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Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute

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Civilizing Pornography: The Case For An Exclusive Obscenity Nuisance Statute

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Criminal penalties are increasingly perceived to be too severe for regulating obscenity. Professor Rendleman shares this perception and suggests that we replace criminal obscenity laws with an exclusive civil sanction utilizing injunctions. He proposes a comprehensive nuisance statute and discusses the various issues that arise in the equitable regulation of pornography.

If there ever was a consensus in American society about the proper role of the government in controlling pornography, that consensus is breaking down. To be sure prosecutors continue to enjoy popular support for pursuing the distributors of obscenity. But the distributors have become emboldened by their own commercially lucrative, if silent, public support, and by the growing conviction among civil libertarians that any form of restriction on the availability of sexually explicit expression to consenting adults is incompatible with the first amendment.[1] In the face of this eroding consensus, the law, at least at the state legislative level, is moving slowly but inexorably toward less instrusive methods of regulating obscenity.[2]

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[1] This is the position of Justice Brennan in McKinney v. Alabama, 424 U.S. 669, 678 (1976) (concurring opinion); and in Paris Adult Theater I v. Slaton, 413 U.S. 49, 83-85 (1973) (dissenting opinion). Justice Tobriner articulates this view forcefully in his dissent in Bloom v. Municipal Court, 16 Cal. 3d 71, 86-100, 545 P.2d 229, 239-48, 127 Cal. Rptr. 317, 327-36 (1976).

[2] *See, e.g.*, N.C. GEN. STAT. § 14-190.2 (Supp. 1975); N.D. CENT. CODE §§ 12.1-27.1-01 to 27.1-12 (Repl. Vol., 1976).

As Justice Tobriner of the California Supreme Court has remarked about resistance to this change, "the would-be legislative and judicial King Canutes must fail in ordering back the waves of a cultural revolution."[3]

In the absence of a cultural consensus, the practice of imposing criminal penalties for the distribution of pornography seems harsh and anachronistic. A number of states have begun to supplement criminal punishment with civil sanctions.[4] This article advocates that the states go one step further, and abandon criminal penalties in favor of an exclusive civil remedy providing for injunctive relief against obscenity. Civilizing pornography through obscenity nuisance actions would temper the harshness of the cultural conflict. It would also provide an appropriate way station in the process of cultural transformation.

The article does not discuss the issues involved in defining constitutionally suppressable obscenity.[5] Others have addressed the definitional problems with skill and erudition.[6] Rather, the focus is

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[3] Bloom v. Municipal Court, 16 Cal. 3d 71, 99, 545 P.2d 229, 248, 127 Cal. Rptr. 317, 336 (1976) (dissenting opinion).

[4] Thus, civil actions have been brought against theaters, *see, e.g.*, N.D.D., Inc. v. Faches, 385 F. Supp. 276 (N.D. Iowa 1974); Airways Theater, Inc. v. Canale, 366 F. Supp. 343 (W.D. Tenn. 1973); Grove Press, Inc. v. Flask, 326 F. Supp. 574 (N.D. Ohio 1970), *vacated*, 413 U.S. 902 (1973); and against bookstores. *See, e.g.*, Speight v. Slaton, 415 U.S. 333 (1974); Classic Distribs., Inc. v. Zimmerman, 387 F. Supp. 829 (M.D. Pa. 1974); People v. Goldman, 7 Ill. App. 3d 253, 287 N.E.2d 177 (1972); State *ex rel.* Blee v. Mohney Enterprises, 154 Ind. App. 244, 289 N.E.2d 519 (1972); Giarrusso v. New Orleans Book Mart, Inc., 304 So. 2d 734 (La. Ct. of App. 1974); McNary v. Carlton, 527 S.W.2d 343 (Mo. 1975); State *ex rel.* Field v. Hess, 540 P.2d 1165 (Okla. 1975). Some actions have been brought against both theaters and bookstores. *See, e.g.*, General Corp. v. Sweeton, 365 F. Supp. 1182 (M.D. Ala. 1973), *vacated and remanded sub nom.* MTM, Inc. v. Baxley, 420 U.S. 799 (1975); People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied*, 429 U.S. 922 (1976).

[5] *See generally* Miller v. California, 413 U.S. 15 (1973), in which the Supreme Court enunciated the following test for determining whether expression is constitutionally unprotected obscenity:

> The basic guidelines for the trier of fact must be: (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.

Id. at 24. The Court provided the following examples of the types of specifically defined sexual depictions that could be proscribed under part (b) of the test:

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

Id. at 25.

[6] *See, e.g.*, F. SCHAUER, THE LAW OF OBSCENITY 69-166 (1976); Lockhart, *Escape from the*

on the consequences of different ways of regulating unprotected obscenity. The article begins by considering the case against criminal regulation. It concludes that a civil remedy is preferable, and proposes a civil statute that displaces criminal obscenity laws. The issues involved in equitable regulation of obscenity are then discussed in light of the proposed statute. Particular attention is given to the need to reconcile equitable regulation with the constitutional proscription of prior restraints.

I. Alternative Sanctions for Regulating Obscenity

Societies regulate repugnant conduct in a variety of ways, ranging from criminal sanctions to social ostracism and moral condemnation.[7] This article is concerned with the relative merits and demerits of the two most commonly encountered legal sanctions for the dissemination of obscenity—criminal punishment and civil injunctions.

The differences between criminal and equitable regulation may at first seem inconsequential. Both establish a legal rule forbidding certain conduct and impose unpleasant consequences upon a violator—criminal punishment or contempt—for the infraction of this rule.[8] The differences are even more elusive when the legislature adds a statute to the criminal code allowing the state to seek injunctions of criminal obscenity.[9] Injunctive control of obscenity, the Supreme Court has understated, "is more akin to a criminal prosecution than are most civil cases."[10]

There are, however, at least four important differences between injunctions and criminal regulation. First, the civil procedure followed in obtaining injunctive relief is not encumbered by the special barriers created for the protection of criminal defendants, barriers that reflect the preference of our system for freeing the guilty rather than convicting the innocent. Of particular importance are the guarantee of trial by jury and the requirement of proof beyond a reasonable doubt, neither of which is found in a proceeding in equity.[11]

Second, an injunction, unlike a criminal statute, is personalized and precise. An injunction singles out the defendant, identifies

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Chill of Uncertainty: Explicit Sex and the First Amendment, 9 Ga. L. Rev. 533 (1975).

[7] *See* H. Packer, The Limits of the Criminal Sanction 320 (1968).

[8] *See id.* at 18-21.

[9] *See, e.g.*, N.D. Cent. Code §§ 12.1-27.1-01 to 27.1-12 (Rep. Vol. 1976).

[10] Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

[11] *See* People v. Lim, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941).

the discrete material that is obscene, and warns the defendant to cease distributing this material. A criminal statute, in contrast, provides only a generalized warning to all the world phrased in terms of an abstract definition.

Third, an injunction is directed toward regulating future conduct instead of punishing past conduct.[12] An injunction in effect requires two violations before the state may punish the violator. As a result, after being enjoined, the defendants go home; after losing a criminal prosecution, they may not. Moreover, although some stigma and economic loss undoubtedly attach to being enjoined,[13] the social and financial impact of incarceration is undoubtedly greater.[14] Thus, most potential offenders would prefer an injunction to a criminal conviction, with its potential loss of liberty and other collateral consequences.[15]

Fourth, the sanctions for violation differ. Although criminal contempt for breach of an injunction is manifestly retributive,[16] contempt in general is not congruent with criminal punishment. Rather, contempt shares the remedial flexibility that characterizes all forms of equitable relief. When a defendant violates an injunction, the court may impose compensatory sanctions, designed to restore a wronged party to the status quo, or coercive sanctions, designed to achieve compliance.[17] At the same time, contempt has a draconian aspect not shared by penal sanctions. The court asks only two questions in a contempt proceeding: Did the contemnor know of the injunction? And did the contemnor violate the injunction? If these questions are answered in the affirmative, the collateral bar rule allows the court to punish the contemnor even if he was engaged in constitutionally protected conduct.[18] This seems harsh. But if a defendant has received notice of the injunction and has had a full opportunity to litigate its issuance, the collateral bar in contempt is not too great a price to pay for orderly decisionmaking and respect for the courts.[19]

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[12] *See* Littleton v. Fritz, 65 Iowa 488, 496-97, 22 N.W. 641, 646 (1885).

[13] *Cf.* SEC v. Coffey, 493 F.2d 1304, 1310 (6th Cir. 1974) (appellants claimed injunction endangered their livelihood).

[14] See H. PACKER, *supra* note 7, at 36.

[15] *See* O. FISS, INJUNCTIONS 154 (1972); R. RANDALL, CENSORSHIP OF THE MOVIES 147-50 (1968); C. REMBAR, THE END OF OBSCENITY 228 (1968).

[16] *Cf.* Maita v. Whitmore, 508 F.2d 143 (9th Cir. 1974) (sixth amendment right to jury trial in contempt proceedings for violation of injunction to be determined by same standards applicable to criminal offenses).

[17] D. DOBBS, REMEDIES § 2.9 at 98-101 (1973).

[18] Walker v. City of Birmingham, 388 U.S. 307 (1967).

[19] *See* Rendleman, *Toward Due Process in Injunction Procedure,* 1973 U. ILL. L.F. 121.

A. The Case Against Criminal Sanctions

The criminal approach to the control of obscenity seems more repressive and anachronistic every day. Perhaps the major problem is that obscenity doctrine is simply too arcane and unpredictable to support criminal sanctions. As Justice Douglas has asserted, "to send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process."[20] Justice Stevens has also recently added his voice to those critics who contend that the line between offensive and inoffensive communication is too blurred to identify criminal conduct.[21]

The severity of criminal sanctions is itself partly responsible for the unpredictability of obscenity law. Merchants cannot learn what is forbidden until the factfinder has rendered its verdict, but because few are willing to risk imprisonment, the precise standards delimiting protected and unprotected sexually explicit expression remain largely unknown. Undoubtedly, distributors are inhibited from disseminating sexually explicit material that would not ultimately be found to be obscene.

Criminal penalties not only have a chilling effect on first amendment rights, they also impede the effective suppression of genuine obscenity. Because of our solicitude for personal liberty and our desire to protect individuals from state power, we have encumbered the criminal law with prophylactic rules. These rules increase the complexity of criminal prosecutions, and suppressable obscenity may escape interdiction because the authorities have violated a defendant's procedural rights. Moreover, criminal proceedings are expensive and protracted, and officials may decide that scarce prosecutorial resources are better spent elsewhere.

Criminal laws against obscenity also share the disadvantages of sumptuary laws in general. Consumption of pornography, like consumption of liquor, narcotics, or the services of prostitutes, is a "victimless" crime, in which there is no harmed person to complain to the authorities. To enforce this type of law, the authorities must participate in the forbidden commerce. This leads to unseemly and overreaching enforcement tactics[22] and diverts police from protect-

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But see In re Berry, 68 Cal. 2d 137, 155-56, 436 P.2d 273, 285-86, 65 Cal. Rptr. 273, 285-86 (1968) (collateral bar dropped).

[20] Miller v. California, 413 U.S. 15, 43-44 (1973) (dissenting opinion).

[21] Smith v. United States, 97 S.Ct. 1756 (1977) (dissenting opinion). *See also* Ward v. Illinois, 97 S.Ct. 2085 (1977) (dissenting opinion); Marks v. United States, 97 S.Ct. 990, 996 (1977) (concurring in part and dissenting in part).

[22] *See* H. PACKER, *supra* note 7, at 151.

ing people and property.

Moreover, there is some evidence that sumptuary criminal statutes actually stimulate crime. Prohibition illustrates that when the legislature declares a commodity illegal, a criminal market develops. The criminal sanction, by increasing the risk to sellers, decreases the number of sellers in the market and raises the price of the forbidden commodity. The sellers may then use the profits from their quasi-monopoly to corrupt the enforcers or finance other criminal enterprises.[23]

Criminal proscriptions often repose on the statute books long after they have become superannuated by the passage of time or by conscious hypocrisy. However, society informally tolerates much that it formally forbids and it is possible to argue that these statutes are justified for their symbolic value, incorporating aspirations or ideals that society fails to observe strictly. The response to this line of reasoning is twofold. First, widespread violation of unenforced legislation draws the rest of the law into disrepute. Second, leaving largely unenforced statutes on the books creates the potential for abuse of prosecutorial discretion through selective enforcement against minorities or politically disfavored groups.[24]

Civil remedies would not eliminate all of the difficulties generated by the use of criminal sanctions. But civil jurisdiction would ameliorate most of the adverse consequences produced by criminal regulation. Before turning to consideration of the civil alternatives, however, a closer examination of the unique dangers of a regime allowing both civil and criminal sanctions is required.

B. The Perils of Dual Sanctions

Several states supplement criminal penalties for the regulation of pornography with equitable remedies. Parallel sanctions are not unique to obscenity regulation. At the turn of the century, dual remedies existed to curb both saloons and houses of prostitution, nuisances that involve cultural conflict, a forbidden commodity, and a victimless offense, as does modern obscenity. But as applied to pornography the solution of parallel remedies contains a potential for prosecutorial harassment that could easily chill free expression. For this reason dual remedies for obscenity are unwise, and legislatures would be well advised to repeal criminal obscenity and replace it with an exclusive civil statute. This conclusion is supported by

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[23] *Id.* at 278-79.

[24] *See generally* K. DAVIS, POLICE DISCRETION (1975).

examining obscenity litigation and the relationship between criminal and civil actions.

