In the

Supreme Court of the United States

PARIS ADULT THEATRE I ET AL.,

Petitioners,

vs.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, ET AL.,

No. 71-1051

Washington, D.C.
October 19, 1972

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LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, ET AL.	:	

Washington, D.C.

Thursday, October 19, 1972

The above entitled matter came on for argument at 11:36 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
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT EUGENE SMITH, ESQ., Suite 507, 102 West Pennsylvania Avenue, Towson, Maryland 21204 for the Petitioners.

THOMAS E. MORAN, ESQ., Suite 820 Northside Tower, 6065 Roswell Road, N.E., Sandy Springs, Georgia 30328 for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1051, Paris Theatre against Slaton.

Mr. Smith.

ORAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case originated in the City of Atlanta when the Respondents filed a complaint seeking a, in essence, a declaratory judgment and injunction to prohibit the showing of two movies. This comes about because the theatre, the Paris Adult Theatre, had two separate sections to it where separate films were being shown and one would walk into the cashier and go into one or go into the other.

Q So there was a common lobby?

MR. SMITH: A common lobby, yes, sir. And then the door would open into the particular film they wanted to go see.

The complaint filed by the prosecutor -- or the prosecution or the Respondents in this case, sought a temporary injunction to stop the showing of the film pending the hearing on the permanent injunction. Fortuitously, the judge did not sign that broad of a temporary restraining order, merely he sought to stop the Petitioners in this case

from taking the films out of the jurisdiction or altering or removing them.

A hearing was scheduled in January and, ultimately, on January the 13th, 1971, the films were produced. Their evidence produced before the court indicated that this theatre had its outside was painted so that no one could see inside and there were several legends on the windows to the extent, "For Adults Only," "You must be 21 and be able to prove it," "If viewing the nude body offends you, do not enter."

The forewarning of the character of the material which one might expect to find therein was clearly stated on the outside. The prosecution at the time of the presentation of its case brought in several witnesses who had viewed the movie. These were investigators in the office of the Solicitor and they indicated that these films showed explicit sexual acts of cunnilingual, fellatio and intercourse.

The trial judge, after viewing the movies, found they did not show these explicit acts. They were simulated. The Supreme Court of Georgia said, well, it doesn't leave really much to the imagination and it is close enough and besides, we thought that the acts which, in essence, were simulated in "I am Curious Yellow," that this is the same kind of thing. We thought it was obscene in "I am Curious

Yellow" and the Supreme Court of the United States has not reversed in that case and so as far as we are concerned, this is hard-core pornography.

That was just the title they threw on it, even though there were no explicit sexual acts consumated in this particular film, sort of in the sense of the language of this Court in Rabe versus Washington when it was talking about certain types of films.

The Court, as I said, issued its order and held that these were not hard-core pornography, that there were no minors involved and that as far as the court was concerned, they were tasteless, vulgar, childish, unimaginative, boring, but as far as it was concerned, it was protected by the Constitution.

The State Supreme Court reversed and we are here on this issue.

We pointed out initially in our brief that the procedure -- there were no procedural guidelines for this taking process in the state. There is no statute that permits this; there is no authoritative judicial construction that will say that as far as the court will hear it on a certain day, the court will decide within a certain number of days as to its decision in this particular matter.

We say the procedural safeguards are lacking. They are not there, but yet the state has been allowed to

do it in this matter.

More importantly, we would like to direct our argument to the question suggested by this Court with regard to the display of sexually-oriented films.

My brother, in his brief, would interpret the terminology "Any sexually-oriented films" as meaning obscene films. I interpret that in a slightly different way. We view this as being whatever the definition -- whatever definition of the members of this Court, whatever definition is applied by statute, whether it is something to the left of Pinnochio on up to the extremes that Mr. Moran has cited in his brief.

Whatever -- however you define it, whatever denominator you use to define it and aside from the specific definition, is there a constitutional right to offer this for dissemination in a commercial theatre where there are no children admitted and where there are some notice, some warning on the outside of the theatre as to the character of the material being offered therein.

Now, my brother would say, "Yes, but there was no sign that said cunnilingual activity depicted, no sign that said fellatio. It just says, 'If the nude body offends you, please don't enter.'"

But the first time we put a sign out that said cunnilingual activity and fellatio in, then they would be

hauling us in and charging us with pandering, which is in essence what they did in other cases in that jurisdiction where that particular matter was present on the outside of the theatre. So in this context, this is what we have, and addressing ourselves to the greater point, we don't think that Roth necessarily is inconsistent with the argument we are making today.

This Court, in essence, did say in Roth that, yes, obscenity is not protected by the First Amendment but it went on to say that the door barring federal and state encroachment into this area must be kept tightly closed to prevent encroachment upon more important interests.

We suggest that the Redrup cases which, in essence, started a trend in which there were approximately 33 or 34 cases reversed per curiam, led us gently from the point of focusing on the expression to focusing on conduct. It is, as Mr. Fleishman pointed out with regard to the California Attorney General who was walking down the street last night.

