An Internal Critique of Paris Adult Theatre I v. Slaton

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**Short Abstract**

This is a critique of the Supreme Court’s majority opinion in *Paris Adult Theatre I v. Slaton*, which endorsed an attempt by authorities in the state of Georgia to enjoin the exhibition of two allegedly obscene films in two privately owned commercial adult theaters. This case was decided in 1973, as a companion case to *Miller v. California*—which has shaped constitutional jurisprudence on the subject matter of obscenity ever since. What this critique purports to show is that the Court’s endorsement was inconsistent with its prior decision in *Stanley v. Georgia*, and that the Court distinguished that case arbitrarily. It also expresses support for Justice Brennan’s dissent in the case.
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I. CASE CONTEXT

In *Miller v. California*, rejecting the claim of a First Amendment freedom of speech right to distribute pornographic pictures through mail advertising, the United States Supreme Court held that a work depicting specifically defined sexual conduct in a fashion deemed “patently offensive” could be regulated if (1) it appealed only to the prurient interest, as perceived by an average person applying contemporary community standards, and (2) it was also found to lack serious value (either literary, artistic, political or scientific)—the “Miller Test” for obscenity.

The Court’s language and decision in *Miller* were grounded for the most part in *Roth v. United States*, which had affirmed a conviction for mailing obscene advertising and an obscene book in violation of a federal statute prohibiting the mailing of obscenity. By 1973 (when *Miller* was decided), *Roth* had established the view that obscene material is generally not protected under the First Amendment *but* its regulation should not interfere with privacy interests. Or, at least, this is how *Roth* had to be construed (i.e. with a qualification) in order to survive the Court’s 1969 decision in *Stanley v. Georgia*. In *Stanley*, the Court protected the possession of obscene material under both the First Amendment and an interest in privacy—where use of the material was assumed to occur “in the privacy of a person’s own home.” Two years after *Stanley*, however, in *United

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4 *Stanley*, 394 U.S. at 564.

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States v. Reidel,\textsuperscript{5} the Court made clear that such right of possession of obscene material would not entail a right to be sold and delivered such material by mail.

Thus, when, in \textit{Miller}, the Court explicitly reaffirmed Roth without overruling Stanley,\textsuperscript{6} it was already clear that the Court had committed to a bifurcated jurisprudence on the regulation of obscene material: one branch for distribution (\textit{Roth} and \textit{Reidel}); one branch for possession (\textit{Stanley}).

\textit{Paris Adult Theater I v. Slaton}\textsuperscript{7} was decided at the same time as, and in light of, \textit{Miller}. The majority opinion in both cases was, indeed, written by the same hand—that of Justice Warren E. Burger. However, where \textit{Miller} had presented a clear case of distribution (through mail advertising), \textit{Paris} arguably resisted immediate classification.

\textbf{II. CASE FACTS}

\textit{Paris} involved a suit by authorities in the state of Georgia to enjoin the exhibition of two allegedly obscene sexually explicit films in two adult theaters open to the paying public. At trial, photographic evidence was admitted showing, as Justice Burger described it, that the single entrance to the theaters was “a conventional, inoffensive theater entrance, without any pictures, but with signs indicating that the theaters exhibit[ed] ‘Atlanta’s Finest Mature Feature Films’.”\textsuperscript{8} On the door itself was a sign saying: “Adult Theatre-You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter.”\textsuperscript{9} No evidence was presented that, in Justice Burger’s

\textsuperscript{5} 402 U.S. 351 (1971).

\textsuperscript{6} See \textit{Miller}, 413 U.S. at 36.

\textsuperscript{7} 413 U.S. 49 (1973).

\textsuperscript{8} \textit{Paris}, 413 U.S. at 52.

\textsuperscript{9} Id.
words, a more “systematic policy” of barring minors had been implemented, apart from posting signs at the entrance; and yet, as Justice Burger also observed, no evidence was presented that minors had ever entered the theaters.  