The requirement that an equitable judgment be obtained before beginning a criminal prosecution for obscenity has often been hailed as a way of curing the inherent vagueness of criminal obscenity statutes,[25] for declaratory judgments or injunctions allow obscenity to be determined without the immediate threat of criminal sanctions. Justice Douglas has argued that "until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained."[26] The President's Commission on Obscenity and Pornography recommended that a civil declaration normally be a prerequisite for a criminal prosecution.[27] And because of the "*in terrorem* effect"[28] of criminal sanctions, a majority of the Supreme Court approved the use of prior civil procedures to determine whether the material sought to be suppressed is protected by the first amendment.[29]

> Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him. . . .[30]

Civil notice decreases self-censorship and advances a first amendment goal—the "dissemination of constitutionally protected literature."[31]

However, adding a civil remedy brings an additional weapon to the prosecutorial arsenal. When public passion against "filth" runs high, the authorities not infrequently single out particular purveyors and concentrate prosecutorial resources on them. The reporters are replete with examples of multiple seizures and arrests.[32] Regard-

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[25] *See, e.g.*, Miller v. California, 413 U.S. 15, 42-43 (1973) (Douglas, J., dissenting); McNary v. Carlton, 527 S.W.2d 343, 350 (Mo. 1975) (Seiler, C.J., dissenting and concurring in result); UNITED STATES COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 63 (1970) [hereinafter cited as COMM'N ON OBSCENITY]; F. SCHAUER, *supra* note 6, at 197-98.

[26] Miller v. California, 413 U.S. 15, 41 (1973) (dissenting opinion).

[27] COMM'N ON OBSCENITY, *supra* note 25, at 63; Lockhart, *supra* note 6, at 569. *See also* MASS. GEN. LAWS ANN. ch. 272, § 28I (Supp. 1977).

[28] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

[29] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973).

[30] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

[31] McKinney v. Alabama, 424 U.S. 669, 683 (1976) (Brennan, J., concurring).

[32] *See, e.g.*, Universal Amusement Co. v. Vance, 404 F. Supp. 33, 46-56 (S.D. Tex. 1975).

less of the outcome, a series of legal actions burdens the merchant with uncertainty and attorney's fees. A period of sustained pressure may result in a "gentlemen's agreement" between a merchant and the authorities, or may result in the merchant acceding to self-regulation, the most effective form of prior restraint. Multiple suit harassment may even destroy a small and vulnerable business.

Furthermore, when multiple remedies are available, nothing prevents the authorities from maintaining contemporaneous actions against a defendant. The authorities may proceed, in single or in separate actions, with as many legal theories as they possess: zoning violations, building code infractions, public nuisance, and criminal charges.[33] But nuisance or other civil actions are more than merely another string for a prosecutor's bow. Since nontestimonial civil evidence can frequently be used in a later criminal prosecution,[34] defendants may suspect, perhaps accurately, that the authorities have resorted to equity to discover for the criminal prosecutor. An equitable proceeding may also be an end in itself if it allows ex parte procedure or injunctions that close a nuisance down,[35] or it may be a refuge from juries and proof beyond a reasonable doubt.

Normally res judicata and, to a lesser extent, stare decisis protect a defendant from a plaintiff's multiple suit harassment. Brief examination shows, however, that res judicata provides scant protection against harassment where dual remedies are available. One reason for this is that the regionally variable standard of obscenity adopted by *Miller v. California*[36] dilutes the res judicata and precedential value of all obscenity judgments. Because obscenity turns on the way the audience perceives the material instead of on the material itself, a judgment's effect may be limited to the territory occupied by that audience.[37] Something legally obscene in Washington, North Carolina, may be standard fare a few hundred miles

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[33] *See, e.g.*, Llewelyn v. Oakland County Prosecutor's Office, 402 F. Supp. 1379 (E.D. Mich. 1975).

[34] *See, e.g.*, Taylor v. State *ex rel.* Kirkpatrick, 529 S.W.2d 692, 697 (Tenn. 1975); N.D. CENT. CODE § 12.1-27.1-06(4) (Repl. Vol. 1976).

[35] *See, e.g.*, State v. Gulf Theatres, Inc., 270 So. 2d 547, 555-57 (La. 1972) (Tate, J., dissenting), *vacated and remanded*, 412 U.S. 913 (1973), *rev'd. on remand*, 287 So. 2d 496 (La. 1974), *cert. denied*, 417 U.S. 911 (1974).

[36] 413 U.S. 15 (1973).

[37] *See, e.g.*, N.C. GEN. STAT. § 14-190.2(f) (Supp. 1975) (judgment not res judicata outside judicial district); United Theatres of Florida, Inc. v. State, 259 So. 2d 210, 212 (Fla. Dist. Ct. App. 1972), *modified*, 323 So. 2d 309 (Fla. Dist. Ct. App. 1975) (injunction against showing of obscene materials may not run throughout the state); State *ex rel.* Little Beaver Theatre, Inc. v. Tobin, 258 So. 2d 30, 32 (Fla. Dist. Ct. App. 1972) (same); F. SCHAUER, *supra* note 6, at 221.

north in Washington, D.C.[38] Thus, a regional or national distributor of sexually explicit material often cannot obtain a definitive answer to the question whether particular material is obscene.

Where parallel remedies are permitted, the order in which civil or criminal proceedings are brought and the outcome of the initial proceeding are also of critical importance in determining the res judicata effect of the prior judgment. A prior successful criminal prosecution may ease a later civil action to enjoin an obscenity nuisance. In some jurisdictions, statutes provide that criminal conviction is either conclusive proof[39] or prima facie evidence[40] that a nuisance exists.[41] And under standard preclusion doctrine the state may employ res judicata to enjoin a convicted criminal defendant from continuing to exhibit or sell the matter litigated and determined to be obscene.[42]

On the other hand, an unsuccessful prior criminal prosecution may have no effect on a later civil suit, for the state's failure to show guilt beyond a reasonable doubt in a criminal trial does not preclude it from attempting, in a later civil action, to meet the less rigorous preponderance standard.[43] Nevertheless, the Iowa Supreme Court, in a liquor nuisance appeal, held that a criminal acquittal precluded the state from maintaining an equitable suit to condemn the liquor as a nuisance.[44] Professor Vestal criticized this decision for ignoring the differing standards of proof.[45] Perhaps the Iowa court interposed the shield of res judicata through concern for the policies that require a plaintiff to elect his remedies and that forbid splitting a cause of action—repose for the defendant, the preservation of scarce

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[38] *See* Miller v. California, 413 U.S. 15, 32 (1973); United States v. McManus, 535 F.2d 460, 464 (8th Cir. 1976); McNary v. Carlton, 527 S.W.2d 343, 347-48 (Mo. 1975); Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion*, 7 SETON HALL L. REV. 543, 569-70 (1976).

[39] *See, e.g.*, ALA. CODE tit. 7, § 1107 (1960); IND. CODE § 35-30-10.5-10 (1973).

[40] *See, e.g.*, OHIO REV. CODE ANN. § 3767.05 (1953).

[41] Though a provision of the latter type was attacked in an Ohio case as reversing the burden of proof, the state had there already proved obscenity beyond a reasonable doubt, and the owner had had an opportunity and the incentive to contest the criminal charge. Grove Press, Inc. v. Flask, 326 F. Supp. 574, 579 (N.D. Ohio 1970).

[42] *See* Raleigh v. United States, 351 A.2d 510 (D.C. Ct. App. 1976); A. VESTAL, RES JUDICATA PRECLUSION V-374-78, V-411 (1969); Edelstein & Mott, *supra* note 38, at 583; F. SCHAUER, *supra* note 6, at 219-22. Some states vest the criminal court with power to enjoin the obscenity upon the entry of the criminal judgment. *See, e.g.*, COLO. REV. STAT. § 18-7-105 (1973).

[43] *See* State *ex rel.* Threlkeld v. Osborne, 207 Iowa 636, 223 N.W. 633 (1929); A. VESTAL, *supra* note 42, at V-368; Edelstein & Mott, *supra* note 38, at 584-85.

[44] State *ex rel.* Hanrahan v. Miller, 250 Iowa 1358, 96 N.W.2d 474, 477 (1959).

[45] A. VESTAL, *supra* note 42, at V-370.

judicial resources, and the protection of citizens from harassment. But the Iowa decision is an exception to standard preclusion doctrine.

What effect does a judgment for the defendant in a civil injunction action have on a later criminal prosecution? Here the preclusion rules should combine with res judicata to bar the second lawsuit. If the government fails to prove obscenity by a preponderance of the evidence, then the court should forbid it from attempting to prove the same issue beyond a reasonable doubt.[46]

Finally, there is the troubling question of the effect of a judgment of obscenity in an earlier civil action on a later criminal case. As we have seen, because the civil action's warning features obviate much of the uncertainty of obscenity law, the use of prior civil judgments appeals to many. But there are a number of difficulties with this approach.[47] Under traditional res judicata principles, when the government wins a civil nuisance suit, it cannot take advantage of that decision in a later criminal prosecution for the same conduct. Proof by a preponderance of the evidence in the earlier nuisance action falls short of proof beyond a reasonable doubt in a criminal prosecution.[48] In some jurisdictions a civil judgment creates a presumption of guilt or establishes an element of the crime.[49] But the state must prove each element of a criminal case beyond a reasonable doubt[50] and must allow the criminal defendant the opportunity to confront and cross-examine the state's witnesses.[51] "In light of the command of the First Amendment," Justice Brennan reminds us, "a standard of proof by a mere preponderance of the evidence poses too substantial a danger that protected material will be erroneously suppressed."[52] Thus, in order to bind a later criminal prosecution, the burden of proof in the civil case should equal or exceed proof beyond a reasonable doubt.[53] Moreover, while a criminal defendant is entitled to demand a jury trial, the civil nuisance may be judge tried; and res judicata doctrine cannot be used to deprive defendants of a jury trial on an issue properly triable to a jury.[54]

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[46] *See* A. VESTAL, *supra* note 42, at V-368; Edelstein & Mott, *supra* note 38, at 584.

[47] *See generally* People v. Lim, 18 Cal. 2d 872, 118 P.2d 472 (1941).

[48] A. VESTAL, *supra* note 42, at V-366; Edelstein & Mott, *supra* note 38, 582-83.

[49] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 28H (Supp. 1977) (civil action creates conclusive presumption of knowledge of book's obscenity); VA. CODE § 18.2-384(13) (Repl. Vol. 1975) (civil action establishes scienter).

[50] *See In re* Winship, 397 U.S. 358, 364 (1970).

[51] *See* Pointer v. Texas, 380 U.S. 400, 403-06 (1965).

[52] McKinney v. Alabama, 424 U.S. 669, 685 (1976) (Brennan, J., concurring).

[53] *Id.* at 687.

[54] *See* Rachal v. Hill, 435 F.2d 59, 63-64 (5th Cir. 1970) (relying on Beacon Theatres, Inc.

An important recent decision directly bearing on this problem is *McKinney v. Alabama*,[55] in which the Supreme Court unanimously struck down a state statute that permitted material previously declared obscene in a civil action to be introduced in a criminal proceeding, with the criminal defense limited to whether the material had been knowingly sold. Since the defendant had not been a party to the civil action, he was effectively precluded from refuting the charge that the material was obscene. The Court viewed with grave misgivings any procedure that purports to bind a later determination unless everyone the state presumes to bind by the first procedure receives notice and an opportunity to be heard.

Although an earlier civil action should not have a preclusive effect in a later criminal prosecution, there are at least two other ways in which a civil judgment may lead to the imposition of punitive sanctions in a later proceeding. First, the civil judgment may be admissible and relevant in a criminal trial as tending to prove scienter—that the merchant was aware of the nature of the material in question.[56] Second, if the civil decision is an injunction, subsequent criminal prosecution does not prevent the state from also punishing the defendant for contempt.[57] The palpable unfairness of this double barrelled sanction for the same conduct may not escape interdiction under the double jeopardy clause.[58]

In summary, res judicata restricts some extravagances and ameliorates some injustices of a system of dual sanctions. But the availability of criminal prosecution to the government, the differing burdens of proof in civil and criminal trials, and the regional variations in the standard of obscenity all reduce the effectiveness of the shield of res judicata. So long as both civil and criminal remedies exist, multiple and harassing prosecutions are possible. This points to the desirability of a single sanction. Moreover, the procedural complexities under two systems argue for the relative simplicity of a single remedy.

The potential for abuse created by a regime of dual remedies

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v. Westover, 359 U.S. 500, 510-11 (1959)), *cert. denied*, 403 U.S. 904 (1971). *But see* Crane Co. v. American Standard, Inc., 490 F.2d 332, 343 n.15 (2d Cir. 1973).

[55] 424 U.S. 669 (1976).

[56] *See generally* C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 318 (2d ed. 1972).

[57] *See In re* Debs, 158 U.S. 564, 594 (1895).

[58] *Cf.* Ashe v. Swenson, 397 U.S. 436 (1970) (fifth amendment guarantee against double jeopardy embodies collateral estoppel as a constitutional requirement); Waller v. Florida, 397 U.S. 387 (1970) (second trial in state court for offense based on same facts that supported conviction in earlier trial in municipal court constituted double jeopardy). *But cf.* Bartkus v. Illinois, 359 U.S. 121 (1959) (due process does not bar state prosecution for violation of state criminal law after prior acquittal for federal offense involving same evidence).

could of course be eliminated by repealing either criminal or civil sanctions or both. The author assumes that society is not ready to substitute extralegal sanctions like ostracism and social condemnation for legal coercion. And if a legal remedy is to be chosen, the advantages of criminal sanctions are outweighed by the advantages of civil sanctions.