We do not have in this record any reference to anyone standing outside of the theatre and hustling them in as you might find in a nightclub or something like that, nothing whatsoever. There is absolutely no hustling or in any way pandering, however you might define those terms involved in this case.

We suggest that the right of the disseminator to

assert this position, although he is not necessarily the viewer, is clear, from a variety of cases held by this Court. One of the key points that the Court has made with regard to the First Amendment is that if there are not the procedural safeguards, we are going to have inducement of self-censorship and when one induces self-censorship, then in essence, the public is the loser. The public is the loser and in prosecutions undertaken without, in this context, sure they can be punished if there is going to be an intrusion but we do not have that in this case. There is not in this case the problem that might be presented in a magazine or a bookstore where the book is taken out of the store and left in a trashcan and the possibility is that it may be found by children.

We have a film in a commercial theatre where people can go and view it . In Karalexis versus Byrnes, reversed by this Court on other grounds, the lower court held that if Stanley, in essence, can watch a film of any kind, any sexually-oriented film, sexually-explicit film in the privacy of his home, why can't a few fellows get together and watch it in a commercial setting and have just the same sense of privacy and the same sense of protection?

We suggest that makes good sense.

We pointed out in our brief that approximately 600-millions of dollars are spent in a year on the sale of

or exhibition of sexually-explicit material and that is an awful lot of public support for an interest in sexually-explicit material.

Q I wonder how many dollars are spent in efforts to suppress it by local and state police and federal?

MR. SMITH: I would say, your Honor, a great deal, I am sure, is spent.

Q A lot of people would be put out of work --

(Laughter.)

MR. SMITH: Well, I think Mr. Clancy, my brother who has the Amicus brief in this case, probably would feel that he was being put out of work, but in this context, we think that the focus on action, on the conduct of the disseminator, would not be inconsistent with the protection of the right of the public under the First Amendment. We are not, as in Reidel, conceding that these films are obscene.

In Reidel, for the purpose of the motion to dismiss, there was a confession that for that matter -- assume the films were obscene, we are saying something different. We are saying that the definition of whether the films are obscene is not relevant until an inpermissable intrusion occurs by the act of the disseminator in thrusting it upon someone or by having it involved with minors in the particular case. This does not exist here. So we say it is not inconsistent for this to have occurred.

We also have argued and set forth that the film itself, regardless of the argument we make on the right of an adult, the right of a disseminator to show films in an adult theatre, that these films are not obscene. They are not unlike films, for instance, involved in the Hartstein case, films that were involved in the Wiener case, and this points out the difficulty, we suggest, in why this Court should enunciate a broader protection and a positive protection to eliminate the difficulty inherent in trying to fit a definition because in some states the prurient interest is defined as shameful and morbid. In others, it is an itching sensation, I think, using some of the terminology taken from a marginal note by Mr. Justice Brennan in the Roth case, using that phraseology and then prurient means so many different things to so many different people.

And then the question of community standards. Are we talking about some standard to which we all should aspire? Getting married for life and never having an extra-marital affair and never getting divorced? But is that what the community really does? Sure, that is something. That is the ideal. That is what we really hope to aspire to. But then, in this context, is the community standard that which we should aspire to or is it that which we find ourself in today and is there a single standard in any community? We suggest there is not. There are many -- there is a standard

of different groups.

It is clear, in surveys taken, whether they are political surveys, whether they are sex-research surveys, that there is a conservative element in our society, there is a liberal element in our society and there are a lot of people who just don't care one way or the other or at least don't show a great deal of positive interest in responding.

We have indicated that there were community attitude surveys by the Presidential Commission on Pornography and Obscenity where several millions of dollars were spent, taking a survey on the demographic basis throughout the United States and one of the conclusions were that many people felt, as Mr. Justice White pointed out in Reidel, that there is a developing sentiment where people, adults, should be allowed to read and see what they want to see and, in essence, that is what the public said.

Now, again, taking the definition of what is the community standard? And when we talk about candor, what is the view of candor? We may tolerate homosexuality in our society. It is not our bag, but it is there. It exists. It is part of it. But yet, if you discuss it, if you depict it, in some ways, it may be said, "No, it is wrong because that is not what the normal person does in our society."

going on to the concept of social value. Some jurisdictions have eliminated or are trying to eliminate by

referendum the concept of social value in an obscenity litigation. Is the fact that a material which is pruriently appealing, is the fact that material exceeds contemporary community standards -- but, if it has some slight modicum of social value as was the Memoirs decision -- is this enough to protect it? And communities are trying to do away with that and there is the problem of the local versus the national and how local is it and how national is national?

This presents a problem. The courts are literally flooded with obscenity cases and I know that this Court has a great many of them that have found their way up here.

There are lots of cases on appeals in federal courts and state courts which are awaiting decision of this court in this case on these issues. There are many cases being made almost daily in the lower courts and which will ultimately find their way up to the appellate courts and, depending on who the judges are that you are sitting in front of and how he views the words of this Court in context or out of context, the jury instructions and such given, make it very difficult -- make it very difficult for to be the uniformity that there should be in the application of a national Constitution, and there is where we get back to the point where the focus we suggest should be on conduct.

