O/a 1-10-90

IN THE SUPREME COURT OF FLORIDA

TODD EDWARD LONG, PHYLLIS ANN MAXWELL, CATHY IRENE ARMSTRONG, EDWARD DEE ARMSTRONG, JOHN E. SHEA and CMH ENTERPRISES, INC., *Petitioners,* vs. THE STATE OF FLORIDA, *Respondent.*	74,390. Case No. ~~79,390~~ (Consolidated with Case No. 79,020) Case No. 88-246 IN THE SECOND DISTRICT COURT OF APPEAL

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SID J. WHITE
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Discretionary Review Of Decision Of The District Court Of Appeal Of Florida, Second District

INITIAL BRIEF OF PETITIONERS ON THE MERITS

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STATEMENT OF THE CASE

Petitioners, five individuals and one corporation, were charged by information in the Polk County Circuit Court with multiple obscenity violations and with RICO offenses predicated solely upon those obscenity charges. Following an extensive hearing on the defendants' motions, the trial court dismissed the information, on grounds that the Florida obscenity statute, 9847.011, violated the privacy, due process and free speech provisions of the Florida and federal Constitutions, and that the severe penalties threatened by the RICO Act (as applied to obscenity) created an impermissible chilling effect in violation of the First Amendment. The state appealed, and the Second District Court of Appeal reversed and remanded. *State v. Long*, 544 So.2d 219 (Fla. 2nd DCA 1989). Petitioners filed a timely notice with the District Court of Appeal, and filed their Brief on Jurisdiction with this Court on July 18, 1989. This Court issued an order accepting jurisdiction in these consolidated cases on October 10, 1989.

SUMMARY OF THE ARGUMENT

These RICO/obscenity prosecutions raise the perennial conflict between the citizen's "right to be let alone" and what Senator Sam Ervin has described as government's "insatiable appetite for power." Because such prosecutions under the vague obscenity standard and the threat of the extraordinary penalties imposed by Florida's

RICO statutes' violate the free speech, due process, and privacy rights guaranteed by the United States and Florida Constitutions, Petitioners urge this Court to reverse the opinion of the Court of Appeal below and to affirm the trial judge's well-reasoned order dismissing the information.2

The Petitioners' essential contention is that the current censorial campaign, spearheaded by these draconian

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1 Criminal conviction of RICO exposes the offender, whose only crime may have been the distribution of two popular and commonly-available X-rated videotapes, not only to a potential 30-year prison term, but to virtually automatic forfeiture of the entire bookstore or video store pursuant to the collateral estoppel provisions of §895.05 (2) (c) (8). *Cf. United States v. Pryba,* 674 F.Supp. 1504 (E.D.Va. 1987).

2 None of this Court's decisions contravene such a result in this case, which in virtually all respects presents issues of first impression. *Sardiello v. State,* 394 So.2d 1016 (Fla. 1981), for example, relied upon as dispositive by the Court of Appeal, in fact did not address the question of the obscenity laws' violation of the right of privacy under Article I, §23, but simply affirmed its pre-privacy amendment decision in *State v. Kraham, 360* So.2d 393 (Fla. 1979), that the obscenity statute did not violate the federal Constitution. Likewise, this Court's decisions in *Bowden v. State,* 402 So.2d 1173 (Fla. 1981), and *Cantrell v. State,* 403 So.2d 977 (Fla. 1981), do not address the issue of chilling effect in violation of the First Amendment. Although this Court has upheld the Florida obscenity laws against vagueness challenges, its decisions to this effect are from more than a decade ago, long prior to the social changes Petitioners detail as having further eroded the viability of the obscenity test. *See First Amendment Foundation of Florida, Inc. v. State* 364 So.2d 450 (Fla. 1978). Subsequent changes such as the "Video Revolution" and its popularization of X-rated films for home viewing require reconsideration of these issues in the light of this altered factual context.

RICO/obscenity prosecutions, is ironically as odds with the greatly increased popularity of erotic materials which are now obviously enjoyed and accepted by millions of adults in Florida as elsewhere. The obscenity laws challenged here patently operate not only to violate the due process and free speech rights of the speaker, but to curtail adults' access to all sexually-oriented materials in violation of their privacy rights. This chilling effect extends to a great many materials which would not offend community standards and would therefore be non-"obscene" even under the amorphous *Miller* test.[3]

Those community standards have dramatically liberalized in the past decade, as evidenced by the greatly increased popular consumption of adult materials occasioned by the much-heralded "Video Revolution." The Meese Commission itself reported these profound changes in the adult entertainment industry, including the enormous growth of the market for X-rated videos disseminated for home VCR and cable television viewing. *See Attorney General's Commission on Pornography, Final Report* (1986) at 1353-1366. The Meese Report also noted that a majority of the home video retail outlets, estimated to number 27,000 in 1987, distributed sexually-explicit video tapes. *Id.* at 1393-94.

American adults now consume hundreds of millions of erotic films, books, and magazines annually, and the

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[3] Petitioners further note, in Argument IV, that the definition of obscenity contained in §847.001 fails to conform to federal constitutional standards announced in *Miller* and its progeny, thus rendering the statute overbroad and precluding the prosecution of these defendants.

trend toward greater consumption is expected to continue. This explosion in the VCR medium was first heralded in a spate of national magazine articles in 1984. See "VCRs: Coming on Strong," ***Time,*** December 24, 1984, pp. 44-50; "The Crowded New World of TV," ***Fortune,*** September 17, 1984, pp. 156-166; "The Video Revolution," *Newsweek,* August 6, 1984, pp. 50-57. These reports revealed that some 20% of all television homes had VCRs in 1984, and that X-rated video cassettes constituted a 15% share of cassette sales and rentals (see *Time, supra),* or over 55 million rentals of adult tapes. By 1986, X-rated video tape rentals exceeded 100 million.[4] ***Time*** again reported on the growing popular enthusiasm for adult videos: "Women account for perhaps 40% of the estimated 100 million rentals of X-rated tapes each year" ***(Time,*** March 23, 1987, at 63).

Today, over 65% of American homes have VCRs, according to a Nielsen report cited recently in ***Variety*** ("VCR Penetration Rises to 65.5%," July 25, 1989, at p.12), and consumption of adult video tapes is estimated to exceed 200 million units this year. "More than 20 million Americans now watch at least 1 blue movie each week," *Newsweek* reported last year (February 1, 1988, at p. 44).

In light of these changed social and cultural realities, Florida's obscenity statutes are unconstitutional for several interrelated reasons. First, under the expansive privacy rights secured by Article I, §23 of the Florida Constitution, such obscenity prosecutions unduly

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[4] Statistics for 1986 reported in "Harper's Index'' (see *Los Angeles Times,* March **1, 1987)** indicated **104** million X-rated rentals.

infringe upon the right of Florida's adult citizens to choose freely the books they will read and the films they will view in the privacy of their own homes. This amendment, adopted by the Florida electorate as part of the contemporary groundswell movement in favor of privacy rights, was clearly meant to secure and expand the rights of privacy the United States Supreme Court began to enunciate in the 1960s in cases like *Stanley v. Georgia,* 394 U.S. *557,* 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). It signifies the public's dissatisfaction with the current Court's retrenchment, limiting the scope of *Stanley,* which had broadly declared the right of adults to acquire sexually-oriented information or entertainment, and otherwise narrowly construing the federal right of privacy. *See, e.g., Florida v. Riley,* ___ U.S. ___, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989).

Obscenity prosecutions dramatically curtail the right of adults to choose sexually-oriented materials for their own entertainment or informational purposes, serve no compelling state interest, and are in any case overly-intrusive means of achieving the state's legitimate objectives such as protecting minors and neighborhoods. The obscenity statutes' negative impact upon privacy rights is aggravated by the other constitutional defects which inhere in these laws as well. The obscenity standards incurable vagueness means that the entire genre of sexually-oriented materials is fair game for prosecution. No one – bookseller, video store operator, police, judge, or jury – has any concrete way of discerning protected erotica from materials which cross the "dim and uncertain line"[5] into the realm of obscenity. The result is

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[5] *See Bantam Books v. Sullivan,* 372 U.S. 58, **83** S.Ct. 631, 9 L.Ed.2d **584** (1963).

the threat of prosecution, or in some cases even conviction, for sale or exhibition of media items such as *Playboy* or the film "Carnal Knowledge." *See Council for Periodical Distributors Association v. Evans,* 642 F.Supp. 552 (Ala.M.D. 1986); *Playboy v. Meese,* 639 F.Supp. 581 (D.D.C. 1986); *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). The uncertainty as to what materials might be prosecuted as "obscenity" inevitably results in self-censorship by all distributors of media items, so that Florida's citizens are denied access to a wide range of materials protected by the First Amendment as well as the state constitutional right of privacy.

With the added factor of the enormous penalties the RICO Act imposes for these unpredictable obscenity violations, including a 30-year maximum prison term, the chilling effect of these statutes becomes an absolute certainty. The RICO Act as applied to this offense is the most harshly punitive obscenity statute in the nation, and has already deterred the dissemination of presumptively-protected materials by those who must "steer far wider of the unlawful zone" as a matter of basic prudence, a censorial result condemned by the Supreme Court in *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), and by this Court in *Ladoga Canning Corp. v. McKenzie,* 370 So.2d 1137 (Fla. 1979). The Brief of *Amici* PHE, Inc., *et al.* concretely demonstrates that this chilling effect is no "mere assertion."

Particularly in view of the Florida electorate's adoption of a strong privacy rights amendment, Petitioners respectfully urge this Court to join the others around the country engaged in a fundamental reassessment of obscenity laws' constitutionality under the free speech

and privacy clauses of the state and federal Constitutions. Of the greatest relevance to this case, of course, is *State v. Kam*, 748 P.2d 372 (Hawaii 1988), decided the very same day the trial court below issued its order of dismissal, and reaching the identical conclusion: that obscenity laws violate state constitutional guarantees of the right to privacy, under the rationale of *Stanley v. Georgia.*

The Hawaii Supreme Court decision came not long after the Supreme Court of Oregon had reached a similar result in *State v. Henry*, 302 Or. 510, 732 P.2d 9 (Or. 1986), striking down the Oregon obscenity statute on grounds that it violated the free speech clause of the state constitution, materially identical to Art. I, §4 of the Florida Constitution. (On this alternative basis, the Oregon Court affirmed the result reached by the state Court of Appeals in that case, 78 Or.App. 392, 717 P.2d 189 (1986), concluding the *Miller* obscenity test was unconstitutionally vague.)

