact that we cannot assume that there were any threats on the part of the District Attorney of Suffolk County over the Attorney General of the Commonwealth of Massachusetts during this five-and-a-half month period. There were no threats and I further suggest that a threat connotes illegal action on the part of a state law enforcement official.

There was only one single action taken during this five-and-a-half month period. There has been no action taken by the District Attorney since that period; only the fact that he will not pledge to undergo more further prosection should this film be shown. Where there was a forbearance on the Appellees here after the finding. And I respectfully submit that after the finding by a court of competent jurisdiction in Suffolk County, that there is obscenity that any prosecuting official, any law enforcement official who should take a pledge that he would not move against the film, found in fact, to be obscene in his jurisdiction, would not be upholding his sworn duty to administer the law and to prosecute crime.

But, there was no such statement made; only that a change had occurred. This was after the five-and-a-half month showing; this was after a finding of obscenity; this was after,

I respectfully submit, a removal of that presumption which must have existed on the part of individuals on the basis of decision: the two-to-one decision in the Second Circuit.

I further suggest to this Honorable Court: what else is a law enforcement official to do as far as these cases areconcerned if, over his shoulder, constantly is -- I would not use "the threat," but is the possibility of Federal Court intervention in every action that might be undertaken by that state law enforcement official in good faith in the pursuance of his duty. What else is he to do but stand still and, I submit, let something now presumptively a crime, continue to be perpetrated within his jurisdiction.

I would further suggest that if we are to remove the very pressing issue of obscenity from determination by this Court or by any individual citizen, nobody has seriously suggested that I have heard, that we not continue to apply the limitations which were mentioned in the provisos in the injunction by the Court below. Those limitations that provided this injunction shall not apply if the picture is advertised in a manner pandering to prurient interest in sex; or shown to an audience not warned of its possibly offensive character; or if shown to children under the age of 18 years.

I respectfully submit that more constitutional issues could be raised in any one of these three classifications than are raised in the whole issue of what is obscene

and not obscene under the concepts of definitions of obscenity as outlined by this Court in Roth versus the United States.

We would have to wonder what size newspaper ad was advertising in a manner pandering to prurient interest. We would have to wonder if showing the film in Disneyland with all the cautions in the world, was, nevertheless, a failure to warn of possible offensive character. We would have to wonder if some young people in these United States who come from, for example, the Mediterranean counties in their heritage, as my own wife does, could not be allowed a greater degree of maturity than age 18; or to those individuals of my own heritage, who might have come from Northern Europen countries.

No; I hardly think that removing obscenity as proscribed conduct could remove the problems that beset law enforcement officials and this Honorable Court alike, in the area of obscenity.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Strauss, you have a few more minutes.

REBUTTAL ARGUMENT BY PETER L. STRAUSS, OFFICE OF THE SOLICITOR GENERAL, ON BEHALF OF APPELLANTS

MR. STRAUSS: I think, in fact, Mr. Chief Justice, that the 20 minutes that I was allotted by the Court had expired, I think the only thing that I would wish to note on the

issue of Griswold versus Connecticut, counsel sought to bring that case to his aid. Certainly if the statute involved in that case were a statute prohibiting birth control clinics, we would be in for a much harder time of relying on it. The statute involved in that case is the statute which prohibited married couples from using contraceptives. This Court struck down that statute in a prosecution against the directors of the clinics as aiders and abettors under that statute and in doing so, used the language that I quoted, the reasoning which had been found not only in that opinion but in the ultimately prevailing dissent of Mr. Justice Harlan in Poe versus Ullman(?) and I think again that that is the central issue in Stanley, that the state is invading -- in the Stanley facts the state is invading a completely private realm and here we are dealing with public conduct and because it is public conduct, no matter how carefully guarded it may be, there are at least some sorts of materials which the state may prevent from appearing in the course of that conduct.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Strauss. The case is submitted.

(Whereupon, at 11:36 o'clock a.m. the argument in the above-entitled matter was concluded)