

Supreme Court of the United States

OCTOBER TERM, 1969
1970

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In the Matter of:

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 GARRETT H. BYRNE, et al.,
 Petitioners;
 VS.
 SERAFIM KARALEXIS, et al.
 Respondents.
 ----- X

Docket No. ~~1149~~
83

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Place Washington, D. C.

Date April 30, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

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: GARRETT H. BYRNE, et al., :
: :
: Petitioners; :
: :
: vs. : No. 1149
: :
: SERAFIM KARALEXIS, et al., :
: :
: Respondents. :
: :
----- x

Washington, D. C.
April 30, 1970

The above-entitled matter came on for argument at
11:44 a.m.

BEFORE:

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

APPEARANCES:

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will hear arguments in
3 No. 1149, Byrne against Karalexis.

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

5 ARGUMENT OF ROBERT H. QUINN

6 ON BEHALF OF PETITIONERS

7 MR. QUINN: Mr. Chief Justice; may it please the
8 Court:

9 This matter is here on appeal from an interlocutory
10 order of the United States District Court for the District
11 of Massachusetts under the provisions of 28 U.S.C. 1253. That
12 provides for direct appeal from an order or judgment of a
13 three-judge court granting temporary injunctive relief against
14 enforcement of a state statute.

15 Q Future enforcement.

16 A That is correct, Your Honor.

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

23 The second is whether under this Court's holding in
24 Stanley vs. Georgia any state can constitutionally prohibit
25 public, commercialized dissemination of pornographic matter,

1 absent distribution to minors, to non-consenting adults, or
2 by pandering.

3 Q What is there in Stanley that protects commercial
4 distribution?

5 A That is not the way we read it, Your Honor, and
6 I do not think that is the way the author of the opinion wrote
7 it.

8 Q Thank You.

9 Q If you prevail on the first point, why do we get
10 to the second at all?

11 A I think it is significant to get to the second
12 point for the same reasons stated by my brother, the distin-
13 guished Assistant Attorney General from Texas, in the immed-
14 iately prior argument, Your Honor.

15 Q And yet, as Mr. Justice Stewart pointed out,
16 if we sustain you on the first point, why should we go in
17 ourselves and say that we will do what we said the lower court
18 shouldn't do? And then we would interfere with the state
19 prosecution.

20 A I submit, respectfully, Your Honor, that there
21 exists now a great deal of confusion.

22 Q I know that, but you have to argue these cases
23 on some kind of principle and not just because it is nice to
24 have a little certainty.

25 A I submit, Your Honor, that the principles exist

1 in Roth vs. the United States and the opinions following that
2 and also in Stanley vs. Georgia.

3 Q Then it will get here through the state vehicle.

4 A That is correct, Your Honor, but in the meantime
5 we submit that there exists a great deal of confusion and a
6 chilling effect among law enforcement officials as far as the
7 degree to which they can go ---

8 Q That is a switch.

9 A --- in reading the statute.

10 Q Tell me, what is the standing of -- There has
11 already been a conviction I understand, is that right?

12 A That is correct, Your Honor.

13 Q Of this distributor, Mr. Karalexis?

14 A Yes, sir.

15 Q And there was something about some delay in
16 the hearing of the appeal, which is in the Supreme Judicial
17 Court, is that it?

18 A That is correct. Our understanding, Your Honor,
19 is that the bill of exceptions was entered in the Massachusetts
20 Supreme Judicial Court yesterday.

21 Q So in the ordinary course, will there be oral
22 argument in that case?

23 A In the ordinary course there would be oral
24 argument and, very likely, in the October sitting of the
25 court, because it is too late for this argument to reach the

1 May sitting.

2 Q That is what I was trying to get to. So we
3 won't have a decision which goes to the constitutionality of the
4 statute, will we?

5 A I submit the decision would go to the constitu-
6 tionality of the statute as well as to the question of obs-
7 cenity vel non.

8 Q But we probably wouldn't get that from your high
9 court until December, January, maybe?

10 A That is a fair assumption, Your Honor.

11 I would add, parenthically, that if there had been
12 all haste in the preparation of the bill of exceptions so that
13 it might be entered by the court, it is very likely that this
14 case would have been argued in the state court at next week's
15 scheduled arguments in the May sitting.

16 The facts may be stated, briefly, as follows: On
17 June 30, 1969, after preliminary proceedings not relevant
18 here, appellees filed an amended complaint in the court below
19 alleging reason to believe that indictments would be sought
20 against them by appellant Byrne's office under Massachusetts
21 General Laws, Chapter 272, Section 28a.

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

24 Q This was after this suit was filed?

25 A That is correct, Your Honor. After the suit was

1 filed but before there was any action taken. If I may say,
2 respectfully, there was a bit of a race to the courtroom doors
3 to courts involved.

4 Appellees sought a declaration that the statute
5 is unconstitutional and an injunction against prosecution
6 thereunder. They alleged the statute was overbroad, because,
7 among other things, adequately controlled commercial distri-
8 bution of obscene material is protected by the First Amendment.

9 The court declined to grant injunctive or other
10 relief but requested briefs on questions regarding the scope
11 of this Court's holdings in Stanley vs. Georgia and the effect
12 of that opinion on the Massachusetts statute.

13 Prosecution continued in the state court in a jury-
14 waived session, and the appellees were convicted. Following
15 their conviction, appellees renewed their request for injunctive
16 relief.

17 After further argument a majority of the court
18 below held that Stanley vs. Georgia went so far as to prohibit
19 state prosecutions with respect to adequately controlled public
20 distribution of obscene material. And the court decided that
21 the Massachusetts statute was, probably, unconstitutional as
22 being overbroad on its face.

23 Based on this opinion a majority of the court below
24 enjoined the appellants from further prosecution with respect
25 to showing of the film, "I Am Curious Yellow."

1 I address myself first to the question whether the
2 court below abused its discretion in granting injunctive
3 relief. Comity and federalism prompt a federal judge to be
4 extremely reluctant to enjoin good-faith enforcement of a
5 state's criminal laws by law enforcement officials.

6 Q In the application of that was there any
7 significance in the fact that the proceeding had been brought
8 before the actual criminal prosecution was initiated?

9 A I respectfully submit no, Your Honor.

10 Q Haven't we made the distinction?

11 A That is correct, Your Honor, you have, and the
12 Congress has legislated a distinction in that respect, but I
13 respectfully submit that what we have here -- in the facts that
14 I suggested were not relevant to the facts present -- what we
15 have here really was the seeking of an indictment before any
16 approach to the federal court. This indictment was, subsequen-
17 tly, dismissed in the judgment of the district attorney
18 because there was lacking scienter in terms of the indictment.

19 The district attorney then in the normal course
20 of his business proceeded to seek a new indictment, including
21 all the proper elements of the kind so that there would not be a
22 dismissal on the basis of a technicality. And during the
23 interim ---

24 Q How long after this suit was brought was the
25 second indictment made?

1 A I would say within a week of the hearing on
2 the motion to dismiss, Your Honor. On June 25 the matter was
3 dismissed on motion of the district attorney in the Suffolk
4 Superior Court. On June 30 the appellees here were in the
5 federal court. Within days there there was a process of
6 indictment again in the Suffolk Superior Court.

7 What have we here to contravene that fundamental
8 principle which I have now stated? No monetary loss. For there
9 is no evidence whatsoever on the record of any financial loss
10 on the part of the appellees here. As a matter of fact, there
11 is no proprietary interest. They are not the owners of this
12 film.

13 They own a movie house which shows this and other
14 films. We can hardly say ---

15 Q I am not sure what difference it makes whether
16 they own it or whether they are showing it.

17 A I think it goes to the essence of whether
18 injunctive relief can be granted, Your Honor, whether there
19 is monetary damage. We submit there was no showing of monetary
20 damage. That simply stating that they own a movie house and
21 that they are showing or they might want to show a particular
22 film is not sufficient showing of damage.

23 As a matter of fact, I think that in the red brief
24 there is a mention of the other films that have been shown,
25 since in the judgment of the appellees here they should show

1 other films.

2 Q Could we take judicial notice that "I Am
3 Curious Yellow" gets a heavier box office price than the others?

4 A I don't know how, Your Honor.

5 Q Look in the newspapers.

6 A There are a great many exciting films, Mr.
7 Justice Marshall. You know many a time I have attempted to go
8 to one of the theaters of the appellees involved here, and I
9 have never been able to get inside the theater.

10 Q Probably afraid you would prosecute them.

11 A I didn't think I looked that way, Mr. Justice.

12 Then we can hardly say there is any chilling effect
13 here, either on the appellees or their patrons. We are not
14 talking about political handbills. We are talking about
15 commercial pornography, assumptively in the court below and
16 on a finding after a trial in the Superior Court of Suffolk
17 County. A subject matter assumed to be obscene, we submit,
18 cannot be said to have any value within itself.

19 Furthermore, this film showed for five and one-half
20 months, pending the argument on the merits and the decision
21 of obscenity on the facts in the Suffolk Superior Court.

22 We find only one instance where this Court approved
23 relief granted against a state law enforcement official. That
24 was the case of Dombrowski vs. Pfister. It concerned civil
25 rights advocacy. The record is replete with incidences of

1 bad faith on the part of local officials. This is epitomized
2 by the anecdote of night raids on citizens' offices which
3 discouraged their protected activities.

4 These are not the facts in the case at bar. We have
5 here activity, whose dominant theme, by assumption and by a
6 finding on the facts after a state trial, is offensive to
7 community standards of morality, whose appeal is to a prurient
8 interest in sex, whose content is utterly without redeeming
9 social value.

10 Furthermore, there is no bad faith whatsoever,
11 either evident on the record or argued in the court below,
12 on the part of the prosecution or law enforcement officials.
13 This has been -- excepting the incident that I related to
14 Your Honor, Mr. Justice Brennan -- this has been the single
15 case pursued in the course of his work by the District Attorney
16 of Suffolk County.

17 We submit, therefore, that there is no showing of
18 irreparable injury which would prompt and support the action
19 taken by the majority membership of the court below.

20 Moreover, in this case we have a classic example
21 for the application of the principle of abstention. If the
22 statute in question, Chapter 272, Section 28a of the
23 Massachusetts General Laws, should be overbroad -- and this
24 we do not concede -- that fault can here be overcome by
25 leaving the case to be resolved in the state court and giving

1 the state court an opportunity to narrowly construe the law
2 and thus avoid constitutional defect. This can be done in the
3 single matter pending in the Massachusetts Supreme Court.