If we want to go out and talk about a political candidate it is one thing, but if we are going to do it at

2:00 o'clock in the morning in a residential neighborhood, then the right of freedom of speech is ended right there. It is not the right, of course, to do it any time, any place that you want. You can't block ingress and egress if you are going to do picketing.

In the same sense here, no one forces these people to go into the store. It is the right of the individual to choose and it is the right of the disseminator here to assert the right of the citizen who might want to see this. We are doing this and, in essence, if the Court were to go to this point, then the self-censorship factor would be eliminated and I think that, as Mr. Justice Brennan has pointed out in the past in some of his decisions, the public would really then be in a position to choose, view and disregard what it is and then it is the mature and free society that should be allowed to make that choice. It should not be jurors focused in the light, the public light, where they feel they must react because there is a community pressure. If they say it is not obscene, somebody will think they are dirty old men. This is the concept.

We eliminate these things by focusing on the conduct so that if there is a public display, then this is eliminated. The State of Oregon, for instance, now has litigated -- has passed a statute and there can be no prosecution for obscenity unless there is public display of material by the

public highways; in an adult-only bookstore, in an adult-only theatre, it is okay, as long as there are not juveniles involved.

The State of Hawaii has now passed the same kind of law as the State of Oregon, again holding this is the kind of law that should exist.

Q Are those matters discussed in your brief, Mr. Smith?

MR. SMITH: No, sir, they are not.

Q They are not?

MR. SMITH: No, sir, they are not.

Q Do you have them?

MR. SMITH: Yes, I can furnish them to the Court.

Q Would you submit them?

MR. SMITH: Yes, sir.

Q Are those the only two that you know of, Hawaii and Oregon?

MR. SMITH: They are the only two states which have thus far done this.

Q How recent is Oregon?

MR. SMITH: Oregon is about a year and four months, your Honor. Hawaii is about four or five months. It is very recent.

And we suggest that this works and I have quoted extensively from Professor Emerson's book and he is

suggesting the solution to this Court to get it out of a lot of the problems with regard to obscenity litigation.

We think it is a sound solution. The Chief Justice is well-known for his views regarding the clogging of the dockets. We say there is a big way to get a lot of these cases out of the way by enunciating a principle like this which will protect the shock that may be found to the public that wants to avoid confrontation but at the same time giving the right to the individual who wants to view and read. And I would like to say --

Q There was no jury in this case, was there?

MR. SMITH: No, sir.

Q Indeed, it was a proceeding in the nature of an equitable proceeding?

MR. SMITH: Yes, sir, that is correct.

Q In the Petitioner for Certiorari, you say in your brief that the relevant statutes and constitutional provisions are in the Certiorari petition and I pick that up and all I find is a criminal statute.

MR. SMITH: That is the point I am making, your Honor. I said earlier,your Honor, there is no statute to cover what they were doing because of the criminal statute they sought to undertake and utilize a ad hoc procedure.

Q Well, that is an ordinary civil, equitable interpretation.

MR. SMITH: That is correct, but I am relying upon the criminal statue for definitional purposes and, of course, ultimately they may have decided to take the films when they obtained them and, as an ancillary proceeding, institute a criminal proceeding. That is the statute under which they travel, the definition under which they travel and, of course, one of our complaints here is that the matter was simply an ad hoc proceeding. It was --

Q Well, of course, if the courts of Georgia say that that is a procedure available under Georgia law, I suppose that is the end of it as far as we are concerned, although apparently there is no statutory authority for it.

MR. SMITH: No, sir, there is no statutory authority.

Q Well, you must proceed by the Georgia courts.

MR. SMITH: Yes, but again, they approved the procedure in this particular case, but they did not say or dwell or say that, you know, the judge issued his opinion within so many days and --

Q That is your Freedman argument, isn't it?

MR. SMITH: Yes, sir. That is the point I was making.

Q Well, Mr. Smith, you complained that in fact here the judge took an unduly long time on the facts --

MR. SMITH: No, sir, no, sir.

Q -- he didn't, but because there were no guidelines, another judge might have.

MR. SMITH: That is correct, your Honor. Yes, sir.

Q Was this in the nature of the ancient nuisance type of injunction?

MR. SMITH: Sir, I do not see that. Mr. Clancy, in his brief and the Amicus brief seems to suggest that and, you know, I did not find that was even an issue in this case. There was no -- this was not called "obnoxious public nuisance." It was not being shown in an outdoor theatre. As I said, it was an indoor theatre and this was simply an effort to suppress the showing and distribution or exhibition of these two films to adults.

Q You mentioned an Amicus brief. I don't seem to have one. I don't know who filed an Amicus brief.

MR. SMITH: Well, I got one this morning.

Q It was just filed this morning, late.

MR. SMITH: Yes, sir, I just received it this morning.

Q Of course, you won -- you prevailed in the trial court?

MR. SMITH: Yes, sir.