The costs of criminal obscenity were alluded to earlier: the unfairness of imposing criminal penalties in an area permeated with definitional vagueness and inconsistency, the complexity and expense of criminal prosecutions, and the victimless nature of obscenity infractions. The benefits of criminal regulation of obscenity are, on the other hand, fairly elusive. Professor Lockhart has argued that the authorities need the criminal sanction because of the delay inherent in securing a "final" civil judgment.[59] But he underestimates the potency of injunctive relief, for protection against the distribution of obscenity need not await a "final" injunction. A court may enjoin the altering or transporting of allegedly obscene material immediately and without notice,[60] and may issue an interlocutory injunction against dissemination on short notice.[61] A merchant who ignores these injunctions may be held in contempt. On the other hand, both civil and criminal procedure compel the state to let distributors of alleged obscenity remain open for business until an adversary adjudication has taken place.[62] Thus, so long as the Constitution demands certainty before expressive activity may be curbed, both civil and criminal jurisdictions will allow some unprotected material to escape.

Perhaps the strongest reason for retaining criminal statutes is the symbolic value of such statutes as an expression of a community's moral outrage with the purveyors of obscenity. Certainly, it would require great courage for a legislator to vote to repeal criminal obscenity laws. Perhaps it is for this reason that a complete break with the practice of regulating obscenity criminally has yet to be achieved. The President's Commission recommended that a civil declaration be a prerequisite for criminal prosecution, but would allow the authorities to proceed criminally first when material is "unquestionably within" the category of obscenity.[63] Even the

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[59] Lockhart, *supra* note 6, at 570-71.

[60] *See* text and notes at notes 158-166 *infra.*

[61] *See* text and notes at notes 150-152 *infra.*

[62] *Cf.* Heller v. New York, 413 U.S. 483, 492-93 (1973) (first amendment requires that seized film be returned or copied so that showings may continue pending adversary proceedings).

[63] COMM'N ON OBSCENITY, *supra* note 25, at 63; Lockhart, *supra* note 6, at 572.

new statutory approach adopted by North Carolina retains dual remedies, permitting criminal prosecution when a merchant persists in conduct that has previously been condemned in a civil proceeding.[64] However, in a period of waning consensus about the propriety of obscenity regulation, the moral symbolism of criminal prosecutions seems unduly harsh and repressive. Certainly, if civil regulation can be shown to be equally, or more, effective in actually controlling the distribution of obscene material, we can well afford to abandon a symbol of a certitude that no longer exists.

Today both parties in the cultural struggle over obscenity are united in favor of civil regulation—prosecutors disgruntled with the complexities of the criminal process and merchants and their libertarian allies horrified by the prospect of imposing criminal sanctions on a bookseller. The merchants favor abandoning criminal sanctions; the prosecutors, on the other hand, favor adding civil remedies without disturbing the criminal sanction. However, if we are interested in effective regulation with a minimum of abrasion, the authorities need only a civil remedy. The most effective course is a fresh start: abolition of the harsh and anachronistic criminal sanction, and exclusive reliance on a more humane civil remedy.

II. The Need for Statutory Reform

One who expects to find little civil obscenity litigation will be surprised. The President's Commission reported in 1970 that eighteen states had authorized in personam injunctions against obscenity, and that five allowed in rem injunctions.[65] Since then, civil actions against obscenity have reached reported decisions in at least twenty-four states,[66] and the Supreme Court has rendered several decisions on various aspects of obscenity nuisance.[67]

Although the majority of reported civil obscenity judgments are in personam, a minority of states have in rem obscenity nuisance statutes[68] that permit a plaintiff to bring an action against the

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[64] N.C. Gen. Stat. § 14-190.2 (Supp. 1975).

[65] Comm'n on Obscenity, *supra* note 25, at 332.

[66] According to the author's research, since 1970 declaratory judgments or injunctions involving obscenity have reached reported decisions in Alabama, Arkansas, Arizona, California, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Vermont.

[67] *See, e.g.*, McKinney v. Alabama, 424 U.S. 669 (1976); MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Maness v. Meyers, 419 U.S. 449 (1975); Speight v. Slaton, 415 U.S. 333 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Mitchum v. Foster, 407 U.S. 225 (1972).

[68] *See, e.g.*, Mass. Gen. Laws Ann. ch. 272, §§ 28C-28H (Supp. 1977); Va. Code § 18.2-

"obscene" property itself.[69] When in personam and in rem injunctions are analyzed, however, the differences are not significant enough to compel separate treatment.[70]

In rem orders, like in personam decrees, may be enforced in later contempt proceedings against a party. Moreover, in jurisdictions having both criminal and civil sanctions for obscenity, an in rem decree, like an in personam judgment, may provide the basis for subsequent criminal prosecution.[71] And constitutional safeguards apply to in rem and in personam injunctions alike.[72] Thus, in *McKinney v. Alabama*[73] the Supreme Court established that an in rem decision cannot attain a preclusive effect beyond the parties to the action or persons closely related to the parties. The practical effect of this ruling is to make the scope of in rem orders little different from that of in personam decrees.

Yet, theoretically, in personam and in rem actions result in different remedies. In personam actions end with total abatement of the nuisance, or shutdown orders, while in rem actions proceed item by item. However, recent decisions overturning in personam shutdown injunctions on constitutional grounds have effectively destroyed this distinction.[74] Further, both in rem and in personam injunctions ameliorate the asperities and uncertainties of criminal prosecutions by resolving obscenity challenges civilly. The important difference is not between in rem and in personam, but between civil and criminal.

Many states have enacted nuisance statutes specifically designed to control the distribution of pornography.[75] In other states, the authorities have sought injunctions against obscenity under "general public nuisance" laws not drafted with pornography in mind. Serious problems attend this latter practice. General public

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384(2)(a) (Repl. Vol. 1975). *See generally* F. SCHAUER, *supra* note 6, at 197-98.

[69] *See* COMM'N ON OBSCENITY, *supra* note 25, at 332.

[70] One possible distinction is that a proprietor may face less personal stigma when the authorities place an allegedly obscene film or book on trial than when the proprietor is himself charged with distributing obscenity.

[71] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 28I (Supp. 1977); VA. CODE § 18.2-384(13) (Repl. Vol. 1975).

[72] *See* McKinney v. Alabama, 424 U.S. 669, 674 (1976).

[73] McKinney v. Alabama, 424 U.S. 669 (1976). *See* Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue.") (dictum).

[74] *See, e.g.*, New Riviera Arts Theatre v. State *ex rel.* Davis, 219 Tenn. 652, 660, 412 S.W.2d 890, 894 (1967).

[75] *See, e.g.*, N.C. GEN. STAT. § 14-190.1 (Supp. 1975); N.D. CENT. CODE § 12.1-27.1-01 (Repl. Vol. 1976).

nuisance laws suffer from vagueness, overbreadth, and procedural anachronisms that have little place in litigation that raises sensitive first amendment issues.

The law imprecisely defines a nuisance as an unreasonable use of property that hampers another's use and enjoyment of property. Not surprisingly, the concept has earned the deprecating remark that a nuisance is "a good word to beg a question with."[76] Traditionally, nuisances have been divided into public and private: a public nuisance affects the public at large; a private nuisance affects only one individual or a limited group of individuals. Courts have held that the legislature may define what constitutes a public nuisance and confer equitable jurisdiction to abate it.[77]

"Redlight" abatement statutes were generally enacted early in this century for the purpose of shutting down properties used for "lewdness, assignation, or prostitution."[78] Through a two-step process of extension, these statutes have been construed to include "lewd" entertainment,[79] and then, in some jurisdictions, bookstores and theaters exhibiting "lewd" fare.[80] This process of judicial extension is exemplified by the recent decision of the California Supreme Court in *People ex rel. Busch v. Projection Room Theater.*[81] The California public nuisance statute condemns activity that is "indecent" or "offensive to the senses."[82] Refusing to distinguish a pre-World War I decision that abated "an attraction known as the 'Sulton's Harem' conducted at the Panama-California International Exposition," the court could discern "no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and 'live'

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[76] Thayer, *Public Wrong and Private Action,* 27 HARV. L. REV. 317, 326 (1914).

[77] *See, e.g.,* Eilenbecker v. Plymouth County, 134 U.S. 31 (1890); Mugler v. Kansas, 123 U.S. 623 (1887); Carleton v. Rugg, 149 Mass. 550, 22 N.E. 55 (1889).

[78] *See, e.g.,* ILL. REV. STAT. ch. 100 1/2, § 1 (1975). The seminal statute was that of Iowa. Law of April 3, 1884, ch. 143, § 12, 1884 Iowa Laws 146. *See* 20 COLUM. L. REV. 605 (1920).

[79] *See, e.g.,* Maita v. Whitmore, 365 F. Supp. 1331 (N.D. Cal. 1973), *rev'd on other grounds,* 508 F.2d 143 (9th Cir. 1974), *cert. denied,* 421 U.S. 947 (1975); People *ex rel.* Hicks v. "Sarong Gals," 27 Cal. App. 3d 46, 103 Cal. Rptr. 414 (1972); City of Chicago v. Geraci, 30 Ill. App. 3d 699, 332 N.E.2d 487 (1975) (masturbatory massage parlor); Washington Post, Feb. 17, 1974, § 1, at 12, col. 7 (homosexual health club is nuisance per se).

[80] *See, e.g.,* MTM, Inc. v. Baxley, 420 U.S. 799 (1975); General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 320 So. 2d 668 (1975), *cert. denied,* 425 U.S. 904 (1976); Harmer v. Tonylyn Productions, Inc., 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (1972); State v. Gulf States Theatres, Inc., 270 So. 2d. 547 (La. 1972), *vacated and remanded,* 413 U.S. 913 (1973), *rev'd on remand,* 287 So. 2d 496 (La.), *cert. denied,* 417 U.S. 911 (1974).

[81] 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied,* 429 U.S. 922 (1976); Note, *The Devil and the D.A.: The Civil Abatement of Obscenity,* 28 HASTINGS L.J. 1329 (1977).

[82] CAL. PENAL CODE §§ 370-371 (West 1957); CAL. CIV. CODE §§ 3479-3480 (West 1970).

performances on the other."[83]

At one level, decisions such as *Busch* can be faulted for extending judicial equitable powers without the explicit sanction of the legislature.[84] As Justice Tobriner noted in his dissent, "courts of equity enjoy no roving commission to define public nuisances; they may abate only such nuisances as the Legislature declares."[85] He further pointed out that the California Assembly and the state's citizens had recently rejected a proposal for injunctive control of obscenity;[86] and he also stated that "there is no hint in the statutes or the cases construing them that conduct can constitute a public nuisance simply because some people stand philosophically opposed to it."[87] Obscenity nuisances could not subsist under the public nuisance statute, he argued, because the nuisance was not public, the definitions were too vague, and the remedies were too severe. The inevitable response to such a sweeping interpretation would be self-censorship.[88]

More perceptive courts have refused to extend general public nuisance statutes to proscribe "lewdness" in books and movies.[89] An Illinois court refused to extend a "lewdness" statute to enjoin the dissemination of pornography, observing that the statutory language would not bear the freight. So long as "a word is known by the company it keeps," the court explained, the statute must be "aimed solely and only at houses of prostitution."[90] And other courts

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[83] 17 Cal. 3d at 50, 550 P.2d at 604, 130 Cal. Rptr. at 332.

[84] *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (decision to deprive aliens of an important liberty must be explicitly made by Congress or the President).

[85] People *ex rel.* Busch v. Projection Room Theater, 17 Cal. 3d 42, 63, 550 P.2d 600, 613, 130 Cal. Rptr. 328, 341, *cert. denied,* 429 U.S. 922 (1976).

[86] 17 Cal. 3d at 70-71, 550 P.2d at 617-18, 130 Cal. Rptr. at 345.

[87] *Id.* at 66, 550 P.2d at 615, 130 Cal. Rptr. at 343.

[88] *Id.* at 72-74, 550 P.2d at 619-20, 130 Cal. Rptr. at 347-48.

[89] *See, e.g.,* Southland Theaters v. State *ex rel.* Tucker, 254 Ark. 192, 492 S.W.2d 421 (1973) ("roadhouse" does not include theater); Southland Theaters v. State *ex rel.* Tucker, 254 Ark. 639, 495 S.W.2d 148 (1973) ("roadhouse" does not include theater); Mini Art Operating Co. v. State, 253 Ark 364, 486 S.W.2d 8 (1972) (statute declaring nudist colonies public nuisances cannot extend to movies depicting nudism); People *ex rel.* Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328 (red light abatement law not intended to apply to exhibition of obscene magazines or films), *cert. denied,* 429 U.S. 922 (1976); Harmer v. Tonylyn Productions, Inc., 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (1972) (distinguishing live shows); People v. Goldman, 7 Ill. App. 3d 253, 287 N.E.2d 177 (1972); State *ex rel.* Faches v. N.D.D., Inc., 228 N.W.2d 191 (Iowa 1975); State *ex rel.* Wayne County Prosecutor v. Diversified Theatrical Corp., 396 Mich. 244, 240 N.W.2d 460 (1976) (public nuisance statute inapplicable to theater where sexual acts are not committed but are portrayed); State *ex rel.* Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957); Napro Development Corp. v. Town of Berlin, 376 A.2d 342 (Vt. 1977).