Most recently, on November 8, 1989, the Superior Court of Yuma County, Arizona has followed *Henry* and *Kam* in declaring the Arizona obscenity statute unconstitutional under the state free speech clause, Article II, §6, in *State v. Smith* (Case No. 15865; *see* Order Granting Motion to Dismiss, included in the Appendix to this brief).

These social and legal changes, Petitioners respectfully submit, mandate this Court's careful reexamination of the "obscenity" question, and invalidation of all these censorial statutes under the relevant provisions of the Florida and federal Constitutions. To do so

would leave intact the state's ability to protect appropriate interests, while at the same time vindicating the fundamental privacy rights of adult citizens. The two interests can co-exist, and by enacting Article I, §23, Florida's electorate has said they must.

I.

THE FLORIDA OBSCENITY STATUTES VIOLATE THE RIGHT TO PRIVACY CREATED BY ART. I, §23 OF THE FLORIDA CONSTITUTION

> "[T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."[6]

This case involves the tension between that right and what then-Senator Samuel J. Ervin, Jr. described as government's "insatiable appetite for power." Indeed, in reflecting upon the Privacy Act of 19747 some ten years after its enactment, Senator Ervin made an observation which is remarkably appropriate to the situation before this Court:

> "The Privacy Act, if enforced, would be a pretty good thing. But the government doesn't like it. Government has an insatiable appetite for power, and will not stop usurping power unless it is restrained by laws they cannot repeal or nullify."[8]

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[6] *Olmstead V. United States,* **277 U.S. 438, 478 (1928).**

[7] **Pub. L. 93-579, 88 Stat. 1896, 5 U.S.C.§552a (West 1977)**

[8] **D. Burnham,** *The Rise* **of** *the Computer State* **(N.Y.Vantage 1984).**

Florida voters clearly enacted Article I, §23 for exactly that reason – they wanted a law that the state government "cannot repeal or nullify."

The solid 60% majority of Floridians who voted in favor of the passage of Article I, §23[9] clearly intended that such a "right to be let alone" be permanently added to the Florida Constitution[10] – a right which the Florida state government, in this case, is seriously attempting to erode.

As evidenced by its vigorous enforcement in this Court's very recent decisions, *In re: T.W.*, ___ So.2d ___ , 14 F.L.W. 497 (Fla. Oct. 5, 1989), and *Shaktman v. State*, ___ So.2d ___ , 14 F.L.W. 522 (Fla. Oct. 12, 1989), the right to privacy is at the forefront of the current constitutional agenda. In these times of ever-expanding computer and surveillance technology, and correspondingly diminished individual privacy, *cf. Florida v. Riley*, ___ U.S. ___, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989), *rev'g.* 511 So.2d 282 (Fla. 1987), the citizens of Florida have joined the groundswell of other Americans in clamoring for bulwarks against the

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[9] G. Cope, **A** Quick Look at Florida's New *Right* of Privacy, 55 Fla. B.J. 12 (1981).

[10] Given the opportunity, voters have demonstrated a propensity to protect the right to acquire erotica, as in the state of Maine, where there is no state anti-obscenity law. In 1976, Maine voted on a ballot proposition that an anti-obscenity law be added to the books. It was highly publicized and the subject of vigorous media campaigns by proponents of both sides of the question. The proposition was trounced; by a roughly two-to-one margin, voters rejected the proposal to add a law regulating acquisition of erotica where only consenting adults are involved.

continued erosion of that fundamental right – the right to be left alone in the conduct of their personal affairs and intimate decision-making. This expanding governmental intrusion into virtually every realm of life, and the countervailing demands of the citizenry for greater safeguards of personal autonomy, have spawned the popular enactment of the privacy amendment to Florida's Constitution, Art. I, §23, in addition to the wide array of federal and state legislation securing privacy rights in areas such as personal financial and health information, telephone conversations, and of particular relevance, sexual conduct.

This Court has properly recognized the expansive scope of the privacy guarantee, first in *Winfield v. Division of Pari-Mutuel Wagering*, **477** So.2d **544, 548** (Fla. **1985):**

> "The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section ***23,*** of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section **23** was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'govermental intrusion' in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution."

Quoting this passage in the *T.W.* case, this Court again emphasized that "the amendment embraces more privacy

interests, and extends more protection to the individual in those interests, than does the federal Constitution." (Slip opinion at 8.)

The present case involves a right of privacy which the U.S. Supreme Court essentially recognized in *Stanley* D. *Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969): the right of adults" to choose the expressive materials they wish to read or view, free from governmental interdiction on the basis of the "obscene" nature of those materials. *Stanley*, the second of the Court's landmark privacy decisions, built upon the privacy doctrine established in *Griswold* D. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and affirmed the right to possess even "obscene" erotic materials for private enjoyment. Subsequently, a bitterly-divided Supreme Court in a series of 5-4 decisions has given *Stanley* a very restrictive interpretation in construing the right to privacy under the federal Constitution. The Hawaii Supreme Court, however, applying a state constitutional privacy guarantee materially identical to Art. I, §23, rejected that "crabbed approach" to the privacy rights recognized in

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[11] Petitioners emphasize that their argument in this regard extends only to the right of ***willing*** *adults* to read and view materials likewise depicting only consenting adults. They acknowledge, as did the Hawaii Supreme Court in *State V. Kam*, **748** P.2d **372,** 380 n.2 (1988), that entirely different concerns are raised by child pornography, depictions involving coercion of a participant, and the exposure of sexually-oriented materials to minors or unwilling adults. The conceded validity of specific, narrowly-drawn legislation addressing these evils does not negate, but rather reinforces, Petitioners' arguments against the much broader obscenity laws at issue here, with their extremely detrimental impact on the privacy rights of consenting adults.

Stanley, and declared Hawaii's criminal obscenity laws unconstitutional. *State v. Kam*, 748 P.2d 372 (Hawaii 1988). The same result is mandated under the Florida Constitution.

A. The Evolution of the Law of Privacy.[12]

In 1888, Judge Thomas M. Cooley's treatise noted for the first time a "right to be let alone," planting the seed for the legal profession's interest in a right of privacy.[13] On the heels of that treatise came the much-quoted Warren and Brandeis article which to this day is recognized as the cornerstone of tort privacy law.[14]

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[12] Consistent with the legal approach, fundamental psychological and sociological definitions of privacy have common features including "the assumption that privacy is *voluntary and essentially involves individual self-control.*" D. O'Brien, *Privacy Law and Public Policy* at p. 6 (Praeger 1979):

> "Today, many psychologists and sociologists are . . . inclined [toward] . . . broad definitions [of privacy] – of which the following are illustrative:
>
> > " 'A person's feeling that others should be excluded from something which is of concern to him, and also recognition that others have a right to do this.' [A. Bates, "Privacy – A Useful Concept? 42 *Social Forces* 432 (1964)]. . . .
>
> "Such definitions have two common features: the equation of privacy with withdrawal, or the desire to be withdrawn, from public affairs and the assumption that privacy is voluntary and essentially involves individual self-control."

[13] T. Cooley, TORTS at 91 (2nd Ed. 1888).

[14] S. Warren & L. Brandeis, "The Right to Privacy," 4 Harv.L.Rev. 193 (1890).

Warren and Brandeis recognized that material changes in social conditions had brought about the need for recognition of more broadly defined rights:

> "Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society . . . gradually, the scope of [recognized] legal rights broaden; and now the right to life has come to mean the right to enjoy life, – the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession – intangible, as well as tangible."[15]

By the end of the nineteenth century, property, privacy and individualism had closely related or interdependent meanings.[16] Meanwhile, the Constitutional right to privacy was being read into the Bill of Rights, Boyd *v. United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) and applied to the States. *Meyer v. Nebraska, 262* U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

Thereafter, the law of privacy evolved largely in the areas of the right to tort recovery and the right to be free from unreasonable search and seizure in the criminal context. In 1964, a much-cited article by Edward Bloustein explained how the various principles of privacy emanate from the same right:

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[15] *Id.* at 193.

[16] E. Schils, "Privacy: Its Constitution and Vicissitudes, 31 LAW AND CONTEMPORARY PROBLEMS 281, 290-91.

> "[I]f the intrusion cases in tort are regarded as involving a blow to human dignity or an injury to personality, the relation to Constitutional protection of the Fourth Amendment becomes apparent.
>
> " . . . [T]he underlying wrong in both [civilian tort and governmental intrusion] instances [is] the same; the act complained of [is] an affront to the individual's independence and freedom. A democratic state which values individual liberty can no more tolerate an intrusion on policy by a private person than by an officer of government and the protections afforded in tort law, like those afforded under the Constitution, are designed to protect this same value."[17]

Bloustein went on to approve the comments of those Supreme Court Justices who had attempted to define privacy as "an aspect of the pursuit of happiness."[18] Particularly pertinent to the privacy issue with which this Court now is presented is Bloustein's recitation with approval of a very well reasoned (albeit acknowledged to be a somewhat "obscure") court decision:

> "An individual has a right to enjoy life in a way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy . . . .
>
> "Liberty includes the right to live as one will, so long as that will not interfere with the rights of another or of the public. One may desire to live

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[17] E. Bloustein, "Privacy as an Aspect **of** Human Dignity: In Answer to Dean Prosser," 39 N.Y.U.L.REV. 962, 994 **(1964).**

[18] *Id.* at 1001.

> a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others . . . and is entitled to a liberty of choice as a matter of life, and neither an individual nor the public has the right to arbitrarily take away from him his liberty." *Id.* at 1002.

The 1960s and 1970s saw the development of a substantial body of caselaw holding that certain governmental regulations and prohibitions were barred where in conflict with privacy rights guaranteed by the United States Constitution. In addition to *Stanley v. Georgia, supra* (right to private possession of obscene material), these cases include *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965) (right to obtain, use and receive instructions about contraceptive devices); *Eisenstadt v. Baird,* 405 U.S. 438, 31 L.Ed.2d 349, 92 S.Ct. 1029 (1972) (right of unmarried persons to receive contraceptives); *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 704 (1973) (abortion); *Carey v. Population Services Int.,* 431 U.S. 678, 52 L.Ed.2d 675, 97 S.Ct. 2010 (1977) (right of minors to receive contraceptives); *Zablocki v. Redhail,* 434 U.S. 374, 54 L.Ed.2d 618, 98 S.Ct. 673 (1978) (marriage); *Paul v. Davis,* 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976) (characterizing these decisions as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education"); and *Wahlen v. Roe,* 429 U.S. 589, 51 L.Ed. 2d 64, 97 S.Ct. 869 (1976) (disclosure of medical records allowed only to the extent of the existence of a compelling state interest).