Q And you had an adverse determination which was not on the issue of obscenity, as I understand it as such of the film?

MR. SMITH: Yes, sir.

Q And that was favorable to your clients?

MR. SMITH: The first ruling was, yes, sir.

Q And you still think that that procedure did not satisfy the freedom standards?

MR. SMITH: Viewing it, as I was responding to Mr. Justice Rehnquist, the fact that Judge? Ethridge did it this way, we are left then to assert our procedural due process in the vast number of cases to the efficiency of a particular judge and a particular jurisdiction and that is not what I understood this Court meant in Freedman and Teitel Film Corporation and other cases that followed that.

I would like to save whatever few minutes I have left, if I may, for the conclusion of Mr. Moran's case.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Smith.

Mr. Moran.

ORAL ARGUMENT OF THOMAS E. MORAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I filed this suit in the opinions of the law with its variant sections. There existed at that time, in Georgia, three basic types of procedure. One was strictly civil. One was strictly criminal and one was civil leading toward the criminal process.

Now, before I was in office in this particular case, the Solicitor travelled the criminal route. He was stopped in Gable versus Jenkins and the Federal District Court says "No, you must first have a prior adversary hearing before seizing the material."

And therefore, we started the civil proceedings as a prior adversary proceedings leading to the seizure of the film for criminal prosecution purposes. I might add at this juncture that this is not any longer imposed upon us. The federal court says there they were mixing apples and oranges, civil and criminal procedure and it complicated matters and as long as the court would stick with the civil process on the one hand and the absolute criminal process on the other, we had a clear and defined area that the criminal process would inherently grant to the person a far greater protection than any civil injunction could grant.

Nevertheless, the outline or the method of using an injunction was suggested in Gable. Then we started that process and a petition was filed alleging that the film in this case was obscene, setting out a factual description of the film. We showed it was being exhibited to the general public on a fee basis. We asked the court to restrain and enjoin them from further showing of the film --

MR. CHIEF JUSTICE BURGER: We will pick up at that point after lunch.

(Whereupon, at 12:00 o'clock p.m., a recess was taken for luncheon until 1:00 o'clock p.m.)

AFTERNOON SESSION 1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Moran, you may continue.

MR. MORAN: I believe at the recess we were at the point concerning the procedure employed in this particular case for the State of Georgia.

The petition as it was served upon the Defendants at that time did not restrain the showing of the film, did not in any way interfere with the showing of the film. It simply restrained and enjoined them temporarily from removing the film without the jurisdiction of the court and the hearing was set immediately thereafter.

From that juncture it is entirely up to the exhibitor whether he wants the hearing or whether state will press for it at that time, which we generally do. Any continuance is on the behalf of the exhibitor.

In the meantime, he can continue to show the film. Then, after an adversary hearing -- and I might add and I cautioned Counsel I would mention this to the Court -- that the film was produced by Counsel wrapped in a Christmas package and which the court graciously accepted in the manner in which it was tendered.

The film was shown and the court in this case did not render a decision for quite some time. There was still

no injunction whatsoever about showing the film.

Finally, the --

Q The film was produced in court?

MR. MORAN: Yes, sir.

Q And then was shown --

MR. MORAN: Yes, sir.

Q -- to the court and then thereafter was it returned to the Defendant?

MR. MORAN: No, sir, it was kept as evidence in that particular case.

Q But they were permitted to go ahead with the showing on another copy?

MR. MORAN: Yes, sir. They could do so.

Q Did they have more than one print of the film?

MR. MORAN: I do not know, sir. But that is the procedure imposed on us by the Federal Judiciary in Georgia.

I might point this out at this juncture --

Q What this amounted to was a seizure of evidence by way of a civil action.

MR. MORAN: Yes, sir, after a hearing.

Q But did I understand, was this the only print of the film?

MR. MORAN: I do not know that point.

Q You did say, I thought, that they were free to continue to exhibit.

MR. MORAN: They could have exhibited. There was no prohibition about exhibiting the film.

Q But you don't know that they, in fact, did exhibit?

MR. MORAN: No, sir. No, sir. We do not use this procedure any more and we only used it then because it was imposed upon us. We resisted it then and we resist it now.

For you see, unlike most states, since 1877, Georgia enacted a constitutional provision which reads, "Liberty of speech or of the press guaranteed. No law shall ever be passed to curtail or restrain the liberty of speech of of the press. Any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Now, on that statute or because of that statute, I personally filed suit in K. Gordon Murray Productions versus Floyd in challenge to censorship ordinances in the City of Atlanta, Georgia in 1962. The ordinances, I contended then, were infected with the vice from Teitel and the Georgia Supreme Court declared them unconstitutional, as abridging this particular provision and said that they could show what they please but they are going to be responsible for what they show. If it amounts to criminal acts in nature, they can be punished for the criminal acts in nature.

Just as you can have a gun legitimately on your

person and that is all right, or in your home, but if you use that gun for an illegal purpose, that is something else again and that is the procedure we adopted in the State of Georgia.