[90] People v. Goldman, 7 Ill. App. 3d 253, 255, 287 N.E.2d, 177, 178-79 (1972). *Accord,* People *ex. rel.* Carey v. Route 53 Drive-In, 45 Ill. App. 3d 81, 358 N.E.2d 1298 (Ill. App. 1976);

have perceived that, although the first amendment protects live entertainment, enjoining representational works such as films and books raises more serious first amendment questions than does enjoining a bawdy burlesque.[91] The Arkansas Supreme Court, reversing a trial judge who had enjoined nudist movies under a statute declaring nudist camps a public nuisance, pointed out that the silver screen had been used to depict, not to practice, nudism.[92]

The most serious objection to applying general public nuisance statutes to pornography, however, arises from the overbreadth and vagueness problems created by such an extension. The possibilities of overbroad application are illustrated by the decision of an Arizona court upholding the application of a general public nuisance statute to the showing of a sexually explicit film at a drive-in theater.[93] The court found that the possibility of exposure to children outside the theater rendered the exhibition a public nuisance. But not long after this decision, the Supreme Court in *Erznoznik v. City of Jacksonville*[94] rejected the notion that different standards of decency could be applied to drive-in movie theaters, in ruling unconstitutional a statute specifically directed at the showing of sexually explicit but non-obscene films at drive-in theaters. Although the Arizona court could not be expected to have anticipated *Erznoznik*, its decision demonstrates how easily the public nuisance concept can stray into constitutionally protected areas.

The vagueness of general public nuisance statutes is an even greater constitutional problem than their overbreadth.[95] *Miller v. California*[96] requires that the applicable standard of obscenity proscribe the depiction of specifically defined forms of sexual conduct. This would appear to forbid injunctions obtained under common

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State *ex rel.* Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957). In City of Chicago v. Geraci, 30 Ill. App. 3d 699, 332 N.E.2d 487 (1975), however, the court held that a masturbatory massage parlor was a specialized form of prostitution. *Id.* at 704, 332 N.E.2d at 492.

[91] *See, e.g.*, Commonwealth v. MacDonald, 464 Pa. 435, 461, 347 A.2d 290, 304 (1975) (construing "lewdness" to refer only to "illicit sexual *conduct*" obviates vagueness problem entailed if "lewdness" construed to include exhibition of obscene books and material), *cert. denied*, 429 U.S. 816 (1976).

[92] Mini Art Operating Co. v. State, 253 Ark. 364, 366, 486 S.W.2d 8, 10 (1972). *See also* State *ex rel.* Wayne County Prosecutor v. Diversified Theatrical Corp., 396 Mich. 244, 240 N.W.2d 460 (1976) (public nuisance statute inapplicable to theatre when sexual acts are not committed but are portrayed).

[93] Cactus Corp. v. State *ex rel.* Murphy, 14 Ariz. App. 38, 480 P.2d 375 (1971).

[94] 422 U.S. 205 (1975).

[95] *See* State *ex rel.* Murphy v. Morley, 63 N.M. 267, 271-72, 317 P.2d 317, 319-20 (1957); Gulf State Theatres, Inc. v. Richardson, 287 So. 2d 480, 489-92 (La. 1973) (court held that the statute created a prior restraint).

[96] 413 U.S. 15, 24 (1973). *See* F. SCHAUER, *supra* note 6, at 164-66.

law nuisance acts, or redlight statutes.[97] But *Miller* also permits courts to construe state statutes as incorporating constitutional obscenity standards.[98] The question then becomes under exactly what circumstances should a court read constitutional standards into existing law.

Even where the relevant statute includes the word "obscenity" in some form, not all courts have been willing to construe it as involving constitutional standards.[99] Nevertheless, some courts have followed what can only be described as a tortuous route to find that even general public nuisance or redlight statutes also incorporate the applicable constitutional standards. For example, the Oklahoma Supreme Court read "offends decency" in the public nuisance statute to include offenses under an obscenity statute, which in turn had been construed to incorporate the current constitutional standard.[100] Thereafter, selling obscene material could be enjoined as an illegal act which offends decency. And the California Supreme Court read the public nuisance language "indecent or offensive to the senses" to encompass "obscene" as judicially and legislatively defined.[101] After this decision, California's total scheme is a little bizarre: "lewd" in the redlight act may not be used for obscenity but may be used against live entertainment; "indecent or offensive to the senses" may be used against obscenity, primarily because it had been previously used against live entertainment.[102]

In the shadow of these jerrybuilt constructions the attitude of Chief Justice Heflin of the Alabama Supreme Court is healthy. His position seems to be that courts may construe criminal obscenity statutes to be commensurate with the constitutional ebb and flow; but he registered skepticism as to whether the Alabama legislature intended the state's Redlight Abatement Act to be employed to control obscenity. By construing such a statute to incorporate con-

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[97] *See, e.g.,* Commonwealth v. MacDonald, 464 Pa. 435, 459, 347 A.2d 290, 303 (1975), *cert. denied,* 429 U.S. 816 (1976) (quoting Grove Press, Inc. v. City of Philadelphia, 418 F.2d 82, 88 (3d Cir. 1969)).

[98] 413 U.S. at 24 & n.6.

[99] *Compare* Universal Amusement Co. v. Vance, 404 F. Supp. 33, 39-42 (S.D. Tex. 1975), *remanded on other grounds sub nom.* Butler v. Dexter, 425 U.S. 262 (1976); State v. "The Bet," 219 Kan. 64, 70-71, 547 P.2d 760, 767 (1976); Magnum v. Maryland Bd. of Censors, 273 Md. 176, 187-88, 328 A.2d 283 (1974) *with* Commonwealth v. MacDonald, 464 Pa. 435, 443-46, 347 A.2d 290, 294-96 (1975); Theatre Guild, Inc. v. State *ex rel.* Rhodes, 510 S.W.2d 258, 259-60 (Tenn. 1974).

[100] State *ex rel.* Field v. Hess, 540 P.2d 1165, 1168-69 (Okla. 1975).

[101] People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 56, 550 P.2d 600, 608, 130 Cal. Rptr. 328, 336, *cert. denied,* 429 U.S. 922 (1976).

[102] *Id.*

stitutional standards, the court, he stated, "goes beyond the pale of permissible judicial construction and crosses over into the realm of exclusive legislative drafting . . . ."[103] Justice Heflin is surely correct; for if the legislature did not intend redlight and general public nuisance statutes to reach the dissemination of pornography, then obviously it did not intend that those statutes be read to incorporate the constitutionally mandated *Miller* standards.[104] Yet if these statutes are not construed to incorporate such standards, they are unconstitutionally vague.

Other problems also inhere in applying general public nuisance doctrine to pornography. When nuisance doctrine evolved from liquor and prostitution regulation into obscenity regulation, it carried a number of anachronisms with it.[105] For example, reputation testimony may be prima facie evidence of a public nuisance.[106] Clearly, admitting such evidence in an obscenity nuisance proceeding would undermine the constitutional standard for obscenity and impermissibly reverse the burden of proof.[107]

In sum, unreconstructed redlight and saloon doctrine is too elastic, too imprecise, and too anachronistic to be used to close bookstores and theaters. To control the channels of communication, courts should proceed with constitutional procedure[108] and constitutional definitions of obscenity.[109] "The sword of public nuisance," Justice Tobriner has remonstrated, "is a blunt one, admirably designed to curb noxious odors or to quell riots, but ill suited to the delicate sphere of the First Amendment where legal overkill is fatal."[110]

III. The Proposed Civil Obscenity Statute

Up to this point, the article has emphasized two main themes: 1) If declaratory judgments and injunctions are to emerge as truly

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[103] General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 674, 320 So. 2d 668, 683 (1975) (concurring opinion), *cert. denied,* 425 U.S. 904 (1976).

[104] Also see Justice Tobriner's dissent in People *ex rel.* Busch v. Projection Room Theatres, 17 Cal. 3d 42, 63-74, 550 P.2d 600, 613-20, 130 Cal. Rptr. 328, 341-48, *cert. denied,* 429 U.S. 922 (1976).

[105] *See generally* Gulf States Theatres, Inc. v. Richardson, 287 So. 2d 480, 491 (La. 1974).

[106] *See, e.g.,* Ind. Code Ann. § 35-30-10.5-5 (1975).

[107] *See* text and notes at notes 208—213 *infra.*

[108] *See* Blount v. Rizzi, 400 U.S. 410, 417-19 (1971); Oregon Bookmark Corp. v. Schrunk, 321 F. Supp. 639, 641 (D. Ore. 1970); General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 663, 320 So. 2d 668, 673 (1975), *cert. denied,* 425 U.S. 904 (1976).

[109] *See* Miller v. California, 413 U.S. 15, 23-25 (1973).

[110] People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 74, 550 P.2d 600, 620, 130 Cal. Rptr. 328, 348 (dissenting opinion), *cert. denied,* 429 U.S. 922 (1976).

civilized remedies, legislatures should repeal criminal obscenity statutes and divorce civil obscenity from the criminal process. 2) Because present civil obscenity statutes are unfocused, ill-defined, and superannuated, legislatures should pass statutes specifically designed to regulate obscenity civilly. The following statute is submitted to advance these goals.

1) The (courts of general jurisdiction) shall have jurisdiction to adjudicate whether matter disseminated within the (county) is obscene. "Disseminate" means to sell, lease, or exhibit or to hold with intent to sell, lease, or exhibit. [Alternative: "Disseminate" means to exhibit to the general public or where it can be perceived by a substantial number of people; or to sell, lease, or exhibit or hold with intent to sell, lease, or exhibit to (children).] "Obscene" means (. . . .).

2) The (prosecuting attorney) may begin a civil action in the name of the state against any person or organization that disseminates any obscene matter. This action may be brought in any (county) where the alleged dissemination occurs.

3) The (petition) shall describe with particularity the matter to be adjudicated, allege obscenity and dissemination, and seek remedies hereinafter provided.

4) When the state presents its (petition) the court may, without notice to the defendant, grant a restraining order forbidding the defendant from altering the matter, disposing of it entirely, or transporting it out of the (county).

5) The court may grant a preliminary injunction against dissemination following notice to the defendant and a hearing scheduled to begin twenty-four or more hours after the defendant receives notice.

6) The court shall not require the state to post security before granting an interlocutory order. But if (the trial or appellate court) enters a final judgment that the matter is not obscene, or if the state dismisses the suit voluntarily before final judgment, then the court may award to any party incorrectly subjected to an interlocutory order the cost of defending against the orders, including reasonable attorney's fees, and any damages or losses resulting from that order.

7) If the court grants an interlocutory injunction forbidding dissemination, the defendant may demand and the court shall schedule a plenary hearing within twenty days. The court shall render judgment within ten days after the hearing.

8) The court shall allow any person or organization with a pecuniary or artistic interest in the matter sought to be adjudicated to intervene as a defendant. The court may permit any other person

to appear as amicus curiae.

9) Any defendant may demand that the obscenity issue be tried to a jury.

10) The (prosecuting attorney) must prove obscenity by clear and convincing evidence.

11) Pursuant to a jury verdict that the matter is not obscene, the court shall enter a judgment declaring the matter not obscene and dismissing the action. Pursuant to a jury verdict that the matter is obscene, the court shall independently determine whether the matter is obscene.

12) In cases tried to juries and to the court, the court shall make findings of fact and conclusions of law.

13) Pursuant to a jury verdict and a judicial finding or, in a case tried without a jury, a judicial finding that the matter is obscene, the court shall declare the matter to be obscene. The court may enjoin any or all defendants from disseminating the matter adjudicated to be obscene.

14) Any party finally enjoined may appeal to the (appropriate appellate court). Any party adversely affected may appeal any final declaration or judgment to the (appropriate appellate court). The (appellate court) shall independently consider whether to stay an injunction. The appeal shall be submitted and decided expeditiously.

15) If any party violates a restraining order or an injunction, the court may issue an order to show cause and upon hearing hold that party in contempt. The court may sentence any party found guilty of contempt to no more than a ($500) fine and (ninety days) imprisonment or impose any other lesser appropriate sanction.

16) Any person or organization with a pecuniary or artistic interest in matter intended to be disseminated in the (county) may sue the (prosecuting attorney) and ask the court to declare matter not obscene and to enjoin prosecution. In this action, the (prosecuting attorney) may counterclaim for a declaration of obscenity and seek remedies as herein provided.

17) Declaratory judgment and injunction procedure which is inconsistent with this statute shall not govern actions brought under this statute. Except as herein provided, all actions brought under this statute shall be governed by the procedure which governs ordinary civil actions.

18) Actions under this statute shall be the exclusive method of controlling obscenity. All inconsistent statutes are repealed.

The balance of this article will attempt to justify the provisions of this statute through an analysis of obscenity nuisance law. The

article will proceed in roughly chronological order, discussing standing, interlocutory orders, bonds, trials, right to a jury, final injunctions, and post-injunction issues.

IV. Procedural Issues Before Trial

A. Standing and Related Problems

Under traditional equity doctrine public nuisance actions may be brought either by public officials or by private persons who can prove "special damages"; private persons who cannot show "special damages" are denied standing.[111] Occasionally, modern obscenity nuisance statutes *broaden* standing to include any resident of the county,[112] or "any corporation or association formed in this state for the suppression of vice."[113] The rationale for expanding standing in this manner is that "private attorneys general" will be more vigilant in suppressing vice than their professional counterparts.

However, there are two basic reasons for retaining the public-private distinction of traditional equity doctrine. First, as a general rule, legislatures, not courts, should resolve society's general problems. If courts are called upon to solve general problems, authorities accountable to the public should at least control the litigation mechanism. Second, private citizens adequately animated to become obscenity nuisance plaintiffs may lack the perspective and discerning judgment on first amendment issues to be allowed to control obscenity litigation. Public officials may show more circumspection about bringing frivolous or unnecessary suits.

For these reasons, the proposed statute allows suits only if brought by the prosecuting attorney in the name of the state. The statute requires that actions be brought by the prosecuting attorney rather than the state attorney general because prosecutorial discretion should be exercised on a local level. It specifies the prosecuting attorney rather than "law enforcement officers"[114] so that this discretion will be exercised by a legally trained official.

Because the statute denies all standing to private litigants, no showing of special damages would be required under traditional

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[111] Massachusetts Soc'y of Optometrists v. Waddick, 340 Mass. 581, 165 N.E.2d 394 (1960).