The Florida amendment explicitly enshrined all these privacy rights, held to have emanated "penumbrally"

from various provisions of the federal Constitution. The Florida electorate's strong endorsement of greater privacy rights came at a time when the contemporary Supreme Court had begun to give a restrictive reading to those federal rights, however, notably *Stanley D. Georgia*, which the Court drastically limited in the 1973 "*Miller* Quintet" of obscenity cases. Passage of Article I, §23, therefore, can only be viewed as a call for the broader and consistent application of the privacy rights originally discerned in cases such as *Stanley D. Georgia.*

B. Petitioners have standing to assert the privacy rights of their customers.

Petitioners' standing to assert the privacy rights of their customers is well established by the decisions of this Court and of the United States Supreme Court. The District Court of Appeal below acknowledged their standing to raise these claims, noting that this case falls squarely within the realm of cases implicating fundamental rights of parties who "have no effective avenue to preserve their rights." *State D. Long*, 544 So.2d 219, 221-222 (Fla. 2d DCA 1989). *See also State D. Saiez*, 489 So.2d 1125, 1127 n.2 (Fla.1986).

In *Griswold D. Connecticut*, *supra*, and *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), for example, the Supreme Court held that disseminators of contraceptives and information regarding contraceptives had standing to assert the privacy rights of citizens whose rights to receive contraceptives and birth-control information would be "diluted or adversely affected" under the challenged statutes. Those statutes denied

access to contraceptive services but did not subject the recipients themselves to prosecution, so that their constitutional rights would never be raised unless vicariously asserted by the providers of those services.

Similarly in this case, Petitioners have standing to challenge statutes which materially impair the privacy rights of those who may wish to purchase, rent, or view sexually explicit materials, regardless of whether they enjoy free speech protection as defined by *Miller*. Because *Stanley v. Georgia* established their right to private possession of such books and films, adult consumers have no forum in which to challenge these obscenity laws which effectively deny them access to those materials. The courts below were therefore correct in concluding that this case is a proper one in which to afford Petitioners vicarious standing to advocate their adult customers' privacy rights.

C. Florida's Constitutional Right of Privacy Protects the Discretion of Willing Adults to Rent, Purchase, and View Sexually Oriented Materials Regardless of Their "Obscenity" Under *Miller v. California*.

Article I, §23, added to the Florida Constitution in 1980 by popular election, creates an expansive right of privacy: "Every natural person has the right to be let alone and free from governmental intrusion into his private life . . . ." This provision contains no express standard of review, but in recognition of the fundamental nature of the right, and the spirit and intent behind the amendment, this Court in *Winfield, supra,* 477 So.2d at 547, adopted a standard of strict scrutiny:

> "The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least restrictive means."

The initial step in this analysis, of course, is the determination that a cognizable right of privacy is in fact implicated by the challenged legislation. The District Court of Appeal below erroneously concluded no such right was involved here and thus declined to apply strict scrutiny in light of the asserted privacy interests. Yet the privacy right Petitioners assert here – the right of adult citizens to acquire, to read and view sexually-oriented materials free of a governmentally-imposed ban on "obscenity" – is a right the Supreme Court in essence discerned in *Stanley v. Georgia* as emerging from the intersection of the privacy and free speech rights protected by the federal Constitution. This right very nearly became the basis for a rejection of all laws censoring "obscenity" under the federal Constitution, and a strong minority of Supreme Court Justices has always criticized as intellectually dishonest the Court's subsequent refusal to extend *Stanley* to its logical conclusions. Among the critics of this circumscribed notion of privacy rights is the Hawaii Supreme Court, which found that state's criminal obscenity laws unconstitutional under the very similar privacy provision of the Hawaii Constitution. *State v. Kam*, *supra*.

Moreover, this affirmative right to information and personal autonomy in a realm of intimate concern is

closely analogous to many such privacy rights recognized and sustained by this Court and others – the right to contraceptive information, for example. As this Court noted in *Shaktman v. State, supra,* **14** F.L.W. at **523,** the right of privacy is a wide-ranging concept not confined to traditional notions of privacy within the home:

> "One of its ultimate goals is to foster the independence and individualism which is a distinguishing mark of our society and which can thrive only by assuring a zone of privacy . . . .
>
> * * *
>
> *"The central concern is the inviolability of one's own thought, person, and personal action.* The inviolability of that right assures its preeminence over 'majoritarian sentiment' and thus cannot be universally defined by consensus." (Emphasis added.)

The privacy right recognized in *Stanley v. Georgia* essentially has two aspects: the right to be free from governmental intrusion into one's sphere of personal autonomy, and the more positive freedom to receive information about matters of intimate concern and to exercise one's personal autonomy in the choice of "what books we will read and what films we will watch." From either perspective, criminal obscenity laws are incompatible with the right the Court discerned in *Stanley* for adults to choose freely the reading and viewing materials they wish to enjoy privately. It is important to understand that this freedom also involves the second, positive aspect, in close analogy to the abortion and contraceptive cases, which is not strictly limited to the protected sphere of the home.

In *Stanley*, **394** U.S. at 568, the Court held centrally that private possession of obscene material could not be criminally punished consistent with the First Amendment. Under the First and Fourteenth Amendments, the Court upheld on the one hand Stanley's "right to be free from state inquiry into the contents of his library," a freedom closely associated with the Fourth Amendment notion of the home as a protected private sanctum:

> "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565 (emphasis added).

Yet the Court's rationale in *Stanley* went far beyond this narrower right to be free from governmental intrusion into the home, as the majority continued: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* Following *Griswold,* the Court based its result in *Stanley* essentially on the broader, positive "right to receive information and ideas." Citing *Winters v. New York,* **333** U.S. 507,510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), for the premise that mere entertainment, regardless of its social worth or alleged lack thereof, is protected under the First Amendment, the Court stressed that this affirmative "right to receive information and ideas . . . is fundamental to our free society." *Id.* at 564.

Beyond the concern to protect against "unwanted governmental intrusions into one's privacy," then, the Court more broadly upheld Stanley's asserted "right to read or observe what he pleases – the right to satisfy his intellectual and emotional needs." *Id.* at 564-565. The

Stanley Court quoted the same language from Justice Brandeis' dissent in *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928), which has informed this Court's recent privacy opinions[19] as well:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."

The privacy right upheld in *Stanley* therefore should be understood as it originally was intended, a positive right closely akin to the privacy rights deemed protected in *Griswold, Eisenstadt,* and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) – it is an affirmative right to acquire information, to read and view what one pleases, including materials dealing candidly with sexuality. After all, as the Court noted in *Roth v. United States,* 354 U.S. 476, 487, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957):

> "Sex, a great and mysterious motive force in human life, has indisputedly been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

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[19] *See In re: T.W., supra* (slip opinion at 7), *Winfield v. Division of Pari-Mutuel Wagering, supra,* 477 So.2d at 546.

It is also a sphere of intimacy and private decision-making with regard to which the individual has a right of access to materials for his or her own private enjoyment or informational purposes, free from governmental intrusion, as the Court affirmed in *Stanley*.

As such, the right of privacy asserted here is not location-specific and confined to the home. Certainly, the fact that most of the materials alleged to be obscene in this case are videocassettes intended for private home viewing enhances the privacy interests invoked here, as in *Stanley*. But the right of access to sexually-oriented information or entertainment can no more be confined exclusively to the home than could the rights to acquire contraceptives or to obtain an abortion. Rather, the right must extend to the bookstore or video store just as the right to obtain birth control devices extends to the store or pharmacy.

The District Court of Appeal therefore erred in its conclusion below that the broader right of privacy afforded by the Florida Constitution "is not so broad that a person can take it with him to the store in order to purchase obscene material – even though he has the right to possess such material in the privacy of his home." *State v. Long*, 544 So.2d at 223.[20] This result is illogical, as

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[20] In concluding that citizens "do not have a reasonable expectation of privacy while acquiring obscene materials at a public commercial establishment," the District Court of Appeal interpreted far too narrowly this Court's prior admonition that before the right of privacy attaches, "a reasonable expectation of privacy must exist." 544 So.2d at 222-223. In the

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critics of the post-Stanley decisions have noted: the right of private possession becomes meaningless without the corresponding right to acquire what one may rightfully possess.

Because the Court in Stanley essentially rejected any rationale for regulation broader than that necessary to protect minors and unwilling adults, commentators have correctly observed that Stanley virtually destroyed the holding in *Rofh* that a broad category of "obscenity" could be criminalized, consistent with the First Amendment and constitutional privacy rights.[21] Perhaps in an attempt to resuscitate the rationale in *Roth,* the Supreme Court has subsequently given Stanley a narrowing interpretation, in a number of hard-fought decisions dividing the Court 5-4 in each case.

At the time Miller *v.* California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), was decided, the Court

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first place, this conclusory argument inappropriately utilizes a Fourth Amendment notion, which for the reasons discussed above is inadequate even as an analytical approach to federal privacy decisions such as the contraception and abortion cases, and especially is unduly restrictive in analyzing the expansive privacy rights afforded by Art. I, §23. *Cf. T.*W., *supra; Shaktman, supra.* Moreover, this contention is belied by the recent movement for legislation such as the Video Privacy Protection Act of 1988, 18 U.S.C. **52710,** designed precisely to protect the individual's privacy in the selection of videotapes he or she rents for home viewing.

[21] See Katz, "Privacy and Pornography: *Stanley v.* Georgia," 1969 S.Ct. Rev. **203.**

reportedly came very close to reversing *Roth*.[17] Instead, a tenuous majority formulated yet another inscrutable definition of "obscenity." In companion cases, the Court refused to extend the federal constitutional right of privacy articulated in *Stanley* to the exhibition of "obscene" movies to consenting adults in movie theaters, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), to private shipment of "obscene" materials by common carrier, *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973), or to importation of such material even for purely private purposes, *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

This abandonment of the sound reasoning of *Stanley* met with vehement dissents from the other four Justices, and has continued to inspire widespread criticism both on and off the Court. **As** Justice Douglas dissented in *Twelve 200-Ft. Reels*, 413 U.S. at 137:

> "[I]t is ironic to me that in this Nation many pages must be written and many hours spent to explain why a person who can read whatever he desires . . . may not without violating a law carry that literature in his briefcase or bring it home from abroad. Unless there is that ancillary right, one's *Stanley* rights could be realized . . . only if one wrote or designed a tract in his attic and printed or processed it in his basement, so as to be able to read it in his study."

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[17] *See* Woodward, *The Brethren: Inside the Supreme Court* (Avon 1981), at 226-241, 290-300.

See also Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (Stevens, J., concurring and dissenting).

More recently, Justice Stevens complained in *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 1930, 95 L.Ed.2d 439 (1987):

> "The court has adopted a restrictive reading of *Stanley*, opining that it has no implications to the criminalization of the sale or distribution of obscenity. . . . But such a crabbed approach offends the overarching First Amendment principles discussed in *Stanley*, almost as much as it insults the citizenry by declaring its right to read and possess material which it may not legally obtain." (Citations omitted.)

Although the Supreme Court narrowly refused to recognize the privacy right asserted here under the more restrictive conception of privacy rights it deemed afforded by the federal Constitution, the Hawaii Supreme Court had little difficulty interpreting that state's constitutional right of privacy to embrace these privacy interests. Coincidentally, the same day the trial court filed its order of dismissal in this case, the Hawaii Court, *State v. Kam*, 748 P.2d 372 (Hawaii 1988), held that the privacy provision of the Hawaii Constitution, materially identical to the Florida amendment as construed by this Court,[18] prohibited criminalization of the sale of

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[18] Article 1, § 6 of the Hawaii Constitution provides a right of privacy which expressly may be overcome only by a demonstration of compelling state interest:

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obscenity. The Court agreed with Justice Stevens and others in concluding:

> "Since a person has a right to view pornographic items at home, there necessarily follows a correlative right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless." **748** P.2d at **380.**
>
> "It is obvious that an adult person cannot read or view pornographic material in the privacy of his or her own home if the government prosecutes the sellers of pornography . . . and consequently bans any commercial distribution." ***Id.*** at **379.**

Analogizing this privacy right to the right of access to contraceptives, the Court found no compelling justification for prohibiting the sale of pornographic or "obscene" materials and therefore struck down the criminal obscenity statute.

In addition to this highly persuasive authority from the Supreme Court of Hawaii, one further consideration should inform this Court's determination of whether

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> "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."

This amendment was adopted by general election in 1978, just two years before Florida's version was likewise popularly enacted. See *Kam, supra,* 748 P.2d at **378.** Florida's privacy amendment, of course, does not expressly contain this standard of review, but this Court has rightly ascribed such a standard **as** the intent of its framers.

adult citizens of this state have a cognizable privacy right to acquire expressive materials they unquestionably have a privacy right to possess and to enjoy. Obscenity laws, as explained further below, inevitably have a much broader censorial effect than simply to remove surgically a few films or books determined to be obscene. Because the would-be distributor of erotica or other sexually-oriented materials can never know in advance what items may be targeted for an obscenity prosecution, criminal obscenity statutes exercise a widespread chilling effect which deters the dissemination of such materials generally.

Especially when zealous censorial officials are armed with death-dealing weapons like the remedies available under the RICO Act,[19] the state can effectively eliminate *all* sexually-oriented materials from general circulation, depriving the public of access *to* materials which are in fact nonobscene and fully protected by the First Amendment. This reality should also be a factor in this Court's assessment of whether Florida's obscenity statutes threaten privacy rights protected by Article I, § **23,** which "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *T.W., supra,* slip opinion at 8.

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[19] *See* Justice Stevens' concurring and dissenting opinion in *Fort Wayne Books v. Indiana,* ___ U.S. ___, 109 S.Ct. 916, 939 (1989), wherein he observes that RICO statutes "arm prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use."

D. Florida's Obscenity Laws Drastically Impinge Upon Adults' Privacy Right to Obtain Sexually Oriented Materials, Are More Intrusive Than Necessary to Achieve Any Compelling State Interest, and Are **Therefore Unconstitutional.**

As the Hawaii Supreme Court concluded in *Kam,* following the Oregon Supreme Court's similar conclusion in *State D. Henry,* 302 Or. 510, 732 P.2d 9 (Or. 1987), the state has no compelling interest in censoring sexually-oriented materials based on their "obscene" content. Moreover, Florida's obscenity laws are patently an over-intrusive means of achieving even the state's legitimate goals. Far from being the least intrusive means, obscenity prosecutions dramatically impact both free speech and privacy rights, in most cases without significantly advancing the purported goals of safeguarding juveniles, protecting neighborhoods, etc. The state's very legitimate goals such as protecting minors and the quality of neighborhoods can and should be addressed through more narrowly-tailored legislation: child pornography laws and zoning regulations are much more effective means of achieving these aims in any case.

> "In *Stanley,* the Court recognized that there are legitimate reasons for the state to regulate obscenity: protecting children and protecting the sensibilities of unwilling viewers. . . . But surely a broad criminal prohibition on all sale of obscene material cannot survive simply because the state may constitutionally restrict public display or prohibit sale of the material to minors." *Pope D. Illinois, supra,* 107 S.Ct. at 1930 (Stevens, J., dissenting).

When the Court returned to the problem of defining "obscenity" in *Miller D. California,* the failure of *Roth* and its progeny to advance any coherent rationale for censoring such expression was glaringly apparent. In the accompanying case of *Paris Adult Theatre I D. Slaton, supra,* Chief Justice Burger undertook to explain for the first time *why* "obscenity" could be treated as an exception to First Amendment protection. For the scant majority, he invoked several "legitimate" state interests (although normally the governmental interest must be *compelling* to justify content-based regulation under the First Amendment, as it must be under Florida's privacy amendment). All of these asserted interests may be reduced to an argument that government may regulate a broad category of speech based on "unprovable assumptions about what is good for the people," **413** U.S. at 62; none of them suffices to justify blanket prohibitions as opposed to narrowly-tailored regulation designed to protect neighborhoods and inappropriate audiences.

In support of its first rationale, the Court cited the *Minority Report* of the 1970 Commission on Obscenity and Pornography for the proposition that "there is at least an arguable correlation between obscene material and crime." ***Id.*** at 58. Of course, the *Majority Report* of the 1970 Commission found no such correlation,[20] and the Court itself had dismissed this rationale in *Stanley v. Georgia, supra,* **394** U.S. at 566, finding "little empirical basis" for the assertion "that exposure to obscene materials may

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[20] *See, Report* of *the Commission on Obscenity* ***and*** *Pornography* (1970) at **p.** 27.

lead to deviant sexual behavior or crimes of sexual violence." In fact, most social scientists deny a link between nonviolent sexually-explicit material and anti-social behavior. Even the Meese Commission concluded that the balance of social scientific evidence "is slightly against" the hypothesis that there is any correlation between nonviolent, non-degrading sexually-explicit materials and sexual violence. *Final Report, **supra*** n. **4**, at **337-38.**

In any case, this speculative assertion cannot justify the categorical, content-based censorship of "obscenity." "Unprovable assumptions" have been firmly rejected as a basis for regulation of speech in all other contexts, such as racial invective.

The asserted rationale that "hardcore pornography" is linked to crime fails to justify blanket prohibitions of "obscenity" for another, equally fundamental reason. Because much "hardcore" erotica is unquestionably protected expression even under the *Miller* test, and widely available, obscenity prosecutions or injunctions against particular items are not even rationally related to the goal of preventing the harm vaguely alleged to result from "obscenity."

Especially since the Video Revolution has popularized adult videos, which are now standard viewing fare in millions of American homes, sexually-explicit materials are commonly within the bounds of community tolerance. (Indeed, the Meese Commission and other opponents of erotic entertainment ironically cite its immense popularity and widespread availability at video outlets and convenience stores as the motivation for extraordinary efforts to suppress it under draconian new

censorship laws.) In this context, it becomes apparent that obscenity prosecutions for dissemination of individual items bear no rational relationship to the asserted state interest, when many thousands of comparable items remain freely available as protected non-"obscene" expression. As Justice Stevens noted, concurring and dissenting in *Fort Wayne Books*, ___ U.S. ___, **109** S.Ct. **916, 936-937, 103** L.Ed.2d **34 (1989):**

> "Whatever harm society incurs from the sale of a few obscene magazines to consenting adults is indistinguishable from the harm caused by the distribution of a great volume of pornographic material that is protected by the First Amendment. Elimination of a few obscene volumes or videotapes from an adult bookstore's shelves thus scarcely serves the State's purpose of controlling public morality."

For the same reason, laws criminalizing obscenity cannot be justified by reference to the other announced rationales of the *Miller/Paris Adult Theatre* Court. Random, erratic obscenity prosecutions are not even reasonably related to an asserted interest in protecting "the total community environment, the tone of commerce in the great city centers," **413** U.S. at 58, because they do not at all address the existence of the "red light" districts the Court apparently had in mind. The problems associated with such urban districts are properly addressed by more narrowly-tailored solutions such as zoning laws and similar regulations of "adult" businesses, which the Court subsequently approved in *Young* D. *American Mini Theatres*, **427** U.S. **50, 96** S.Ct. **2440, 49** L.Ed.2d **310 (1976),** and *City of Renton* D. *Playtime Theatres, Inc.*, **475** U.S. **41, 106** S.Ct. **925, 89** L.Ed.2d **29 (1986).** This rationale cannot,

then, justify outright suppression of books and films on the basis of their "obscene" content: "to assert, as the Court has, that unmarked brown envelopes speeding through the mails to Mr. Stanley's protected home impinge on the 'total community' environment is surely to claim too much," as Professor Tribe has observed.[21] Even less justifiable is the ban on the over-the-counter dissemination of videotapes for home viewing.

The Court in *Paris Adult Theatre* asserted even more broadly that government has an interest in maintaining a "decent society", and may therefore act upon the further "unprovable assumption" that obscene materials "have a tendency to exert a corrupting and debasing impact." 413 U.S. at 69, 62-63. Because "what is commonly read and seen and heard and done intrudes upon us all, want it or not," the Court concluded, the state may outlaw "obscenity" in order to elevate "the tone of the society." Again this argument fails because obscenity prosecutions leave untouched a panoply of indistinguishable "corrupting and debasing" but non-"obscene" materials. Such an argument makes sense only as a contention that *all* sexually-explicit materials may be censored, an alternative which the *Miller* test itself and currently prevailing community standards preclude.

The Supreme Court itself has seemingly rejected this particular rationale as inconsistent with First Amendment standards. In Boos *v. Barry*, ___ U.S. ___, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988), a majority of the Court took the position that any regulation of speech justified with

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[21] Tribe, ***American*** *Constitutional Law* (1978), at 668.

reference to "listeners' reactions" must withstand strict scrutiny as a content-based law, e.g, an ordinance "justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies."[22] Most recently, in the "flag burning case," *Texas v. Johnson*, ___ U.S. ___, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), the Court further discredited the notion that "disagreeable" or "offensive" speech may be banned without a particularized determination that it will cause actual harm.

However flawed logically, this broad "corrupting and depraving" rationale harking back to Victorian ethics betrays a great deal regarding the essential nature of obscenity regulation. This pervasive motivation for the suppression of obscenity has prompted Professor Henkin to observe, "Obscenity . . . is not a crime. Obscenity is sin."[23] This unique instance of regulating speech on behalf of morality creates a lonely exception to the otherwise solid First Amendment principle that free speech may not be curtailed in order to insulate willing recipients from the intellectual or emotional impact of speech, i.e. on grounds that some find it "offensive" or "corrupting and debasing."[24] Justice Stevens, concurring and dissenting in *Fort* Wayne *Books*, ***supra***, 109 S.Ct. at 935, has most recently noted this tension: "Quite simply, the long-standing justification for suppressing obscene materials has been to prevent people from having immoral

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[22] Justice O'Connor's plurality opinion on this point, on behalf of herself and Justices Stevens and Scalia, was also endorsed in this observation by concurring Justices Brennan and Marshall, 108 S.Ct. at **1171.**

[23] Henkin, "Morals and the Constitution: The Sin of Obscenity," 63 Colum.L.Rev. 391 (1963).

[24] *See, Nimmer on Freedom* of *Speech* § 2.05[B][1] (1984).

thoughts." *See also Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, 162-165 (Ark. 1987), Justice Purtle dissenting that the state's obscenity laws represent no more than "attempts to curb the thoughts of the average person."

Censorship on this basis is certainly at loggerheads with the Court's pronouncement in *Stanley v. Georgia*, *supra*, 394 U.S. at 565-566, 89 S.Ct. at 1248:

> " . . . Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."

Since *Miller* was decided, moreover, changes in society and in the law have eroded even further the justifications then adduced in defense of criminal obscenity statutes. Videocassettes intended for private, residential viewing have become the primary medium of sexually-oriented entertainment, and these materials are becoming more oriented toward a target audience of middle-Americans, an audience increasingly made up of women and couples. *See* "Romantic Porn in the Boudoir", *Time* Magazine, March 30, 1987, at p. 63: "Women account for perhaps 40%" of X-rated videotape rentals. In the face of such competition, adult theaters and bookstores which formerly constituted "red light" districts "have fallen on hard times," *id.;* half the nation's adult movie theaters have closed in the past few years.[25] The VCR has, in

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[25] See Kristoff, "X-Rated Industry in a **Slump",** *New York* ***Times,*** October 5, 1986, Section **3,** at **p.l.**

short, decimated other markets for erotic materials. *See* Groskaufmanis, "What Films We May Watch: Videotape Distribution and the First Amendment," 136 U.Pa.L.Rev. 1263, 1284-86 (1988). Correspondingly, the privacy argument has become all the more compelling.

Also, subsequent to the decision in *Miller*, the Supreme Court upheld, in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), zoning regulations of adult theaters and bookstores, as a valid time, place and manner regulation. Since that time, localities have widely and exercised their zoning and other regulatory powers to curb undesirable "secondary effects" associated with adult businesses, local authority broadly reaffirmed in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). As a factual matter, the *Miller* Court's "tone of commerce" justification for obscenity laws no longer retains any Validity. As in every other area in which regulation of sexually-oriented expression is actually justified, legislation addressing the specific problem is both consistent with privacy and free speech principles and more effective than is a blanket criminal prohibition of "obscenity."

The Supreme Courts of Hawaii and Oregon have so concluded in striking down their states' criminal obscenity laws under the privacy and free speech clauses, respectively, of their state Constitutions. *See State v. Kam*, 748 P.2d at 380, n. 2. In *State v. Henry*, 732 P.2d at 18, the Court observed:

> "We do not hold that this form of expression, like others, may not be regulated in the interests of unwilling viewers, captive audiences, minors and beleaguered neighbors. No such issue is

> before us. But it may not be punished in the interest of a uniform vision of how human sexuality should be regarded or portrayed."

The popular acclaim for a greater range of privacy protections, such as the federal Video Privacy Protection Act of **1988,** 18 U.S.C. § 2710,[26] demonstrates the widespread public concern in favor of just such privacy rights as those asserted in this case. Particularly in the context of censorial campaigns against all erotic expression, this Court's affirmation of this right to privacy is an essential bulwark against ever-expanding state intrusion into personal autonomy to decide "what books we may read and what films we may watch." As Justice Stevens eloquently summarized the argument:

> "The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. . . . [T]he baneful effects [some would ascribe to] these materials are disturbingly reminiscent of arguments formerly made about what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." *Smith v. United States, supra,* **431** U.S. at **320-321, 97** S.Ct. at **1773-1774** (dissenting opinion).

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[26] This Act prohibits disclosure of information about personal video rentals, having been enacted in response to public outcry regarding the public disclosure of Supreme Court nominee Robert Bork's video rental records.

II.

THE FLORIDA OBSCENITY STATUTE IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

To the extent that the obscenity test under § 847.001, Fla. Stat., conforms to the standard for obscenity announced by the Supreme Court in *Miller v. California* and its progeny (see Argument IV, infra), that standard is, nonetheless, unconstitutionally vague in violation of due process and the right of free speech.

Simply put, the obscenity standard has always been vague, and changing social conditions including the popularization of the X-rated video have only made it more so. Given that sexually-explicit videotapes have become standard viewing fare in American homes, there is no longer a discrete category of "hard core" erotic material which can be presumed to violate (the always-amorphous) community standards. The result is a situation in which no one – video store operator, bookstore owner, police officer, prosecutor, or judge – can predict in any realistic sense which materials are "obscene" and which are perfectly within the bounds of First Amendment protection. The United States Supreme Court has emphasized, in cases subsequent to *Miller,* that this situation, in which law enforcement officials are left to prosecute with no meaningful guidelines to curtail their discretion, is particularly intolerable and offensive to due process. *Kolender D. Lawson,* 461 U.S. 352, 103S.Ct. 1855, 75 L.Ed.2d 903 (1983).

Moreover, the Supreme Court has repeatedly insisted that statutory vagueness represents a particularly unpardonable sin where free speech is involved. "Stricter standards of permissible vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because [free expression] may be the loser." *Smith* D. *California,* 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). *See also Hynes v. Mayor and City Council of Borough of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976).

Yet the obscenity laws create by far the most amorphous and unintelligible offense in the criminal code. No other criminal statute provides the potential defendant with less advance notice of its violation. No other statute requires refraining altogether from expression which may be entirely protected by the First Amendment in order to be safe from conviction.

Approved by a bare 5-4 majority at the time of the *Miller* decision, the current standard for obscenity has always been criticized by a substantial minority of the Court as inadequate to the task of meaningfully distinguishing protected speech from that which can trigger criminal sanctions. "One of the strongest arguments against regulating obscenity though criminal law is the inherent vagueness of the obscenity concept," wrote Justice Stevens, calling for the "ultimate downfall" of the *Miller* test in *Ward* D. *Illinois,* 431 U.S. 767, 782, 97 S.Ct. 2085, 2093-94, 52 L.Ed.2d 738 (1977) (Stevens, J., dissenting).

Justice Brennan delivered perhaps the most eloquent condemnation of this speech-criminalizing enterprise in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 103, 93 S.Ct. 2628, 2657, 37 L.Ed.2d 446 (1973), maintaining that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice . . . , to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harms."[27]

> "Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' . . . we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech." 413 U.S. at 84.

Since *Roth,* at least six justices have agreed that obscenity laws suffer from vagueness in violation of the First Amendment and due process. See *Roth,* **354** U.S. at 508 (Douglas and Black, JJ., dissenting); *Paris Adult Theatre, supra,* (Brennan, Stewart and Marshall, JJ., dissenting), *Smith v. United States,* 431 U.S. 291, **311,** 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977) (Stevens, J., dissenting).

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[27] *See also Brockett v. Spokane Arcades,* 472 U.S. 491, 510, 105 S. Ct. 2794, 2805, 86 L.Ed.2d 394 **(1985)** (Brennan and Marshall, JJ., dissenting).

Indeed, four sitting Justices – enough to grant review of the question – have expressed their interest in re-examining the obscenity standard in a proper case. The most recent addition to the list is Justice Scalia, who observed in *Pope v. Illinois, supra,* 107 S.Ct. at 1923:

> "[I]n my view it is impossible to come to an objective assessment of (at least) literary or artistic value . . . .
>
> "All of today's opinions, I suggest, display the need for reexamination of *Miller*."[28]

In *Miller v. California, supra,* the Court returned to the task Justice Harlan called "defining the undefinable." The well-known *Miller* test for obscenity asks:

> "(a) whether the 'average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The bare *Miller* majority, acknowledging that "there are few eternal verities" in the areas of obscenity,

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[28] Because Justice Scalia was one of only five Justices joining the portion of opinion in *Fort Wayne* Books *v. Indiana,* ___ U.S.___, 109 S.Ct. 916, 925 (1989), wherein Justice White for the Court "rejected the invitation" to overturn *Miller,* that dictum must be interpreted in light of the fact that the issue of the *Miller* standard was neither briefed nor argued in that case, and at oral argument, undersigned counsel John Weston, who argued the case on behalf of the Petitioners, expressly disavowed any desire to raise the issue in that case.

believed it had agreed on "concrete guidelines to isolate 'hard-core' pornography" and to "provide fair notice to a dealer in such materials." 413 U.S. at 23, 29, 27.

> "[N]o 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. . . ." *Id.* at 27.

"A few weeks later," as Woodward and Armstrong report, "an Albemarle County, Virginia prosecutor announced that he would prosecute anyone selling *Playboy* magazine on local newsstands." The Brethren, *supra*, at p. 300.

Justice Brennan vehemently disagreed with the essential premise that such an identifiable category of 'hard-core' obscenity existed, observing that "almost every case is 'marginal.' " *Paris Adult Theatre, supra,* 413 U.S. at 91. Subsequent experience has borne out his prediction that under the *Miller* test or any other standard, "there is no probability of regularity in obscenity decisions by state and lower federal courts.'' *Id.* at 92.[29]

The problem is two-fold. First, the *inherent* vagueness of any attempt to define "obscenity": "under all verbal formulae, . . . reasonable men can, and ordinarily do, differ as to proper assessment of challenged materials." *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 709, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) (Harlan, J., concurring and dissenting). "Surely the

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[29] *Cf. Penthouse International, Ltd. V. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980), concluding *Playboy* was protected by the First Amendment but *Penthouse* was obscene, after the district court had determined both periodicals were constitutionally protected, 436 F.Supp. 1241 (N.D.Ga. 1977); *State v. Walden Book Co.,* 386 So.2d 342 (La. 1980), holding contemporaneous issues of *Penthouse* were not obscene.

Court cannot now believe that 'redeeming social value', 'patent offensiveness,' and 'prurient interest' are . . . terms of common understanding and clarity." *Id.* at 711, n. 17.

Second, even to the extent that there ever was a meaningful category of 'hard-core' erotica which could be defined by the *Miller* approach or any other test, subsequent social changes have completely eroded that boundary line. Particularly with the advent of the VCR, which as noted above has brought mass popular viewing of X-rated videotapes formerly regarded as 'hard-core' pornography, community standards have demonstrably shifted toward greater tolerance of the sexually explicit. Under these conditions, the definition of obscenity has become increasingly vague.

In recent years, the Supreme Court has emphasized that the concept of vagueness actually entails two related constitutional problems. In *Miller,* the majority relied solely on the "fair notice" aspect of the vagueness doctrine: the rule that a statute is vague if it fails adequately to define the offense so as to provide reasonable notice of "what the State commands or forbids." *Lanzetta v. New Jersey,* **306** U.S. **451, 453, 59** S.Ct. 618, **619, 83** L.Ed. 888 **(1939).** More recently in *Kolender v. Lawson,* **461** U.S. **352, 103** S.Ct. **1855, 75** L.Ed.2d **903 (1983),** however, the Court denominated as even more important the requirement that a statute not inherently lend itself to arbitrary or erratic application by police, prosecutors, courts and juries. In this *post-Miller* decision, the Court invalidated a statute requiring persons on the streets to provide "credible and reliable" identification.

> *"[W]e have recognized recently that the more important aspect of the vagueness doctrine 'is not actual*

> *notice, but the other principal element of the docfrine – the requirement that a legislature establish minimal guidelines to govern law enforcement'*. . . .Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " **461** U.S. at **358,** quoting *Smith v. Goguen,* **415** U.S. **566, 574-575 (1974)** (emphasis added).

"Our concern here is based," the Court emphasized, "upon the 'potential for arbitrarily suppressing First Amendment liberties.' " *Id.,* quoting *Shuttlesworth D. City of Birmingham,* **382** U.S. **87, 91, 86** S.Ct. **211,** 15L.Ed.2d **176 (1965).**

From either of these perspectives, fair notice to the defendant or adequate guidelines for law enforcement, obscenity laws such as § **847.011** fail miserably to avoid the arbitrary suppression of First Amendment rights. Much to their frustration, distributors and retailers of sexually-oriented materials are completely unable to discern in advance where the "dim and uncertain line" demarcating protected and unprotected speech lies, particularly when they must make that judgment regarding countless different communities. Their attorneys, even those with a professional lifetime of experience in this area, are equally perplexed and unable to advise their clients.

Those charged with enforcing the law can hardly be expected to find any more guidance in the amorphous definition of "obscenity." **As** Justice Stevens stressed, concurring and dissenting in *Marks D. United States,* **430** U.S. 188, **198, 97** S.Ct. **990, 996, 51** L.Ed.2d 260 **(1977),** "the

present constitutional standards . . . are so intolerably vague that even-handed enforcement of the law is a virtual impossibility." Rather, obscenity is characterized by "grossly disparate treatment of similar offenders." *Id.*

> "The question of offensiveness to community standards . . . is not one that the average juror can be expected to answer with even-handed consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. . . . [T]he expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. . . . *In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law." Smith v. United States, supra,* **431** U.S. at **316** (Stevens, J., dissenting) (emphasis added).

The *Miller* majority's assertion that "different juries may reach different results under any criminal statute," **413** U.S. at 25, is no defense to this vagueness challenge. In a normal criminal case, that disparity would result from one panel or the other being mistaken as to objectively verifiable facts. In the obscenity context, however, disparities result from the fact that there is *no objective basis* for the jury's decision. Concepts like "prurient interest," "patent offensiveness," and "serious value" are incurably subjective. The Court itself recognized in *Kois v. Wisconsin,* 408 U.S. 229, 232, 92 S.Ct. 2245, 2247, **33**

L.Ed.2d 312 (1972), that "contemporary community standards" in particular, and the obscenity test as a whole, entail "an undeniably subjective element."

"Obscenity" is the only crime which turns upon the concept of "contemporary community standards," a majoritarian notion strangely employed in the context of constitutional guarantees intended to protect minority rights from just such vagaries. However the relevant community is defined, Justice Stevens concluded in *Smith v. United States, supra,* 431 U.S. at 314, "surely, the standard for a metropolitan area is just as 'hypothetical and unascertainable' as any national standard."

The Oregon Supreme Court in *State v. Henry, supra,* 732 P.2d at 10, although invalidating the obscenity statute on different constitutional grounds, particularly objected to the "community standards" notion and heartily endorsed its Court of Appeals' conclusion that the statute was void for vagueness:

> "The indeterminacy of the crime . . . lies in tying the criminality of a publication to 'contemporary state standards.' Even in ordinary criminal law, we doubt that the legislature can make it a crime to conduct oneself in a manner that falls short of 'contemporary state standards.' In a law censoring speech, writing or publication, such an indeterminate test is intolerable. It means that anyone who publishes or distributes arguably 'obscene' words or pictures does so at the peril of making a wrong guess about a future jury's estimate of 'contemporary state standards' of prurience."

This vagueness dilemma could possibly be cured by the addition of a meaningful scienter element to the

obscenity offense, as the Supreme Court noted in Village of Hoffman Estates *v. Flipside,* Hoffman Estates, *Inc.,* 455 U.S. 489, 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982): "a scienter requirement may mitigate the law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." The U.S. Supreme Court has not required a meaningful scienter element for the offense of obscenity, however, and the attribution of constructive knowledge under the Florida statute, § 847.011(1)(b), amounts to the strict liability forbidden in Smith *v.* California, supra.

Although there is a strong governing First Amendment/due process principle that a speaker must have known the unprotected nature of expression which is the subject of criminal prosecution, current obscenity law imposes virtual strict liability for a wrong guess as to the protected nature of erotic expression. As the trial court below observed, meaningful freedom of expression requires recognition of the right to be wrong.

Soon after deciding Roth, the Supreme Court in Smith *v.* California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), confronted the issue of strict liability for a bookseller's possession of obscene materials. The Court concluded that to impose strict liability for unprotected speech would create a chilling effect and "work a substantial restriction on the freedom of speech and of the press." 361 U.S. at 150. "Our holding in Roth," the Court emphasized, "does not recognize any state power to restrict the dissemination of books which are not obscene." Id. at 152.

The Court in *Smith* articulated the essential problem posed by an obscenity statute lacking an adequate scienter requirement. Such a law, compelling speakers to act at their peril,

> "tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge . . . , he will tend to restrict the books he sells to those he has inspected, and thus the State will have imposed a restriction upon . . . constitutionally protected as well as obscene literature. . . .The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to [materials] the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Id.* at **153-154.**

Because of these special First Amendment concerns, booksellers could not be made "the strictest censors of their merchandise," without unduly chilling protected expression. *Id.* at 152.

Building upon *Smith*, the Court in *New **York** Times v. Sullivan*, **376** U.S. **254, 84** S.Ct. **710,** 11 L.Ed.2d **686 (1964),** held that even in the context of civil libel actions, the heightened scienter standard of "actual malice" was necessary to prevent a widespread chilling effect upon publication. **As** in *Smith*, a contrary rule "compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship.' " **376** U.S. at **279.** In the absence of

such safeguards, "the pall of fear and timidity imposed . . . is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

In the light of these guiding principles, the existing scienter rule governing obscenity prosecutions is frankly irrational. Although the obscenity offense requires scienter in the form of "knowledge of the contents [,] character and nature of the materials," the defendant need not have known the expression was legally obscene. *Hamling v. United States,* 418 U.S. 87, 123-124, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590 (1974). Without a requirement of knowledge of illegal obscenity (which might be provided in a prior civil adjudication, for example), there is nothing to temper the statute's vagueness.

Even this minimal scienter requirement has been reduced to the vanishing point in practical application: see *Sherwin v. United States,* 572 F.2d 196 (9th Cir. 1978), *cert. denied,* 437 U.S. 909 (1978) (obscenity conviction upheld on mere knowledge of material's "sexual orientation"); *Sewell v. Georgia,* 238 Ga. 495,233 S.E.2d 187, *appeal dismissed,* 435 U.S. 982 (1978) ("constructive knowledge'' of material's contents sufficient scienter for obscenity conviction). Florida's obscenity statute contains just such a diminished scienter test, § 847.011(1)(b) creating prima facie evidence of scienter merely from "the knowing possession by any person of three or more identical or similar materials, matters, articles, or things.''

When this virtual strict liability standard is combined with the extremely broad definition of the conduct which may be depicted or described "in a patently offensive way,'' under § 847.001(7)(b), it becomes apparent how widely a prosecutor may range over the entire field of materials dealing with sexuality. Section 847.001(9) and

(11) define this "sexual conduct" which may be patently offensive to include even a depiction which "simulates," (i.e., a suggestion with even the slightest nudity) that sexual intercourse *will* occur. Plainly, any sexually-candid depiction including R-rated movies and even much of network television programming could come within this definition.

In this vein, *see Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D.Ala. 1986) a case which witnesses the efforts of zealous, politically-motivated prosecutors to censor the distribution even of mainstream magazines such as *Playboy* and *Penthouse. See also Penthouse International, Ltd. D. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *Playboy D. Meese*, 639 F.Supp. 581 (D.D.C. 1986). When the limitless punishment threatened under the RICO Act is also factored in, it is clear that the vaguely-defined obscenity offense becomes a weapon with which the censorial-minded can eliminate sexual candor entirely by means of chilling effect.

111.