And I might add in just passing, that reference was made to Oregon and Hawaii, I believe, reducing the standards of obscenity or abolishing it althgether.

That, I say, is well and good, if that is what the state there wants. This is a legislative problem we are coping with and not, as we contend, a judicial problem.

Q How would you go about this procedure -- what procedure would you employ if you were doing that now in Georgia?

MR. MORAN: In -- we would proceed under a search warrant and proceed criminally. We would make the arrest, have the commitment hearing which we are required to do in a matter of 24 to 48 hours and have every criminal protection of any person accused of crime. There could be no destruction. The only difference in civil process is strictly civil and strictly criminal without the abortive intertwined in that in a civil process it is for the purpose of seizure and destruction.

In the criminal process it is seizure for the purpose of evidence.

Q Well, then, what you do, I suppose, is that some officer would have to see the exhibition, and then he would make an affidavit in support of the search warrant and go to a

magistrate and get the search warrant on the basis of that information. Is that right?

MR. MORAN: Yes, sir. A factual effort, not one that just would say, "I saw a film and it was obscene." He'd have to start off exactly as the films are described in this brief and that is the factual basis upon which they are now issued, and let the magistrate himself determine it and that is why we have made no effort to school the police officer in the field of pornography. We don't want his extra-judicial opinion. What we want to know is an affidavit of what you saw, where you saw it, and when you saw it and let the justice take it from there.

The motion picture films here I think speak for themselves, the description, I think, is accurate.

There is a big conflict in what you see and what they say you see. They bring in an expert witness and I think the remark was made here today that it does not clearly depict certain acts, that you have to use your imagination, and some of these experts testify that way but in the New Orleans Book Mart case I think it was Judge Brown observed this in his opinion, "Thus one defense witness testified that a particular photograph did not depict cunnilingus but only suggested it."

This is a photograph of a nude female with photographic focus on her genital area showing a male head and

face a few inches away, mouth open and tongue out and the witness said, "That just suggests something. It doesn't show anything."

We get down to the next issue. They make a professional witness or expert witness and this is where we get into an unusual area because the so-called "expert witnesses" fall into two categories. One, nothing is obscene and, two, everything is obscene which leaves the jurors sitting mutual again.

So as in this case, and the witness is a very personable fellow, they brought in a hired gun and that is what he is, a hired gun. He comes there for a purpose. He could give no concern about what happens and this hired gun is usually a nonresident. He just comes riding in. Then his services are contracted for before he views the material. That is true in this case. The man got on the airplane, flew to Atlanta, got an agreement how much he was going to be paid, was going to testify and he had not seen anything he was going to testify about.

As a matter of fact, he hasn't seen both these films entirely yet, but we'll let that go.

This testimony is all prepared. He arrives at the trial prepared to get on the stand. His testimony won't vary between a dozen cases. In this case, Dr. Dowd didn't see the film until the trial was in progress and he only saw

part of "Magic Mirror," but this didn't deter his testimony one iota and he went trotting down the primrose path.

Then he testifies and he collects his bounty and rides off into the setting sun to parrot his testimony to anyone who wants to buy it and he candidly confesses that no sexually-oriented material is obscene.

He is for sale. He is for hire and that is all.

In the United States versus Brown, the Court made a reference to one of these hired guns and they said, "Referring to the photographs in the two books, Dr. Hammond stated they would appeal to some homosexuals but not necessarily any more than a Sears and Roebuck catalog."

Likewise, Dr. Hammond indicated that these books were no more revolting than a television commercial showing a man brushing his teeth. The realm of psychiatry is indeed highly technical and beyond the understanding of laymen, but these conclusions seem absurd.

It goes without saying that the difference between the Sears and Roebuck catalog or a toothpaste advertisement and these two books is almost immeasurable.

In Buckley, the Court said it might be noted in passing that Defendant's "expert witnesses" were, for the most part, unpersuasive. For example, a defense psychologist testified that 42nd Street movies depicting sexual intercourse did not appeal to the prurient interest in sex but that

lingerie ads in the New York Times did.

So, following the reasoning and going to the graphically obscene material, I think the Court said, which men could not differ in their opinion?

As involved here, I don't think that in this case expert opinion was necessary. I don't know how in the world one man is going to sit before a judge or a jury or a combination of the two and tell them that they didn't see on the screen what they just got through seeing and that is exactly what he has to do.

I have tried one case which comes to mind where you cross-examine these expert witnesses and the witness actually took the stand involving 16 magazines and never hesitated in his testimony for one minute while he was flipping through them, so he could testify that they were not obscene. This is incredible but this exists. So we say that the procedural proposition is correct.

The fourth question is the question the Court asked us to brief and to argue, whether a display of any sexually-oriented filmsin a commercial theatre when surrounded by notice to the public of their nature and by reason of the protection against the exposure of the films to juveniles, is constitutionally protected?