[112] *See, e.g.*, Ind. Code § 35-30-10.5-3 (1975) (private plaintiff must post $1000 bond but if successful recovers reasonable attorney fees); Ohio Rev. Code Ann. § 3767.03 (Page 1971); Va. Code §§ 18.2-384(1), 385 (1975). *See also* Littleton v. Fritz, 65 Iowa 488, 22 N.W. 641 (1885) (any person could sue to abate a liquor nuisance).

[113] La. Rev. Stat. Ann. § 13:4712 (West 1968).

[114] N.D. Cent. Code § 12.1-27.1-06 (1976).

equity doctrine. It is possible, however, that the special damage requirement provides protection for first amendment values over and above the protection afforded by restricting standing to public officials. This possibility is illustrated by two decisions of the California courts. In *Harmer v. Tonylyn Products, Inc.*[115] private plaintiffs sued to enjoin the exhibition of a film as a public nuisance. The appellate court rejected the suit because only those who paid admission were exposed to the film, so the nuisance, if any, was not "public." The court stated that the mere philosophical discomfort of knowing that obscenity is afoot could not be analogized to an odor or something palpably impinging on the senses.[116]

In effect, the *Harmer* court employed traditional standing doctrine of public nuisance law to extend the zone of privacy afforded to consumers of sexually explicit expression. In *Stanley v. Georgia*[117] the Supreme Court held that an individual cannot constitutionally be subject to a search for constitutionally suppressible obscenity in the privacy of his own home. *Harmer's* invocation of the special damages rule extended the protected zone to include self-selected commercial establishments.

After *Harmer,* the Supreme Court concluded that the constitutional right of privacy recognized in *Stanley* should not be extended to protect the commercial distribution or exhibition of obscene materials to consenting adults.[118] This undoubtedly influenced the California Supreme Court in rejecting one-half of *Harmer* in favor of the notion that what consenting adults see in a book store or movie theater may constitute a "public" nuisance. Over a vigorous dissent, *Busch v. Projection Room Theater*[119] ruled that "conduct offensive to a community's moral sensibilities" is subject to civil restraint, even if that conduct takes place behind the closed doors of a commercial establishment. But since public officials brought the action in *Busch,* the court did not consider whether special damages had been shown.[120]

Concern for privacy values and the difficulty of clearly defining suppressable obscenity have prompted Justice Brennan[121] and Cali-

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[115] 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (1972).

[116] *Id.* at 943, 100 Cal. Rptr. at 577. *See also* Napro Development Corp. v. Town of Berlin, 376 A.2d 342, 345 (Vt. 1977).

[117] 394 U.S. 557 (1969).

[118] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[119] People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied,* 429 U.S. 922 (1976).

[120] *Id.* at 51, 550 P.2d at 605, 130 Cal. Rptr. at 333.

[121] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73-114, (1973) (Brennan, J., dissenting).

fornia Supreme Court Justice Tobriner[122] to advocate the *Harmer* result as a general rule of obscenity regulation. Consenting adults, they argue, should be allowed to consume any type of sexually explicit matter; state regulation should be limited to protecting unwilling adults and children. The author personally accepts the Brennan-Tobriner view. Although state regulation of sexually explicit material is appropriate when public displays or the peculiar susceptibilities of children are involved, a business establishment that excludes minors, charges admission, and clearly informs people what is offered within, should be entitled to exhibit the annoying or even the outrageous. The proposed statute's alternative definition of "disseminate" is intended to allow a jurisdiction to adopt this alternative view. In functional terms, this definition imposes a rule of special damages, as defined by *Harmer*, even though obscenity nuisances may be brought only by public officials.

Under the alternative definition of "disseminate," courts would normally be required to enjoin either public displays of obscenity or sales to children. But additional problems may develop. Unlike ordinary movie theaters, drive-in theaters expose their screens to travelers, neighbors, and groups of children. Although the Supreme Court in *Erznoznik* suggested that unwilling viewers of drive-in screens should merely "avert their eyes,"[123] it is unrealistic to expect a parent driving an auto containing small children in heavy traffic to shield young eyes from the sight of a drive-in screen. Equity should—and can—be more creative. Under the alternative definition of "disseminate," judges should call upon the remedial flexibility of equity and focus on the whole environment, abating unwarranted dissemination with fencing requirements or changes in screen location.

Furthermore, obscene books and pictures, unlike exhibition of moving pictures, present the possibility of an outside resale business to minors.[124] The proposed statute's alternative definition anticipates that resale is one of the types of dissemination that a court may enjoin. But the authorities must proceed against the bootlegger who resells rather than the merchant who sells legitimately to adults. This is essentially the approach now adopted toward liquor regulation. As is true with all "victimless" infractions, the authori-

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[122] Bloom v. Municipal Court, 16 Cal. 3d 71, 86-100, 545 P.2d 229, 239-48, 127 Cal. Rptr. 317, 327-36 (1976) (Tobriner, J., dissenting).

[123] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[124] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n.7 (1973). *See also* State *ex rel.* Field v. Hess, 540 P.2d 1165, 1170 (Okla. 1975).

ties may find it difficult to suppress clandestine commerce in obscene materials to minors. This is a common problem of sumptuary regulation, however, rather than a peculiarity of civil obscenity.

The state's proper interest in regulating obscenity is to stop distribution for commercial gain without interfering with constitutionally protected privacy. Thus, the proposed statute's first definition of "disseminate" is intended to reach any commercial exploitation of obscene materials. "Disseminate" includes both printed material and motion pictures; "exhibit" includes other forms of commercial exploitation such as broadcasting or performing. Jurisdictions that wish to reach noncommercial purveyors may do so by also enacting the first half of the alternative definition of "disseminate." This extension, however, runs into the danger of impermissibly interfering with constitutionally protected privacy.[125] A court confronted with an impermissible application of the extended definition should limit the statute by finding that a noncommercial exhibition in the home does not constitute a "public" nuisance.

B. Interlocutory Restraints

Generally, an interlocutory restraint is an order directing a party to stop something or retain something pending the court's decision on the merits. Interlocutory restraints serve two functions: they preserve a controversy for later adjudication, and they ensure that the court will be able to give full relief to the moving party. In the sensitive area of free speech, however, interlocutory restraints pose considerable danger. Orders that purport only to preserve the status quo may deter or inhibit the defendant from further distribution, and thus may be final in practice.[126] Moreover, the commercial and communicative value of expression-related materials is often short-lived, making later reversal of an interlocutory order merely symbolic if the occasion for the expression is gone forever.[127] The first question to resolve, then, is the extent to which interlocutory restraints are compatible with the first amendment.

1. *Ex Parte Orders and the Problem of Prior Restraints.* Whether a court may issue an interlocutory order restraining

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[125] Airways Theatre, Inc. v. Canale, 366 F. Supp. 343, 346 (W.D. Tenn. 1973); Grove Press, Inc. v. Flask, 326 F. Supp. 574, 579 (N.D. Ohio 1970).

[126] United Farm Workers v. Superior Ct., 14 Cal. 3d 902, 913, 537 P.2d 1237, 1244, 122 Cal. Rptr. 877, 894 (1975).

[127] *See, e.g.,* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (reversing a three-year-old temporary injunction); Carroll v. President & Comm'rs, 393 U.S. 175 (1968) (reversing a two-year-old ten-day restraining order).

expression-related activity is generally approached under the doctrine of prior restraints. Unfortunately, definitional confusion abounds in this area.[128] Generally speaking, a prior restraint is the imposition of legal sanctions for the distribution of expression-related material before a final adjudication of whether this distribution can be so restrained.[129] As applied to court orders and decrees, prior restraints can occur in one of two ways: through the failure to provide the necessary procedures before sanctions for distribution are imposed, or through the rendering of an order or decree that goes beyond the scope of the materials adjudicated. I shall call the former a procedural prior restraint, and the latter a remedial prior restraint. The distinction can be illustrated by a simple example. If a judge enjoins the December issue of the Law Review as obscene without affording notice or a hearing to the editors, this is a procedural prior restraint. But if a judge, after notice and a full hearing, determines that the December issue of the Law Review is obscene, and enjoins publication of both the December and January issues, this is a remedial prior restraint. Remedial prior restraints will be considered later; this section is concerned with procedural prior restraints.

The most radical of interlocutory restraints are ex parte restraints, since the defendant is not even provided with notice before the restraint issues. But, as a brief review of the Supreme Court's major decisions on procedural prior restraints indicates, even the basic question of the constitutionality of ex parte restraining orders has not been definitively resolved.

Kingsley Books, Inc. v. Brown[130] has been read as approving of ex parte injunctions as part of a statutory scheme for the regulation of pornography.[131] The Supreme Court upheld a New York statute that allowed municipalities to obtain civil injunctions against obscene material and to obtain orders for the seizure of such material. Under the statute, an ex parte injunction could be obtained, but the defendant was entitled to a trial on the issue of obscenity within one day, and to a decision within two days of the conclusion of the

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[128] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 503-12 (1970).

[129] *Id.* at 504. *See* Paper Back Mart v. City of Anniston, 407 F. Supp. 376, 378-79 (N.D. Ala. 1976); Edelstein & Mott, *supra* note 38, at 547; *cf.* Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 542-43 (1977) ("The doctrine of prior restraint nullifies a particular prior restraint without deciding whether the same speech could constitutionally be restricted by 'subsequent punishment.'" [citation omitted]).

[130] 345 U.S. 436 (1957).

[131] *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 533-34 n.61 (1970).

trial.[132] Thus the ex parte restraint was of very limited duration, and was not the principal focus of the Court's decision.

Freedman v. Maryland,[133] probably the leading case on procedural prior restraints, endorsed the *Kingsley* procedure, stating that it "postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing."[134] On this reading, *Kingsley* did not involve an ex parte interlocutory restraint at all. In the obscenity nuisance procedure authorized by *Paris Adult Theatre I,*[135] an adversary hearing preceded the injunction and so the issue did not arise.

An examination of the logic of Supreme Court decisions outside the context of ex parte restraints against obscenity strongly suggests that such restraints are unconstitutional. Particularly important in this regard are *Freedman v. Maryland,*[136] *Carroll v. President & Commissioners of Princess Anne,*[137] and *Fuentes v. Shevin.*[138]

Freedman ruled that a system of administrative licensing of motion pictures is constitutional only if conducted pursuant to "procedural safeguards designed to obviate the dangers of a censorship system."[139] The Court determined that a constitutional administrative licensing scheme must (1) assure a prompt judicial determination of obscenity; (2) place the burden of instituting judicial proceedings on the administrator; and (3) limit the duration of any restraint imposed prior to judicial review to that required briefly to preserve the status quo.[140] *Freedman* suggests the possibility of imposing a restraining order before judicial review but after an adversary administrative procedure. But it does not in any way support dispensing with notice altogether.

Carroll v. President & Commissioners of Princess Anne[141] concerned an ex parte restraint outside the obscenity context. The Maryland Court of Appeals had upheld an ex parte injunction

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[132] 354 U.S. at 437-38 n.1. The trial court appeared to assume a hearing before any injunction. Burke v. Kingsley Books, Inc., 208 Misc. 150, 164, 142 N.Y.S.2d 735, 747 (Sup. Ct. 1955).

[133] 380 U.S. 51 (1965).

[134] *Id.* at 60. *See also* Stengel v. Smith, 18 App. Div. 2d 458, 459, 240 N.Y.S.2d 200, 201-02 (1963); Tenney v. Liberty News Distribs., Inc., 13 App. Div. 2d 770, 215 N.Y.S.2d 663 (1961).

[135] 413 U.S. 49, 55 (1973).

[136] 380 U.S. 51 (1965).

[137] 393 U.S. 175 (1968).

[138] 407 U.S. 67 (1972).

[139] 380 U.S. at 58.

[140] *Id.* at 58-59.

[141] 393 U.S. 175 (1968).

against a racist rally on the ground that the rally presented a clear and present danger of violence. Although the Supreme Court refused to disapprove of all ex parte orders, it declared this one unconstitutional. The Court stressed three reasons why ex parte procedures were inappropriate: the injunction forbade expressive conduct; the order raised issues that required the trial court to resolve difficult factual and legal problems; and the defendants were available for notice. These reasons apply with equal force to civil injunctions of obscenity.

Lower courts have distinguished *Carroll* as involving political speech, and have refused to apply it in the context of obscenity injunctions, where the timeliness of expression is considered less important.[142] But these courts often forget that a merchant has a constitutional right to sell, and the public a first amendment right to receive,[143] protected expression—even if it is sexually explicit. And timing and momentum may be as important to the distributor of sexually explicit expression as to the political publicist. Public demand is often ephemeral, and even a short delay produced by an interlocutory order can damage a business. Moreover, providing notice is not particularly onerous in the obscenity nuisance context. Most businesses have a telephone or a street address and can be notified formally or informally without difficulty.[144]

The third source of relevant precedent lies outside the first amendment context altogether. *Fuentes v. Shevin*[145] struck down as inconsistent with due process a statute that allowed a plaintiff to replevy personal property in the possession of another without notice. The Court ruled that the state ordinarily cannot disturb a constitutionally cognizable interest in property without providing notice and an opportunity to be heard. *Fuentes* permits the state to affect a protected property interest without notice only in an "extraordinary situation."[146] Three prerequisites exist:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest.

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[142] ABC Books, Inc. v. Benson, 315 F. Supp. 695, 700 (M.D. Tenn. 1970); Go v. Peterson, 14 Ariz. App. 12, 14, 480 P.2d 35, 37 (1971). *But cf.* United Farm Workers v. Superior Ct., 14 Cal. 3d 902, 537 P.2d 1237, 122 Cal. Rptr. 877 (1975) (groundbreaking opinion uses *Carroll* reasoning in picketing case).