The trial judge dismissed the suit on the ground that, even assuming that obscenity was established, “the display of [the] films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of [the] films to minors, [was] constitutionally permissible.”  

On appeal, the Georgia Supreme Court unanimously reversed, citing Reidel and distinguishing Stanley. The court held that, even assuming that the theaters effectively barred minors and gave requisite notice to the public of the nature of the films shown, the display of the films in a commercial theatre was still without protection under the First Amendment.

III. MAJORITY OPINION

The United States Supreme Court held that “nothing preclud[ed] the State of Georgia from [regulating] the allegedly obscene material exhibited in [the theaters], provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, [met] the First Amendment standards set forth in [Miller].”  

The Court based its holding on the ruling that “the States have a legitimate interest in [1] regulating commerce in obscene material and in [2] regulating exhibition of obscene material in commerce.”

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10 Id.
11 Id. at 53.
12 Id.
13 Id. at 69.
places of public accommodation, including so-called ‘adult’ theaters from which minors are excluded.”\(^{14}\)

Concerning more particularly the ruling that there is a legitimate state interest in regulating exhibition of obscene material in places of public accommodation, it was clearly the Majority’s view that the consent of adult viewers did not suffice to afford constitutional protection for any obscene material exhibited in adult theatres. Above such consent, the Majority identified a legitimate state interest in “stemming the tide of commercialized obscenity”\(^{15}\) expressing public concerns for the “quality of life” and the “total community environment.”\(^{16}\) What is more, such state interest could command protection “even assuming that it [were] feasible to enforce effective safeguards against exposure to juveniles and to passersby.”\(^{17}\) In effect, the Majority worried with Professor Alexander Bickel that conceding others a right to obtain obscene books or pictures in the market and join in public places (as opposed to one’s home—as in Stanley) would be “to affect the world about the rest of us, and to impinge on other privacies.”\(^{18}\) It dismissed the assumption under Cohen v. California\(^{19}\) that “each of us can, if he wishes, effectively

\(^{14}\) Paris, 413 U.S. at 69 (emphases added).

\(^{15}\) Id. at 57 (emphasis added).

\(^{16}\) Id. at 58.

\(^{17}\) Id. at 57 (emphases added).

\(^{18}\) Id. at 59.

\(^{19}\) 403 U.S. 15 (1971).
avert the eye and stop the ear,”\textsuperscript{20} because “what is commonly read and seen and heard and done intrudes upon us all, want it or not.”\textsuperscript{21}

Hence, in the words of one commentator, the \textit{Paris} Court adopted a decidedly “communitarian” approach.\textsuperscript{22} However, to the extent that the Court’s communitarian approach downplayed the more specific issue of exposure to juveniles and passersby (which was presumably important in \textit{Roth}), it also created a puzzle: once the protection of juveniles and passersby from exposure no longer justifies the regulation of obscenity, what specific status or interest remains in “the rest of us” that could justify such regulation?

The Majority rejected the proposition that state regulation had to be restrained merely because the adverse effects of pornography on people had never been properly demonstrated. Although a 1970 congressional commission report had suggested that no adverse effects could be observed, and had even recommended that laws prohibiting the sale, exhibition or distribution of sexual material to consenting adults be repealed,\textsuperscript{23} \textit{Paris} could still have been one of those cases in which the Court was to defer to the “wisdom” of the people (represented by the government of their state)—and so it did. According to the Majority, on the one hand, it was not the Court’s role to resolve “empirical

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1077 (14th ed. 2001).

uncertainties underlying state legislation”24 and, on the other hand, the legislation at hand in Paris did not “[plainly impinge] upon rights protected by the Constitution itself.”25 (“No communication of ideas prevented,” the opinion later hints.)26

In sum, exploiting Roth, the Paris Court refused to consider the exhibition of obscene material, standing alone, as a form of speech protected by the First Amendment. Furthermore, it distinguished Stanley by emphasizing that, in the latter case, a privacy interest had prevailed solely because the obscene material had been found inside a person’s home. Accordingly, the Majority proceeded as if there had been no invasion of privacy in Paris, even if only because, as it meant to distinguish a commercial theatre from a home, “[the] idea of ‘privacy’ right and a place of public accommodation are … mutually exclusive”27—statement which the Majority justified by stating that it had previously “[declined] to equate the privacy of the home relied on in Stanley with a ‘zone’ of ‘privacy’ that follows a distributor or a consumer of obscene materials whatever he goes.”28

As a result, states would be allowed to prohibit the display of obscene material in all commercial theaters so long as their definition of obscenity passed the Miller test.