I set out in my brief and have picked up here the Commission report. The Commission report does not like to use the word "obscene"

and they abhor the word "pornographic" and they were the ones who first created and the trial court picked up the use of the phrases "explicit sexual materials," "sexually-oriented materials,""erotica." But the report in its preface on page 3 cautions that the words and materials in this context is meant to refer to the entire range of depictions or descriptions in both textural and pictorial form, primarily books, magazines, photographs, films, sound recording, statutory and sex devices.

Therefore, when faced with this question which relates to any sexually-oriented materials, we must consider it to embrace all terms from cunnilingus with a female and a pig -- which is on the market -- to the Redrup innocuous materials. It spans the spectrum.

I would caution the Court on -- not caution, that is not the proper word -- suggest to the Court that a distinction be made between the written word and a motion picture film -- the Commission makes such a distinction and advises against legislation which would prohibit or permit children to view pictorial scenes but says they should not be deprived of the right of reading.

Q Mr. Moran?

MR. MORAN: Yes, sir.

Q Now, let me ask you one question relating or attempting to relate to question asked to be argued by the

state for the record here. Am I right in thinking that the record made in the trial court is silent as to whether or not there was pandering or juvenile attendance and that sort of thing so that in effect whichever party had the burden of proof on that point would lose?

MR. MORAN: It was silent in that regard. There was no evidence of either pandering or exposure to juveniles.

Q Was there any evidence that there not pandering or exposure to juveniles?

MR. MORAN: No, sir, I don't think it was raised either side.

Q You feel it was silent, then?

MR. MORAN: Well, it was silent with these photographs of the outside of the theatre, yes, which they said were modestly warning of what was going on inside, but we did not consider that to be such as to be pandering in the strict sense of the word.

Q Well, no, but didn't I understand your colleague to say that there was some notice outside that no children under a certain age would be admitted?

MR. MORAN: I think it said "Be 21" or be gone." or something like that. I presume it referred to the ages.

Q And also, if certain types of material offend you, don't come inside?

MR. MORAN: That's right.

Q That kind of notice.

MR. MORAN: Yes, sir.

Q And that was before the trial judge, wasn't it?

MR. MORAN: That's right. That's right. It was stipulated there.

Q I don't see otherwise why --

MR. MORAN: As a matter of fact, he lost his pictures and we put ours in for him. We are very gracious people down there.

Q As I recall the order of the trial judge, it was on a basis of a finding of something to that effect that he denied the wasn't it?

MR. MORAN: Yes, sir.

Q Yes.

MR. MORAN: Yes, sir, we said that there was frolicking in the nude. If you could call frolicking in the nude obscene, then maybe this is true. I did not see nor did the Supreme Court see where the word "frolic" came from. After the viewing the film, they held it to be hard core pornography. I don't think there is any question about it and we ask this Court to go along with that.

Well, now, the fourth question, Mr. Justice. This is where we get into a very serious thing in my judgment. It was suggested, for example, in Mr. Fleichman's argument that the right to sell a book is based upon the right of a

person to read that book.

Now, Stanley limited itself and stated very clearly that nothing -- Roth is not impaired by what we hold here today. There is no question about that. It emphasized that Roth was not impaired a second time and said it was not reversed.

And so did Reidel. But in a number of the lower trial courts, they said that is what the Supreme Court said, but that is not what they meant and down the primrose path they went and they extended Stanley to the right to possess and to the right to receive. And statute standing between that highway was struck down.

The right to receive was the right to transport. So that statute went aside. Then to import, and that statute went aside in Thirtyseven Books to the trial court.

Now, mind you again, the book is words created in the mind of an author and nothing more. Perhaps they are more erotic, more feeling. I don't know. But that is important, really, because motion picture films are live people and live animals. Then take this distinction, if it can be so, that you have a right to show sexually-oriented films unemcumbered and to control circumstances and hold that this is constitutionally protected, then someone has a right to sell these films to a distributor which envisions the right to transport these films, which envisions the right to

manufacture the films.

And when the Court holds that a person has a constitutionally-protected right extending from a person who wants to view a film to manufacture films in the United States consisting of human beings and animals, human beings and human beings, man and man and man and woman or a combination of the two, then we have got a strange First Amendment, a very strange First Amendment.

So you can't start extending unless you go all the way and this is a step that is going to be taken and they don't miss anything. Now this question was decided, I thought -- frankly I thought that Reidel was the light at the end of the sewer.

But Roth first held that it is obscenity and its distribution was outside the reach of the First Amendment. In Reidel, on page 357, this Court observed that it has erred that there is a development sentiment that adults should have complete freedom to produce, to deal in, to possess and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age.

The concepts involved are said to be so elusive that the law is so inherently unenforceable without

extravagant expenditures of time and effort by enforcement officers and that the court, the basement reassessment is not only wise, but essential and this is what this Court said.

This may prove to be the desirable and eventual legislative course, but if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. Roth and like cases pose no obstacle to such developments and that is where this question should lie.

For it is then that some way, some control could move to stop this line of communication along the line. It is easy to look at one part of the question and say, "We can do this," and this is fine, but you must look to the overall picture as to how it is going to affect everything and by proclaiming a constitutional privilege on one hand may grant a constitutional license on another in a field we did not even consider.