[143] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976); Stanley v. Georgia 394 U.S. 557, 564 (1969).

[144] FED. R. CIV. P. 65(b); Advisory Committee's Note to 1966 Amendments to Rule 65(b), 39 F.R.D. 124-25 (1966); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2952 (1973).

[145] 407 U.S. 67 (1972).

[146] *Id.* at 90.

> Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[147]

The Court gave examples in which these criteria could be said to have been met: tax collection, the war effort, bank failures, misbranded drugs, and contaminated foods.[148]

Of course, some perceive obscenity regulation as the last bastion shielding civilization from barbarism. They would analogize the moral pestilence of obscenity to contaminated foods, and find a compelling public interest that mandates an immediate ex parte response. More realistically, however, lower courts that take *Fuentes*'s examples seriously should sanction ex parte restraints against obscenity rarely if at all. *Fuentes*'s third standard, requiring state control of ex parte procedure, a statutory definition of the emergency, and an emergency in fact, is also to the point. At a minimum it precludes a private obscenity nuisance plaintiff from securing an ex parte order. It reinforces the emphasis of *Miller v. California*[149] on precise standards, and the concern of *Carroll* for a searching factual inquiry whenever possible.

The logic of *Freedman, Carroll,* and *Fuentes* argues strongly for requiring notice before an interlocutory restraint may issue.[150] Simi-

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[147] *Id.* at 91.

[148] *Id.* at 91-92. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Court distinguished *Fuentes* and allowed an installment seller to repossess property after an *ex parte* judicial hearing and posting of sufficient bond. *Mitchell* apparently turned on the duality of ownership—both seller and buyer had property interests in the property in question and the statute involved provided a reasonable balancing of such interests. *See* Rendleman, *Analyzing the Debtor's Due Process Interest,* 17 WM. & MARY L. REV. 35 (1975).

[149] 413 U.S. 15 (1973).

[150] Grove Press, Inc. v. City of Philadelphia, 418 F.2d 82, 89 (3d Cir. 1969); Llewelyn v. Oakland County Prosecutor's Office, 402 F. Supp. 1379, 1382-83 (E.D. Mich. 1975); Meyer v. Austin, 319 F. Supp. 457, 463 (M.D. Fla. 1970); Newman v. Conover, 313 F. Supp. 623, 631 (N.D. Tex. 1970); Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied,* 429 U.S. 922 (1976); Camil v. Buena Vista Cinema, 129 Cal. Rptr. 315, 318 (Ct. App. 1976); State v. "The Bet," 219 Kan. 64, 547 P.2d 760, 769 (1976); Gulf States Theaters, Inc. v. Richardson, 287 So. 2d 480, 489 (La. 1974); Commonwealth v. Guild Theatre, Inc., 432 Pa. 378, 382, 248 A.2d 45, 48 (1968). *See also* Skinner v. Superior Court, 69 Cal. App. 3d 183, 137 Cal. Rptr. 851 (1977).

Several criminal obscenity decisions dealing with the procedural standards for the issuance of search warrants are also relevant. At one time it appeared that the Constitution

larly, *Freedman* and *Carroll* advance persuasive first amendment reasons for requiring an adversary proceeding before a court may impose an interlocutory restraint. Because it is difficult to separate protected expression from obscenity, adversary procedures help assure that the critical issues will be illuminated for the court. Certainly a court should hear both sides before embarking on the inevitably difficult task of finding the facts, applying the law, and drafting an acceptable order. An order to stop selling a book or exhibiting a movie is final with respect to the sales and exhibitions prevented.[151] Given the public's interest in communication and the court's interest in precise tools for distinguishing obscenity from protected communication, adversary procedures prior to the issuance of an injunction do not entail difficulties too burdensome to tolerate.

In short, the Constitution compels notice and an opportunity to be heard *before* interrupting any phase of the right to sell or receive expression-related material. Notice may be as informal as a telephone call. And the adversary procedure that may lead to an interlocutory injunction does not have to be a plenary trial.[152] It may consist of no more than the opportunity to appear and present oral argument in opposition to interlocutory relief. Beyond these requirements, however, further protection from interim equitable relief should not be required. Courts quite properly hold parties who violate interlocutory injunctions in contempt. The Vermont obscenity nuisance statute forbids the imposition of punitive measures unless the merchant violates a "final injunction."[153] This, however, protects merchants more than due process requires.

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required an adversary hearing before a warrant could issue for the seizure of obscene material. A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) (plurality opinion per Brennan, J.). *See* Tyrone, Inc. v. Wilkerson, 410 F.2d 639 (4th Cir. 1969). In Heller v. New York, 413 U.S. 483 (1973), however, the Court permitted the authorities to seize a movie print without an adversary hearing. The facts of *Heller* are somewhat unique—the magistrate issuing the warrant had personally viewed the offending picture before approving the seizure, and there was no showing that the seizure of a single copy of the film precluded its continued exhibition pending trial. *Id.* at 490, 492. The Court distinguished cases involving injunctions of exhibiting a film or destruction of the print. *Id.* at 490. And in a companion case, the Court expressly overturned a warrant that issued after an officer had seized the suspect picture. Roaden v. Kentucky, 413 U.S. 496 (1973).

[151] *Cf.* Heller v. New York, 413 U.S. 483, 490 (1973) ("In this case, of course, the film was not subjected to any form of 'final restraint,' in the sense of being enjoined from exhibition . . . ."); Rendleman, *Toward Due Process in Injunction Procedure*, 1973 U. ILL. L.F. 221, 242-43.

[152] FED. R. CIV. P. 65(a); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2949 (1973).

[153] VT. STAT. ANN. tit. 13, § 2809 (Supp. 1977).

The proposed statute departs from traditional injunction procedure to comport with the procedural safeguards required by the first amendment. As the Court noted in *Freedman*, "[o]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression."[154] To enjoin dissemination, the proposed statute requires formal or informal notice to the defendant, and a hearing not sooner than twenty-four hours after the defendant receives notice. The twenty-four hour waiting period represents a compromise. A hearing immediately after notice might attenuate the defendant's preparation and destroy his opportunity to be meaningfully heard. Yet if the state has correctly filed the action, two days is a long time to stand idly by muttering imprecations while the defendant exhausts an inventory or fills a theatre several times. While some may think one day is twenty-four hours too much notice, the author considers it a necessary procedural safeguard "designed to obviate the dangers of a censorship system."[155]

The statute permits general equity procedure to prescribe the "nature and form" of interlocutory hearings. One caveat is in order: "Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations . . ., it is axiomatic that the hearing must provide a real test."[156] Finally, *Kingsley Books* and *Freedman* suggest two provisions that hasten final decisions: a defendant who cannot disseminate because of a preliminary order may demand a prompt hearing and decision on the merits; and appeals "shall be submitted and decided expeditiously." These provisions "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and perhaps erroneous"[157] decision, while recognizing the need for procedures compatible with sound and considered decisionmaking.

2. *Preservation Orders.* Interlocutory restraints may be imposed without adversary procedures when they do not interfere with a constitutionally cognizable interest.[158] The preservation order in *United States v. Little Beaver Theatre*[159] is an example of this. The court, without notice, enjoined the theater from "disposing of, relinquishing possession of, or in any manner cutting, altering, splicing,

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[154] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[155] *Id.*

[156] Fuentes v. Shevin, 407 U.S. 67, 97 (1972).

[157] Freedman v. Maryland, 380 U.S. 51, 59 (1965).

[158] *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

[159] 324 F. Supp. 120 (S.D. Fla. 1971).

destroying or mutilating subject motion picture Turned on Girl for a period of ten days . . . ."[160] The authorities apparently resorted to ex parte procedure because they feared that the film might be transported or altered,[161] yet they believed they could not seize it under a search warrant without an adversary proceeding.[162]

The *Little Beaver* injunction accommodates several interests: the state receives an order backed by the court's contempt power which preserves the evidence; the defendant is permitted to continue his business; and the court is able to adjudicate the obscenity of a film that might otherwise end up in Mexico or the projectionist's wastebasket. Ex parte preservation orders are constitutional, for they neither restrain expression prior to publication nor deter future expression.[163]

Obscenity nuisance statutes generally provide for preservation orders.[164] Absent a statute, courts probably have discretion to issue such orders under ordinary equity doctrine, despite the minor incongruity that a *Little Beaver* order compels the defendant to preserve the nuisance. Courts may also grant preservation orders ancillary to a criminal case. In fact, both the state and the merchant may prefer a preservation order to ex parte criminal seizure, since such an order accomplishes everything ex parte seizure does without criminal stigma.[165] Under a system of dual remedies, however, a defendant may fear that the authorities are using equity to obtain discovery for subsequent criminal proceedings.[166] This fear is legitimate, but again it derives from the availability to the state of multiple remedies, not from the nature of a preservation order.

3. *Erroneous Interlocutory Orders.* Statutes and rules commonly require a plaintiff who receives an interlocutory remedy to post bond,[167] which the defendant may recover upon if the order is later determined to have been wrongly granted. Short of malicious prosecution, the bond normally limits the plaintiff's liability for an

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[160] *Id.* at 120.

[161] Heller v. New York, 413 U.S. 483, 493 (1973); Bethview Amusement Corp. v. Cahn, 416 F.2d 410, 412 (2d Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

[162] Meyer v. Austin, 319 F. Supp. 457, 464 (M.D. Fla. 1970). *But see* Heller v. New York, 413 U.S. 483 (1973).

[163] *See* Go v. Peterson, 14 Ariz. App. 12, 13-14, 480 P.2d 35, 36-37 (1971).

[164] *See, e.g.,* IND. CODE § 35-30-10.5-4 (1975); N.C. GEN. STAT. § 14-190.2(d)(3) (Supp. 1975); TENN. CODE ANN. § 39-3019 (1975).

[165] *See* Heller v. New York, 413 U.S. 483, 492-93 (1973).

[166] Maness v. Meyers, 419 U.S. 449, 463-65 (1975); Classic Distribs., Inc. v. Zimmerman, 387 F. Supp. 829, 833 n.6 (M.D. Pa. 1974).

[167] *See generally* Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?,* 52 N.C.L. REV. 1091 (1974).

inappropriate interlocutory restraint.[168] Unless the plaintiff truly needs an interlocutory order and is confident of the ultimate outcome, the cost of the bond and the chance of liability upon it may deter him from seeking provisional relief.

Someone must bear the expense of an improvidently granted interlocutory injunction. For a movie theater the expense might include the cost of renting the enjoined print, lost profits from lower ticket sales, and unrecoverable expenses related to advertising, building rental, wages and salaries, and so forth.

As a general rule, the applicant for extraordinary relief should protect the defendant against the risk of an incorrect interim order. Interlocutory orders are frequently not appealable. Even if appealable, the reviewing court generally accords very deferential oversight to preliminary injunctions, reviewing for abuse of discretion, not correctness.[169] Moreover, appellate review is time consuming and does not compensate for the past effects of an erroneous decision.

Despite these considerations, rules and statutes generally exclude governmental plaintiffs from posting bonds when requesting interlocutory relief,[170] and obscenity nuisance statutes are no exception.[171] General principles of sovereign immunity protect both the judge[172] and prosecuting attorney[173] from liability for damages in all but the most exacerbated instances.[174] Under these circumstances the expense of an erroneous interim decision falls on the merchant.

Obscenity nuisances thus present a compelling case for some kind of governmental liability to deter hasty requests for interim relief and to compensate for improper interlocutory restraints. Professor Dobbs suggests that legislatures modify general security statutes by making governmental units liable for improperly granted interlocutory restraints, but without making them post a security or bond.[175] The proposed civil obscenity statute incorporates this suggestion. Power without restraint is unacceptable, particularly

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[168] *Id.* at 1122-23.

[169] *See, e.g.*, Commonwealth v. Graver, 461 Pa. 131, 134, 334 A.2d 667, 669 (1975); Moore v. State, 470 S.W.2d 391, 393 (Tex. Civ. App. 1971).

[170] *See, e.g.*, FED. R. CIV. P. 65(c).

[171] FLA. STAT. § 847.013(3)(d) (1976); N.Y. CIV. PRAC. LAW § 6330(4) (McKinney Supp. 1976) (also exonerating plaintiff from malicious prosecution). In Indiana, a private plaintiff must post a $1000 bond but, if successful, recovers attorney's fees. IND. CODE § 35-30-10.5-3 (1975). *But see* City of Aurora v. Warner Bros. Pictures Distrib. Corp., 16 Ill. App. 2d 273, 276, 147 N.E.2d 694, 695 (1958) (requiring $4000 bond).

[172] Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

[173] Imbler v. Pachtman, 424 U.S. 409 (1976).

[174] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

[175] Dobbs, *supra* note 167, at 1165.

given the political and cultural realities of obscenity litigation and the fragile nature of expression. Governmental immunity creates irresponsibility;[176] legislatures would do well to consider this proposal carefully.

V. Procedural Issues at Trial

Obscenity nuisances raise three procedural issues concerning the conduct of the trial itself. First, should the court summon a jury to decide the obscenity question? Second, what should be the standard of proof? And third, if the state proves that the material is obscene, should the judge be compelled to enjoin further distribution, or should the nature of the relief be left to the judge's discretion?

A. Right to Trial by Jury

The choice of criminal or equitable remedies is inextricably linked to the issue of the right to jury trial. In a court of equity, the judge finds the facts, applies the law, and formulates the relief.[177] The judge may summon a jury to render an advisory verdict,[178] but the defendant stands before the court without a right to jury trial, whether the issue is the existence of a nuisance or the commission of contempt.[179]

The first line of defense of those who object to employing equity to deprive the defendant of the safeguards associated with criminal prosecution is the venerable maxim that "equity will not enjoin a crime." Courts generally avoid the maxim with circumlocutions such as "the mere fact that the act constituting a nuisance is also a crime does not hinder the use of the civil processes to procure its abatement where the use of property is a part."[180] But the maxim expresses a wise policy about a defendant's procedural rights, par-

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[176] K. Davis, Administrative Law Text § 25.01 (1972).