The Majority was less detailed in its reasoning behind the ruling that there is a legitimate state interest in regulating commerce in obscene material. Nonetheless, beyond public concerns for the “quality of life” and the “total community environment,” which

24 Paris, 413 U.S. at 60.
25 Id. (emphasis added).
26 Id. at 67.
27 Id.
28 Id. (emphasis added).
might be characterized as concerns with *contemporary* social conditions, the Majority also mentioned the “commercial exploitation of sex”\(^{29}\) (hence stressing the commercial aspect implied in the operation of the theaters) as giving a basis to justify state intervention under a “broad power to regulate commerce.”\(^{30}\) In the Majority’s view, the legislature could have concluded that the commercial exploitation of sex involved in the business of adult theaters contributed to the “debasing” and “distorting” of the important (and, we might add, *enduring*) matter of human sexuality.\(^{31}\)

**IV. JUSTICE BRENNAN’S DISSENT**

Justice Brennan, author of the Court’s opinion in *Roth*, dissented in both *Miller* and *Paris*. He had come to the view that the approach adopted in *Roth* collapsed and jeopardized First Amendment values. What he called the “essence of our problem” was that, in his opinion, nobody had been able to elucidate what obscenity *was* in a way that would have made it discernable from other protected sexual expression.\(^{32}\) (Never mind that one could not discern its adverse effects!) Justice Brennan worried that the resulting “vagueness of the standards in the obscenity area,”\(^{33}\) not evaded even by apposing terms like “serious value” to shield protected speech, on the one hand, could subject people to a standard they did not adequately grasp (occasioning a lack of fair notice),\(^{34}\) and, on the

\(^{29}\) *Id*. at 63.

\(^{30}\) *Paris*, 412 U.S. at 68-69.

\(^{31}\) *Id*. at 63.

\(^{32}\) *Id* at 79.

\(^{33}\) *Id*. at 86.

\(^{34}\) *Id*. 

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other hand, would give state legislatures unbounded power to force a way of thinking.\(^\text{35}\) At the same time, he conceded that the protection of minors and bystanders from allegedly obscene material could remain, somehow, a legitimate state interest.\(^\text{36}\)

What Justice Brennan emphasized was that *Roth* and its progeny had done little to clarify the nature of the state’s interest in specifically controlling access by consenting adults to allegedly obscene material. Instead, he relied more on *Stanley* to support his recognition of a state interest in protecting children and bystanders\(^\text{37}\)—reasoning that obscenity, whatever it is, could at least be said without controversy to threaten unwelcome emotional offense upon persons of that class, thus potentially occasioning an invasion of others’ “privacies.”\(^\text{38}\)

Justice Brennan conceded that the state has a general interest in morality. But in cases involving obscenity, he insisted, the subject was too “ill-defined” to command reason, or not to limit morality to a “speculative interest.”\(^\text{39}\) Hence, if there was to be any regulation of obscenity, then it was probably to be limited to the manner of distribution or circulation of obscene material.

Justice Brennan went on to call for a new approach, not limited to categorizing some specific kind of material as suited for regulation. The approach would not oppose

\(^{35}\) *Id.* at 88.

\(^{36}\) See Paris, 413 U.S. at 107.

\(^{37}\) See Paris, 413 U.S. at 106 (“[The opinion in Stanley] reflected our emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests.”)

