In the

Supreme Court of the United States

MURRAY KAPLAN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

No. 71-1422

Washington, D. C.
October 19, 1972

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Thursday, October 19, 1972

The above-entitled matter came on for argument at 10:36 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:

STANLEY FLEISHMAN, ESQ., Suite 718, 6922 Hollywood Boulevard, Hollywood, California 90028; for the Petitioner.

WARD GLEN McCONNELL, Deputy City Attorney, Room 500, 205 South Broadway, Los Angeles, California 90012; for the Respondent.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Stanley Fleishman, Esq., for the Petitioner	3
In Rebuttal	37
Ward G. McConnell, Esq., for the Respondent	16

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1422, Kaplan against California.

ORAL ARGUMENT OF STANLEY FLEISHMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

Petitioner Murray Kaplan, a bookseller, has been branded by the State of California as a criminal for selling a book, a sexy book, to an adult who asked for a good sexy book. For doing so, Mr. Kaplan has been placed on probation for three years on condition that he spend 30 days in jail and that he pay a fine of a thousand dollars.

Initially I would like to point out what is not involved in this case. We do not have in this case any issue of sale to or exhibit to minors. We do not have in this case any affront to the sensibilities of adults or anyone else. We have no shock. We have no fighting words. We have, to put it simply, pure communication, a sale of a book to an adult.

The facts are not in dispute at all. On May 14, 1969, Mr. Donald Shaidell, a police officer with 16-1/2 years of experience, came to petitioner's bookshop--it is an adult bookshop, there were some 250 of them in the City of Los Angeles at the time. Mr. Shaidell was browsing around for

about 30 or 40 minutes when the petitioner said, "This is not a library. Can I help you?"

It was at that point where Mr. Shaidell said, "Do you have any good sexy books?"

The petitioner said, "All our books are sexy."

Then he said, "I want a good paperback book. Something really good."

The petitioner said, "Hey, I'm reading one now. Suite 69." And he read it, a portion of pages 84 and 85, which I may say parenthetically are paled--the words are paled by comparison to Henry Miller's Tropic of Cancer, found not obscene by this Court a long time ago.

After reading the passages to the officer, he bought it for $1.95, and that is the entire transaction.

From the beginning, the petitioner here urged that his conduct could not be punished constitutionally, that he did not do anything that offended the state in any fashion by selling this book to this adult under these circumstances.

Our basic claim here, Your Honors, is one that has, not to my knowledge, been posed quite this way before, although certainly we have posed it differently on other occasions. Our claim here is that an adult in America has an absolute right--and I know that absolute rights are not many, but I believe this is one of the few absolute rights that we do have--an absolute right to read anything he wants

to read, even if it has no social value, even if it appeals to the prurient interest of the average person, and even if it may be thought to be taking the offensive by others.

Q Your client was not convicted for reading something, was he?

MR. FLEISHMAN: My client asserts the right to defend the right to read, Your Honor. My client claims a derivative right. We say that if in fact an adult has this absolute right to read, then the bookseller has the right to assert the right to read in exactly the same fashion that Mr. Baird was given standing to assert the right of the unmarried woman who wanted to obtain a contraceptive. We do not claim that petitioner bookseller has the right to sell an obscene book. That fact is so. We do say, however, that the right to read would be meaningless unless the bookseller, when he is charged criminally, can come before the Court and say, "This you cannot do because you are interfering with the right of an adult to read if you punish me," the bookseller who is selling to an adult.

Q Stanley would seem, at least superficially, to uphold the right to read. But Reidel, on the other hand, would indicate that that does not mean that your client has the right to sell, would it not?

I mean, in other words, your client was not convicted for reading anything.

MR. FLEISHMAN: No. My client--

Q I think you have to go a little further--

MR. FLEISHMAN: I do.

Q --than assert the right to read. Because your client was not convicted for reading anything.

MR. FLEISHMAN: You are right. I have gone further, I believe, in the sense I have constructed this case, at least my argument, differently than we did in Reidel. In Reidel we asserted the right of Mr. Reidel to sell. He had a constitutional right to sell. I come here now and say I know the Mr. Kaplan does not have a constitutional right to sell an obscene book. But I do say that the bookseller has standing to assert the right of the reader. There is nothing in Reidel at all that is in conflict with that.

As a matter of fact, I believe that on a close reading, Justice White, of Reidel, you told us that we did not posit our argument correctly. As I read it, you did state that there was an independent right there but we had not claimed the correct right in Reidel. At least that is my reading of it. I do not believe there is anything in Reidel that stands in the way of our prevailing in this case. That is all. The result may be very close to the same. But we certainly are walking in a different door, and that is what I am talking about at this time.

I do not think there is any way of avoiding the

result that we claim here once we agree as to a proposition that there can be no disagreement about. That is that an adult simply has this absolute right to read. It is not only in our Constitution. It is not only in the cases that this Court has decided on innumerable occasions. But it is, if you will, in the Universal Declaration of Human Rights, which has been with us now for some 25 years, passed in 1948. Article 19 of that Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression. This right includes freedom to uphold opinions without interference and to receive information and ideas through any media.