[177] Kane, *Civil Jury Trial: The Case For Reasoned Iconoclasm,* 28 Hast. L. J. 1, 5 (1966).

[178] Fed. R. Civ. P. 39(c); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2335 (1971).

[179] Eilenbecker v. District Ct., 134 U.S. 31 (1890); Mugler v. Kansas, 123 U.S. 623 (1887). Unless punishment for contempt exceeds six months. Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Taylor v. Hayes, 418 U.S. 488 (1974).

[180] Goose v. Commonwealth *ex rel.* Dummit, 305 Ky. 644, 646, 205 S.W.2d 326, 328 (1947). *See also* Toushin v. City of Chicago, 23 Ill. App. 3d 797, 803-04, 320 N.E.2d 202, 207 (1974). The property requirement is, in fact, of little importance in statutory nuisances which focus on conduct. *See* Iowa Code § 123.70 (Supp. 1977) (defining an ambulatory liquor nuisance: "[T]he fact that an offender has no known or permanent place of business . . . shall not prevent . . . [an] injunction . . . from issuing.")

ticularly the right to jury trial.[181] As recently as 1973, an Illinois court refused to enjoin an "obscene" bookstore because "equity will not enjoin a crime."[182]

Nonetheless, the civil obscenity defendant should not be entitled to a jury trial simply because the criminal obscenity defendant is. The civil action lowers the stakes. The defendant loses the right to a jury trial and to proof beyond a reasonable doubt, but the state must be satisfied with a milder remedy. The court may circumscribe the defendant commercially, but not personally. To argue against the civil action because it lacks a jury trial is to argue that the legislature must be as solicitous of the defendant's procedural options when seeking a mild remedy as a harsh one.

Merchants probably have more to gain than prosecutors from broad-based community participation in obscenity adjudication. Jurors are drawn from across social classes, ages, races, and sexes. In contrast, judges are predominantly selected from upper-middle class white male lawyers. Where, as in obscenity regulation, the issues are generational and cultural, the unanimity rule generally followed in jury trials makes an adverse judgment less likely from a jury than from a judge.[183] Thus, some who argue against an equitable remedy are actually arguing for jury trial of obscenity, since they think a jury will find for the merchant in close cases. Justice Tobriner put it this way:

> The fact that the public nuisance statutes relegate the decision to a judge, rather than to a jury, exacerbates the chilling effect. A dealer in protected material who might have been confident that no group of 12 jurors would unanimously conclude that his material offended community standards might find himself inhibited by the greater uncertainty of how a single member of the community—the judge—would react to it.[184]

Moreover, some may argue that a jury should be allowed, or even encouraged, to nullify unpopular substantive law.[185]

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[181] *See* Southland Theaters v. State *ex rel.* Tucker, 254 Ark. 192, 492 S.W.2d 421 (1973).

[182] People v. Goldman, 7 Ill. App. 3d 253, 254, 287 N.E.2d 177, 178 (1972) (alternative holding). *But see* City of Aurora v. Warner Bros. Pictures Distrib. Corp., 16 Ill. App. 2d 273, 147 N.E.2d 694 (1958).

[183] *See, e.g.*, Universal Amusement Co. v. Vance, 404 F. Supp. 33, 37 (S.D. Tex. 1975) (two hung juries), *remanded on other grounds sub nom.* Butler v. Dexter, 425 U.S. 262 (1976). *But see* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 527 (1970) (jury insensitive to first amendment interests).

[184] People *ex rel.* Busch v. Projection Room Theatre, 546 P.2d 733, 752 n.6, 128 Cal. Rptr. 229, 248 n.6 (Tobriner, J., dissenting), *vacated,* 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied,* 429 U.S. 922 (1976).

[185] Scheflin, *Jury Nullification: The Right to Say NO,* 45 S. CAL. L. REV. 168 (1972).

Different considerations animate prosecutors. Prosecutions are protracted and expensive. If juries are often hung, or if they acquit, then the authorities may be induced to cease to "beat a dead horse."[186] Prosecutors may prefer judge-tried civil nuisance actions over criminal prosecution for this very reason.[187] In a democracy, however, public dislike of substantive law is a poor reason to allow equitable relief.[188]

A constitutional argument for a right to jury trial in civil obscenity proceedings made in a challenge to Virginia's in rem obscenity statute was summarily rejected by the Supreme Court.[189] In a brief per curiam opinion, the Court held "a trial by jury is not constitutionally required in this state civil proceeding."[190] A note-writer has suggested that the Supreme Court's approval of nonjury in rem procedure might not extend to in personam injunctions where the control of conduct is involved.[191] However, the traditional wisdom is that a defendant's claim of a constitutional right to a jury trial is at its weakest when a plaintiff seeks an in personam remedy.[192] Thus, when the Court rejected a right to trial by jury for in rem obscenity, it foreclosed a jury for in personam injunctions.

The most persuasive argument for a jury is based on the nature of the substantive obscenity standard set forth by *Miller v. California.*[193] This argument began even before *Miller* with Justice Brennan's dissent in *Kingsley Books.*[194] Under substantive obscenity law, the community sets the standard, and a jury represents a cross section of the community. Therefore, Justice Brennan argued, a jury is "the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene."[195] In *Miller,* the Supreme Court, rejecting a national obscenity standard, enhanced its emphasis on the community and the local jury as the arbiter of

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[186] Washington Post, Oct. 22, 1973, § C, at 1.

[187] Black, *The Expansion of Criminal Equity Under Prohibition,* 5 WISC. L. REV. 412, 417 (1930).

[188] *But see* Commonwealth *ex rel.* Attorney General v. Pollitt, 258 Ky. 489, 80 S.W.2d 543 (1935) (equitable action held proper after grand jury refused to return indictment).

[189] Alexander v. Virginia, 413 U.S. 836 (1973), *on remand,* 214 Va. 539, 203 S.E.2d 441 (1974). The Court also approved the Maryland censorship and licensing process which operates without a jury. Star v. Preller, 419 U.S. 956, *aff'g* 375 F. Supp. 1093 (D. Md. 1974). *See also* Dist. Att'y v. Three Way Theaters Corp., 357 N.E.2d 747 (Mass. 1976).

[190] 413 U.S. at 836.

[191] Note, *Defects in Indiana's Pornographic Nuisance Act,* 49 IND. L.J. 320, 327-28 (1974).

[192] D. DOBBS, REMEDIES § 2.6, at 74 (1973).

[193] 413 U.S. 15, 24-25 (1973). *See* note 5 *supra.*

[194] 354 U.S. 436, 447-48 (1957) (Brennan, J., dissenting).

[195] *Id.* at 448.

community values.[196] *Hamling v. United States*[197] further stressed the jury's role in discerning and applying community standards. Justice Brennan renewed his argument for jury trial of obscenity in civil cases in *McKinney v. Alabama,*[198] but to no avail. Justice Tobriner has also recently contended that because of the definition of obscenity, "[t]he jury, as a microcosm of the community, is the only vehicle fit to conduct that inquiry."[199]

The Missouri Supreme Court grasped the essentials of the Brennan-Tobriner argument in *McNary v. Carlton.*[200] The court found that the diverse attitudes and desires of different communities in Missouri demand that neither residents of St. Louis County nor residents of Dade County set standards for the other. Although the court recognized that equity usually proceeds without a jury, it compelled trial courts to try obscenity injunctions to "advisory" juries.[201] And the court ruled that the trial court would be bound by a jury verdict that the material involved was not obscene.[202]

Even though the Supreme Court has held that the Constitution does not require a jury trial in a civil obscenity proceeding, the explicit teaching of *Miller* and *Hamling* is that a jury is a useful gauge.[203] It is possible that the Court will reexamine the jury question, reject the nature of the remedy as the key, and require a jury trial in both the criminal and civil obscenity context.[204] Better yet, as Justice Brennan suggests, either the legislature or state appellate courts may extend the right to jury trial to civil obscenity.[205]

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[196] 413 U.S. at 30-34.

[197] 418 U.S. 87, 103-08 (1974). In the companion case, Jenkins v. Georgia, 418 U.S. 153, 160 (1974), the Court overturned a jury verdict of obscenity, stating that juries do not have "unbridled discretion in determining what is 'patently offensive.' "

[198] 424 U.S. 669, 687-89 (Brennan, J., concurring).

[199] People *ex rel.* Busch v. Projection Room Theatre, 546 P.2d 733, 745-46 n.1, 128 Cal. Rptr. 229, 241-42 n.1 (Tobriner, J., dissenting), *vacated,* 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied,* 429 U.S. 922 (1976). *Cf.* Vergil v. Time, Inc., 527 F.2d 1122, 1130 n.13 (9th Cir. 1975) (right to privacy) ("We believe that a determination founded on community mores must be largely resolved by a jury subject to close judicial scrutiny to ensure that the jury resolutions comport with First Amendment principles.").

[200] 527 S.W.2d 343 (Mo. 1975).

[201] *Id.* at 347-48.

[202] *Id.* at 348. Both trial and appellate courts must independently determine obscenity.

[203] *See, e.g.,* State *ex rel.* Cahalan v. Diversified Theatrical Corp., 396 Mich. 244, 245 n.3, 240 N.W.2d 460, 461 n.3 (1975) (advisory jury); Richards v. State, 497 S.W.2d 770, 771 (Tex. Civ. App. 1973).

[204] *See* DeSalvo v. Codd, 386 F. Supp. 1293, 1303 n.3 (S.D.N.Y. 1974) (Oakes, J., dissenting).

[205] McKinney v. Alabama, 424 U.S. 669, 688-89 (1976) (Brennan, J., concurring). Apparently there is no right to a non-jury trial. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2317, at 84 (1970); Note, *The Right to a Nonjury Trial,* 74 HARV. L. REV. 1176 (1961).

The proposed statute follows Brennan's advice and extends jury trial to civil obscenity. It requires the judge following ordinary civil procedure to determine whether the plaintiff's evidence generates a jury question. A jury's exonerating verdict terminates the proceeding. If the jury finds the matter obscene, the statute compels the judge independently to determine whether the material is obscene. This is patterned after the Missouri court's decision in *McNary v. Carlton,*[206] and is intended to ensure "the necessary sensitivity to freedom of expression."[207] In addition, the statute lays a foundation for appellate review by asking the trial judge to draft findings of fact and conclusions of law.

B. Standards of Proof

Normally, the civil plaintiff must persuade the factfinder by a preponderance of the evidence.[208] The proposed statute departs from this and requires "clear and convincing evidence." Traditionally an equitable standard, but also a standard a jury can apply,[209] "clear and convincing" asks the factfinder to determine whether the proponent's contention is "highly probable." In a civil proceeding that neither threatens the defendant's liberty, nor imposes a criminal stigma, proof beyond a reasonable doubt is too imposing a standard to administer.[210] Yet as Justice Brennan has observed, "[i]n light of the command of the First Amendment, a standard of proof by a mere preponderance of the evidence poses too substantial a danger that protected material will be erroneously suppressed."[211] I sought and found a compromise: clear and convincing evidence.

Civil obscenity trials otherwise present few problems of proof. Blunderbuss anachronisms from the liquor nuisance era like allowing "general reputation" evidence to show a prima facie nuisance must be rejected. The use of reputation evidence would undermine both the substantive constitutional standard attuned to the nature of the materials, and *Freedman's* requirement of a judicial determi-

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[206] 527 S.W.2d 343 (1975).

[207] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[208] C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 339 (2d ed. 1972).

[209] *Id.* § 340; Van Hecke, *Trial By Jury in Equity Cases,* 31 N.C.L. REV. 157, 169 (1953).

[210] *But see* McKinney v. Alabama, 424 U.S. 669, 690 (1976) (Brennan, J., concurring) (beyond a reasonable doubt in civil cases).

[211] *Id.* at 685.

nation.[212] For defendants with poor reputations it would also reverse the burden of proof.[213]

C. The Chancellor's Discretion to Enjoin

After the jury's verdict and the judge's independent finding of obscenity, the proposed civil obscenity statute returns to its equitable origins. The judge determines the nature of the plaintiff's remedy. Normally a chancellor possesses broad discretion to shape an equitable remedy,[214] but some obscenity nuisance laws purport to force the remedial hand. In Indiana, if the plaintiff sustains the allegations in the petition, the act compels the judge to issue a temporary injunction.[215] Under the Ohio statute, if the judge finds that a theater is showing an obscene film, the relief is mandatory: the judge must enjoin the nuisance perpetually, impose a $300 tax, order personal property removed and sold, and abate the nuisance by closing the theater for one year.[216] The Ohio Supreme Court held that the word "shall" creates a mandatory duty to impose the remedies provided, but moderated the statute's impact by insisting that the judge find scienter before imposing the tax and limiting the nuisance to a particular obscene film.[217]

Louisiana's statute went even further. It compelled the judge to grant a temporary injunction when the district attorney alleged, with a verified affidavit on information and belief, that an obscenity nuisance existed.[218] This not only supplanted judicial discretion but also omitted the usually rigorous standard for interlocutory relief. The Louisiana Supreme Court struck it down. Holding that "shall" meant mandatory interlocutory relief, the court declared the statute invalid because the state could suppress alleged obscenity without a hearing and a prior judicial determination.[219]

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[212] Universal Amusement Co. v. Vance, 404 F. Supp. 33, 46 (S.D. Tex. 1975), *remanded on other grounds sub nom.* Butler v. Dexter, 425 U.S. 262 (1976).