AS APPLIED TO OBSCENITY, THE FLORIDA RICO STATUTE EXERTS AN UNCONSTITUTIONAL CHILLING EFFECT UPON A WIDE RANGE OF PROTECTED EXPRESSION, IN VIOLATION OF THE FREE SPEECH CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS

The Florida criminal RICO statute, Fla. Stat. § 895.01 *et seq.*, as applied here solely on the basis of obscenity predicate offenses,[30] represents the most harshly punitive

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[30] **Of the RICO Act's numerous predicate offenses, incorporated by § 895.02(1), only the obscenity predicate implicates**

(Continued on following page)

anti-obscenity measure in the nation. The bookstore or video outlet operator who is alleged to have twice crossed the "dim and uncertain line" into the realm of obscenity faces a potential sentence of **30** years in prison.[31] The inevitable result of these extreme sanctions, combined with the underlying obscenity statute's incorrigible vagueness and minimal scienter requirement, is that the RICO statute will create – and indeed has already created – an unconstitutional regime of censorship by means of the chilling effect it casts over the dissemination of any and all erotic materials in the state of Florida.

For this reason, the trial court in this case declared the RICO statute as applied to obscenity unconstitutional under the First Amendment. The court noted that these

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(Continued from previous page)

expressive activity protected by the First Amendment. Petitioners challenge the Act's constitutionality only in its application to obscenity, a challenge which if sustained would leave the RICO Act in its other applications fully intact. *Cf. State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (Kan. 1976), invalidating red-light abatement statute as applied to obscenity while leaving its non-obscenity applications unaffected.

[31] Under § 895.04 of the RICO Act, a violation of § 895.03 is classified as a first-degree felony. The criminal RICO defendant therefore faces a potential punishment of 30 years' imprisonment and a fine of $10,000 for each RICO count (as prescribed by §§ 775.082-.083), in addition to the penalties assessed for the underlying obscenity offenses, and collateral exposure to the threat of civil RICO forfeiture of the entire communicative business, all for disseminating two items presumptively protected by the First Amendment at the time of dissemination and until finally adjudged obscene.

charges expose the Petitioners to a minimum sentence of 4½ to 5½ years as mandated by the Florida sentencing guidelines, assuming conviction of the alleged obscenity offenses as misdemeanors. The court further noted, however, that most of the Petitioners could be convicted of the obscenity charges as felonies, and would therefore be subject to a guidelines sentence of 17 to 22 years. (See slip opinion at 1.) Given these extremely severe penalties for the ill-defined offense of obscenity, the trial court concluded:

> "It is clear that this Act may be used not only to prevent the sale and exhibition of obscene materials by racketeers, but also to chill and dissuade any persons from distributing or exhibiting any and all sexually oriented or sexually explicit materials, including those that are constitutionally protected. *Because of the extraordinarily severe penalties for guessing wrong, few individuals will be willing to accept the extreme penalty for a wrong guess.*
>
> "Thus the State has conceived an unreviewable prior restraint by virtue of the very existence of this statute . . . as applied to obscene materials." Slip opinion at **13** (emphasis added).

In its argument to the District Court of Appeal below, the State did not attempt to deny the patent chilling effect of such a draconian statute. Rather, the state relied upon the contention that the RICO Act was "not aimed specifically at obscenity," but rather at "racketeering," and therefore enjoyed immunity from First Amendment scrutiny. The United States Supreme Court, however, has firmly laid to rest this formalistic argument in its intervening decision of *Fort Wayne Books v. Indiana*, — U.S. ___, 109 S.Ct. 916 (1989), addressing two consolidated

challenges to Indiana's very similar civil and criminal RICO statutes.

In *Fort Wayne Books*, the Supreme Court invalidated pre-trial civil RICO seizures of bookstores, and in doing so rejected the notion that the First Amendment becomes any less relevant where the state seeks to punish obscenity under the rubric of "racketeering" rather than under a traditional obscenity law. The Court made clear that the full glare of First Amendment scrutiny applies in the context of a RICO/obscenity proceeding:

> "The fact that the . . . seizure was couched as one under the Indiana RICO law – instead of being brought under the substantive obscenity statute – is unavailing. As far back as the decision in *Near v. Minnesota*, 283 U.S. 697, 720-721, 51 S.Ct. 625, 632-633, 75 L.Ed. 1357 (1931), this Court has recognized that the way in which a restraint on speech is 'characterized' under State law is of little consequence. . . . [T]he State cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.' " 109 S.Ct. at 929.

The Court thus reaffirmed that RICO provisions as applied to obscenity must withstand the scrutiny of all relevant First Amendment principles, including the chilling effect doctrine. In *Fort Wayne Books*, however, the Supreme Court addressed the chilling effect question in the context of dramatically lower penalties than those prescribed by Florida's RICO law. Justice White (writing for a bare majority of five on this point) pointed out that the Indiana RICO Act provided for a five-year *maximum*

per count, a penalty within the range of criminal punishments the Court had previously upheld for obscenity offenses.

> "We have in the past upheld the constitutionality of statutes that provide criminal penalties that are not significantly different from those provided in the Indiana RICO law. . . ." 109 S.Ct. 925, n.8 (citing Smith *v.* United States, 431 U.S. 291, 296, 97 S.Ct. 1756, 1761, 52 L.Ed.2d 324 (1977), and *Ginzburg v.* United States, 383 U.S. 463, 464-465, 86 S.Ct. 942, 944-945, **16** L.Ed.2d 31 (1966)).

The Florida RICO statute with its 30-year maximum prison sentence is, of course, incomparably more severe. Whereas Indiana law would allow the RICO defendant to receive a sentence of probation (Ind. Code § 35-50-2-2), Florida law mandates an extensive prison term for this offense, imposing a range of punishments typically reserved for murderers and other violent criminals.

The Supreme Court in Fort Wayne *Books* certainly did not abrogate the chilling effect doctrine, but simply concluded that a RICO/obscenity scheme carrying penalties similar to those the Court had previously approved in obscenity cases represented no qualitative departure from existing law. It was in this context that the Court observed, "The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents." ***Id.*** at 926. The Court went on to reserve as unripe the question whether the associated civil RICO penalties including blanket forfeiture rendered the statute void for chilling effect, because the criminal RICO case did not involve application of these penalties. The Court clearly

contemplated that under the chilling effect doctrine as developed in its prior First Amendment decisions, at some point severe penalties breach a threshold and become impermissibly deterring of protected expression.

Unfortunately, then, the decision in *Fort Wayne Books* leaves unresolved the issue raised in this case by the threat of a 30-year prison sentence for obscenity. Because the Court left undisturbed the general prohibitions against speech-chilling legislation announced in *Smith v. California,* 361 U.S. 147, 80 S.Ct. 2015, 4 L.Ed.2d 205 (19591, and *New York Times v. Sullivan,* 376 U.S. 254, **84** S.Ct. 710, 11 L.Ed.2d 686 (19641, however, the District Court of Appeal below erred in concluding that the Court had resolved the chilling effect question in favor of the state for all purposes. This case presents far more than a "mere assertion of some possible chilling effect;" the Florida RICO Act patently operates to deter a wide range of protected speech and must be realistically scrutinized in that regard if the chilling effect doctrine is to retain any meaning at all.

The chilling effect of such overbroad statutes has always been a twin First Amendment concern in tandem with the prior restraint doctrine. Indeed, the adverse effects of a chilling regulation may be more insidious than the flagrant prior restraint. As the Supreme Court noted in *N.A.A.C.P. v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), First Amendment freedoms "are delicate and vulnerable," and the very "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." Unduly severe or overbroad statutes can chill protected expression by causing "a continuous and pervasive restraint on all freedom

of discussion that might reasonably be regarded as within [their] purview." *Thornhill v. Alabama,* **310** U.S. 88, **98, 60** S.Ct. **736, 84** L.Ed. **1093 (1940).**

Integral to the Supreme Court's holding in *Roth* D. *United States,* **354** U.S. **476, 77** S.Ct. **1304, 1** L.Ed.2d **1498 (1957),** that obscenity could be regulated as unprotected speech, was the stipulation that such statutes must not infringe upon the circulation of *protected* materials.

> "[S]ex and obscenity are not synonymous. . . . The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputedly been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." **354** U.S. at **487.**

"Our holding in *Roth,*" the Supreme Court later emphasized in the cornerstone chilling effect case, *Smith* D. *California, supra,* **361** U.S. at **152,** "does not recognize any state power to restrict the dissemination of books which are not obscene." Accordingly, as this Court recognized in *Mitchem* D. *State* ***ex rel. Schaub,*** **250** So.2d **883, 886** (Fla. **1971),** the "operation and effect" of measures designed to regulate obscenity must be strictly scrutinized so as to "insure against the curtailment of constitutionally protected expression or publication."

Unquestionably, the Florida criminal RICO Act has the inexorable effect of indirectly censoring protected materials. The chilling effect of such statutes results from the combination of three factors: the inherent vagueness of the obscenity test, the lack of a meaningful scienter

requirement, and the threat of these extreme – indeed, unprecedented – penalties.

The first two of these, the intractable vagueness problem and the inadequacy of the scienter standard, are discussed at length above. Regardless of whether one concludes that obscenity laws are unconstitutional for these reasons alone, the addition of penalties of this magnitude to the calculus sharply tips the balance into the range of impermissible chilling effect. No one contests the obvious fact that the "dim and uncertain" line demarcating the forbidden category of "obscenity" is, in virtually every case, impossible to locate in advance of prosecution and ultimate conviction. Given this fact, it is equally undeniable as a matter of logic and common experience that the threat of such drastic penalties makes the dissemination of any sexually-oriented materials an ultahazardous endeavor which only the most intrepid will undertake. The rational response of the prudent bookseller or video store operator faced with the specter of RICO liability will be simply to remove all erotic wares from his or her shelves – even though *all* are presumptively protected by the First Amendment.

This result is precisely what the Supreme Court condemned in *Smith v. California, supra,* striking down a strict liability statute which, like the threat of RICO prosecutions for obscenity,

> "would tend to restrict the public's access to [materials] which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." 361 U.S. at 153-154.

Building on this concern expressed in *Smith* that measures aimed at unprotected speech must be tailored so as to avoid the evil of self-censorship, the Court in *New York Times v. Sullivan, supra,* recognized that in the absence of a safeguarding elevated scienter requirement, the potential for crushing or limitless sanctions for a speech offense would unconstitutionally deter free expression. Holding that a "malice" standard was required in libel actions by public figures so that debate on public issues could remain "uninhibited, robust, and wide-open," the Court addressed the scienter component of the equation. 376 U.S. at 270. A contrary rule "compelling the critic of official conduct to guarantee the truth of all . . . factual assertions . . . on pain of libel judgments virtually unlimited in amount," the Court noted, would create an intolerable degree of self-censorship. So too does a statute compelling booksellers and video retailers to guarantee the non-obscenity of all their wares, on pain of prison sentences usually reserved for murderers.

The chilling effect of the Florida RICO Act with its potential 30-year prison term is far from being a matter of speculation or "mere assertion." *See* Brief of Amici PHE, Inc., *et al. In the current environment of aggressive prosecutorial action aimed at broadly curtailing the availability of erotic materials, a number of legal and journalistic reports have documented the censorial effects upon protected speech. Justice Stevens, concurring and dissenting in Fort Wayne Books,* 109 S.Ct. at 936, cites one such excellent study, Groskaufmanis, "What Films We May Watch: Videotape Distribution and the First Amendment," 136 U.Pa.L.Rev. 1263 (1988), which thoroughly documents both the

immense popularity of X-rated videotapes and the censorial pressures brought to bear by prosecutions such as this one. That study reports that these "pressures [have] prompted an estimated 17,000 stores nationwide to drop non-obscene magazines – including Playboy and *Penthouse* – from their inventories," and have likewise caused countless videotape distributors to withdraw adult films from their shelves altogether.

> "Both the nation's largest video wholesale distributor and franchise chain have dropped adult material. Many video store owners in North Carolina and Phoenix, Arizona dropped X-rated cassettes in the wake of vigorous prosecutions." 136 U.Pa.L.Rev. at 1274, n.84.

See also Cieply, "Risque Business: Video Outlets Face Mounting Pressure to Stop Carrying X-rated Cassettes," *The Wall Street Journal*, April 21, 1986, at 20D. Employing the "ultimate weapon" of RICO prosecutions, the state has now added Florida to this list of dramatically affected locales.

In this current climate of censorial prosecutions, any bookseller, theater manager, or video store operator who would make so bold as to disseminate materials dealing candidly with sexuality must take heed of the threat of RICO liability for a wrong guess as to what a prosecutor and ultimately a jury might deem obscene. The cautionary tales of these Petitioners' experience, and that of the defendants in *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va. 1987), will undoubtedly color that decision whether or not to carry expressive materials to which the adult population of Florida has every constitutional right of access.

In *Pryba,* the only case in which post-conviction RICO/obscenity forfeiture has been sustained and actually imposed, the trial court broadly construed the parallel federal statute as authorizing forfeiture of the defendants' entire chain of bookstores and video stores including their inventories of presumptively-protected materials. **As** the *New* ***York*** *Times* reported (January 12, 1988), the *Pryba* defendants

> "were ordered to hand over assets with an estimated worth of $1 million, even though a jury had found that relatively few items sold in their shops were obscene. The assets included the contents of three shops where customers could rent a variety of videocassettes, everything from family fare like the film 'Star Wars' to sexually-explicit tapes."

Now on appeal to the Fourth Circuit, *Pryba*'s example of the fate in store for the RICO/obscenity defendant has undoubtedly had an incalculable chilling effect on the exercise of free expression in Florida as elsewhere.[32]

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[32] Conviction under the criminal RICO Act would subject the defendant to virtually automatic liability for civil RICO sanctions as well. Although blanket civil forfeiture of the entire "enterprise" and other drastic civil remedies under the civil component of the Florida RICO Act, § 895.05, are of course not directly at issue in this case, they should be borne in mind by this Court, as they undoubtedly are by expressive businesses, Justice Stevens rightly admonished the majority in *Fort* Wayne ***Books,*** 109 S.Ct. at 931 (concurring and dissenting opinion). At any rate the civil RICO penalties, draconian as they are, pale in the light of the criminal sanctions at issue in this case.

Subsequent to the *Pryba* decision, the Supreme Court in *Fort Wayne* ***Books*** made clear that normal First Amendment scrutiny applies to the challenged RICO/obscenity provisions. This Court is respectfully urged to join those courts which have subjected such RICO/obscenity measures to realistic First Amendment scrutiny and have found them patently unconstitutional. *See* ***4447*** *Corporation v. Goldsmith,* 479 N.E.2d 578 (Ind. App. 19851, *rev'd.* 504 N.E.2d 559 (Ind. 19871, *rev'd. sub nom. Fort Wayne* ***Books,*** *Inc. v. Indiana,* 109 S.Ct. 916 (1989), in which the Indiana Court of Appeals declared the civil RICO provisions invalid on a variety of grounds, including chilling effect. The Indiana Court of Appeals' reasoning was adopted by the Arizona appellate court in the similar decision of *State v. Feld,* 745 P.2d 146 (Ariz. App. 1987), *cert. denied sub nom. Arizona v. Feld,* 108 S.Ct. 1270, 99 L.Ed.2d 482 (1988).

Consistent with the sensitive concern evinced in *Ladoga Canning Corp. v. McKenzie,* 370 So.2d 1137 (Fla. 19791, that this state's laws be tailored so as to avoid the chill of self-censorship, Petitioners urge this Court to dismiss this prosecution under a statute which "may indeed curb the availability of obscenity but cuts a broad swath into the realm of protected expression as well." *4447 Corporation, supra,* 479 N.E.2d at 592 (Ind.App. 1985). The unquestionable right of Florida's adult citizenry to have access to the wide range of protected erotic materials requires this result under the First Amendment, as well as the broader result mandated by the privacy guarantee of Art. I, § 23 of the Florida Constitution.

IV.

THE DEFINITION OF OBSCENITY UNDER THE FLORIDA STATUTE FAILS TO CONFORM TO THE TEST FOR OBSCENITY ESTABLISHED BY THE DECISIONS OF THE UNITED STATES SUPREME COURT, AND ITS CONSEQUENT OVERBREADTH SHOULD BAR THIS PROSECUTION

Because F.S. § 847.001 and § 847.011, as they now define obscenity, substantially depart from the test for obscenity enunciated by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), as subsequently clarified by *Smith v. United States*, 431 U.S. 291 (1977), and most recently by *Pope v. Illinois*, 481 U.S. ___, 107 S. Ct. 1918 (1987), the trial court correctly held the obscenity statute to be invalid.

In 1986, the Florida legislature amended and renumbered the Florida obscenity statute (§ 847.001) to define obscenity as follows:

> " 'Obscene' means the status of material which:
>
> a) The average person, *applying contemporary community standards*, would find, taken as a whole, appeals to the prurient interest;
>
> b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
>
> c) Taken as a whole, lacks serious literary, artistic, political, or scientific value." (Emphasis added)

The significance of the 1986 amendment was that it removed the "community standard" requirement from the (b) prong of the obscenity statute (i.e., the "patent offensiveness" prong), and explicitly retained it only for

the (a) prong or "prurient interest" component of the test. This amendment rendered the Florida statute fatally incompatible with the *Miller* test.

This deletion of the community standards element from the "patent offensiveness" prong of the Florida statute by means of this 1986 amendment, is in direct contravention of the holding in *Smith, supra,* rendered in 1977, in which the Supreme Court specifically indicated that "patent offensiveness" must be determined with reference to contemporary community standards.

Thus, by specifically deleting community standards from the "b-prong," the Florida Legislature enacted an obscenity definition which substantially departs from the *Miller* test, as clarified by *Smith,* and rendered the statute unconstitutionally overbroad. Consequently, it follows that the information in this case which charges obscenity violations under the unconstitutionally overbroad Florida obscenity statute is defective and should be dismissed.

Moreover, these defendants could not be reprosecuted following any narrowing construction of the statute by this Court. In *Massachusetts v. Oakes,* ___ U.S. ___, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989), the Supreme Court made precisely this type of a ruling in a case involving a prosecution under a Massachusetts child pornography statute. At the time Oakes allegedly committed a criminal act, the relevant statute prohibited the photographing of minors "in a state of nudity" and also prohibited photographing any minors engaged in any sort of sexual activity. The defendant was convicted under that statute based upon photographs he had taken of his partially nude 14-year-old stepdaughter. On appeal, the

defendant asserted the First Amendment overbreadth of the statute. However, while his appeal was pending, the Massachusetts legislature amended the statute by eliminating the portions of it which he had complained were overbroad. In the United States Supreme Court, the defendant argued that if the statute was unconstitutionally overbroad when he committed his allegedly criminal act, then he could not be prosecuted under it for conduct occurring prior to the narrowing of its scope.

A majority of the Court, per Justice Scalia, agreed. Although a four-member plurality of the Court asserted that the statute could, in essence, be saved retroactively, Justice Scalia, speaking for five members of the Court, held that if in fact the statute was overbroad at the time of the defendant's conduct, it could not thereafter be applied against him for conduct occurring prior to the narrowing of the statutory scope.

Part I of Justice Scalia's opinion in *Oakes, supra,* (with which four other members of the Court concurred, thereby making it the law of the land) establishes that five members of the Court now agree that when a criminal speech statute is found to be unconstitutionally overbroad, conduct occurring *prior* to a saving amendment cannot become retroactively unlawful, and that a subsequent curative amendment does not eliminate the defense of overbreadth.

> "[It is a] strange judicial theory that an act which is lawful when committed (because the statute that proscribes it is overbroad) can become retroactively unlawful if the statute is amended *preindictment.*" 109 S.Ct. at 2639 (Scalia, J. concurring).

Similarly, Justice Brennan unambiguously reiterated exactly what the five Justices had agreed upon:

> "Accordingly, I join Part I of Justice Scalia's opinion holding that a *defendant's overbreadth challenge cannot be rendered moot by narrowing the statute after the conduct for which he was indicted occurred – the only proposition to which five Members of the Court have subscribed in this case.*" 109 S.Ct. at 2642, n.1. (Emphasis added).

Under the *Oakes* rationale, it is clear that no prosecution may proceed in the instant case since the alleged conduct occurred when the Florida obscenity statute was indisputably unconstitutionally overbroad. Accordingly, notwithstanding any subsequent saving judicial construction this Court might render herein, the Florida obscenity statute was void *ab initio,* and consequently, the prosecution may not now proceed against the Petitioners under the statute should the flaws be rectified. *See also Princess Cinema v. Wisconsin,* 292 N.W.2d 807 (Wis. 1980).

CONCLUSION

For all the foregoing reasons, Petitioners respectfully urge this Honorable Court to reverse the judgment of the District Court of Appeal and to remand this cause with instructions to dismiss the information on grounds that the underlying statutes violate the United States and Florida Constitutions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by United States mail to Peggy A. Quince, Esq., 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, and Deborah Brueckheimer, Esq., Assistant Public Defender, P. **O. Box** 9000, Bartow, Florida 33830, on this 13th day of November, 1989.

_____

Robert Jorgensen