4 Assuming, however, that this statute is ---

5 Q Why should you not be content to stop at that
6 point?

7 A Why should I not be content to stop at that
8 point, Mr. Justice Harlan? I think, as I have stated before,
9 that there must be some consideration given by this distinguis-
10 hed Court to the aspect in which our complete American society
11 finds itself as far as the issue of obscenity.

12 Q If you are right in what you just told us,
13 then it would be quite wrong for this Court in this case at
14 this time to give that sure guidance that you feel so much the
15 need of.

16 A I submit, Your Honor, that it is not without
17 precedent that this Court has made distinctions and has made
18 findings as far as the procedure in cases like this, where it
19 rendered what appeared to be sufficient decision on one part
20 of a case to eliminate consideration of the second part, but
21 then went on in its judgment for proper interpretation of the
22 law to considering a second point.

23 Q Of course, there is nothing wrong and nothing
24 impermissible about your making alternative arguments, but if
25 you do prevail on this argument you just made to us, then that

1 is the end of the case. Then we obviously don't get into the
2 substance of the merits of this particular movie at all.

3 A That is correct, Your Honor. But I submit that
4 we continue to have 2 judges of 3 in the three-judge district
5 court in Massachusetts making a decision of probable unconsti-
6 tutionality. We continue to have a federal judge in California
7 making another decision of unconstitutionality of a federal
8 statute. We continue to have that confusion that I mentioned
9 before.

10 Q Let me put a practical question to you, and
11 this is not supposed to be humorous. What you are arguing now,
12 in effect, is the chilling effect on you prosecutors, you
13 state prosecutors, of the confusion that manifestly exists
14 under this Court's decisions in this whole obscenity field.
15 Nobody can belie that.

16 Now, as between that and as between the proposition
17 that you just argued -- namely, the implications of federalism
18 that go into federal courts, not getting into restraining
19 state enforcement authorities from proceeding to enforce their
20 own laws and letting individual constitutional questions come
21 up through the state system -- which do you think, if you had
22 to look at this from the two countervailing chilling effects
23 of all this, which do you think is the most important?

24 MR. CHIEF JUSTICE BURGER: Do you want to ponder on
25 that, Counsel, and give us your response after lunch?

1 MR. QUINN: If that is the pleasure of the Court, yes,
2 Your Honor.

3 (Whereupon, at 12:00 noon the argument in the above-
4 entitled matter was recessed, to be resumed at 1:05 the same
5 day.)

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1 (The argument in the above-entitled matter resumed at
2 1:05 p.m.)

3 MR. CHIEF JUSTICE BURGER: Mr. Quinn, you have had
4 time to ponder now. Do you want to address yourself to Justice
5 Harlan's question?

6 FURTHER ARGUMENT OF ROBERT H. QUINN, ESQ.

7 MR. QUINN: Thank you, Mr. Chief Justice and may it
8 please the Court. I did not need quite the hour to answer respect-
9 fully, Your Honor.

10 I have no doubt in my experience as Attorney General
11 that of extreme importance and of primary importance in considera-
12 tion of this Court today is the first point, that point of ab-
13 stention as far as the three-judge Federal court in its action
14 in this case. This is of extreme importance to all of us because
15 in addition to the confusion it establishes in the judicial and
16 in law enforcement administration.

17 It also, I respectfully submit, creates the possibility
18 of disrespect with the public at large. And, it is that point
19 additionally that makes it advisable we submit for the further
20 consideration of the problem of obscenity and for consideration
21 of clarifying exactly this Court's views on obscenity. I

22 I go now to another factor relied on in the majority
23 opinion below, because it leads to the second question presented
24 in our case here. That court gave great weight to the likelihood
25 of success for the appellees here in their posture on the facts.

1 That success depends on the answer to the question, "Can public
2 commercial dissemination of pornography be proscribed by any
3 State?"

4 Before Stanley vs. Georgia, we submit there was no
5 doubt at all about this principle. Roth vs. United States, the
6 leading case on this subject based that answer on the fact that
7 obscenity is not protected speech within the First Amendment.
8 We agree with Mr. Justice Marshall that the holding in Stanley
9 in no way impairs the principle so well announced in Roth.

10 In fact, only last week this Court summarily affirmed
11 in Gable vs. Jenkins, No. 1049 on the Docket of the Court, a case
12 involving action under a distinguishable statute in the same
13 jurisdiction as Stanley, distinguishable from the statute in
14 the Stanley case, but a statute very much like that upheld in
15 the Roth case and very much like the statute under consideration
16 in the case at bar.

17 The statute upheld Roth prohibited commercial distr -
18 bution of pornography. The Massachusetts statute, Chapter 272,
19 Section 28A is of like tenure. It strikes at public dissemina-
20 tion. This, we submit, does not effect a fact situation like that
21 present in Stanley vs. Georgia.

22 Q Was that case you referred to last week a denial
23 of "cert" or an affirmant It was

24 A It was a summary affirmant, Your Honor.

25 Q What is the name of the case?

1 A Gable vs. Jenkins, No. 1049. As I recall, I
2 think there were two justices either abstaining or dissenting,
3 Your Honor.

4 For all othe foregoing reasons that I have brought
5 forth ---

6 Q Did you say No. 1249?

7 A 1049, Your Honor.

8 I am aware that the Solicitor General is going to take
9 some time of the Honorable Court and will dwell exclusively on
10 the issue of obscenity and the relationship between the Roth
11 decision and those following it in Stanley vs. Georgia.

12 So, I will conclude submitting that for all of the
13 foregoing and for the reasons brought forth in our brief we
14 submit that the court below abused its discretion in granting
15 relief and should be reversed on that instance.

16 We also submit that the right to prohibit obscenity,
17 that right annunciated in Roth, and the right to possess obscene
18 matter in the privacy of one's home, that right protected in
19 Stanley, are compatible as this Court has held. Therefore, the
20 Massachusetts statute is constitutional.

21 We ask this Honorable Court so to hold and add again,
22 if I may make bold to do so, a special plea on behalf of the
23 judicial systems of the several states, the enforcement officials
24 and the legislatures of those several states, that this Honorable
25 Court make that latter point clear.

4 Q I suppose on your latter proposition if we accept-
1 ed it, the case would then go back to the court of appeals to
2 have them pass in the first instance as to whether this was within
3 or without the Roth case.

4 A I think that this Court here could consider that,
5 Your Honor.

6 Q Do you think we ought to bypass the court of
7 appeals on that -- I mean the three-judge court?

8 A I submit that we do have here a commercial as-
9 pect. This is the -- the appellees here in question were the
10 owners, the manager, the corporate owner of a movie house so
11 that there is sufficient here for the Court with other cases pre-
12 sently under consideration, there is sufficient here for the Court
13 to elaborate on what we find in Stanley vs. Georgia.

14 Q How can a man who is charged with a crime be able
15 to know for himself in advance of the trial whether or not a
16 piece of literature or whatever you may want to call it has a
17 redeeming social value?

18 A I respectfully submit, Your Honor, that this
19 is basic to the question of obscenity no matter where the issue
20 is applied. I am well aware of the position of Your Honor re-
21 garding obscenity, but there is another opinion and there is
22 an opinion supported by actions of the legislatures of the
23 several states as well as the United States Congress which has
24 proscribed obscenity, and there is support in legal opinion that
25 suggests that obscenity in its reference may properly continue

5 1 to be difficult to specific definition and specific application,
2 as has been stated by one justice, "I know it when I see it."

3 Q Yes, but what I am getting at is if one element
4 of the crime is that whatever you are examining has no redeeming
5 social value, how can any man who handles literature of any kind
6 know whether he is violating it or not?

7 A It is extremely difficult to do so, Your Honor,
8 and this is another reason why further clarification of the
9 distinctions made by this Court would be helpful to all of us
10 who are in society and in law enforcement.

11 Q Do you suppose that an addendum to that answer
12 would be that the States did not make that standard but they have
13 to try to live with it.

14 Q But if the Federal constitution requires that no
15 man be convicted of a crime unless it is accurately described so
16 that he can know whether he is violating the law, that is a
17 State problem and a Federal problem, isn't it? And if he cannot
18 be convicted if the test is each time whether it has a redeem-
19 ing social value, is that to be proven by evidence, is it to be
20 proven by and tried by the jury or is it to be tried by this
21 Court ultimately? Can a man ever know whether it has redeeming
22 social value until his particular case gets up here?

23 A I must answer in the affirmative to all of those
24 disjunctives, Your Honor. There is an evidentiary problem in
25 determining obscenity or not. This is the case that was tried

1 in this particular matter in the State court. There is also,
2 of course, the overview of this Honorable Court as far as the
3 extent to which the factual problem of obscenity goes. Constant-
4 ly we have seen cases brought before here arguing the issue of
5 obscenity on a given set of facts. Fortunately that is not the
6 case here.

7 Q Whether or not those facts, the facts in the case,
8 are sufficient to show that the article or whatever it is that
9 was purchased or sold has a redeeming social value.

10 A How is that ---

11 Q That is the test isn't it?

12 A That is one of the tests, yes, Your Honor. How
13 this is established is extremely difficult I am sure for the
14 court as well as for individual lay people, citizens of the
15 United States of America.

16 Q I suppose that you would say that even in the
17 constitution life is not without its hazards.

18 A Well stated, Your Honor.

19 Q Life would have its hazards, but under the con-
20 stitution everybody has supposed I thought up to now in the
21 discussion of obscenity no man could be convicted of a crime un-
22 less it could be defined in such a way that he could know whether
23 he is violating the law.

24 A That is correct, Your Honor.

25 Q Suppose a man operating a motor vehicle under the

1 the reckless driving laws as a certain area that we up here call
2 the penumbra where he might not think it was reckless but some-
3 body else, an officer, might think it was reckless. He has to
4 make a difficult judgment there too, doesn't he?

5 A In Massachusetts we always thought 20 miles an
6 hour was a reasonable speed practically anywhere, Your Honor.

7 Thank you.

8 MR. CHIEF JUSTICE BURGER: Mr. Beytagh?

xxxx

9 ARGUMENT OF FRANCIS X. BEYTAGH, JR., ESQ., ON BE-
10 OF THE UNITED STATES AS AMICUS CURIAE

11 MR. BEYTAGH: Mr. Chief Justice, and may it please the
12 Court.

13 At the outset, I should like to indicate as our amicus
14 brief shows and as Attorney General Quinn has pointed out, the
15 interest of the United States in this case is limited to that
16 aspect of the District Court's decision that considered and in-
17 terpreted this Court's holding in Stanley vs. Georgia. We,
18 therefore, take no position on the procedural issues that was
19 also involved in this case and has been the subject of extensive
20 briefing and argument by the party.

21 I should like also to note the reasons for the Govern-
22 ment's interest in this case. As the Court well knows, the
23 Federal Government, as well as the States, has laws that bear upon
24 the matter of obscenity. The Government bans the importation of
25 obscene materials and the Federal Government again through a

1 statute enacted by Congress proscribes the interstate mailing
2 transportation, transportation through the mail, of obscene
3 material.

4 In addition, there is a treaty that the United States
5 is a party to that the Court referred to in the Roth case and
6 Mr. Justice Brennan's opinion that requires the United States
7 to take necessary steps to prohibit the international traffic
8 of obscene materials.

9 Moreover, we have a number of pending cases that we
10 refer to in our amicus brief in which the issue of the meaning
11 and effect of Stanley is centrally raised. Those cases are work-
12 ing their way up to this Court, but because this case is being
13 considered this term and those cases will not we thought it
14 appropriate to express our views on the question of the meaning
15 of Stanley at this point and not to run the risk of having an
16 opportunity to do so.

17 Q Did I understand from scanning your brief that
18 at least one Federal court, I think in California, has held this
19 Federal legislation or part of it constitutionally invalid based
20 on Stanley?

21 A Yes, that is correct, Your Honor.

22 Q And that was the importation statute, the cus-
23 toms statute?

24 A That is correct, based essentially on the same
25 reading in the opinion in Stanley as the district ---

1 Q That Judge Alberts gave?

2 A Yes, that is correct.

3 Q Is the Solicitor General able to give us any
4 more definite definition of this crime than that it must be
5 something that does not have a redeeming social value? Is so,
6 what is it then?

7 A As Your Honor knows, the issue of obscenity is
8 one that has divided the Court perhaps more than any other issue
9 in recent times. We are, of course, aware of your position and
10 the position of Mr. Justice Douglas on the matter.

11 Q I am not just talking about the position or
12 individual, I am talking about a situation where there has been
13 an evident, honest, deliberate purpose to find some way, make a
14 definition that does not leave people uncertain. Does the
15 Solicitor General have any idea of a better way than the test
16 to be whether it has redeeming social values?

17 A That is one aspect of several that the Court has
18 applied in determining obscenity. I think the answer to your
19 question is no and I think it would really be an insult to the
20 intelligence of those justices and judges and counsel that have
21 struggled over the last 15 and 20 years to comment a definition --

22 Q That is quite a struggle.

23 A You are quite right -- to suggest that we -- As
24 Mr. Justice Harlan pointed out that in cases taken and considered
25 on the merits this Court -- his count then was 55 separate

1 opinions, it is over 60 now. It is a very difficult problem, but
2 I would suggest that one way of looking at it as Attorney General
3 Quinn did is that it is a problem that the legislative branch,
4 both at the State and the Federal level, has some role to play
5 in. The statutes that the States have enacted and the Congress
6 has enacted -- they have sought to reflect as best they can this
7 Court's articulation of the pertinent constitutional standards.

8 There is, as the Chief Justice indicated, a penumbra
9 where an individual has to make a very difficult choice.

10 Q Difficult guess.

11 A Choice.

12 Q Well, doesn't he have to make a guess?

13 A I think that is correct, Your Honor. I don't
14 think that is limited to the area of obscenity. I think that
15 perhaps there is a heightened impact there because of the First
16 Amendment and its protection of free expression. But I don't
17 think that we should throw the whole notion of obscenity legis-
18 lation out simply because it is difficult to arrive at a satis-
19 factory definition.

20 I think the Court has worked through the cases that
21 have come to it to reach such a definition. We think that the
22 definition stated in Roth, as explicated in subsequent cases,
23 memoirs in Redrup, is a workable definition that permits on the
24 one hand free expression of those ideas that the framers of the
25 First Amendment had in mind protecting and yet allows States and

1 the Federal Government to prevent on behalf of the people material
2 that has no role to play.

3 Q How do we know exactly what ideas the framers had
4 in mind?

5 A Your Honor, the Court traced this in the Roth
6 case, traced the history of the First Amendment. It was quite
7 clear at the time that the First Amendment was adopted and ratified
8 that there were obscenity laws on the books at that time.

9 Q Undoubtedly. Undoubtedly, but I thought the ob-
10 ject of the Constitution was to say what the Government could do
11 and what it could not do.

12 A That is correct, Your Honor. I think that this
13 Court has ---

14 Q They just didn't ratify what had been done be-
15 fore, did it?

16 A No, but I think the Constitution has to be read
17 in the historical context in which those words were written. That
18 is what the Court in Roth said, and that is the point of departure
19 that the Court has followed since that time.

20 Q There weren't any Federal obscenity laws on the
21 book at the time the Constitution was written because there was
22 no Federal Government until the Constitution was ratified.

23 A That is correct, there ---

24 Q And the First Amendment is directed only at govern-
25 ing what the Federal Government can do, at least that was true

24 which there is an area of uncertainty and the language simply
25 doesn't lend itself to any better definition. The Court has

1 and attempted and worked and I assume will continue to work with
2 the refinement of the standard as best it can in this area and
3 in the area you refer to and in other areas.

4 Q Seventy-six years ago this Court decided almost
5 4-1/2 to 4-1/2 on the Northern Securities case, or I think it
6 was the predecessor. A couple of months ago we, without dissent,
7 affirmed the merger of those same two railroads. I suppose in
8 the interval that left a lot of doubt about the problem of com-
9 petition and monopoly in that area.

10 A Yes, Your Honor, I think that is correct.

11 Q Do I understand you to agree with the statement
12 that was made that many businessmen think you have no boundaries?
13 Or, are you saying that you do not think that there any more
14 solid boundaries for the anti-trust laws than for obscenity?
15 Which are you saying? You said you agreed to something.

16 A I think that the Chief Justice was suggesting that
17 in the anti-trust field under the broad dictates of the Sherman
18 Act and Clayton Act, this Court's opinions construing those
19 statutes that there was at least as much ambiguity about those
20 opinions in the standards there annunciated as in the obscenity
21 field.

22 Q Do you think that is the case?

23 A Yes, I think ---

24 Q Do you think so?

25 Q I think perhaps you have overstated inadvertently

1 my position. I think there is a difference, but it is one of
2 only degree. I think the publishers and exhibitors maybe have
3 a little harder time of it. I am sure they thing so. Perhaps
4 the businessmen think they have the harder time of it.

5 A I would like to turn to Stanley. Itha's been
6 discussed a bit, but that is the central concern for us and I
7 should like to give the Court the Government's view of what
8 Stanley holds and what it doesn't hold.

9 As we read that opinion, it expressly disclaimed under-
10 mining of Roth and its progeny. It said instead that the con-
11 cern there was with the mere possession of materials that might
12 be regarded as obscene in the privacy of an individual's home.
13 We suggest that it is inappropriate for the District Court to
14 extrapolate from that narrow holding a decision with what we
15 regard as sweeping implications in the whole field of obscenity
16 as it has.

17 What the District Court essentially did, as the Court
18 is aware here, is hold dividing two to one that because there
19 was a right to possess privately materials that might in other
20 context be regarded as obscene, it was necessarily all right to
21 receive them. Since there was the right to receive them, there
22 was necessarily a right to distribute them and therefore is
23 a right for commercial distribution that adheres to any exhibitor
24 of a film or distributor of a book or whatever.

25 We think the court is wrong in its logic. We think

1 this Court's opinion in Stanley should be honored for what it
2 said. It said that it was limited to the question of mere
3 possession. It did place its holding on First Amendment ground.
4 But as we indicated, the whole opinion is rather full of language
5 that speaks in Fourth Amendment terms. It speaks about a con-
6 cern about privacy in a man's home.

7 Now, I am not talking as appellees suggest about some
8 protected area. That has been done away with by the Court in
9 the Katz case. What we are talking about is an individual's
10 privacy, and I would suggest that if Mr. Stanley would like to
11 carry an obscene book down the street he could that too and he
12 couldn't be prosecuted.

13 Q Where would he acquire this book?

14 A I don't know where he would acquire it, Your
15 Honor. I really don't think that it matters where he acquired
16 it. I think the Government has ---

17 Q You are saying it matters very much where he
18 acquitted, aren't you? How do you suggest that he would have gained
19 possession of this book, that he has an absolute constitutional
20 right to possess?

21 A He could have obtained it in a variety of ways.

22 Q He would almost have had to written it himself,
23 wouldn't he, under your theory?

24 A No, Your Honor. I assume he obtained it from
25 the same sort of source that other Stanley's obtain similar sorts

16 1 of materials.

2 Q Yes, but you are telling us it is illegal or can
3 be made illegal and has been made illegal by the States and the
4 Federal Government for one Mr. Stanley to sell or give the book
5 to another Mr. Stanley. So, each Mr. Stanley apparently has to
6 create his own.

7 A He doesn't have to. We know as a practical matter
8 that Stanley's can obtain this material. The question is whether
9 the holding in Stanley reaches as far as giving constitutional
10 sanction to the people that would distribute it. I suggest that
11 it doesn't.

12 Q I am suggesting it would be kind of an empty right
13 and that the Court in Stanley may have been spending a lot of
14 time writing a very eloquent opinion about almost nothing at
15 all if the right of possession of something doesn't involve or
16 bring in its train the right to acquire it. The absolute con-
17 stitutional right that was upheld in Stanley.

18 A I am not suggesting that he doesn't have the
19 right to acquire acquire it. I am suggesting that it doesn't
20 extend so far as to hold that distributors have a right to
21 disseminate material contrary to obscenity statutes.

22 Q So far as the record in Stanley shows, somebody
23 might have given it to him.

24 A I don't know where he got the film. Or, somebody
25 might have mailed it to him. There is nothing in the record to

1 show where he got the film from.

2 A The basic right it seems to me, Mr. Justice
3 Stewart, is really a right not to be interfered with by the
4 Government in this possession and the right has, we think, Fourth
5 and Fifth Amendment underpinnings that ---

6 Q The opinion of the Court in Stanley, as I under-
7 stood it -- I did not join it as you know -- is based on the
8 First Amendment. The separate opinion in that case which I do
9 know something about having written it was based on the Fourth
10 Amendment. Quite a different basis.

11 A But I would suggest that there is a long quote
12 in there from Olmstead which was a Fourth Amendment case and
13 there is repeated references to invasions of privacy and that is
14 Fourth Amendment talk as far as I read this Court's opinion.

15 It seems to us that what the Court should do in this
16 area is to adhere to the standards that it has enunciated in
17 the past instead of the bold departure that the District Court
18 here has suggested.

19 The District Court suggested that so long as material
20 commercially disseminated was adequately controlled, by adequately
21 controlled the District Court suggested not allowing minors in,
22 no pandering and insuring that there was no intrusion into un-
23 willing or uninterested people.

24 The District Court suggested so long as that was done
25 that then commercial distribution of films, books, whatever would
be constitutionally protected. We think that that is a misguided

1 notion because first it doesn't give sufficient weight to the
2 legislative judgment in this matter. There has been a running
3 debate about the empirical evidence on the inducement of obscene
4 materials to antisocial conduct. As the Court knows, there is
5 a Presidential commission presently studying this matter. We
6 don't know what they are going to come up with. They are going
7 to make a report in the middle of this year. I would suggest
8 that the better part of wisdom would be to wait and see what
9 they come up with.

10 Q What are they as a matter of interest? You say
11 the middle of this year?

12 A The statute requires a report by July 31st of
13 this year, yes, Your Honor. I am not positive that they are
14 going to make it by then, but that is what it says.

15 It seems to us this is so because where you end up if
16 you accept this position is essentially at hard-core pornography,
17 whatever it is, assuming you can know it when you see it can be
18 allowed in and the kind ---

19 Q Well, that is what I would like to know. That
20 word alarms me, hard-core pornogrphahy. How can you see it any
21 better than you can understand it with your brains when you hear
22 it. I don't understand that.

23 A But, Your Honor, as you know, the only conclusion
24 if you accept that is to allow everything in and say that ---

25 Q And the only conclusion the other way is just to

1 sex, which is one of the strongest urges in the human race, can-
2 not be publicly discussed or privately discussed, unless you
3 stretch some other amendment to fit the privately discussed. It
4 puts that subject out of -- of course, it can't be done, every-
5 body knows it can't be done even if you have laws against it.

6 A I think that there certainly is a position between
7 those extremes that the Court has sought to carve out, and I would
8 hope it would continue to carve out.

9 Indeed, it seems that appellees concede that the Dis-
10 trict Court's resolution is no panacea. This is the so-called
11 assault theory or nuisance theory of obscenity. Somehow that is
12 going to get the Court out of all of these problems, but it won't
13 get them out of all of these problems. It is clear that it would
14 not get them out of all of these problems because, in the first
15 place, you are going to have to decide in each case whether the
16 three-prong test has been complied with adequately. And, you
17 are going to have to decide in cases where the distributor or
18 the exhibitor determines that he doesn't have to comply with the
19 three-prong test. You are still going to have to apply a stand-
20 ard of obscenity .

21 So, it is no panacea and they admit that. They backed
22 off and they finally said well maybe what you should do is draw
23 a line between what is conceivably obscene and possibly obscene.
24 We suggest that is just a different verbal formulation and that
25 doesn't advance the inquiry anyway.

1 It seems to us finally that the basic problem here is
2 one of whether this Court should seek to create for the society --
3 a society that is concerned about morality, whose people are con-
4 cerned about pornography -- create a fixed and inflexible rule
5 that prevents legislatures from reflecting the will of the people.

6 I would suggest that the Court shouldn't do that. It
7 hasn't done that up to now and we suggest that it is not appro-
8 priate to do it.

9 So, if the Court reaches the issue that is presented
10 on the question of the meaning of Stanley, we suggest that it
11 would be appropriate for the Court to overturn the District
12 Court's decision and restore Stanley to the limited and original
13 meaning that we think that the Court had in mind when they wrote
14 the opinion.

15 Q Is it your judgment that the Court can do any bet-
16 ter and if it is its business to create a definition, that it
17 can do any better than was done in the opinion written by my
18 brother Brennan?

19 A No, Your Honor, I don't think so. I think the
20 Court -- all of the minds on the Court and counsel that have
21 sought to assist them have struggled as I have indicated for
22 15 or 20 years. I don't suggest there is any better formulation
23 that can be arrived at. I think it is a difficult problem and ---

24 Q Well, I don't either.

25 A But the standards that the Court has enunciated

1 they give very wide range to free expression. The Court is moved
2 really to the point where what is prohibited is essentially the
3 hard-core sort of pornography that doesn't really express ideas
4 that have any merit or any worth. It seems to us that that is
5 a sound and sensible position. That is the position that the
6 people in the legislatures can live with.

7 Thank you.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Beytagh.

9 Mr. Lewin?

10 ARGUMENT OF NATHAN LEWIN, ESQ., ON BEHALF OF APPELLEES

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

12 The Attorney General of the State of Massachusetts and
13 the Solicitor as Amicus Curiae have, I submit, argued before
14 this Court a case that simply is not here and an issue that is
15 not fairly presented by the order which is here under review.

16 I would just like to take a minute to summarize what,
17 in fact, has happened here. A theatre owner threatened with
18 criminal prosecution under a State statute of dubious constitution-
19 ality for showing a film which was found not obscene by a Federal
20 Court of Appeals and has been widely and seriously reviewed insti-
21 tuted a proceeding under 42 U.S. C 1983 in a Federal District
22 Court to prevent the threatened prosecution and harassment by
23 the State prosecutor under the local obscenity statute.

24 The Federal Court upon entertaining that complaint
25 refused to intervene even with a subsequently instituted

xxxx

1 prosecution under the State statute. Appellants here concede
2 that unlike ---

3 Q Is it accurate for you to say it was subsequent?
4 As I understood it there had initially been a prosecution and the
5 indictment for some infirmity was superceded by another indictment
6 after this suit had been filed. Is that a fact?

7 A It is true, there was a prior indictment. Now,
8 that earlier indictment is not involved in this case.

9 Q I know that but on the question whether or not
10 ther was a pending prosecution when this suit was brought in
11 the District Court ---

12 A I think in the ---

13 Q Isn't it difficult to argue that there was none
14 pending when this suit was filed?

15 A There was a prosecution pending when this suit
16 was originally instituted. At the time the final amended com-
17 plaint was filed, amended complaint which really presented the
18 issues before the Court. There was then no outstanding indict-
19 ment. That indictment had been dismissed.

20 Q Well, as I understand, it is only a matter of days
21 before the second one instituted.

22 A That is correct, Mr. Justice.

23 Q Was that really a continuity of the initial
24 prosecution?

25 A I think in terms of 2283 which after all is a

1 technical statute I think it is appropriate to construe that
2 particularly in the First Amendment context to construe it narrow
3 ly. Let me go beyond that, Mr. Justice Brennan, I don't think
4 that is essential and it is in no way essential to our case, be-
5 cause even if one assumes that the indictment that was entered
6 subsequent to the filing of the last amended complaint was one
7 which was entitled to protection under 2283 the three-judge
8 District Court in this case, in fact, fully protected that prosecu
9 tion. It refused in any way to interfere with that State
10 prosecution.

11 The issue that was presented to the District Court
12 and which prompted the entry of the order which is here under
13 review, the interlocutory order which appears on pages 44 to
14 45 of the appendix, the circumstances which prompted the entry
15 of that order were solely and exclusively the fact that in the
16 interim that State prosecution had gone through a trial and a
17 judge had found the appellees in this case guilty. The State
18 prosecutor then returned to the Federal court and said that
19 whereas heretofore I have by stipulation permitted this film to
20 continue its exhibition during the pendency of that trial I
21 hereby withdraw that stipulation. That appears in the transcript
22 which is on file here in this Court, several times.

23 It was at that point that the three-judge District
24 Court was faced with the question on which it acted in this
25 Court. That question was, "Was it to permit a State prosecutor

1 at that juncture to threaten by threatening inditments and
2 seizures to threaten a theatre owner out of permitting him to show
3 his film?"

4 Now, I point out to the Court ---

5 Q What you are saying is this is not a 2283 case at
6 all, it is a pure question as to the reach of Dumbrowski, isn't
7 that right?

8 A Right. We think it is -- this follows a fortiori
9 from Dumbrowski. We think it is ---

10 Q That is the question in debate.

11 A Right.

12 Q But it is a Dumbrowski issue and not a 2283 issue.

13 A Definitely a 2283 issue, but we think it is not
14 even Dumbrowski for this reason, Mr. Justice ---

15 Q That is another question.

16 A It is not a Dumbrowski issue because in this case
17 the relief actually granted by the District Court did not in
18 any extent to State prosecutions and, in fact, we submit if the
19 order is read, and we think that this Court must judge the case
20 on the order. If the order is read, it removed not a single
21 issue either factual or legal from the purview of the State
22 court in its consideration of the State prosecution.

23 What the order did ---

24 Q That is the declaration of unconstitutionality,
25 of course, was not conclusively upon the State court.

1 A It was not. Indeed, Mr. Justice Brennan, the
2 Judge Aldrich was very careful to talk about constitutionality
3 in terms of probably constitutionality. Now, that makes absolute-
4 ly no sense unless one considers the case in the context of th s
5 interim relief.

6 As the case was presented to the three-judge District
7 Court, it was faced with the question of whether it should at
8 the point where the State prosecutor had said, "I will now seize
9 this film, I will now indict again and again, if this film is
10 shown." The three-judge court was faced with the question whether
11 having previously allowed the State court proceedings to continue
12 whether it should then, having indeed abstained -- we submit that
13 under the traditional view of what abstention is that is exactly
14 what the District Court judge did in this case.

15 He said, "I will retain jurisdiction over this case.
16 I will permit you to make your consitutional claims in the State
17 courts, and you can come back to me ultimately after you have
18 gone through that State procedure."

19 But then there was a change of facts. Suddenly there
20 was a conviction and the prosecutor said, "Now the film has got
21 to stop, and I will indict and seize." At that point, the
22 three-judge District Court said, "We have to consider what the
23 probable outcome of the State case will be, because that is
24 relevant to a determination as to whether this exhibitor is
25 entitled to interim relief."

1 It was for that reason, and that reason alone, that
2 the three-judge District Court then went on to consider in terms
3 of probable outcome the constitutional issue which was presented
4 by the challenge to the statute on its face.

5 Q Didn't you attempt a temporary injunction against
6 further prosecution?

7 A He issued, Mr. Justice Harlan, a temporary in-
8 junction against proceeding civilly or criminally or otherwise
9 interfering with the exhibition.

10 I think an important element in understanding that
11 injunction is the sentence which the next to last sentence of
12 the District Judge's opinion. He says, "Finally, we voice no
13 opinion as to the legal consequences if plaintiffs exhibit their
14 film under the protection of our injunction, and it is ultimately
15 determined that our view was mistaken and that such exhibition
16 was properly considered illicit.

17 What Judge Aldrich was saying in that sentence, I
18 submit, was that if these appellees, who were now entitled to
19 be free of the threat, the jawboning as it were of a local D.A.,
20 now go out and continue to show the film "I am Curious Yellow"
21 they are assuming the risk they were assuming all along. If, t,
22 if at some future date the film was found obscene and the
23 statute is found constitutional, they may be prosecuted even
24 for the period of exhibition between the date of the injunction
25 and the date of that finding.

1 All that the order did, Mr. Justice Harlan, was tell
2 the D.A. you may not threaten these prosecutors with indictment,
3 you may not seize this film, you may not interfere with its show-
4 ing, but nothing beyond that.

5 Q Will it hold up the State process during that
6 period.

7 A It does, in the interim.

8 Q Well, that is what the issue is here whether he
9 should have done that.

10 A Right. But, it holds up the State process in the
11 interim but does not forever foreclose a prosecution even for
12 that interim period.

13 Q Oh, certainly.

14 A In other words, ultimately they may prosecute.
15 The question now is, and we submit that -- well, let me first
16 turn then in that context to the abstention point. The question
17 with respect to this interim relief which the three-judge dis-
18 trict court granted is was that appropriate action by a Federal
19 District Court? Is that appropriate in terms of abstention,
20 was it appropriate in terms of the injunctive relief which is --
21 or the ground rules for injunctive relief set out in this
22 Court's opinion in Dumbrowski? We submit it plainly was.

23 Unlike all of the other cases which this Court hasd
24 heard in the last two case, this is an instance on ongoing, con-
25 tinuing to this very day suppression of speech. Nothing is more

1 plainly demonstrable than the fact that from the time that the
2 District Attorney withdrew his stipulation this film was not
3 shown by these appelles in Boston. It is not shown today only
4 because that stipulation was withdrawn.

5 If we are talking as ---

6 Q Why is it not being shown?

7 A Because the District Attorney announced to the
8 Federal District Court on November 12, 1969, that if that film
9 was reopened he would seize and he would prosecute, although
10 he had then one prosecution.

11 Q So, why didn't you show it?

12 A Because it would just subject my clients to
13 continuing harassment of seizures and prosecutions. If we were
14 to open the film, it would immediately be seized by police offi-
15 cers, there would be an indictment ---

16 Q The substance of your position, then, is that
17 Federal intervention is justified by a desire to avoid a State
18 criminal prosecution?

19 A Federal intervention is justified, Mr. Justice
20 White, when the State prosecution, the threat of State prosecu-
21 tion, is being used to close down a film whose obscenity is
22 then being litigated in the State courts.

23 Q When the threat of criminal prosecution is effec-
24 tive enough to deter someone from exercising what he claims is
25 his right of free speech and which he would otherwise exercise.

1 A That is exactly what we say. We say that a
2 Federal District Court could enjoin -- well, we say there are
3 a host of reasons supporting this injunction. The District
4 Court chose one reason which is that it viewed this statute
5 as probably unconstitutional under Stanley.

6 There are narrower grounds for sustaining that order,
7 we submit, Mr. Justice White, than the District Court did. We
8 urge the Court to affirm on the District Court's reasoning, but
9 there are narrower grounds.

10 We have set out on pages 54 to 62 of our brief our
11 argument that in fact a State prosecutor may not constitutionally
12 jawbone the film, by that I mean threaten prosecution and multi-
13 ple prosecutions of a film in order to have it closed when, in
14 fact, that very film is being litigated, its obscenity is being
15 litigated in a State court is then under litigation and there are
16 constitutional challenges to the statute under which it is being
17 litigated ---

18 Q There are some risks you have to take. You could
19 go ahead and show your film you just don't want to take the risk.

20 A No, we are taking the risk. Our client ---

21 Q Are you showing the film or not?

22 A Right now we are not. We have taken the risk.

23 Q Why aren't you?

24 A Let me explain that. Because the repeated pros-
25 ecutions, repeated, multiple prosecutions, is more of a risk,

1 risk, we think, than we are required to take.

2 Q So, it is your decision in essence, right?

3 A Only under duress. It is our decision just as
4 any decision under duress is a decision.

5 Q I suppose you would be in the same position as
6 if the prosecutor never said a word.

7 A No, Your Honor. Because if the prosecutor ---

8 Q Why? You would never know what the prosecutor
9 is going to do.

10 A If the prosecutor is by --- we don't deny the
11 prosecutor's right to indict and to prosecute after he has a
12 finding that a film is obscene and that has been concluded.
13 We are assuming that risk. The risk we don't have to assume,
14 Mr. Justice White, and I think that is the risk that this
15 Court talked about in Dumbrowski, is what I think is very
16 practically a risk of a very much different magnitude and that
17 is day in and day out seizures of films, repeated indictments
18 for every day in which you show a film. We are assuming the
19 risks.

20 Q What is the prosecutor supposed to do, say I
21 think you are breaking the law but you think you are not, but
22 you can go ahead, but I am constitutionally obligated to let
23 you go on breaking the law until we get a position. Is that
24 your position?

25 A We think -- let me say this, Mr. Justice White,

1 where the State provides an injunctive remedy, as it may -- and
2 this Court in the Kingsley Book case, for example, set out very
3 specifically the rules for injunctive remedies. Where the State
4 provides a Board of Censors, Mr. Justice White, of course it can
5 do that. But the State of Massachusetts has not done that. What
6 the State of Massachusetts has done is it has said you may pro-
7 ceed by way of criminal prosecution.

8 Q But did the State court refuse to issue the tem-
9 porary relief?

10 A The State court couldn't issue it. It was a
11 criminal prosecution.

12 Q Why couldn't the State enjoin the prosecutor from
13 any further prosecutions pending decision of the case.

14 A It was a criminal prosecution brought by the
15 State. There is no way, to my knowledge, in which in a criminal
16 prosecution you can ask the judge in a State court to enjoin the
17 prosecutor from bringing other prosecutions.

18 Q Did you try it?

19 A We did not try it. We are entitled to go into
20 a Federal court, Mr. Justice White, under this Court's decisions,
21 the abstention ---

22 Q The State court can't do it but the Federal court
23 can.

24 A The Federal court doesn't have the -- the State
25 court may be able to do it in an independent proceeding, Mr.

1 Justice Harlan. Then, you are squarely up to the question whether
2 we are obliged to institute a separate proceeding in a State
3 court where we chose instead to go to a Federal Court.

4 In this Court's case in *England vs. Louisiana State*
5 *Broad of Medical Examiners*, that was specifically rejected by
6 the Court. If we have a claim under 1983, if we are entitled
7 to present to a Federal District Court our claim that the pro-
8 secutor is not permitted, either because the statute is uncon-
9 stitutional or because he is in effect-- what this prosecutor
10 has in effect done is he has implemented a system of informal
11 censorship.

12 There is no judicial superintendence over what he does.
13 There is no review. Indeed, as you pointed out, Mr. Justice
14 White, his success is what makes the whole thing nonreviewable.
15 If he can go over to any exhibitor of motion films in Massachu-
16 setts and say I will indict you tomorrow if you show that film,
17 and, of course, the exhibitor will close up. If he says, I will
18 indict you time and again and again and again if you show it,
19 then a fortiori he will close up.

20 Now, our client has taken the risk. He is, in fact,
21 presently under an appeal sentence of one year imprisonment for
22 showing this film. He is, in fact, assuming a further risk under
23 Judge Aldrich's opinion that if, in fact, this film is found
24 obscene he can be prosecuted after the judgment of conviction
25 is ultimately confirmed and after this Court acts on that film

1 he can be prosecuted for every day that he now shows that film.
2 The only relief we are seeking is interim relief.

3 Q So, pending a State criminal prosecution, pend-
4 ing the outcome of the State criminal prosecution, the Federal
5 court is authorized to require that the conduct as challenged
6 by the State be permitted to continue?

7 A No, Mr. Justice White, our position is that when
8 is it speech ---

9 Q There is where there is a film involved.

10 A When it is continuing speech, yes, that is our
11 position, because otherwise, if you don't do that, if you don't
12 do that, then, in fact, what you are saying to the District
13 Attorney is you may without State statute, this Court has said
14 time and again that in the First Amendment area if the State
15 legislates, it must narrowly define the conduct to be prohibited.

16 Q I suppose then Freedman against Maryland really
17 ought to be amended in your position to say that no State Board
18 of Censors can stop a film pending appeal of the censorship
19 decision.

20 A No, because ---

21 Q Why not?

22 A Because Freedman and Maryland provides the very
23 procedural safeguards which we say are absent here.

24 Q Not on appeal it doesn't. It doesn't regulate
25 the length of time it has to appeal, especially to this Court.

1 A True, it doesn't regulate the length of time, but
2 what it does, what has happened in Freedman and Maryland, Mr.
3 Justice White, is that the State of Maryland has focused on the
4 question of exhibition of films. It has said that with regard
5 to the exhibition of films, we authorize this procedure. The
6 State of Massachusetts has never done that.

7 Q Yes, but nevertheless in the Freedman case the
8 State of Maryland is saying you can't show the film and you are
9 not going to show the film unless you can get this order upset
10 on appeal. It may take a long time and Freedman doesn't even
11 limit the time to the court of appeals of Maryland.

12 A It may, indeed, but the difference, we think,
13 between that case and this is that there Maryland has specifically
14 focused on the question of films and has made a determination
15 as to what are the appropriate procedures in the interim. That is
16 just not true in Massachusetts.

17 Massachusetts could very easily enact an injunction
18 statute as was approved by this Court, for example, in Kingsley
19 Books.

20 Q You haven't given them a chance to focus on it.
21 You haven't even asked them about the interim stay. You haven't
22 asked the State court or anybody else in the State about an
23 interim stay.

24 A Your Honor, the option we had in the State court
25 was simply to institute a separate proceeding.

1 Q So, what if it was?

2 A We are not required to do that. If we have a
3 right under 1983 ---

4 Q Well, what is the issue here? That is one of
5 the issues here.

6 A No. Your Honor, I think, with all deference, I
7 think the issue here -- I mean that issue was taken care of by
8 the England case. Very specifically what the Court said in
9 England vs. Louisiana State Board, and I refer to page 415,
10 "When a Federal court is properly appealed to in case over which
11 it has by law jurisdiction, it is its duty to take such juris-
12 diction." The right of a party-plaintiff to chose a Federal
13 court when there is a choice cannot be properly denied.

14 The additional difference, Mr. Justice White, is that
15 there is here no question of State law, which we want to go to
16 a State court on. What you are urging us to do in the terms
17 of bringing a separate suit in a State court is to bring a
18 separate suit for the purpose of having the State court make
19 the very consitutional determination that we are asking the Federal
20 court to do. That this Court specifically said in McNeese was
21 impermissible, was the wrong standard to apply. You can't force
22 a plaintiff to claim his Federal constitutional right in the
23 State court when it is the same right that he is claiming in the
24 Federal court.

25 Q How about the constitutionality of the statute?

1 A The constitutionality of the statute ---

2 Q Are you going to say that you can have a decision
3 on that in the Federal court?

4 A Only in the context of this interim relief. We
5 think that ---

6 Q Why? By your argument, you cannot force a man to
7 take his Federal constitutional claim to the State court.

8 A No.

9 Q You just said it.

10 A Because I think the claim that is being made,
11 Mr. Justice White, in regard to the State statute is that the
12 State court may construe that statute narrowly. That is the
13 ground for abstention. The ground for abstention, the only
14 ground urged by the appellant ---

15 Q I wasn't even talking about abstention.

16 A The only ground urged here by the appellants here
17 is not that the State statute may be found unconstitutional by
18 the Massachusetts Supreme Judicial Court. The only ground is
19 that the Massachusetts Supreme Judicial Court may construe that
20 statute narrowly.

21 That is just not true with regard to this other claim.
22 Let me make clear that what we are saying essentially is that this
23 interim relief is permissible and was appropriately granted for,
24 as I say, a variety of reasons.

25 The first and second reasons is that the statute is

1 unconstitutional on its face and that it is unconstitutional as
2 applied to the exhibition of this motion picture by these appellees
3 will be gone into in some detail by my colleague, Professor De
4 Grazia.

5 What I would like to address myself to is the narrower
6 grounds, which are that in the absence of any State injunction
7 statute, in the absence of any State statute such as that in
8 Freedman and Maryland, in the absence of any State provision
9 that says to a State District Attorney, you may call determina-
10 tion of a film, this District Attorney could not in effect stop
11 this film from being shown by withdrawing that stipulation.
12 That is really all that the order that was issued by Judge Al-
13 drich did.

14 It simply said to the State District Attorney, "You
15 may not interfere with the exhibition of this film."

16 Q Supposing there had been no stipulation by the
17 State and the prosecutor had made no statement whatever but he
18 simply went around enforcing the laws as he saw it. What would
19 you say to that about the propriety of the Federal court stepping
20 in?

21 A We think the same would be true if a plaintiff
22 could show that that repeated indictment and seizure was like the
23 allegations in Dumbrowski pursuant to a plan to suppress the
24 speech. Here we didn't have to show that because here there was
25 a stipulation and it was withdrawn. The obvious purpose of its

1 withdrawal was to terminate the showing of the film which it did.

2 So, we are now in the posture where the film played
3 from May to November, no great harm done to the citizens of
4 Massachusetts, it played from May to November, the prosecutor
5 then withdrew his stipulation, the film-showing immediately
6 terminated, the District Court entered its order and we are seek-
7 ing affirmance just in order to allow this film to play.

8 The film is ---

9 Q What you are really arguing, I think, is that in
10 the peculiar facts of this case this is in the four corners of
11 Dombrowski.

12 A Yes, sir.

13 Q Then you are arguing that even apart from that
14 the reach of Dombrowski ought to enable the Federal courts to
15 stop in where there are at least more than one prosecution you got.

16 A Yes, we think -- but as I have tried to point
17 out, we think it is even beyond Dombrowski because in Dombrowski
18 the District Court was being asked to take an issue away from
19 the State courts, to take away from the State court the issue
20 of the constitutionality of that Louisiana subversive act.

21 Q Mr. Lewin, there is another little difference.
22 In the Dombrowski case, as I read it, they would put that man
23 out of business and his whole organization. If I understand
24 Attorney General Quinn, your client is still in business, running
25 with a packed audience.

1 A I think really the distinction is cut with all
2 respects, Mr. Justice Marshall. I think in Dombrowski the
3 suppression was much less direct. What was happening was that they
4 were in occasional seizures, occasional ransacking of the files,
5 there was a broad allegation that this would drive away members
6 at sometime in the future and would put him out of business.

7 Q Do you have any of those allegations in this
8 case here?

9 A In this case we have the fact. We have the very
10 fact that here is an exhibitor who wants to speak and is being
11 gagged.

12 Q Well, let's face facts. Does that exhibitor want
13 to speak or make a buck?

14 A We think that makes no difference constitutionally.
15 In this Court's opinions from New York Times and Sullivan through
16 Burns there ---

17 Q Granted, but they don't keep -- you say he has
18 been denied his speech all the time this has been pending.

19 A That is true.

20 Q And, if I understand it correctly you'll admit
21 that his theatre hasn't been closed yet.

22 A The fact that it hasn't been closed -- if I, for
23 example, want to speak with respect to a Congressional election
24 and I am told I can speak with regard to the World Series I am
25 still allowed to speak but I still can't speak about ---

1 Q I would assume you would say that if the prosecu-
2 tor said you shall not say, "They Kingdom Come," on the corner
3 that he had been denied his right to speech providing he can
4 say anything else he wants to say.

5 A I think, Your Honor, I think Dombrowski would have
6 been a much stronger case if what had happened in Dombrowski was
7 the State prosecutors were taking Mr. Dombrowski, just hypotheti-
8 cally and arresting him or threatening him with arrest if he
9 opened his mouth or if he distributed the pamphlets which ---

10 Q That is Dombrowski.

11 A No, in Dombrowski there were seizures and it was
12 claimed that the seizures were part of the plan but there was not
13 as there is here the gag in the mouth.

14 Q Is there anything in this case that says that the
15 prosecution or anybody is out to stop this man's speech?

16 A That is plain, Your Honor, from the withdrawal of
17 the stipulation and the fact that immediately upon its withdrawal
18 the film is terminated.

19 Q Well, I could construe that as saying we don't
20 want you to show this one picture.

21 A But that is his speech, Your Honor, that is the
22 speech just as surely as Mr. Dombrowski's pamphlet -- or take
23 Mr. Harris' case, the case Your Honors heard as the first of
24 this series. We think that would be parallel to this one if on
25 the day after the day on which he was arrested for distributing

1 the pamphlet Harris said I want to distribute this pamphlet
2 again today and again tomorrow and the day after and for a whole
3 month and the sheriff had come up to him and said, "We will
4 arrest you every time, if you distribute it."

5 Q That is Harris' pamphlet, this is not this man's
6 film.

7 A It is, Your Honor.

8 Q How?

9 A He is exhibiting it. Let me just go back to the

10 Q It is his by being loaned to him for a price.

11 A Right, and he wants to exhibit it.

12 Q That is a lot different from a man that prints
13 his own pamphlet and has a right to distribute it.

14 A Let me just for a minute add, Your Honor, because
15 I think I should respond to a claim that has been made in the
16 brief by the State and which was made here on oral argument.

17 It is true that this film does not belong to these
18 exhibitors. The distributor of this film is Grove Press which is
19 not a party to this case. Grove Press moved to intervene in the
20 court below. Intervention was denied on the ground that its
21 interest would be represented by the exhibitor. We think that
22 entitled the exhibitor to make all the claims that the distri-
23 butor would have made.

24 Indeed, we submit the exhibitor is no different. Assume
25 Harris writes his pamphlet, Mr. Justice Marshall, and he hands

1 it to an associate who isn't smart enough to write it himself
2 and tells him, "You distribute it." I don't think the associate
3 has less rights than Harris has to speak.

4 Q My problem is that a man that is in business to
5 run -- he hopes to run a packed house every day and they say that
6 one film he can't show and he runs a packed house every day and
7 despite your claim that he is interested in speech, how is he
8 damaged?

9 A Because he is not ---

10 Q You admit he is not damaged financially?

11 A Well, I don't know. I don't think that is true.
12 As was pointed out here, it is a fact, which you referred to, that
13 it is well known that this film has been doing far better than
14 other films. I admit taht the record doesn't have the facts on
15 whether this exhibitor would have done better with this film than
16 he did with the one he used in place of it.

17 But I submit that if an exhibitor wants to show Film A
18 and he is constitutionally entitled to show it, it makes no
19 difference that the State says to him, "You can show Film B in-
20 stead."

21 If that were right, then the State would be controlling
22 speech. That is the worst kind of regulation.

23 Q That depends on the Professor's argument of whether
24 he does have a constitutional right to show it.

25 Q What you are saying is that one of the speeches

1 he wants to make, he is afraid to make.

2 A That is right. He wants to make this speech.
3 This exhibitor says, "I want to show this film, " and the pro-
4 secutor who is able to achieve by various other means -- is able
5 to achieve his lawful ends, which is to prosecute. If, in fact,
6 an offense has been committed. And, in fact, he has prosecuted.

7 In fact, all the issues are going to be considered in
8 the State case. That prosecutor choses instead to suppress the
9 film without statutory authority, without the benefit of any pro-
10 cedure that has been authorized by any State court, suppressed
11 the film simply by threatening it to death. That is what this
12 prosecutor has done. He has threatened this film to death. He
13 simply closed it up by saying, "If you don't close it up, I'll
14 just prosecute you and I'll seize you and I'll prosecute you
15 again."

16 There is no exhibitor, we submit, even an exhibitor
17 who is willing to run the risk, and our client is willing to run
18 the risk of ultimate jail sentence. He is under a one-year jail
19 term. Even an exhibitor who is willing to run the risk is not
20 prepared to be hauled into court every day to answer a new indict-
21 ment every day to plead, to have his film seized and to have to
22 retain a barage of attorneys in order to be able to show a film,
23 which -- an important element which I don't think I have mentioned
24 in all of this, is the fact that this is a film which the court
25 below knew, and which this Court can certainly take judicial

1 notice of, had been found constitutionally protected by a United
2 States Court of Appeals.

3 So, we are not dealing with just some whatever it may
4 be hard-core pornography. We are dealing with a film which a
5 United States Court of Appeals has said in a suit brought by the
6 United States is subject to constitutional protection.

7 Q But that was no part at all of the District Court's
8 reasoning? The

9 A I don't think so, Your Honor.

10 Q They proceeded on the hypothesis that this was
11 ---

12 A Well, Mr. Justice Stewart, it may be a fine read-
13 ing of the opinion and I think ---

14 Q I have read it and I don't know how finely I read
15 it, but I read it carefully.

16 A I just mean my proposed reading of it. At the
17 top of page 33 Judge Aldrich says, "For the purposes of this case
18 we assume that the film is obscene by standards currently applied
19 by the Massachusetts courts." Footnote, "Another court view-
20 ing the same film has differed, United States vs. 'I am Curious
21 Yellow.'"

22 I think what Judge Aldrich was saying is, "Well, all
23 right, the Massachusetts court has, we know, the trial court has
24 found it obscene. We will assume arguendo that will be upheld."
25 But it is by no means, by no stretch of the imagination totally

1 worthless, hard-core pornography. It is a film which maybe
2 Massachusetts will find obscene, the Second Circuit has found
3 not obscene.

4 I think that is an important element in deciding whether
5 that film should be entitled to be shown in the interim. While
6 these appellees are making their way through the Massachusetts
7 courts and being forced to assert in those courts every right,
8 every claim that they might have. The Federal court has enter-
9 tained, in effect, no substantive claim, either factual or con-
10 stitutional other than the claim essential to whether they are
11 entitled to interim relief.

12 Q How many State prosecutions have there actually
13 been? One, or two?

14 A There has been instituted by complaint in addition
15 to the one in Boston, I think, three others. Three others in
16 other counties.

17 Q What is their status now?

18 A They are just awaiting really -- of course, this
19 Court has the obscenity vel non as one of the issues of this
20 film on its docket in No. 905, which will be heard next term.

21 So, I think they are probably just awaiting the outcome
22 of ---

23 Q I guess they are.

24 A Yes, they all played one day. And, let me show
25 you, again, what the District Court did means that each one of

1 those exhibitors also will be forced to a criminal trial and, we
2 are not contesting that. We haven't appealed the abstention
3 issue and all the Federalism issues would be presented in this
4 case had we appealed the District Court's refusal to enjoin the
5 ongoing State proceeding. We did not appeal that.

6 So, therefore, the abstention issues just aren't here.
7 The District Court has, in fact, no matter what it said -- has
8 in fact abstained. The only issue that is here on this appeal
9 is what happens in the interim.

10 Q This District Court issued an injunction and that
11 injunction has been stayed, has it not, by us?

12 A Yes, sir.

13 Q And this, therefore, brings us back to the situa-
14 tion that existed before the issuance of the injunction by the
15 District Court which you said was an intolerable situation, be-
16 cause you were going to be prosecuted every day. The fact is now
17 you are not exhibiting the film.

18 A We are not exhibiting the film. Our speech in
19 the plainest sense is being suppressed. We are just not exhibit-
20 ing the film.

21 Q That is your choice, isn't it? whether or not you
22 exhibit it?

23 A No, I don't think it is, Your Honor. I think it
24 is no more our choice than it was the choice of "Viva Maria" in
25 Interstate Circuit not to exhibit that film or the exhibitor

1 exhibiting it because the informal censorship board in the
2 Interstate Circuit case had found that juveniles should not
3 be allowed to see that film.

4 This Court struck down in the Interstate Circuit case
5 a system under which it noted self-regulation would be the re-
6 sult. In Smith and California, it is a book seller's own individual
7 choice not to sell books if he hasn't read them. But, that is
8 not a defense.

9 If the State is forcing you to that choice, it is not
10 a choice at all. And that really is what the State is doing.
11 We know this ---

12 Q You say this is a fortiori from Dombrowski, as
13 I understand your argument.

14 A Yes.

15 Q And yet in Dombrowski the allegations were that
16 it was deliberate pattern and course of harassment, an abuse
17 of a statute and a bad faith course of conduct.

18 A Right.

19 Q Here I don't understand there have been any such
20 claims at all.

21 A No.

22 Q There is no bad faith; there is no claim of deli-
23 berate harassment. There is simply a prediction of a good-
24 faith enforcement the prosecutor of the law of Massachusetts.
25 It makes it quite different from Dombrowski, doesn't it?

1 A Well, I think Zwickler and Koota certainly es-
2 tablish that bad faith is not an essential element in getting --
3 in the Federal courts getting into these cases.

4 We submit that here there is an alternative reason
5 which just didn't exist in Dombrowski. Because in Dombrowski,
6 again, the prospect of interference with speech was off in some
7 future date. True there were general allegations about it and
8 general allegations of harassment and bad faith, but the fact
9 of the matter is here you have the very evil that the Court though
10 was a prospect in Dombrowski. Because what the Court was con-
11 cerned about in Dombrowski was that the conduct of the prosecu-
12 tor was going to chill the expression of First Amendment rights,
13 was going to prevent Mr. Dombrowski from expressing his views.

14 In this case, what the prosecutor has done has in the
15 most demonstratable way achieved that result. It doesn't only
16 have the prospect of it but it has achieved it. Moreover, I ---

17 Q You mean that it has chilled it to death?

18 A It has chilled it to death, that is right. It
19 just can't be shown. It is just dead, and with motion pictures,
20 we submit that is of the essence. If you can't show a film that
21 is being nationally distributed at the time when it is nationally
22 reviewed in national magazines, people just won't be interested
23 in it anymore.

24 Q And then you lose money.

25 A Which we think is a permissible -- this Court has

1 repeatedly recognized it as a permissible constitutional considera
2 tion.

3 Q I wasn't suggesting that it wasn't permissible,
4 but that is the consequence at the end.

5 A That is what the New York Times case was all
6 about. The Court said that, indeed, in Ginzburg, this Court
7 went out of its way to specifically say that has no part of our
8 decision in this case, the fact that money is being made.

9 I think the distinction from Dombrowski is even greater
10 than that. I think there is really a fallacy in trying to com-
11 pare this with Dombrowski. We are not in the Dombrowski ball
12 park because we are not talking here about the Federal court in-
13 validating the State statute.

14 In Dombrowski, the plaintiffs went specifically to re-
15 move from the jurisdiction of the State courts the question of
16 the Federal constitutionality of the State statute. That is
17 not in this case at all. So, we are not really in Dombrowski in
18 that sense. We don't need a Dombrowski exception.

19 MR. CHIEF JUSTICE BURGER: Mr. Lewin, I should tell
20 you that you are down to about 12 minutes for Professor De
21 Grazia.

22 MR. LEWIN: Yes, I am sorry. I have been transgressing
23 on Professor De Grazia's time, I am sorry.

24 MR. CHIEF JUSTICE BURGER: Professor De Grazia?

25 ARGUMENT OF EDWARD DE GRAZIA, ESQ., ON BEHALF OF APPELLEES

1 PROFESSOR DE GRAZIA: Mr. Chief Justice, may it please
2 the Court.

3 I want to speak mainly to the issue of the unconsti-
4 tutionality of the statute on its face and as it was applied to
5 the circumstances of the exhibition below. Before I do that, I
6 would like to make one or two remarks concerning statements or
7 questions raised by the Chief Justice and by Mr. Justice Marshall
8 concerning the interest of the exhibitor which was defended by
9 the District Court below.

10 It is not only his right to make money, but it is his
11 right, as was ably argued by Mr. Lewin, to show this particular
12 film. But more important was the right of all the people in
13 Boston who might want to see this film to see its ideas, to
14 consider its images. It was their right which was being stifled
15 by the State of Massachusetts.

16 Q Well, is the exhibitor in that circumstance the
17 appropriate party to indicate that right?

18 A I believe he is, Mr. Chief Justice.

19 Q I don't suggest that he is not. I just raise
20 that question.

21 A I believe he may be the only person, he certainly
22 is the logical person. He is the person ---

23 Q He has the most immediate interests, immediate
24 impact.

25 A He has the most interest. It is his skin that

1 is at stake also.

2 I think that book sellers and motion picture exhibitors
3 -- they run a hazardous business, if they publish sexual material
4 and I think it is up to this Court to see that they get the
5 measure of protection they need to perform an important social
6 and constitutional duty.

7 I don't think it is fair and I don't think it is just
8 to say that these people can run the risk of going to jail for
9 a year merely because they may not be able to reach the judg-
10 ment that a majority of this Court might reach concerning what
11 or not a particular film or a particular book is obscene. It is
12 an exquisite question. It is a very difficult question and I
13 think it is something which you are trying very hard -- this
14 Court, this Honorable Court, is trying very hard to clarify so
15 that we will have a situation where persons will know what materi-
16 al is obscene, persons will be on notice what behavior with res-
17 spect possibly obscene material will land them in jail or will
18 cause them to be punished or will cause their films or their
19 books to be suppressed.

20 Q Do I get from that an intimation that you con-
21 cede there is some suppressible material, that there are some
22 movies that could be suppressed under a ----

23 A Mr. Chief Justice, I do. I think that the direc-
24 tion that this Court is going to in its opinions, at least for
25 the next 20 years, I would anticipate that there will be material

1 that will validly be proscribed.

2 However, I would like to say that I think the direc-
3 tion this Court is taking, and the proper direction and the
4 hopeful direction, is to focus more and more on the behavior of
5 the parties involved, less and less to be concerned less and less
6 with obscenity vel non of the material because obscenity vel non
7 in fact, differs from person to person, from prosecutor to defen-
8 dant, from judge to judge, from court to court, from state to
9 state, from country to country, from culture to culture.

10 Q Do I understand you in answer to the question to
11 say that you concede that the First Amendment does not protect
12 this literature or whatever it is they are talking about?

13 A Mr. Justice Black ---

14 Q Or do you concede that the court has decided that
15 up to now? Which do you concede? There is quite a difference. If
16 you are making a contention that the First Amendment does not
17 protect you, I would like to know it.

18 A The Court has decided that.

19 Q Are you making a concession that the First Amend-
20 ment does not protect your client?

21 A This case doesn't require me to -- oh, no, Your
22 Honor.

23 Q Well, I understood you to answer a question that
24 you conceded. The Chief asked you a question and you conceded.

25 A I must have misunderstood the question.

1 Q I thought sure you did.

2 Q Well, let's try again. I thought you did con-
3 cede explicitly that there is some material which could be sup-
4 pressed, that is it could be so bad, whatever that means under
5 the standards, that it is so bad that it could be lawfully sup-
6 pressed. That was the question.

7 A It is clearly not the material in this case, Your
8 Honor.

9 Q Well, no, no, I am not talking about this case.
10 Is there some kind material which would be suppressed?

11 A In my judgment, a State may validly pass a valid
12 statute proscribing and punishing certain kinds of behavior with
13 respect to material which can be called obscene, but it will be
14 the behavior focused on which imparts the criminality to the
15 situation. It is not the material itself.

16 Q Well, it is the behavior that results from
17 disseminating the material.

18 A Yes, it is the dissemination of the material which
19 is involved, yes.

20 Your Honor, for example, the State court in this case
21 below spent perhaps 100 pages, 100 pages of an opinion, in try-
22 ing to decide whether or not the three-prong test of Roth was
23 met in this case. Then, in one sentence found that the necessary
24 guilty knowledge or scienter for criminal culpability existed.
25 And, he found that in one sentence despite the fact that these

1 exhibitors knew that the Second Circuit Court of Appeals had
2 found the film constitutionally protected and could not possibly
3 imagine that the film was obscene, could not possibly have the
4 guilty knowledge that this film was obscene or that their exhibi-
5 tion of this film was criminal or culpable.

6 Q Well, of course, Judge Aldrich and his two
7 colleagues were not absolutely sure of this were they?

8 A I don't think Judge Aldrich had any question in
9 his mind. I think that he chose not to reach the question in order
10 that he could reach more interesting, more deep-sounding questions
11 concerning the laws of obscenity.

12 Q Well, in terms of probable unconstitutionality,
13 which is, I suppose, when a judge uses that term he means some-
14 thing like probable cause. This was probable cause in reverse.

15 A The three-judge court based its preliminary in-
16 junction principally on the probability that the statute was
17 unconstitutional on its face and as applied to the circumstances
18 below.

19 Principally the court relied on the Stanley vs. Georgia
20 opinion. There are -- it is our position and we urge you to
21 consider that this statute is overbroad in a number of other
22 respects procedurally and substantively it is in fact, not only
23 probably but quite certainly unconstitutional.

24 I would like to direct myself to that question for a
25 few minutes. We don't deny for purposes of this case that the
State of Massachusetts has some power to deal with social

1 problems involving alleged obscenity and alleged obscene material.
2 But, we insist, as this Court has insisted, that when a State
3 legislate in this field which touches on First Amendment free-
4 doms that it do so with specificity and with careful considera-
5 tion to the First Amendment freedoms that are involved.

6 Q If it has that power, why hasn't it done so in
7 this case? I can't see that part of your argument.

8 A Why hasn't the State of Massachusetts done it?

9 Q Why is it not specific? I thought it was, as
10 specific as it could be made.

11 A Mr. Justice Black, this statute is not as specific
12 as it could be made.

13 Q How could it be made any more specific?

14 A The Massachusetts' statute with respect to books,
15 for example, provides an interim proceeding, provides a number,
16 a great number of procedural, constitutional safeguards to pro-
17 tect the rights of publishers and book sellers.

18 Q That procedural safeguard, that doesn't have any-
19 thing to do with the fact that I understand you to say now you are
20 defending this on the ground that although the court can abridge
21 speech that the court deems immoral or obscene that here it hasn't
22 done so with sufficient definiteness. I think it has, in the
23 State of Massachusetts.

24 A The definition in the book statute is no more pre-
25 cise or specific than the definition in this statute, Mr. Justice

1 Black, that is true. I would not and I am attempting here to
2 say -- I would not suggest to you that that book statute is con-
3 stitutional, is not itself overbroad. I am suggesting, however,
4 that most of the vices contained in this statute as it is being
5 applied to films are not contained in the Massachusetts' book
6 statute.

7 For example, criminal prosecutions are not brought
8 until after there has been an interim proceeding and a judicial
9 determination of obscenity with respect to a particular book.
10 For example, book sellers are given the benefit of any prior
11 final decision concerning nonobscenity of a book and are protected
12 by an absolute presumption against a criminal prosecution. For
13 example, police and prosecutors do not bring criminal actions in-
14 volving books in Massachusetts unless and until the Attorney
15 General of the State has considered the material and weighed the
16 constitutional issues and decided whether or not the book is
17 probably obscene.

18 Q That doesn't decide anything, does it?

19 A It doesn't solve the substantive problem.

20 Q If the Attorney General looks and decides that
21 the Attorney General thinks it is constitutional, that wouldn't
22 be binding on anybody, would it?

23 A The Attorney General's action? No, the statute --

24 Q Sure, the Attorney General decides that it is
25 constitutional, would that be binding on us?

1 Q It just means he is going to take in to the
2 grand jury or issue an information charge, doesn't it?

3 A I simply -- I don't want to suggest that if assa-
4 chusetts enacted a new statute applicable to films which pro-
5 vided precisely what the Massachusetts statute applicable to
6 books provided that that would solve all of the problem, but I
7 am suggesting that the State can in Massachusetts, obviously
8 can, look the problem of freedom of speech in films and look at
9 the problem of obscenity and come a lot closer to protecting the
10 rights of persons who have as their duty the exercise of First
11 Amendment rights in trying to pursue their legitimate State
12 interest in obscenity, their interest, their purpose in protect-
13 ing the people of the State from obscenity.

14 I suggest that what this Court said in Stanley, what
15 this Court said in Redrup are the legitimate State purposes. I
16 think that if this statute were restricted to the dangers pointed
17 out in the Stanley vs. Georgia decision and in Redrup, that is
18 the dangers of pandering, solicitation, the dangers that material
19 might fall into the hands of children and the danger of obtrusive
20 invasions of privacy, that we would have a statute that people
21 could operate under without wholesale violations of their con-
22 stitutional rights.

23 MR. CHIEF JUSTICE BURGER: I think your time is up,
24 Professor De Grazia.

25 PROFESSOR DE GRAZIA. Thank you.

1 MR. CHIEF JUSTICE BURGER: Attorney General Quinn, you
2 have four minutes.

3 REBUTTAL ARGUMENT OF ATTORNEY GENERAL ROBERT

4 H. QUINN

5 MR. QUINN: Thank you Mr. Chief Justice, and may it
6 please the Court.

7 We all agree that we have difficulty with the definition
8 of obscenity. I must confess now I have a great deal of diffi-
9 culty with the definition of the word "threat."

10 Q The word what?

11 A "Threat," Your Honor.

12 After five and one half months of the showing of the
13 film by the appellees here, "I Am Curious Yellow," after a trial
14 on the merits in Superior Court lasting days, not suddenly, in
15 a colloquy in the Federal court, the District Attorney declines
16 to renew a stipulation which he made previously that he would
17 not seek further prosecutions that seek to enjoin the showing of
18 this film until the conclusion of the trial on the merits, this
19 is all called threats. This is all called jawboning. This is
20 all called multiple prosecution. This is called Dombrowski
21 ^a fortiori.

22 Q The what?

23 (Laughter)

24 A Pardon my latin, Your Honor.

25 Q I think Dombrowski complicated it a little.

1 A This is called Dombrowski a fortiori. I submit
2 it is neither a fortiori or the weaker. It is compeltely not
3 the case. The record dhows no evidence of threats whatsoever
4 but simply a declination to renew a stipulation by the District
5 Attorney.

6 Q Well, he was just calling it legally threatened.
7 He wasn't criticising your official functions.

8 A I submit that however we interpret or define
9 threats, that cannot be held to be a threat legally in the English
10 language or even in the Swedish language.

11 Further, we must accept the fact that my brother has
12 conceded that there has never been an effort made in the State
13 courts of Massachusetts to continue the showing of this film.

14 I submit in conclusion that the appellees here are not
15 Grove Press Inc. The appellees here are film distributors. The
16 action on the part of the appellants has never under any color
17 or interpretation of that action been able to be defined as
18 threats or anywhere near the fact ation existing in the
19 Dombrowski vs. Pfister.

20 Q Mr. Quinn, I am, perhaps it has been made clear,
21 but if so I missed it, what is the posture of the State prosecu-
22 tion now in the Massachusetts courts? There has been a convic-
23 tion and it is on appeal ---

24 A And the Bill of Exceptions was entered yesterday
25 in the Massachusetts Supreme Judicial Court which leaves us to
the safe assumption that this Court -- this case will be argued

1 on the merits in Massachusetts in the October sitting.

2 Q October sitting.

3 Q How long does it usually take for the Massac u-
4 setts Supreme Court to get down decisions?

5 A Our Massachusetts Supreme Court has a tradition of
6 never having letting a year pass without deciding all of the
7 cases that were argued before it, and I think that it is safe
8 to assume that within a month or two after the oral argument there
9 would be a decision on this case, Your Honor.

10 Q So, it begins this calendar year?

11 A That is correct, Your Honor.

12 MR. QUINN: I thank you, Mr. Chief Justice.

13 MR. CHIEF JUSTICE BURGER: Thank you Mr. Quinn, tha^k
14 you gentlemen.

15 The case is submitted.

16 (Whereupon, at 2:30 p.m. the argument in the above-
17 entitled matter was concluded.)
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