[213] Nihiser v. Sendak, 405 F. Supp. 482, 495 (N.D. Ind. 1974), *vacated and remanded,* 423 U.S. 976 (1976).

[214] O. Fiss, Injunctions 91-93 (1972).

[215] Ind. Code § 35-30-10.5-4 (1973).

[216] Ohio Rev. Code Ann. §§ 3767.01-.09 (Page 1971).

[217] State *ex rel.* Ewing v. "Without a Stitch," 37 Ohio St. 2d 95, 103, 104-05, 307 N.E.2d 911, 917-18 (1974), *appeal dismissed sub nom.* Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975).

[218] 1918 La. Acts, No. 47 § 2, *previously codified in* La. Rev. Stat. Ann. § 13:4712 (1968) (repealed 1974).

[219] Gulf States Theatres, Inc. v. Richardson, 287 So. 2d 480, 485-87 (La. 1974). In response to the *Gulf States* decision, the Legislature repealed the offending statute and substituted what seems to be a constitutionally permissible system. 1974 La. Acts, No. 277, § 1, *codified at* La. Rev. Stat. Ann. §§ 13:4711-16 (Supp. 1976).

Two Supreme Court opinions are instructive in this regard. In *Freedman,* the Court said "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."[220] In *Hecht Co. v. Bowles*[221] the Court construed a statute providing that upon the required showing an "injunction, restraining order, or other order shall be granted" not to compel courts of equity to depart from traditional "qualities of mercy and practicality."[222] The judge could conclude that the defendant had breached the substantive standard, yet, in response to promises to do better, refuse to enjoin.[223] Thus, if the legislature attempts to circumscribe the full range of judicial discretion, it may unconstitutionally prevent a judicial determination of obscenity. And in any event, courts of equity retain discretion to ignore compulsory remedies.

The proposed statute preserves the judge's remedial flexibility. The jury, if it is demanded, serves solely as a factfinder. When both jury and judge find material to be obscene, the judge must enter a declaration of obscenity. The declaratory judgment is a full-fledged remedy because it gives the decision the force of law, precedential value, and res judicata effect. But coercive remedies that must be enforced with contempt are a matter of judicial discretion. The statute says only that the judge "may enjoin" dissemination. This allows the remedial discretion announced in *Hecht Co. v. Bowles.*

VI. The Nature of the Final Injunction

Injunctions contain two parts: they specify *who* is obliged to obey, and *what* they must do. In his 1897 article entitled *Government by Injunction,*[224] Mr. Dunbar complained, "A looseness of thought is apparent in the decisions discussing the use of injunctions which has tended to conceal the principles involved."[225] The following discussion of obscenity nuisance injunctions will attempt to avoid Mr. Dunbar's criticism.

A. Who Must Obey the Injunction?

The only significant problem in determining who is bound by

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[220] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[221] 321 U.S. 321 (1944).

[222] *Id.* at 329.

[223] *See, e.g.,* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 60-62 (1975).

[224] Dunbar, *Government by Injunction,* 13 Law Q. Rev. 347 (1897).

[225] *Id.* at 358.

an obscenity injunction is the product of bad doctrine from the turn of the century. The in rem injunction, which was used primarily to abate saloons, restrained "all persons" from illegal activity on the described premises. This permitted a court to hold in contempt any person who acted contrary to the injunction, even if he was not a party to the suit and was ignorant of the injunction.[226] By substituting constructive notice for actual knowledge, in rem injunctions obviated enforcement and proof difficulties. But in so doing they created serious due process and first amendment problems.

Obscenity nuisance statutes sometimes achieve an in rem effect by permitting injunctions that restrain both the defendant and the property on which the nuisance was discovered.[227] Courts have occasionally enjoined "the defendant and all other persons,"[228] or "any person."[229] But, whether the nuisance involves liquor or pornography, holding a person in contempt of an injunction of which he has no notice violates elemental principles of due process.[230] The first amendment probably precludes in rem obscenity nuisances as well. In *Smith v. California,*[231] the Supreme Court reversed a conviction under an ordinance that made simple possession of obscene books illegal. The Court held that to permit conviction for possession without proof of scienter or knowledge would inhibit freedom of expression by booksellers. Injunctive theories that attempt to punish people who lack knowledge of an interdiction run afoul of the same principle.[232]

The proposed statute eliminates in rem injunctions and allows the court to enjoin only "any or all defendants." By implication, the court cannot "enjoin" the property, nor can it compel nonparties to comply. The general law of injunctions goes somewhat further and permits courts to punish a defendant's agents or cohorts who violate an injunction.[233] The author anticipates that courts would use the proposed statute to enjoin named defendants, and general equitable

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[226] *See, e.g.,* Silvers v. Traverse, 82 Iowa 52, 47 N.W. 888 (1891). *See generally* Rendleman, *Beyond Contempt: Obligors to Injunctions,* 53 TEX. L. REV. 873, 911-16 (1975).

[227] IND. CODE § 35-30-10.5-4 (1973).

[228] *See* Grove Press, Inc. v. Flask, 326 F. Supp. 574, 578 (N.D. Ohio 1970), *vacated,* 413 U.S. 902 (1973).

[229] Speight v. Slaton, 356 F. Supp. 1101, 1104 (N.D. Ga. 1973) (Morgan, J., dissenting), *vacated and remanded,* 415 U.S. 333 (1974).

[230] *See generally* Rendleman, *supra* note 226, at 884-88; Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class,* 44 U. CHI. L. REV. 111, 128-32, 140-43 (1976).

[231] 361 U.S. 147 (1959).

[232] State *ex rel.* Ewing v. "Without a Stitch," 37 Ohio St. 2d 95, 101-02, 307 N.E.2d 911, 916 (1974), *appeal dismissed sub nom.* Art Theatre Guild v. Ewing, 421 U.S. 923 (1975).

[233] Rendleman, *supra* note 226.

doctrine to prevent defendants from breaching injunctions through the use of alter egos or straw men. In no event, however, should the court attempt to bind individuals who lack actual knowledge of the original injunction.

B. What May Be Enjoined?

Commentators traditionally employ two variables in analyzing the "what" part of injunctions.[234] The first variable, broad to narrow, refers to the amount of conduct the injunction forbids. The second variable, imprecise to specific, refers to the particularity with which the injunction describes the forbidden conduct. An injunction that intrudes upon sensitive first amendment interests brings related but distinct concepts into play. An overly broad injunction may run afoul of the constitutional proscription of prior restraints, and an imprecise injunction may be infirm because it violates the constitutional vagueness doctrine.

Before examining particular types of final injunctions, a further word about prior restraint doctrine is required. This article earlier divided prior restraints into procedural and remedial restraints, and discussed procedural restraints in the section on pretrial procedures.[235] Remedial restraints are found in the part of the injunction that describes "what" conduct is forbidden. Remedial restraints can be further subdivided into "hardcore" restraints and "standards" restraints.

Hardcore restraints prevent future expression because of past expression. An example would be: "Because we dislike the May issue of the Law Review, you may not publish at all in June." Hardcore restraints, when identified as such, seldom cause courts any trouble and are almost invariably held unconstitutional. Standards restraints are illustrated by the well-known decision in *Near v. Minnesota.*[236] A Minnesota public nuisance statute permitted the state to enjoin "a malicious, scandalous and defamatory" newspaper.[237] Near appealed from an injunction that forbade, in part, "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law . . . ."[238] In other words, the injunction simply adopted the standard embodied in the statute, without specifying further what content could not be published. The

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[234] *Developments in the Law—Injunctions,* 78 HARV. L. REV. 994, 1064-67 (1965).

[235] *See* text and notes at notes 129-157 *supra.*

[236] 283 U.S. 697 (1931).

[237] *Id.* at 702.

[238] *Id.* at 706.

constitutionality of standards restraints in the obscenity nuisance context is unclear and will be discussed below.

To summarize, injunctions may be constitutionally invalid for one of three reasons: vagueness, hardcore prior restraint, or standards prior restraint. The article will turn to litigated obscenity injunctions, beginning with the easiest, and apply this frame of reference. Because haziness attends prior restraint doctrine, the analysis will be greeted with inconstant success. But the frame of reference allows some intelligible generalizations to be adduced.

1. *Hardcore Prior Restraints.*

a. *Shutdown orders.* Many statutes permit obscenity injunctions that close an establishment where pornography has been disseminated,[239] and at least one court has approved such an injunction.[240] Other courts have disapproved requests for shutdown orders.[241] A court that closes a business associated with past offensive expression effectively prohibits the proprietor from disseminating protected materials from that location in the future.[242] Thus, shutdown orders represent a clear-cut case of hardcore prior restraints.

Although this would appear to be obvious, the Michigan Court of Appeals, in approving the padlocking of a theater for one year, nevertheless sought to distinguish a shutdown order from a prior restraint.[243] First, the court reasoned, since the defendants remained

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[239] *See, e.g.,* DEL. CODE ANN. tit. 10, § 7204 (1976 Supp.); IND. CODE §§ 35-30-10-5-4, 35-30-10-56 (1973). The Indiana statute includes complex bonding, taxing, and release provisions which are not discussed herein. The district court reprobated these provisions in Nihiser v. Sendak, 405 F. Supp. 482 (N.D. Ind. 1974), but the Supreme Court vacated and remanded over Justice Brennan's cogent dissent. Sendak v. Nihiser, 423 U.S. 976 (1975).

[240] Bloss v. Paris Township, 380 Mich. 466, 157 N.W.2d 260 (1968).

[241] Universal Amusement Co. v. Vance, 404 F. Supp. 33, 43-44 (S.D. Tex. 1975), *remanded on other grounds sub nom.* Butler v. Dexter, 425 U.S. 262 (1976); General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 320 So. 2d 668, 675-76 (1975), *cert. denied,* 425 U.S. 904 (1976); People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 59, 550 P.2d 600, 610, 130 Cal. Rptr. 328, 338, *cert. denied,* 429 U.S. 922 (1976); State *ex rel.* Blee v. Mohney Enterprises, 154 Ind. App. 244, 247-48, 289 N.E.2d 519, 521, (1973); Hall v. Commonwealth *ex rel.* Schroering, 505 S.W.2d 166, 168 (Ky. 1974); New Riviera Arts Theatre v. State, 219 Tenn. 652, 659-60, 412 S.W.2d 890, 893-94 (1967); Napro Development Corp. v. Town of Berlin, 376 A.2d 342, 349 (Vt. 1977).

[242] Speight v. Slaton, 356 F. Supp. 1101, 1107 (N.D. Ga. 1973) (Morgan, J., dissenting), *vacated and remanded,* 415 U.S. 333 (1974); General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 320 So. 2d 668, 675 (1975), *cert. denied,* 425 U.S. 904 (1976); Sanders v. State, 231 Ga. 608, 613, 203 S.E.2d 153, 157 (1974). As the court in *Sanders* points out, a shutdown order is also a particularly noxious procedural restraint because the order, without according any procedural safeguards, suppresses matter that the defendant could have disseminated in the future. *Id. See generally* Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion,* 7 SETON HALL L. REV. 543 (1976).

[243] State *ex rel.* Cahalan v. Diversified Theatrical Corp., 59 Mich. App. 223, 237, 229 N.W.2d 389, 396 (1975), *rev'd,* 369 Mich. 244, 240 N.W.2d 460 (1976).

free to exhibit nonobscene films elsewhere, the padlocking order was a sanction for past conduct, rather than a restraint on future conduct. Second, because individuals convicted of distributing obscenity could be imprisoned for up to one year, the defendants should not be heard to complain about the less severe padlocking sanction.[244]

The court's attempt to distinguish shutdown orders from prior restraints is unpersuasive. Whatever the defendants were free to do elsewhere, to forbid them access to *this* facility and equipment restricts their future freedom of communication, and is an ill-concealed hardcore restraint. Moreover, an analogy to criminal remedies ignores the point that the state may not mete out criminal punishment under the reduced protection of civil procedure. If the state's interest in closing a building is to exact a punishment for past conduct, then it must proceed against the defendant under criminal, rather than civil, procedures. Finally, if the offending distributor rents the building, a padlocking order deprives the building's owner of property without due process of law.[245]

The Michigan Supreme Court reversed the court of appeals, holding that the authorities could not employ the Redlight Nuisance Statute against motion pictures. While the court did not pass on the prior restraint issue, it registered disapproval of the injunction, since it could be "used to suppress materials not found to be obscene."[246] The author would prefer a more explicit repudiation of the pernicious doctrine of the lower court.

b. *Bonding requirements.* After finding that obscenity has been disseminated, some courts have forced the owner or proprietor to post a bond as a condition of keeping the business open.[247] This varies the analysis applied to shutdown orders, but does not change the result. The bond does not *prohibit* future conduct because of a finding of illegal past conduct; it merely *qualifies* the defendant's first amendment rights by imposing a burdensome condition on

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[244] *Id.*

[245] Gulf States Theatres, Inc. v. Richardson, 287 So. 2d 480, 492 (La. 1973). *See* State *ex rel.* Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974) (per curiam); *cf.* State *ex rel.* Wayne County Prosecutor v. Gladstone, 64 Mich. App. 55, 235 N.W.2d 60 (1975) (nuisance abatement statute invoked to close down property being used for purposes of prostitution).

[246] State *ex rel.* Cahalan v. Diversified Theatrical Corp., 396 Mich. 251 n.15, 240 N.W.2d 460, 464 n.15 (1976).

[247] *See* State *ex rel.* Leis v. William S. Barton Co., 45 Ohio App. 2d 249, 255, 344 N.E.2d 342, 346 (1975) (per curiam); DEL. CODE ANN. § 7204 (1976 Supp.). *But see* Universal Amusement Co. v. Vance, 404 F. Supp. 33, 43-44 (S.D. Tex. 1975), *remanded on other grounds sub nom.* