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Pornography: Miller v. California, 93 S. Ct. 2607 (1973), Paris Adult Theatre I, et. al. v. Slaton, 93 S. Ct. 2628 (1973), United States v. Orito, 93 S. Ct. 2674 (1973), Kaplan v. California, 93 S. Ct. 2680 (1973), United States v. 12 200 Ft. Reels of Su

tion[74] cases. In fact, the cases cited in *Roe* as support for this standard of a compelling governmental interest involved equal protection and first amendment claims.[75]

Although the time periods adopted by the Court seem to be a reasonable resolution of a sensitive issue, criticism is warranted because of the Court's willingness to "weigh the wisdom" of abortion legislation, which is a practice outside of its given function, and to expand the concept of personal privacy far beyond its previous bounds. When a decision rests upon a paucity of legal authority, confusion is bound to follow. The lack of a constitutional foundation for the right of privacy established in *Roe* undoubtedly will cause similar confusion.

[74] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

[75] Kramer v. Union School District, 395 U.S. 621, 627 (1969) (involving an equal protection challenge of a statute requiring ownership or leasing of taxable real property to vote in school district elections); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (a statute requiring one year residency before a person is entitled to welfare was held to violate the equal protection clause); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (a state unemployment compensation statute which did not recognize the first amendment right of a Seventh Day Adventist not to work on Saturdays was held unconstitutional).

PORNOGRAPHY

Miller v. California, 93 S. Ct. 2607 (1973)
Paris Adult Theatre I, *et. al.* v. Slaton, 93 S. Ct. 2628 (1973)
United States v. Orito, 93 S. Ct. 2674 (1973)
Kaplan v. California, 93 S. Ct. 2680 (1973)
United States v. 12 200 Ft. Reels of Super 8 mm Film, *et. al.*, 93 S. Ct. 2665 (1973)

In *Miller v. California* and its companion cases,[1] the United States Supreme Court attempted once again to define obscenity and prescribe the limits of its regulation consistent with first amendment freedom of speech. Unlike recent past decisions, however, the Court did not merely further explain its *Roth v. United States*[2] definition of obscenity.[3] Nor did it set out additional procedural safeguards necessary in separating obscenity from protected speech.[4] The Court instead returned to the basic *Roth* definition for a fresh start at solving the "intractable obscenity problem" by directing the focus of inquiry from the Court to state legislatures and courts. In furtherance of that goal, the Court's avowed purpose in *Miller* was to "set out concrete guidelines to isolate 'hard core' pornography from expression protected by the first amendment . . . [in order] to provide positive guidance to the federal and state courts alike. . . ." [5]

This note will explore the extent to which *Miller* changed the legal conceptions of obscenity as those conceptions were developed in *Roth* and its progeny. It will also set out and evaluate the new guidelines prescribed by the Court for defining and regulating obscene materials.

In order to more fully comprehend the current state of the law of obscenity as set forth in *Miller, et al.*, and its implications for the future, it is necessary to examine the basic definition of obscenity as established in *Roth* and embellished in the cases that followed it up to *Miller*.

In *Roth v. United States*,[6] the Court held that any

[1] Miller v. California, 93 S. Ct. 2607 (1973); Paris Adult Theatre I, *et al.* v. Slaton, 93 S. Ct. 2628 (1973); United States v. Orito, 93 S. Ct. 2674 (1973); Kaplan v. California, 93 S. Ct. 2680 (1973); United States v. 12,200 Ft. Reels of Super 8mm Film, *et al.*, 93 S. Ct. 2665 (1973).

[2] 354 U.S. 476 (1957); *see* text at note 7 *infra*.

[3] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Ginzberg v. New York, 390 U.S. 629 (1968); Redrup v. New York, 386 U.S. 767 (1967); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); A Book Named "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney Gen. of Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Smith v. California, 361 U.S. 147 (1959).

[4] *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Marcus v. Search Warrant, 367 U.S. 717 (1961); Speiser v. Randall, 357 U.S. 513 (1958); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

[5] 93 S. Ct. at 2617–18.

[6] 354 U.S. 476, 485 (1957). *Roth* was a prosecution pursuant to 18 U.S.C. § 1461 (1950) for mailing obscene publications. Its companion case, Alberts v. California, was a state prosecution for the retail sale of obscene publications. *Id.* at 479–80.

materials which dealt with sex in a manner appealing to prurient interest were obscene and not protected speech within the first and fourteenth amendments. The standard of obscenity was whether to the average person applying contemporary community standards, the dominant theme of the materials taken as a whole appealed to prurient interest.[7]

The "average person" was indeed the average person, and not the weakest nor the most insensitive member of the society,[8] though the state could use a less stringent standard in the proscription of sales to minors.[9] However, if the material was designed for and primarily disseminated to a clearly defined deviant sexual group, the *Roth* test was met if the dominant theme appealed to the prurient interest of that group.[10]

The contemporary community standards were thought by a plurality of the Court to be those of a national community which could vary from time to time, but not from place to place.[11] But before considering whether to the average person applying contemporary community standards the materials taken as a whole appealed to prurient interest, the materials had to be patently offensive. That is, they had to be deemed to affront current community standards on their face.[12] In addition, it was not sufficient that the materials were patently offensive and appealed to everyone's prurient interest, but they had also to be utterly without redeeming social importance.[13] These last two elements had to be determined before one went to the prurient appeal test, and if the work was not without social value, it could not be proscribed no matter how patent its offensiveness or prurient its appeal.[14]

Pandering satisfied the *Roth* test on the obscenity *vel non* of materials in cases where they might or might not be utterly without redeeming social importance depending upon how and to whom they were sold.[15] Finally, the mere private possession of obscene matter could not constitutionally be made a crime,[16] even though this might interfere with proof of intent to sell.[17]

What all of the above seemed to mean was that unless the materials in question were obscene in the constitutional sense—that is, utterly without re-

[7] *Id.* at 488–89.

[8] Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). In *Jacobellis*, the Court overturned the conviction of a theater manager for exhibiting an allegedly obscene film. It held that the movie was not obscene, which determination it said it had to make as a matter of constitutional fact. *Id.* at 187. It also held that the standards to be applied in the *Roth* test were those of the average, not the weakest person in the community, and that the community was national. The material had also to be utterly without redeeming social importance. *Id.* at 191–95.

[9] Ginzberg v. New York, 390 U.S. 629, 637 (1968). In *Ginzberg*, a bookseller's conviction for selling non-obscene (by adult standards) "girlie" magazines to a 16-year old boy was affirmed. The Court held that the states could adjust the definition of obscenity as applied to minors.

[10] Mishkin v. New York, 383 U.S. 502, 509 (1966). The Court affirmed the defendant's conviction for publishing obscene books depicting masochism, fetishism and homosexuality. It held that the prurient appeal requirement could be adjusted to social realities "by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group." *Id.*

[11] Justices Brennan and Goldberg in their opinion in *Jacobellis* so stated their conception of contemporary community standards, but there was never a majority position on this though it gained some legitimacy in the "*Redrup per curiam* era." The Court in *Miller* expressly rejected that interpretation and adopted a local community standards test. 93 S. Ct. at 2620.

[12] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962). Accepting the finding of the Judicial Officer of the Post Office Department, and the appellate court, that the materials sent through the mails by appellant were appealing to the prurient interest of their intended audience, the Court held that the materials could not be deemed so offensive on their face as to affront current community standards and hence it was not required to consider the issue of prurient appeal.

[13] Jacobellis v. Ohio, 378 U.S. 184, 191–95 (1964). *See also* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Massachusetts, 383 U.S. 413, 419 (1966). In *Memoirs*, the Court reversed the finding of the Supreme Judicial Court of Massachusetts that "Fanny Hill" was obscene. It held that a book was not obscene unless it was utterly without redeeming social value, and that the social value could not be weighed against nor canceled by its prurient appeal or patent offensiveness.

[14] 383 U.S. at 419.

[15] Ginzburg v. United States, 383 U.S. 463, 475–76 (1966). The Court, in affirming appellant's conviction for selling obscene publications, even though the publications themselves were not necessarily obscene, held:

> Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

Id.

[16] Stanley v. Georgia, 394 U.S. 557, 568 (1969). Under authority of a warrant to search appellant's home for gambling devices, police found and viewed films which they determined to be obscene, and arrested appellant for their possession. The Court held that under the first and fourteenth amendments the mere private possession of obscene material could not be made a crime. The Court's rationale was that the Constitution protects one's right to receive information and ideas, regardless of their worth, and be free from governmental intrusions into one's privacy and thoughts. *Id.* at 564–66. In *Paris Adult Theatre*, the Court limited *Stanley* to its facts. *See* text accompanying note 39 *infra*.

[17] 394 U.S. at 567–68.

deeming social value, patently offensive on their face, and appealing to the prurient interest of the average person applying contemporary community standards—they could not be proscribed unless there was evidence of sale to juveniles, an assault on privacy or pandering.[18] This state of the law resulted in what one writer has called "a constitutional disaster area." [19] Not only did the materials themselves have to be judged for their social importance, patent offensiveness and prurient appeal, but the actions of the seller, the composition of his advertising and the nature of his audience had to be scrutinized as well. In addition, after *Roth*, there was never a majority opinion of the Court in an obscenity case.[20] Hence, there was confusion over such items as whether or not contemporary community standards meant a national or local community.[21]

The foregoing led the Court, prior to *Miller*, to the *Redrup v. New York* approach to decision making.[22] That approach consisted of the per curiam reversals of convictions for dissemination of materials that at least five Justices applying their various tests deemed not obscene, and hence fully protected under the first amendment. Thirty-one cases were disposed of in this manner after *Redrup*, with the resultant confusion as to what standards the Court was applying in reaching its decisions.[23]

[18] Redrup v. New York, 386 U.S. 767, 768–71 (1967). This case involved the criminal convictions of two institutional sellers who sold magazines requested by name to government agents, and a third seller who was required to forfeit certain of his wares pursuant to an *in rem* civil statute. The Court, in a per curiam opinion, reversed all the decisions on the grounds that under none of the prevailing obscenity tests were the materials obscene. It said that in none of the cases was there a claim of specific state concern for juveniles, an assault upon individual privacy, or evidence of pandering. The materials themselves were not obscene, either as "hard-core pornography" or via the Justice Brennan three-part test of prurient appeal, patent offensiveness and total lack of social value. Hence, the judgements were reversed. The Court in *Miller* expressly repudiated this approach, which was followed in 31 cases after *Redrup*, and listed it as one of the primary reasons for its attempt to "regroup" on the obscenity issue. 93 S. Ct. at 2617.

[19] Magrath, *The Obscenity Cases: Grapes of Roth.* SUP CT. REV. 7, 56–7 (1966) [hereinafter cited as Magrath].

[20] *See* 93 S. Ct. at 2614. For a general discussion of the different views and alignments of the Justices, see MAGRATH.

[21] *See* note 11 *supra*.

[22] 386 U.S. 767 (1967); *see* note 18 *supra*.

[23] For a full exposition of this approach, see the dissenting opinion of Justice Brennan in Paris Adult Theatre I, *et al.* v. Slaton, 93 S. Ct. at 2628, 2646 (1973) (Brennan, J., dissenting).

In *Miller*, the Court expressly eschews this per curiam approach as unworkable, and sets out to resolve the problems it has engendered. As Chief Justice Burger states in the *Miller* opinion:

> It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed to concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup v. New York*, *supra*, and attempt to provide positive guidance to the federal and state courts alike.[24]

From 1957 to the present, then, the Court has developed a tortured history of decisions trying to balance the interests of free speech with those of the "moral health and welfare" of the citizenry. Both the majority and the minorities in *Miller* admit failure and a desire to start fresh.[25] Which

[24] 93 S. Ct. at 2617 (emphasis in original).

[25] *See* text at note 24 *supra* for the majority's expression of dissatisfaction. For the minority, Justice Brennan in *Paris Adult Theatre* states:

> This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the states through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 15 years ago in *Roth* v. *United States*, 354 U.S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

93 S. Ct. at 2642 (emphasis original).

Mr. Justice Douglas states the following:

> I have expressed on numerous occasions my disagreement with the basic decision that held that "obscenity" was not protected by the First Amendment. I disagreed also with the definitions that evolved. Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that "obscenity" was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncracies of individuals. They are too personal to define and too emotional and vague to apply. . . .
>
> The other reason I could not bring myself to conclude that "obscenity" was not covered by the First Amendment was that prior to the adoption of our Constitution and Bill of Rights the colonies had no law excluding "obscenity" from the regime

approach to that fresh start is more likely to be successful is perhaps discernible by examining the various opinions in the most recent decisions, keeping in mind the course of obscenity decisions to date.

Miller v. California

Miller v. California[26] arose when the appellant sent brochures advertising four "adult" books[27] to a restaurant in Newport Beach, California. The manager of the restaurant and his mother were the recipients of the unrequested brochures. Appellant was charged with and convicted of the misdemeanor of knowingly distributing obscene matter.[28]

It was assumed at trial that the three-part *Memoirs v. Massachusetts*[29] test was applicable in determining whether or not the objectionable materials were obscene. The *Memoirs* test required that in order for materials to be judged obscene, it must be established that to the average person:

> (a) the dominant theme of the materials, taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is "utterly without redeeming social value." [30]

It was determined at trial and affirmed on appeal that the materials appellant distributed were obscene under the above standard of obscenity. The only significant deviation made by the California courts from prior United States Supreme Court case law was that of defining contemporary community standards as meaning California standards and not national ones.[31] The Supreme Court affirmed this view, stating:

> Nothing in the first amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. . . .
>
> [T]he primary concern with requiring a jury to apply the standard of the "average person applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. . . . We hold the requirement that a jury evaluate the materials with reference to "contemporary standards of the state of California" serves this protective purpose and is constitutionally adequate.[32]

Since local versus national community standards was not a settled issue prior to *Miller*, and the jury had determined that the materials were in fact obscene under *Memoirs*, and there was evidence that the appellant had foisted his wares upon unwilling recipients, the Court could easily have affirmed the conviction under the *Redrup* approach, either by affirming that the materials were obscene in the constitutional sense,[33] or if they were not, by holding that appellant's conduct in distributing the materials made them so under *Ginzburg* and *Redrup*.[34] Instead, the Court chose to take the opportunity to purge *Memoirs* from the *Roth* test, in particular, the "utterly without social value" prong of that test.

The Court began with the proposition that obscene material is unprotected by the first amend-

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of freedom of expression and press that then existed.

. . .

I applaud the effort of my Brother Brennan to forsake the low road which the Court has followed in this field. The new regime he would inaugurate is much closer than the old to the policy of abstention which the First Amendment proclaims. . . .

Id. at 2663–64.

[26] 93 S. Ct. 2607 (1973).

[27] The books are entitled: "MAN-WOMAN", "SEX ORGIES ILLUSTRATED", "INTERCOURSE," and "AN ILLUSTRATED HISTORY OF PORNOGRAPHY." There also was a film advertised, entitled "MARITAL INTERCOURSE." Their content was described by the Court in the following manner:

> While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities with genitals often prominently displayed.

Id. at 2611–12.

[28] In contravention of CAL. PENAL CODE § 311.2(a) (West 1970).

[29] 383 U.S. 413 (1966); *see* text at note 13 *supra*.

[30] 383 U.S. at 418.

[31] *See* note 11 *supra*. Apparently, at trial both defense and prosecution counsel assumed "contemporary community standards" to mean California standards. The trial court so instructed the jury, and though appellant raised this issue on appeal, the trial court was affirmed. 93 S. Ct. at 2619–20 & nn. 12–13.

[32] *Id.*

[33] *See* text at note 18 *supra*.

[34] *See* notes 15 & 18 *supra*. The Court described appellant's conduct as follows:

> This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who in no way indicated any desire to receive such materials.

93 S. Ct. at 2612.

ment, as held in *Roth*, and thus could be regulated by government. It went on to say that because of the nature of its subject matter, such regulation must be carefully drawn, and laid down the following test:

> [W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct ... specifically defined by applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political, or scientific value.[35]

It would seem then that *Miller* stands for the proposition that state legislatures can statutorily define specific depictions or descriptions of sexual conduct as obscene.[36] The main question for the reviewing court is, then, whether or not the statute is sufficiently drawn to give adequate notice.[37] The trier of fact then decides whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined in the statute; whether the average person, applying contemporary local community standards, would find that the work taken as a whole appeals to one's prurient interest in sex; and, finally, if the work is so found obscene, whether it has sufficient literary, artistic, political or scientific value to save it from the fire.[38]

[35] 93 S. Ct. at 2614.

[36] Admitting that it was not the function of the Court to propose legislation, and that the sufficiency of legislation would have to await further decision, the Court gave the following examples of specific conduct which could be proscribed:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; [and]
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Id. at 2615.

[37] For the Court's idea of statutes so drawn, see HAWAII PENAL CODE, Tit. 37, §§ 1210-16, Hawaii Session Laws, pp. 126-29, Act 9, Pt. II (1972); OREGON LAWS ch. 743, Art. 29, §§ 255-62 (1971).

[38] 93 S. Ct. at 2614-17. The court described its holding the following terms:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

Id. at 2616.

In tackling the ongoing problem of understanding the Court's definitions, it said:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide, as we do with rape, murder and a host of other offenses against society and its individual members.

Id.

Paris Adult Theatre I v. Slaton[39]

In *Paris Adult Theatre*, the Court explained the latitude of permissible state regulation authorized by *Miller*. At the same time, it laid to rest any lingering doubts that the privacy theory of *Stanley v. Georgia*[40] could be argued beyond the narrow

[39] 93 S. Ct. 2628 (1973). In this civil proceeding the state of Georgia sought to enjoin the showing of two motion pictures on the grounds that they were obscene and shown in violation of GEORGIA CODE ANN. § 26-2101 (1953). The trial court, upon complaint, issued a temporary injunction restraining the theater owners from destroying or removing the films from the court's jurisdiction. It also ordered respondents to bring the films to court with them two weeks later. At bench trial, the court found that a sign bearing the legend—"Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter"— was posted at the theater entrance; that there was no conclusive evidence presented that minors had ever entered the theater, nor that they had been systematically excluded; that the marquees did not display offensive pictures, nor did it give notice of the full content of the films. The court held:

> It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

Id. at 2632-33.

The Georgia supreme court, assuming that minors were excluded and adequate notice of the film's content was given, reversed on appeal, saying that "the sale and delivery of obscene material to willing adults is not protected under the first amendment." *Id.* The United States Supreme Court agreed with this Georgia holding, but vacated and remanded the case for consideration of whether or not the Georgia statute met the new standards set out in *Miller*. *Id.* at 2633-34.

[40] 394 U.S. 557 (1969); *see* note 16 *supra*. In two prior cases, United States v. Reidel, 402 U.S. 351 (1971), and United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), the fate of *Stanley* was perhaps forecast. In *Reidel*, the Court refused to hold the federal anti-obscenity mailing statute unconstitutionally broad in that it did not distinguish between protected and unprotected deliveries. That is, even though the materials were being sent only to willing adults, the delivery was not protected under *Roth* and *Stanley*. In *Thirty-Seven Photographs*, likewise, the Court held that obscene materials could be seized at a port of entry to the United States, even though they were being imported solely for private use.

facts of that case. In essence, the Court held that there was a permissible state interest in regulating obscenity beyond the protection of juveniles and unconsenting adults. And, although there was conflicting evidence as to the connection between obscene materials and sex crimes, the state legislature could resolve for themselves the empirical uncertainties revolving around the effects of obscenity. It held that the state interest in maintaining a "decent society" was sufficient apart from the questionable relation between obscenity and crime. The Court said:

> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to the passerby. Rights and interests "other than those of the advocates are involved." *Cf. Breard v. Alexandria*, 341 U.S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers and, possibly, the public safety itself. . . . As Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society . . .," *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C. J., dissenting) . . . . It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicity accepted that a legislature could legitimately act on such a conclusion to protect "*the social interest in order and morality.*" *Roth v. United States, supra*, 354 U.S., at 485 (1957), quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).[41]

As for *Stanley*, the Court made it clear that the right of one to possess obscene materials in the privacy of one's home would not be extended into a general right of privacy of consenting adults to obtain such materials or gather together for the purpose of viewing them:

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' *Palko v. Connecticut*, 302 U.S. 319, 325." [*sic*] *Roe v. Wade*, 410 U.S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. [citations omitted] Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of order liberty" to watch obscene movies in places of public accommodation.[42]

It is upon these issues, especially, that Mr. Justice Brennan parts ways with the majority and offers his own theory of what new test should be adopted in the wake of the admitted unworkability of the *Roth* line of decisions. Basically, his theory is that the Court, rather than delimiting *Redrup* and *Stanley*, should seek to protect only the interests which those cases sought to protect. Those interests are, the protection of children and unconsenting adults, and a respect for the privacy and freedom of those consenting adults who wish to be able to obtain and use so-called obscene materials—at least until it is shown that such use endangers the public safety.

In questioning the validity of the state interest in maintaining a "decent society" in this manner, and the wisdom of allowing the states to resolve empirical uncertainties in favor of more stringent regulation, Justice Brennan states:

> If, as the Court today assumes, "a state legislature may . . . act on the . . . assumption that . . . commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior" . . . then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State may, in an effort to maintain or create a particular moral tone, pre-

[41] 93 S. Ct. at 2935–36 (emphasis added). In further exposition of the state interests that its decisions sought to protect, the Court quoted Professor Bickel as saying that apart from sex crimes, there remained one other problem of importance.

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not. 22 THE PUBLIC INTEREST 25, 25–26 (Winter, 1971).

Id. (emphasis by the Court).

[42] *Id.* at 2639–40. *See also* note 40 *supra*.

> scribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films. . . .
>
> . . .
>
> In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.[43]

While the majority is thus willing to weigh the empirical uncertainties surrounding the "deleterious" effects of obscenity in favor of the state's right to regulate, Justice Brennan would strike the balance in favor of the first amendment. Although the majority says it does not have to consider the first amendment, since obscenity is unprotected, it assumes its conclusion since the only reason obscenity is not protected is that it was thought to be utterly without redeeming social value.[44] Since that standard is no longer the measure of what is obscene, and materials with some social value may be banned, then the only reason left to proscribe those materials is their harmful effect upon society. If it cannot be shown that such a harmful effect will result, then the legislatures have been given license to ban books which simply are not palatable to them. So, Mr. Justice Brennan's solicitude for the impact of the Court's decision upon the first amendment is well taken.[45]

United States v. Orito[46]

United States v. 12 200 Ft. Reels of Super 8 mm Film[47]

Orito and *12 200 Ft. Reels* seriously limited the right to private possession of obscenity established in *Stanley*. In *Orito*, the Court held that the private transportation of obscene materials was not protected under *Stanley* on the basis that: (1) obscene material is not protected under the first amendment; (2) the government has a legitimate interest in protecting the public commercial environment by preventing such materials from entering the stream of commerce, even though the transporter intends that the materials remain private; and (3)

[43] *Id.* at 2661–62 (Brennan, J., dissenting).

[44] Roth v. United States, 354 U.S. 476, 484–85 (1957). As Justice Brennan stated in *Paris Adult Theatre:*

> [T]he definition of "obscenity" as expression utterly lacking in social importance is the key to the conceptual basis of *Roth* and our subsequent opinions. In *Roth* we held that certain expression is obscene and thus outside the protection of the First Amendment, precisely *because* it lacks even the slightest redeeming social value. [citations omitted] The Court's approach [today] necessarily assumes that some works will be deemed obscene—even though they clearly have *some* social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. That result is not merely inconsistent with our holding in *Roth;* it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of *serious* literary or political value. . . .

93 S. Ct. at 2654 (emphasis in original).

[45] As stated in *Paris Adult Theatre:*

> Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words, justify an assault on the protections of the First Amendment. [citations omitted] Where the state interest in regulation of morality is vague and ill-defined, interference with the guarantees of the First Amendment is even more difficult to justify.

Id. at 2662.

[46] 93 S. Ct. 2674 (1973). In this case, *Orito* was charged with transporting obscene material (83 reels of film—including ten copies of some films) via common carrier in interstate commerce in violation of 18 U.S.C. § 1462 (__). The trial court dismissed on the grounds that the statute was overbroad since it did not distinguish between public and private transportation, under the authority of Griswold v. Connecticut, 381 U.S. 479 (1965), and *Redrup* and *Stanley*. The Supreme Court reversed the privacy assumptions of the district court, and vacated and remanded the case for consideration of the sufficiency of the indictment under the *Miller* standards.

Id. at 2675–76.

[47] 93 S. Ct. 2665 (1973). In this case, the claimant had movie films, color slides, photographs and other printed and graphic materials seized pursuant to 19 U.S.C. § 1305(a) ( ) as he attempted to bring them through customs in Los Angeles from Mexico. Claimant filed an affidavit with the district court asserting that none of the materials seized were for public display or distribution, but were intended solely for his personal use. The district court dismissed the complaint on the grounds that the statute was overbroad, including within its sweep materials for private use. The Supreme Court held that the district court erred in its determination that the statute was unconstitutional, and remanded the case for reconsideration in light of *Miller*.

no constitutional right of privacy protects such materials beyond the home.[48]

Likewise, in *12 200 Ft. Reels*, the Court held that *Stanley* did not permit one to purchase obscene matter for use in the home, though that use was protected, stating that *Stanley* "depended not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home." [49] It should be noted that the Court was basing its decision on the powers of Congress under the Commerce Clause.[50] However, the decision is still grounded in the theory expressed by the Court in *Paris Adult Theatre* that government has a legitimate interest in maintaining a "decent society." [51] For without that interest, and without any proven connection between obscenity and crime, there would be no danger to any interests for Congress to protect.

Kaplan v. California[52]

The final case in this latest round of obscenity decisions was *Kaplan v. California*. Considering the above four cases, nothing startling came out of *Kaplan*, but a few loose ends were knotted. The Court reaffirmed its *Miller* holding that local community standards were applicable under the new test, as opposed to national ones.[53] It also restated the proposition that *Paris Adult Theatre* required no expert testimony, and that the materials in question themselves were sufficient for a determination of the obscenity *vel non* issue.[54] Finally, the Court noted that unillustrated books could be constitutionally banned as obscene as well as illustrated books and movies.[55] It also reiterated its decision in *Paris Adult Theatre* that:

> A state could reasonably regard the "hard core" conduct described in *Suite 69* [the book] as capable of encouraging or causing anti-social behavior, especially in its impact on young people. States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy.[56]

Beyond the question of whether or not these latest obscenity decisions will have a chilling effect on first amendment interests, there is the question of whether or not the Court has in fact made the entire subject more manageable by setting out "concrete guidelines" so that the state legislatures and courts can effectively and consistently administer the law of obscenity without infringing upon protected speech. The majority claims it has, and that, even though the Court still remains the final arbiter of the Constitutionality of the statutes and their application, it can move away from the role of "supreme board of censors" which it assumed under *Roth* and *Redrup*.[57]

Mr. Justice Brennan, on the other hand, finds the new guidelines are not only dangerous, but will still require the Court to be a final board of censors unless it is to abandon the constitution. Furthermore, he sees the majority's decision in *Miller* as one more step in the ongoing attempt of the Court to separate obscenity from protected speech, which it began in 1957, and which he feels is an impossible task. It is time, he says, for the Court to adopt a new approach to resolving the problem, and he suggests one for its consideration.[58]

Whatever can be said for the merits of these two positions, it appears certain that the Court is not out of the "obscenity business" yet. Undoubtedly there will of necessity be further decisions explaining what the limits of *local* community standards

[48] 93 S. Ct. at 2678. The Court stated:
> The essence of respondent's contentions is that *Stanley* has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it or distribute it. We have rejected that reasoning.

Id. at 2677.

[49] 93 S. Ct. 2688.

[50] U.S. CONST. at. I, § 8.

[51] *See* 93 S. Ct. at 2638–38. *See* also text at notes 39–42 *supra*.

[52] 93 S. Ct. 2680 (1973). Petitioner, a proprietor of an "adult" bookstore, was convicted of violating a California obscenity statute, CAL. PENAL CODE § 311.2 (West 19), by selling a plain-covered, unillustrated book containing repetitively descriptive material of an explicitly sexual nature to an undercover police officer. No expert testimony that the book was "utterly without redeeming social importance" was offered, nor was any evidence of "national standards" offered. The trial court, relying on the dissents in *Jacobellis* and *Memoirs*, found that the case law was not settled on those points, and that such evidence was not required. It also held that the book was in fact obscene. The Supreme Court affirmed both of those findings. The case was vacated and remanded for determination as to whether or not the California statute satisfied the new standards set out in *Miller*.

[53] *Id.* at 2685

[54] *Id.*

[55] *Id.* The Court noted that only once in the 15 years since *Roth* had it declared any works obscene. That was in Mishkin v. New York, 383 U.S. 502 (1966), and the book condemned was an illustrated one. *See* note 10 *supra*.

[56] *Id.* at 2684 (emphasis in original).

[57] 93 S. Ct. 2617–18.

[58] *See* note 25 *supra*.