Q That means through any medium that is available legally, does it not?

MR. FLEISHMAN: It says really through any media, which is through books, magazines, or through any communication, as I would see it, Your Honor.

Q California is simply saying in this case that the medium, that is the store--I am not now speaking of the book--the store, operating as it was operating, violates California's law. Is that correct?

MR. FLEISHMAN: It does not violate California's statute, Mr. Chief Justice, because--

Q What is California's claim with respect to the statute?

MR. FLEISHMAN: It would violate the statute if the statute were given the broad reach that the state has claimed for it. What we say here, though, is that that broad reach simply is impermissible because it does not trench upon any state interest. The only state interest that has ever been articulated by this Court with regard to the suppression of obscenity are really twofold. One is the legitimate concern with minors and the other is the legitimate concern with the privacy of the general public so that the general public is not shocked or offended by obscenity because it is the fact that this kind of communication, of very explicit sexual material, can cause shock in very much the same way as the words in Chaplinsky were thought to be fighting words or in very much the same way that the words in Boparnet were thought to be offensive to the sensitivities of the persons who heard them.

But once we leave that, there simply is no state interest in telling a person that he cannot read even an obscene book. That is my understanding of what Your Honor said in Reidel, Mr. Justice White, where, as I read it, there was the statement that Stanley recognized an independent, constitutional right, independent of the First Amendment, a constitutional right to read what one wants. Whether one talks of this in terms of the penumbras that come from the First, the Fourth, and the Ninth or however one wants to

articulate it, we do think that the California just simply does not have constitutional power to interfere as far as it has in this case.

Q Mr. Fleishman, if we said in Roth that obscenity as such is not protected by the First Amendment, why need the state to show what you call a state interest if it is dealing with what is arguably obscene?

MR. FLEISHMAN: Because, Your Honor, and this really is the heart of my argument, that even though obscenity is not speech and therefore is not protected by the First and Fourteenth Amendments, even so an adult has the right to read obscenity and this right to read, even obscenity, is a fundamental personal right. Therefore, if the state wants to interfere with the fundamental personal right to read even an obscene book, then the state must show a compelling reason.

Q Then you are saying that what we said in Roth is not entirely correct, that if a person has a right to read an obscene book, presumably that right stems from the First Amendment as incorporating by the Fourteenth.

MR. FLEISHMAN: Not entirely. I think that is what Mr. Justice White was teaching me, at least, in Reidel, that there is a right to read but it is not a First Amendment right to read. And, therefore, it is an independently saved right. There are certain things--for example, I suppose I have the

fundamental constitutional right to go about and enjoy a sunset, to enjoy that; that is a fundamental right that I have. That is not a First Amendment right. It is a personal right that comes to me as a human being in terms of the importance of living. And the state simply cannot interfere with that right without showing some legitimate state interest, and the legitimate state interest must be a compelling interest where you have fundamental rights at stake.

Q Would you require every single exercise of the state police power to be justified on that score? Supposing the state decides to build on land that it owns a large freeway that obscures your view of the sunset from your backyard. Would you say that the state has to show a compelling state interest to cut off that view?

MR. FLEISHMAN: No, no. I think this is the distinction that was drawn in Griswold, the distinction that was drawn in Baird. It is the distinction that is present in Stanley and it is the distinction we claim here, that there are personal fundamental rights that simply stand on a higher footing than merely economic rights or social rights which do not come into this same level. When you said in Griswold that there is a right of privacy, marital privacy, which is fundamental and the state can only intrude in that in a limited area and upon the showing of a compelling interest,

it was because there was a finding that that situation was of great importance in a free society. I am saying that the right to read, the right to think, and all that is embodied in that is fundamental to a free society. You simply cannot have a democratic society without giving and recognizing the importance of a right to read anything that an adult wants to read. Once we agree that that is a fundamental personal right, which is on a different footing than the land case that Your Honor was talking about, then I say that the state has to come in and show something. Why, for what reason, can the state come in and say that an adult cannot exercise that right? And they simply have not done it here. So, it tends to justify--not only do not make a compelling case, they do not even make a rational case.

Q Mr. Fleishman, you have got me confused again. Are we dealing in this case with the right of the reader or the right of a seller?

MR. FLEISHMAN: We are dealing with the right of petitioner to assert the right of the reader in precisely the same way, Your Honor, that Mr. Baird was given standing to assert the right of the unmarried woman who wanted to obtain a contraceptive. In that case, the right belonged to the unmarried woman, but the person who asserted the right was Mr. Baird, who had given it to her. Now, in this case, the right that I claim, the constitutional right that is inherent

here in this case is the adult person's right to read. So, the bookseller, the person who makes that right meaningful, is in a position to assert that right. He has standing. He has standing for better reasons than Baird was given standing in the Baird case, because in Baird the Court said that unless Mr. Baird could assert the right that was involved, the right would fall into disrepute, it would wither away.