\(^{38}\) *Id.*

\(^{39}\) *Id.* at 109.
the suppression of just any sexually oriented expression under the First Amendment, however. Justice Brennan assumed that there was a legitimate state interest at stake, as aforesaid, but seemed to call for further “balancing” (as opposed to “categorizing,” or the establishment of a universal test—like the Miller test—which might only trade off vagueness for overbreadth).\(^{40}\) Moreover, he seemed to encourage the placement of a greater burden upon the state—seemingly inviting greater scrutiny for the sake of protecting a presumed liberty.\(^{41}\)

“Greater scrutiny for the sake of protecting a presumed liberty:” with these words, perhaps a parallel could be drawn between Justice Brennan’s approach and Justice Peckham’s approach in the now infamous case of \textit{Lochner v. New York}\(^{42}\)—a case which has become “synonymous with inappropriate judicial intervention in the legislative process.”\(^{43}\) However, the difference in subject matter between the two cases, and precisely the persistent “vagueness” of the subject matter of \textit{Paris}, could easily justify

\(^{40}\) See \textit{Id.} at 94.

\(^{41}\) See \textit{Id.} at 103 (“Given [the] inevitable side effects of state efforts to suppress what is assumed to be unprotected speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill-effects that seem to flow inevitably from the effort.”)

\(^{42}\) 198 U.S. 45 (1905) (striking down a New York labor law limiting the hours of work for bakery employees as an arbitrary interference with a freedom to contract guarantied by the Fourteenth Amendment of the Constitution, despite conceivable state interests in public health and economic regulation), overruled in part by Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952) and overruled in part by Ferguson v. Skrupa, 372 U.S. 726 (1963).

\(^{43}\) \textsc{Kathleen M. Sullivan & Gerald Gunther, Constitutional Law} 463 (14th ed. 2001).
distinguishing them. As Justice Brennan clearly understood, the “vagueness” of the subject matter of obscenity could make it so difficult to conceive (much less substantiate) the relevant state interest in regulating it (and assess the appropriateness of any means towards regulating it) as to render judicial review altogether derisory.44

V. CRITIQUE OF THE MAJORITY OPINION

The Majority’s implicit view that adult consent does not automatically confer immunity from state regulation is correct. Again, a reference to the Lochner “infamy” might help to emphasize this point—the restrictions traditionally placed on consensual activities such as gambling could be mentioned for example, as in Justice Holmes’ dissent in that case. At the same time, as suggested above, the state’s economic or health interests in Lochner were much more palpable than the state’s interests involved in Paris.45 Likewise, it may also be true that the Court should defer to the factual judgments of legislatures in cases involving “empirical uncertainties,” as the Majority put it.46 At the same time, would this imply that the enactment of witch hunting would be admissible today under judicial review, even if a popular majority ardently supported it? —Probably not. The point is that the history of attitudes about the subject matter of sexuality, which shapes the motives of legislatures for regulating access to obscene material, is likely to reflect just as much harmful superstition as it is clearly presumed by the Court to reflect the people’s “wisdom” in the face of “empirical uncertainties.” (This last point was clearly strengthened by the conclusions and recommendations of the 1970 congressional

44 Trivia: in support of his position, Justice Brennan quoted the observations of Justice Harlan II—grandson of Justice Harlan I, dissenter in Lochner—on the problematic vagueness of the subject matter of obscenity.

45 See supra note 42.

46 See supra Section 3.
committee report.) Coupled with the persistent vagueness of the subject matter of obscenity discussed in Justice Brennan’s dissent, this risk should probably have prompted the Majority to adopt an approach more similar to Justice Brennan’s and, thus, to exercise greater scrutiny of the state’s interest (be it in protecting the “total community environment” or in prohibiting the commercial exploitation of sex), ultimately in order to determine whether the legislation had in fact an irrational basis. That, the Paris Court did not do. Instead, as a result of the Majority’s pious effort to exercise minimum (i.e. rationality-based) scrutiny, it exercised what might be better characterized as cursory scrutiny (a borderline oxymoron—perhaps suggestive of an abandonment of all meaningful scrutiny).

It may seem at first glance that claiming (as Justice Brennan did) that the subject matter of obscenity is so vague as to defy standard justification for state regulation and conceding at the same time (as Justice Brennan did) that the state may still have a legitimate interest in protecting minors and bystanders from allegedly obscene material creates a contradiction. (In fact, Justice Burger touched upon this point in the Miller opinion, in criticism of Justice Brennan’s position.) In other words, how could one identify an interest of the state in protecting minors and bystanders while denying that obscenity could be elucidated? However, Justice Brennan’s view could be clarified by considering that material becomes obscene only subjectively and that, therefore, only

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47 Miller, 413 U.S. at 27 (“Paradoxically, Mr. Justice BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only”).

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those not supposed to access it can be “offended” by it. As aforesaid, he recognized a state interest in protecting children and bystanders by reasoning that alleged obscenity could at least be said without controversy to threaten unwelcome emotional offense or disturbance upon persons of those classes. This interpretation represents a more relativistic approach indeed—in clear contrast with the Majority’s “communitarian” approach.

Furthermore, concerning more particularly the application of the Court’s ruling that there is a legitimate state interest in regulating exhibition of obscene material in places of public accommodation, the Court contradicted itself to the extent that it claimed to recognize *Stanley* and yet justified state intervention in *Paris* by appeal to a general “moral” interest in condemning the viewing of obscene films—unless it was assumed, clumsily, that Stanley was not expected to also watch his films. On this basis, it is clear that “public concerns” could not again reclaim the viewer’s morality. In effect, in its appropriation of *Stanley*, the Majority failed to notice that, had that interest been so great—as the interest in prohibiting the use of drugs might be, for instance—claims based on privacy would probably not have been admissible at all. Thus, the Court’s ruling had to be limited to certain circumstances of exhibition, particularly as to whether such exhibition would affect young or unwilling viewers.

Indeed, more appropriately, the Majority emphasized the “public” aspect of the exhibition involved in *Paris* in order to refute that privacy interests were involved in the case. As aforesaid, the Majority hesitated to concede viewers of obscene material a right to join in public places for their common interest (i.e. viewing obscene films).

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48 See *supra* Section 3.
However, if in the word “public” the Majority meant to emphasize the non-intimate “associational” nature of the activity, it is not so clear that Stanley’s viewing films alone especially granted him privacy—in fact, it is not even clear that Stanley was expected (or could reasonably have been expected) to watch his films alone. He could have invited virtually anyone. Besides, more generally, the viewers of allegedly obscene films could claim a freedom of assembly, and insist that the activity that is their common interest is not in itself illegal (after Stanley) and has the value of a hobby. Nevertheless, a review of the Majority’s ruling and opinion suggests that what was meant to be emphasized was not “association,” but rather the fact that the exhibition was to occur in a “place of public accommodation.”

Accordingly, if, on the other hand, by “public” the Court meant “accessible to all” (pertaining to places of public accommodation), as it reasonably would, it may seem for one moment that, in principle, Paris was really supposed to fall under the distribution branch—like Roth, Reidel and Miller. Those cases involved the public circulation of obscene material through the mailing system, thus with high risks of exposure to minors and bystanders. But, clearly, as taken into consideration by the trial judge, in Paris, some measures were taken to keep minors and bystanders away from the theatres—arguably not enough, but that was another issue. The theatres were really not “accessible to all.” As Justice Burger would admit, a theatre could be expected to screen access to its shows.49 It does not at all, as in Roth, Reidel and Miller, “thrust” obscenity at the public’s face. Nor does its business even create a comparable flow of goods, in that fashion which could be expected to spread obscene articles to the vistas of bystanders and into

49 Paris, 413 U.S. at 59 n.7.
children’s circles. Therefore, although it is true that a commercial theater is not a home, it is also certainly true that, as a controlled, privately owned area, it is much more like a home than a public mailing system.

That the Majority conceded that the theatres might not be “accessible to all” must have been the reason why it felt the need to downplay the matter of exposure and adopt a more “communitarian” approach. However, as stated above, in doing so it created a puzzle: once the protection of juveniles and passersby from exposure no longer justifies the regulation of obscenity, what specific status or interest remains in “the rest of us” that could justify such regulation?

In fact, this puzzle only exposes the logical flaw in the Majority’s approach. For, indeed, minors (presumably incapable of consent), bystanders (unconsenting adults) and consenting adults comprise the entire class of persons potentially interested in the “quality of life” and the “total community environment.” Therefore, where “the rest of us” stands for those who need to be protected, and it is assumed that those to be protected are already effectively shielded from direct exposure, then what remains in “the rest of us” is nothing more than the knowledge that obscene material remains accessible, and that others in the community have access to it. However, were the Majority to rely on such knowledge as a ground for prohibiting the exhibition of obscene films, then it would not only shake up Cohen but also subtly topple Stanley—unless it were assumed, clumsily, that Stanley’s access to his films was expected to be completely ignored by others. This, it seems, the Majority was not willing to do openly.

50 See Court’s language supra Section 3 (“[even] assuming that it [were] feasible to enforce effective safeguards against exposure to juveniles and to passersby…”).
In addition, the distinction that the Majority drew in insisting that *Stanley* involved a *home* is only confusing if it was meant to be based on the proposition that “[the] idea of ‘privacy’ right and a place of public accommodation are … mutually exclusive.” On the one hand, were that unequivocally true, the proposition that distributing obscene material in public creates an invasion of others’ *privacies* would mean nothing. Indeed, persons, not just places, carry some privacy—although, it seems, the Court was arbitrarily willing to contemplate that such privacy “follows” only some persons “whatever they go,” but not others. And, as hinted above, just as persons carry privacy, so could a group of viewers, organized around a common passion, in a privately owned setting controlled for that purpose (i.e. not “accessible to all”).

On the other hand, it may be that the Majority’s insistence on the idea of “places of public accommodation” reveals that it relied upon a third sense of the word “public”: that is, a “metaphysical” sense. In this sense, the Majority may have felt that a privately-owned adult theater, even once it “accommodates” nobody other than adults who consent to be on its premises for the specific purpose of viewing obscene films, retains a certain general property of “publicness,” just by virtue of being, in a sense, “open to the public”—which could provide a basis for a public interest in prohibiting the display of those obscene films on its premises. But it is unclear what could constitute such property other than non-intimate association, accessibility to all and the issues of privacy discussed above. If the Majority chose to allow regulation based on the formless, residual idea of “publicness” behind those elements, then it arbitrarily placed a nearly unbearable

51 *See supra* Section 3.

52 *See Court’s language supra* Section 3.
burden on the possibility that Paris might just fit under Stanley. (Perhaps, more cynical commentators would find in this an explanation why the possibility that the state’s supposed interest in regulating obscenity might stem from superstition did not trouble the Majority at all.)

Finally, something more could be said to address the suggestion that there might be a separate legitimate state interest in regulating commerce in obscene material. This point, barely fleshed out by the Majority, was partly addressed above. First of all, the risk that the proposition that the commercial exploitation of sex contributes to the “debasing” and “distorting” of human sexuality might stem from superstition (and thus have an irrational basis) should have prompted the Court to exercise greater scrutiny of the state’s interest. Second of all, to the extent that the business of adult theaters does not create a flow of goods in that fashion which could be expected to spread obscene articles to the vistas of bystanders and into children’s circles, it is distinguishable from other cases involving commerce in obscene materials.

In addition, by analogy, one could imagine that the protection of sexual culture from commercial exploitation provides states with one ground for the prohibition of prostitution, for instance—in spite of its being a consensual activity. However, had the Paris Court based its decision in Paris on such an example, it would have had to abandon all tolerance for Stanley’s possession (and use), even in the privacy of his home. Indeed, no aspect of prostitution becomes more legal merely because it takes place in the privacy of one’s home.