So we are getting now to ask what was urged in this Reidel, to produce, manufacture and to create and this would be indeed a tragic thing.

The same holding was held in Mugler versus Kansas back in 1887 and it has been that way ever since.

Now, they say, "But most of the people want to see this stuff. It is a multi-million dollar industry." Gambling is a multi-million dollar industry. Prostitution is a

multi-million dollar industry. Narcotics is a multi-million dollar industry and other heinous crimes, so the money value we are not concerned with. The fact that they are concerned about this lowly police officer and poor district attorney who has to prosecute these cases doesn't appeal to me very favorably. There is no valid reason for doing this.

But they say that the Congressional Commission or the Presidential Commission on Obscenity conclusively shows that people will see all of this stuff. This Commission report was immediately rejected by the Senate. It has no foundation in fact or in science. It was referred to in the Congress as a magna carta for pornographers, ludicrous, and a fraud among the American people and it was soundly rejected.

Now, we know of all the hired guns that they come down to, that it first relied upon the Commission report and now they have some other formula of telling you what the community standards are in Texas when they have never been south of New York. There is one survey upon which this Commission primarily bases its report and even the most avid, the most saddlesore hired gun admits that the question is absolutely a fraud and is unscientific.

This was the Abelson report and it is contained in the report here.

And the book says in the public opinion about sexual materials, "In 1970, a survey involving face-to-face interviews with a random sample of 2,486 adults and 769 young persons aged 15 to 20 was conducted at the Commission's request --" Abelson et al, 1970. "One of the purposes of the survey was to determine whether Americans regard and define the area of erotic materials as a significant or important social problem. Adult respondents in the survey were asked this question." And this is a dilly. "Would you please tell me what you think are the two most serious problems facing the country today?" And they set out what answers they gave, but only 2 percent mentioned erotic material. Therefore, 98 percent could not be concerned with it. But none of them mentioned cancer, tuberculosis, or respiratory problems so I guess nobody was concerned with that, this negative report.

Yet on the same page where this is contained, the report did candidly say this, "Opinion surveys sometimes appear to report contradictory findings, and the findings of the Commissionb study --" Abelson, 1970. "-- may appear to be inconsistent with reports that 85 percent of the American adults favor stricter laws on pornography --" that is the Gallup Poll " --and that 76 percent want pronographic literature outlawed and 72 percent believe that smut is taking the beauty out of sex."

Now, how you can join those two, or reconcile those two, I'll never know. The opinion, though -- and this is my idea or understanding of this entire case -- is an effort to have this Court make the judgment of this Commission of Obscenity and Pornography; the judgment of this Court which would, in effect, repeal every law on obscenity in the United States. If we say this can be shown in the commercial theatre, any material under controlled circumstances, then every law relating to pornography throughout the States would be abolished except as it applies to children.

Perhaps, may it please the Court, we have dealt too long in trying to define the word "obscene" or "pornography." It is time we began to describe the act rather than to define the word.

Wild defined it and said, certain things were hard core pornography. Abronovitz described it and said, this is hard core pornography. But the Judge in there also said, "Emphasized in such a way as to totally depersonalize the human model into an object or thing, plainly designed to make possible and this nonpunitive kind of ultimately effective material will affect it."

We ask the Court to affirm.

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

Mr. Smith, do you have anything further?

MR. SMITH: Yes, if it please the Court.

REBUTTAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SMITH: Just a few brief points if it please your Honors.

Q Before you start, Mr. Smith, are these exhibits, pages 84, 85 and 86, which I gather are photographs of the front of this theatre with the notices?

MR. SMITH: Yes, sir.

Q Were they before the trial judge?

MR. SMITH: Yes, sir.

Q They were in evidence?

MR. SMITH: Absolutely, yes, sir.

Q And where are the originals of those photographs? Are they here in the record?

MR. SMITH: They should be.

Q It is hard to read, for example, from this.

MR. SMITH: I think they are.

Q The notice says, "Over 21," I guess.

MR. SMITH: Yes.

Q You think they are?

MR. SMITH: They are and, in fact, the oral testimony of one of the police officers indicated that there was a sign -- on page 57, I believe, of the Appendix where Officer Little said, "Of course, it went on to state that no one under 21 years of age was admitted."

We can make them available, your Honor, they should be in there and I think that the ones in the Appendix were copied from the originals which should be in the record.

The point we made regarding the expert witness testimony was not so much whether --

Q There is a picture of the building, I think, in the Amicus brief on "F" right at the end of the Amicus brief. I think that is the theatre, "Atlanta's Finest Mature Entertainment," on the marquee. Is that it?

MR. SMITH: Yes sir, that's right.

Q Is that the same exhibit?

MR. SMITH: Yes, sir, that is the same.

Q That is the reproduction of the actual exhibit?

MR. SMITH: I don't know where they got these from, your Honor, but I would suppose -- it appears to be the same.