In our case, in California, there is no time of reading an obscene book. Therefore, there would never be a situation where the adult could assert--he would have no forum in which to assert his right. And, under those circumstances, this Court has said that the third party rule, the rule of certain third party rights, can be relaxed and should be relaxed. And that is exactly what we are here. We do not say--and I want to repeat it--we do not say that the bookseller has an independent right to distribute an obscene book. Roth has said no, Reidel has said no, and we accept those propositions here. But that does not mean that a bookseller can be sent to jail for doing nothing more than engaging in a transaction which is absolutely protected. That is to say, letting an adult obtain a book which he has an absolute right to read.

Q Then, Mr. Fleishman, your case stands or fall on the issue of standing, I take it?

MR. FLEISHMAN: On this aspect of the case, that is

true. Before leaving the Court, please, I would like to point out that as I understand it, every member of the Court really has accepted the right of the adult to read obscenity privately. If I understand Rosenfeld correctly, Mr. Justice Powell there stated that our free society had to be flexible enough to permit adults to engage their tastes, which would include obscene talk privately. The condition was that that obscene talk not be such as to intrude upon those who are unwilling to engage in this kind of talk. But inherent in and explicitly stated in Rosenfeld was that there was the right of individuals to exercise their own tastes in this way. It is something we all know, this distinction between the public and the private. A joke which is perfectly proper--it may be an obscene joke--perfectly proper in a fraternity house or in a locker room is perfectly improper when it is in a pulpit or perhaps in this Courtroom because it becomes an offense. But if you have the situation which we have in this case where there is simply no offense to anyone, then so far as this aspect of the case is concerned, there is the actual right to read which then does depend on standing, as Your Honor did state before.

But there are other aspects to the case which do not depend on standing. First of all, once we leave the first point, we believe that the book is not obscene under the variable obscenity test even if it meets the three-pronged

test set forth by this Court in Memoirs. That is to say, a book which sold to a consenting adult under controlled circumstances such as we have here simply is not taking the offensive, because it is one thing if you have a mass mailing such as was involved in Roth in the first instance or in again in Ginsberg--there, because it goes out indiscriminately, it is going to be offensive to large numbers of persons. And then you do have to ask the question, Is it patently offensive to this large group of people who are exposed to it? But it is irrelevant, it seems to me when you have a situation where if I choose to buy the book and read the book and it does not offend me, then it does not matter that that same book would offend most other people. The other people don't buy it, don't read it, and therefore whether it does or does not offend them is simply irrelevant. The same thing is true with regard to the appeal to the prurient interest. The appeal to the prurient interest of the average person makes sense when you have again a widespread distribution to a large number of persons. You have to then stripe the group that is concerned.

But when you have a private transaction, such as you have here, it simply does not matter that it may appeal to the prurient interest of the average person if it does not appeal to the prurient interest of the person who reads it. This is only the other side, really, of Michigan. In

Michigan Your Honor stated that it was proper to adjust the test, depending upon the audience for whom it is prepared and primarily distributed to. And there material which would have been perhaps not obscene, if it was to the average person, was found to be obscene because it was geared for a particular group where it would have a particular impact. I am looking at the other side of that coin. If all we have are consenting adults, people who are not offended, people who do not have their prurient interest appealed to by the reading of this, people for whom it does have value, even if it would not have value generally, then that book to that person under those circumstances simply is not obscene.

For that argument, Mr. Justice Blackmun, of course, we do not require to go on a standing. That is an independent right, because the bookseller has an independent right to sell the book now because on this argument the book is not obscene under a variable obscenity test.

Q When you speak of variable obscenity tests, am I right in understanding that you mean just to capsulize the argument you just made; is that it?

MR. FLEISHMAN: Yes, Your Honor. That is, talk in terms of the audience and the context.

Q Right.

MR. FLEISHMAN: Exactly.

The third part of the argument, insofar as this is

concerned is that, aside from everything else, if we forget the variable obscenity test, if we could get the right to read, this book simply is not obscene under cases already decided by this Court. The book, after all, is words alone. It has no pictures. In terms of the words used, they surely are no stronger, no softer, than the words that were in Henry Miller's book and in Portnoy's Complaint and all around us, as far as that is concerned. And, in terms of the descriptions that are there. There comes a time, I respectfully submit, that there is nothing new that you can say about the subject, and that time has simply come and gone. So that in every aspect of the case, the book, it seems to me, cannot be the basis of a criminal conviction such as was involved here.

I would like to reserve the balance of my time for rebuttal.

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

Mr. McConnell.

ORAL ARGUMENT OF WARD G. McCONNELL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. McCONNELL: May it please the Court, Mr. Chief Justice:

It seems to me that all petitioner wants in this case is that this Court should scuttle Roth, 15 years of

cases following Roth, including Reidel, including Thirty-Seven Photographs, which is less than a year and a half since they were decided.

Petitioner perceives something in Stanley v. Georgia which this Court has held already does not exist. His arguments have already been presented to the California Supreme Court in People v. Luros, and they considered his argument to be highly concatenated. If I understand him correctly, he is saying, number one, it is all right to sell obscenity to a consenting adult. Number two, if you sell it to a consenting adult, it is not obscene. And, number three, he asserts that Roth is still the law of the land, that obscenity is still not protected. He says he does not challenge Roth. To me this is somewhat confusing.

There are some facts in this case which Mr. Fleishman did not stress which I feel should be stressed. I think the conversation in the bookstore between the officer and petitioner was a little more involved than what Mr. Fleishman has stated here. It is all covered in detail in the brief.

I think this case is unusual in the sense that commercial exploitation exists in this case to a much greater degree, at least in the record, than it has in other cases. I think it is invalid for Mr. Fleishman to argue in this Court that obscenity today in the United States is not being

thrust on an unwilling public. The fact of the matter is that the public is complaining. The public did complain, referring to the record, about Mr. Kaplan and that is why the police went there. At the time this case arose, there were some 250--I call them dirty bookstores. If Mr. Fleishman wants to call them adult bookstores, okay. There are 250 in the City of Los Angeles alone. There just are not enough policemen assigned to vice squads to cover dirty bookstores in all the other parts of their assignments for them to go around aggressively enforcing laws against pornography. And the record shows the only reason they went to Mr. Kaplan's bookstore was because they had received complaints from the public and complaints from the government of the people to whom the public had complained.

Q Does Los Angeles have any special squad or a special mechanism to try to keep minors and other children out of these stores?

MR. McCONNELL: Not for that specific purpose. They do have a special squad within their organization that does work on nothing but pornography, but it's just a handful of men. I believe there are no more than about six or eight men assigned to that. And most of their time is taken up with conducting a survey in the state to determine contemporary community standards. There is no legal method in California wherein the police can do anything other than

use the statute before this Court to keep the public from being offended by the pornographic booksellers.

Q Is that group especially trained for pornographic literature or literature generally?

MR. McCONNELL: For the most part, they are especially trained--the few that work on them would be specially trained for pornographic literature to some extent. It depends on what you mean by special training. It is what they call the administrative vice division. There are 17 vice divisions geographically in Los Angeles, and then there is an administrative vice division. And these men, among their duties, supervise and train the other vice officers in the city and conduct special investigations. They work in all kinds of vice. But there would be just a handful that would be assigned to pornography.

In this case, for instance, the witness Blackwell would be one of these men, and the record reflects what kind of training is fairly typical for these men. At the present time, one of the men, I believe, is a psychologist. It just happens to be that he is a policeman who is a psychologist.

Q You say the record shows that there were complaints. What were the complaints? What were they complaining about is what I mean.

MR. McCONNELL: It was not gone into in great detail on the record, but people were complaining that

obscene books were being sold from this bookstore.

Q Does the record show that these were being displayed to people, passers-by?

MR. McCONNELL: The record only reflects that the complaint had been turned over to Sargeant Shaidell, and he was assigned to investigate to see if there was any substance to the complaint.

Q The record just does not show what the complaint was about, does it?

MR. McCONNELL: He stated, as I recall, that there had been complaints from citizens that Mr. Kaplan was selling obscene books.

Q Showing them to unwilling--

MR. McCONNELL: No, just selling obscene books from his store. The record does not show to whom he was selling them.

Q Does the record indicate what the surrounding environment was of the store? Was it a place that purveyed to juveniles and displayed to people who were not interested or were offended by this?

MR. McCONNELL: I think I know what you are driving at.

Q No, I am asking a question. I am driving at trying to get an answer to my question.

MR. McCONNELL: The answer is yes, to some extent.

The record shows, for instance, that there is some kind of a sign in front of the store, I believe, that minors cannot enter.

Q Minors can enter?

MR. McCONNELL: Cannot.

Q Cannot.

MR. McCONNELL: Cannot enter the store. There is nothing in the record to show that Mr. Kaplan ever did or did not sell a book to a minor. I personally would be very surprised if he did. That is not his business, very frankly. Little children do not go out and try to buy these kind of books.

Q Were there displays? Did he have his wares on display?

MR. McCONNELL: Inside the store he did. I do not recall what the record reflects with respect to what the store looked like from the street other than he had the usual sign saying that it was an adult bookstore and so on that you see here in Washington or anywhere else.

Q Do you know where in the record this evidence appears for independence? If you do not know, do not take a lot of time.

MR. McCONNELL: I am going into my brief and have made reference to it there. It is not a particularly detailed area.

Q Is this not at pages 44 and 45? "Did you have any information before you went into the store as to Mr. Murray Kaplan being employed at the store or working at the store?

"Yes.

"Where did you get that information?

"I think I got it from two different sources. I think, number one, at Administrative Vice we were checking on different locations known as adult-type bookstores and who the owner was, through licensing. I also checked with West L. A. to ascertain if, actually, Mr. Kaplan was working in there, if he was actually working as well as being the proprietor of the location."

Is that not about all there is?

MR. McCONNELL: No, I recall more than that. I think it was on page 38 of the transcript.

Q Well, don't waste your time.

MR. McCONNELL: Here it is. He said the purpose was to investigate citizens' complaints regarding obscene matter being sold at that location and then later on either voire dire or cross-examination it was brought out that the complaints came to him via a city councilman's office and the people had complained to the city councilman.

Going on with this point, I think it is interesting to note that in the Los Angeles Times, Sunday past, there

was an article apparently in Denmark that the people are sorry that they have gone ahead and allowed the public distribution of pornography there because it has become the kind of nuisance that there is a danger of it becoming here in the United States and in California and in Los Angeles in particular.

Mr. Fleishman's theory on its face I think has some sort of validity; that is, it would seem reasonable that one could control sales to minors. There is a possibility of a chilling effect. There is a possibility of a prior restraint, though, if the state attempts to license book-stores and police them in the same manner that it does with alcohol. Of course, with alcohol you can never have a problem with prior restraint.

The reason the theory does not work is very simply that if an adult goes into a liquor store and buys a bottle of bourbon, he certainly is not going to give it away to children and most times he is not even going to give it away to other adults. He is buying it to consume himself. Once he has drunk it all up, it is gone and he throws away an empty bottle. It is not the same thing with pornography. It does not self-destruct in five seconds and it is not bio-degradable. It simply sits there until he throws it in his trash and then he has the problems of redistribution. There are controls now in the area of pornography. You do

not have much of a redistribution problem. I anticipate that Mr. Fleishman--he mentioned Butler v. Michigan, and I do not want anybody to think I am implying that that is bad law, I think it is good law, but still in all it bears to the validity of his argument that it should be okay if petitioner does not sell it to children,because the fact of the matter is that if you have wider distribution, that means wider distribution everywhere eventually.

The other factual area in this case that was important to me was the fact that petitioner was exploiting his material. He sold the police on two different occasions three different types of material--a film, a photo magazine, and a book. Petitioner was charged with all three in one complaint. He was tried in one case, and the jury was shown was Mr. Fleishman calls comparables. In the case of Suite 69 an entire book called Adam and Eve, held not obscene by this Court in Hoyt v. Minnesota, was read to the jury. The jury was instructed that they should consider the fact that this Court held Adam and Eve to be not obscene in considering whether or not Suite 69 was obscene. And the jury considering all of the different comparables and all of the factors in the case, acquitted petitioner of selling an obscene movie or selling an obscene photo magazine and yet held, based on what they had heard, that the book is obscene.

The manner in which petitioner and other

pornography peddlers in this country are showing their materials these days I think speaks volumes for social value. And I would question whether a jury trial has the validity in an obscenity case if the petitioner can eventually come to this Court and say, "Well, the jury having all the benefit of all of that testimony in evidence should now be overruled because of some different standard."

If Stanley v. Georgia has any meaning, if Reidel and Thirty-Seven Photographs has any meaning and if they mean what Mr. Fleishman says they mean, then I am truly confounded. I think the basic rule of Roth is still good. I am frankly surprised that a case such as Stanley v. Georgia ever had to come to this Court. It would seem to me that any sixth grade child would have told the police in Georgia that you cannot control a man's thoughts, and he would not have had to base it on the Constitution.

I do not think--and I submit that this Court should not think so either--that because there is any right to think and an absolute right to read what you want in the privacy of your own home, that that means there is the right to sell pornography. And there is not any logical connection between Stanley's right to read and petitioner's right, on the other hand, to conduct a public merchandising of the material that Stanley might want to read. Roth and Reidel simply do not abridge Stanley.

I do not believe that the birth control cases are controlling in this case either. In the birth control cases Griswold and Eisenstadt, the Court was dealing with dissemination of ideas and information which the public at large thoroughly attaches great social value to. Pornography simply is not a matter that so fundamentally affects the people in this country as decisions of whether or not they should bear children.

What petitioner is saying in this case essentially is that the Court should throw out Roth. He is saying that Roth was wrong when it said there was no need for the state to show a clear and present danger based on any compelling state interest. And he says that this Court has limited the state to only two areas in Stanley v. Georgia. The Court gave two examples of Stanley v. Georgia but did not place any limit on what this compelling state interest may be, if any. And I think it is up to the legislature, not the courts, to determine if these interests exist and, if so, what they are.

I would point out that accepting the petitioner's theory in this case would place a burden on the prosecution the same as it is now and would be involved with the issues of whether pornography was being sold to children or unconsenting adults, and I suggest that this flies in the face of Ginsberg v. New York and Butler v. Michigan.

Some other issues that were raised in petitioner's brief I would like to address very briefly. Number one is the question of the national standards versus state standards or other local standards. I see no compelling reason why the states should be denied local control over all aspects of abscenity, and I see no compelling reason why a national standard of contemporary community standards should apply.

Q Suppose the compelling reason is that it is a national constitution, is it not?

MR. McCONNELL: It is true, it is a national constitution but--

Q Unless one were to adopt the view expressed by I think only two members of this Court in modern times, Mr. Justice Jackson and Mr. Justice Harlan, that the Fourteenth Amendment does not fully incorporate the First Amendment against state action; then, because it is a national constitution nationwide that determines what is speech and what is press--

MR. McCONNELL: It is correct that it is a national constitution and that is really the only argument for a national standard.

Q That is a pretty good one, is it not?

MR. McCONNELL: Yes, it is. The question is, though, suppose the national standard were to be applied. In California today contemporary community standards have to

be proven by expert testimony, and the way this is most commonly done is by having the police department continuously conduct a poll which we maintain is scientifically accurate of the entire state of California. They do this every six months and they ask people, "What are the standards in your community?" And when they come into court and they set these scores, does it not stand to reason the California standards are essentially similar or more liberal than the national standard? Why should prosecution be put to the burden of trying to prove this sort of thing over the entire nation? It has been questioned in this Court before whether or not there is such a thing as a national standard and, if so, whether it is too elusive to determine. I think that it could be established by expert testimony in a California court that national standards of tolerance in the areas of nudity or sex might be set by a book such as The Sensuous Woman or by a magazine such as Playboy. But anything beyond that would offend national standards, at least in California.

Q I am talking about what offends and what is protected by the national federal Constitution, the Constitution of the United States, which has the same meaning in every state unless, as I say, you are pressing to us the view taken by Mr. Justice Jackson and Mr. Justice Harlan that the Fourteenth Amendment did not incorporate the First Amendment. Are you pressing that view?

MR. McCONNELL: No, I would not--

Q It is a very, very respected view, held by very fine members of this Court. But I think they are the only two in modern times.

MR. McCONNELL: The view that I have is the Court in Roth defined obscenity and it merely said goes beyond contemporary community standards.

Q Are you suggesting, Mr. McConnell, that the very use of the term "community standards" in Roth may have suggested something other than a national standard?

MR. McCONNELL: you took the words right out of my mouth. That is exactly what I intended to suggest. If they used the word "community," what did they mean? Obviously, if it is a national standard, then there is a better way to phrase it than saying "contemporary community standards."

Q Did not Mr. Chief Justice Warren, when he was sitting, say precisely that?

MR. McCONNELL: Yes, he did. And I submit that if you, on the one hand, make the community too small, then you have a situation analogous to Butler v. Michigan where you are reducing what people can read to a very limited sort of audience. If you are going to make it a nationwide standard, then petitioner also has a valid logical complaint, and that is that he is doing business in Los Angeles, a community of some--well, the metropolitan area--of some ten million people,

and standards that apply in Duluth, Minnesota or Yakima, Washington or wherever all have an effect on how he is going to do business in Los Angeles.

Q So, a community of one or two, under your view, could convict a bookseller, if that was the community standard, of selling the works of Karl Marx or the publications of the John Birch Society?

MR. McCONNELL: No. I think one or two is obviously too small. In California it's a community of some 20 million people. That is the community by which--

Q And the Constitution would have nothing to say if a community decided that the publications of the John Birch Society were obscene and convicted somebody for selling it?

MR. McCONNELL: No, because I would assume that the publications of the John Birch Society would not appeal to prurient interests.

Q Why is that so different? What so different about that constitutionally?

MR. McCONNELL: I am not sure I understand the question, Mr. Justice Stewart.

Q I am not sure I understand your argument, and I am trying to test it.

MR. McCONNELL: The argument is simply that there is no logical reason to me why it is more fair to somebody

such as petitioner to say that community standards in the nation as a whole have to be determined. This Court has never answered the question up till now which standard should apply. And I would assume that perhaps it wishes to answer the question in this term. If it does, then some of the points that I think the Court should consider are, number one, What did the Court mean previously when it used the word "community"? Number two, Is it fair to incorporate standards of very small towns or very rural areas against petitioner when he is doing business in a city such as Los Angeles or Washington, D. C.

Q How about the man doing business in that rural area? Could he constitutionally be convicted of selling Das Kapital?

MR. McCONNEL: No, it can make the community too small or it can make--

Q The community thinks that is offensive and obscene, that particular book.

MR. McCONNELL: No, I do not think so. I think the community, if it is too small or too large, either way, is an analogous situation to Butler v. Michigan; you then have the petitioner in the standpoint of having to gear what he says to the standards of a very limited audience or in a very limited way. In essence, the national standard argument is all tied in with the Stanley v. Georgia argument because

what Mr. Fleishman was saying a few moments ago is that the pruriency and so on should be judged by the intended recipient, by a consenting adult.

Q Where was that in Stanley?

MR. McCONNELL: I beg your pardon?

Q Where was that point in Stanley?

MR. McCONNELL: Did that point come up in Stanley?

Q National standards.

MR. McCONNELL: In Mr. Fleishman's argument, sir?

Q No. You said that was in Stanley. I just want to know where it is in Stanley.

MR. McCONNELL: If I did, then it was the wrong words that came out of my mouth. Mr. Fleishman--

Q On this standard, suppose that California unanimously objects to people reading Suite 69. Could they stop a man from reading it?

MR. McCONNELL: No, no, no, of course not. But Roth says and Reidel says that the State of California can stop petitioner from selling it as standard.

Q Could they stop a man from going door to door with a magazine in a plain package and selling it?

MR. McCONNELL: I do not know the practicalities of trying to sell somebody a brown wrapped package. They would have to know what was inside before they would take it.

Q A man is standing on a corner and a man comes

up and says, "Do you know where I could find a sexy book?"

And the man says, "Yep, just happen to have one here."

Does that violate any law in California?

MR. McCONNELL: Technically under the statute it would. But it is one of those sort of things that just could--I think the way the statute is written it would in construing this--

Q What if somebody comes in somebody's house and says, "I like having sexy books. Have you got any around?"

And the guy says, "Yeah, I just got one. I paid a dollar for it. I've read it. If you give me fifty cents, you can have it."

MR. McCONNELL: Then I think you are in an area that has already been settled by this Court. It is similar to Stanley v. Georgia, but it is more similar to the case involving the people in New York that were sending films of each other back and forth privately in the mail. And that is a Stanley v. Georgia type situation then. To be perfectly frank, the only way that these cases arise is when the police get complaints, they act on them. And they got complaints about petitioner and they went out and investigated--

Q There is no way they could get a complaint

unless somebody voluntarily went in that door and looked.

MR. McCONNELL: I would have to disagree. Just walking down the street here in Washington, if you walk past an adult bookstore, there is somebody usually out in front--it happened to me last night--that says, "Come on in and see what we've got."

Q Is there one iota of that in this record in Los Angeles?

MR. McCONNELL: No. This record--

Q So far this record just shows somebody had to go in there voluntarily and find out that he was selling dirty books.

MR. McCONNELL: According to this record, that is true, yes. But I think under Stanley, under Reidel, it does not make any difference that the police had to go find out. That is how they make their case. The fact that the police bought the book does not have anything to do with the fact that he might have been a consenting adult. It has something to do with the search and seizure law. If the police buy the book, that is how they obtain their evidence and that is how they obtain the fact--

Q You mean the policeman was not a consenting adult?

MR. McCONNELL: Not in the sense that Mr. Fleishman was talking about. He was a man doing his job.

I doubt very much that he wanted to buy that book for himself or if he liked--

Q But he said he was, and the seller assumed he was; is that correct?

MR. McCONNELL: No. The seller assumed he was; that is correct. But I do not believe--

Q This is the man you convicted, the seller. He assumed that this was a man that wanted to see a dirty book.

MR. McCONNELL: That is right.

Q And he accommodated him.

MR. McCONNELL: That is right. Just briefly, if I may, I think that the obscenity of Suite 69 is clear from reading it and the jury's judgment here is based on comparable evidence which this Court had considered previously. It is obviously different from other books. It's charade that the community standards could not be violated because nothing can go further. To say the book is not obscene is to say that no book without pictures--in other words, novel-type book--could be obscene and that there are no community standards.

It would be nice for Mr. Fleishman and for myself if this Court could decide whether social importance is an element that the prosecution has to prove as far as its case or whether or not it is just part of the definition as stated in Roth. It seems to me that Roth created somewhat of a

presumption that if the other elements of obscenity were met, then social value is presumed not to exist. The California court, the court below, interpreted that not to be the law and followed the minority opinion in Memoirs in A Book v. Attorney General, as it also followed the so-called gambling aspects of that book. I submit that if this Court could say that a book such as Fanny Hill might be considered obscene under certain circumstances of sale, then certainly that book, being very tame compared to Suite 69, then certainly Suite 69, under the circumstances under which it was sold, does have to be considered obscene.

I think that this really is not a question of pandering. The court below did not talk about Ginsberg. It talked about A Book v. Attorney General. Ginsberg could not be convicted under California law because you cannot prove the other elements of obscenity by the statements of the seller; you can only prove social value that way.

I think that the opinion of the court below shows that they did not rely on the California statute. Because this Court thinks they did, I would point out that its appearance is, to me at least, that of a rule of evidence that codifies the law that was set forth in opinions coming from this Court long before petitioner was arrested. And it did become effective as a statute in Los Angeles quite a long time before he was actually tried. It did not change any

prior law. Therefore, I would submit under the facts of this case that the judgment should be affirmed. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Fleishman.

REBUTTAL ARGUMENT BY STANLEY FLEISHMAN, ESQ.,

ON BEHALF OF THE PETITIONER

Q Mr. Fleishman, may I ask you a question before you commence. Would you extend the fundamental personal right to read to a similar right to view photographs and moving pictures?

MR. FLEISHMAN: Yes, sir, I would. I think that they stand on exactly the same footing. The right to get information, whether one gets it by words or by picture, stands on the same footing, Mr. Justice Powell, in my opinion.

I think that the colloquy that Justice Marshall had with Mr. McConnell points the direction, as I see it, to the solution in the case. Mr. McConnell said that as he walked down Washington, somebody tried to hustle him into a bookstore and there was no such similar hustling that appeared in the case at bar. There is nothing in the record at all along those lines.

What we have suggested in our papers--and I think it is wise and I think it follows the opinions mostly of you, Mr. Justice White, as I understand them--and that is that a statute can be good or bad, depending upon the record that it has made. That is my understanding of Baird. In that case

it was not the statute that Your Honor was focusing on so much as proof in the case. Since the state was claiming that there was a health hazard, then Your Honor quite properly said, "Where is there any record that this film was relevant to the health hazard?"

There again are only two things that the state talked about in this case or any obscenity cases. Mr. McConnell talks about minors and he talks about an obtrusive kind of distribution. Minors essentially cannot be the basis of the conviction. I suppose it is true that if there are books that are on the market generally, that some of these books will ultimately find their way to minors in the same way that if you have automobiles on the road, I suppose that minors are from time to time going to drive those automobiles. And in the same way if you have cigarettes being sold, minors are going to smoke cigarettes.

But Reidel told us--it was reinforced in Roth and it has been restated at every opportunity this Court has had an opportunity to talk about the subject--that you cannot limit what adults are going to read because we are saying that it is inappropriate for minors. So that in this case, for Mr. McConnell to argue that to follow the argument that we have suggested would mean that there is a greater likelihood that minors will get books, simply does not meet the constitutional issue.

Q Mr. Fleishman, under your theory, which is then the right of the reader rather than of the seller, I take it that the state may limit a seventeen year old's right to read in a way that it cannot limit an adult's right to read?

MR. FLEISHMAN: The Court has so held in Ginsberg against New York, and we do not--

Q But there the theory was selling and purveying rather than the right to read.

MR. FLEISHMAN: Not quite. As I read Justice Brennan's opinion, it was there stated that the right of the minor to read did not stand at as high a footing as the right of an adult and, therefore, since it was not on the same footing, the right of the minor could be interfered with on a showing of rationality.

It is true that that was a bookseller who was convicted. But the Court did talk about the right of a minor in that situation, and he did not have--the minor did not have the same rights. It is what I understand Mr. Justice Stewart was saying in that opinion, saying it is one thing to say that the Constitution protects absolutely the right of an adult to read, because he is a thinking person; but that a minor, on a theory that he does not have the thinking processes yet, it is kind of like an involuntary thrusting upon a person who is not full--

Q The same rationale that limits a minor's right

to vote.

MR. FLEISHMAN: Exactly, exactly. So that my argument does not in any way touch the Ginsberg against New York argument, Mr. Justice Rehnquist.

Q In order to reach that result we would have to combine voting rights with First Amendment to get that analogy. The First Amendment says nothing about age limits or minors.

MR. FLEISHMAN: That is correct, Your Honor. But this Court on a number of occasions has already taken the step in terms of saying that the right of a minor is not as great as the right of an adult. Your Honors did that, of course, in the Prince case in the beginning, came back again in Ginsberg, and it came up in a fashion, I suppose, in the Yoder case, Wisconsin against Yoder.

Q Are you saying the states have a certain amount of latitude in determining this, that California might say age 17 and New Hampshire might say age 20, just as they can on contract liability?

MR. FLEISHMAN: There is certainly some latitude. I don't think that I would accept 20. I think that since a person can vote at 18, I think that whenever you go above 18 you are going to get into a question of rationality. But certainly the state does have a right to have a different test for minors. And I might add that in California we do

have a minors statute. In California, if in fact there were a sale to minors, there is a specific statute which would control that situation.

The other aspect of the case that Mr. McConnell raises is--one, as I say, is minors and that certainly will not do it. And the other is that if you have a rule such as we are arguing for that there may be, it may end up in an obtrusive thrusting upon an unwilling audience, the simple answer to that is, when that time comes the State of California is absolutely free to charge a person, put on proof of that and to convict him for thrusting it upon an unwilling audience. We do not ask in this case that the statute be touched at all. All we say is and all we argue for is that the state has simply gone too far, it has infringed upon a constitutional right when it has punished Mr. Kaplan for doing no more than selling the book under these circumstances.

There are one or two other things that I would like to touch upon, if I may, in the brief time still remaining. Mr. McConnell says of course Griswold and Baird stand on the high ground that discussion about birth control is very important, very fundamental, and of course the state cannot interfere with that. And then he says in a way that I do not quite understand that sex somehow is not important. People somehow are not interested in sex, as I hear Mr. McConnell's argument.

The simple fact is that people are enormously interested in the subject. If there is one thing that we know, it is that the people buy books dealing with sex, very explicit books. They look at films of this kind. And they derive a great deal of value from it. The Commission on Obscenity and Pornography spent some two years engaged in an enormous amount of original research; it engaged in a great deal of scientific survey taking in terms of who reads sexy books, why do they read them, what do they get out of them, and they have concluded that the people who read them are, for the most part, middle aged, middle-class, white people who read them and derive a great deal of pleasure, information, and satisfaction from reading this.

It therefore seems to me to be inappropriate and wrong to make an argument that Griswold and Baird were correctly decided because there the discussion was about contraceptives and whether or not one would have children but at the same time that a book, a magazine, which deals with sex, explicit sexual material, somehow is without social value. It is not the fact, and I believe that the commission studies and our whole history has taught us that there is in fact value in books such as Suite 69, even if the values do not seem clear to all of us. Thank you very much, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:35 o'clock a.m., the case was submitted.]

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