The point that we were making with regard to expert witness testimony was that the prosecution should produce something for the jury. These experts theoretically they don't come in and say, "Well, I think this is obscene and I don't think this is obscene," they are talking -- they talk about some aspects of the test, do these have educational values? Do these have -- do these exceed the limits of candor tolerated in the community in the representation of

sex and nudity? How else can you get this before a jury? We merely alluded to the fact and have argued that the prosecution should have the affirmative evidence. They not only do not affirmatively show this, they say that ours is no good because that if they found someone, he would be saying that it was obscene and ours would say it would not be obscene and so, really, it is a jury question and the jury doesn't need any experts to help them one way or the other and we say, of course, that is incorrect and we say that they should have the affirmative responsibility.

The question of -- made by Mr. Moran regarding the Abelson survey is not entirely complete and accurate. The Abelson survey in the Commission's report on pornography and obscenity as found on page 43 of the Government Printing Office version clearly sets out a national survey of American public opinion sponsored by the Commission shows that the majority of American adults believe that adults should be allowed to read or see any sexual materials they wish.

Now, the part that Mr. Moran talked about was only one aspect of another survey conducted. Abelson conducted numerous surveys and the one aspect that he conducted did, in fact, talk about what Mr. Moran said, but then the major part of the survey related to telling people there are bookstores, there are theatres in this nation which show

people engaged in sexual acts and nudity, pictures of nudity and sexual acts and then they went on to ask the people whether or not they thought others should be allowed to see this, so long as it did not intrude on to their privacy and the majority of the American people at that time, in 1969, said yes and an even larger majority -- about another 20 points or so -- said yes in the early part of 1972.

Q Well, what has this really got to do with the issue before us?

MR. SMITH: I -- what it has to do with the issue before us is that if we listen to these factors, we see that there is a lot of confusion in trying to apply what this Court set out, thinking perhaps it was a good, solid solution, a line limiting and saying what is obscene and what is not obscene.

This has been construed in very many ways and a lot of other problems have come back and what it really has to do with it is we are saying that this Court should hold to the position that we have tried to suggest and that is that we should change the focus from the expression itself to the conduct.

I am saying that there is just complete confusion that has existed. It clearly is apparent in the many petitions that this Court must receive in the trials below and the only value that the surveys have were -- just merely,

I was commenting to Mr. Moran's point and to let the Court know that it wasn't just that point that the Abelson survey was based on. He indicated that the whole report and the conclusions of the majority were based upon this little survey and the way they were asked a particular question.

We again suggest to the Court --

Q What do you mean by conduct? As a matter of fact, your brother asked us to do -- asked the Court to do exactly what you are asking us to do, focus on the conduct.

MR. SMITH: But he is talking of focusing --

Q And you are asking the same thing.

MR. SMITH: -- on the conduct of what is depicted in the films.

Q Well, I thought the conduct of conducting a movie theatre is what he was talking about.

MR. SMITH: Yes, sir. I was talking about --

Q Now, what are you talking about?

MR. SMITH: The conduct that thrusts itself upon an unwilling public, the conduct that interferes with my rights when I don't want to view something. And as I said, your Honor, here is part of the problem now. Mr. Justice Burger asked --

Q You would limit it to that?

MR. SMITH: I limit it to the situation, as I said, where minors are involved and to those ways of dissemination

which intrude into the privacy of unwilling individuals. When there is an intrusion, then the definition of what is obscene becomes constitutionally relevant. Some one -- some man -- may say that he thinks that Time Magazine, because it may show two or three nudes, is obscene and writes the Post Office and then the Post Office would make an analysis whether, applying this Court's definition, is it obscene?

Sure the intrusion occurred. They did not invite Time. That is when it becomes relevant.

We say, your Honors, that these films do not -- are not as represented by Counsel here for the government. They do contain sexually frank scenes but there are no instances of sexual consummation explicitly portrayed.

Taking in part the words from the Rabe versus Washington case, they don't exist and this is part of the problem.

Q What if they did, would you -- that doesn't come under your -- that wouldn't be within either one of your exceptions, anyway, would it? So what has that got to do with your submission?

MR. SMITH: That is correct, and again, your Honor, my brother, on the question of the procedure, Mr. Justice Burger inquired regarding the procedure, how this came about, what is the current procedure today? And one of the things I was pointing out was, and it was pointed out by my brother -- was an officer would make an affidavit as to

what was being shown, but no two people can agree on what was being shown.

The trial judge says it did not show explicit sexual acts. My brother says it does show explicit sexual acts.

Q I understand your argument to be that that is basically an irrelevant inquiry under your submission, that it is permissable in any event so long as there is not an assault on the privacy of unwilling people and so long as there it is not exposed to children. Is that your argument?

MR. SMITH: Yes, sir, right in the context of our fourth argument.

Q So this question is irrelevant to your argument, is it not?

MR. SMITH: Irrelevant as to that argument in point number four, yes, sir.

Thank you.

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

Thank you Mr. Moran.

The case is submitted.

(Whereupon, at 1:35 o'clock p.m., the case was submitted.)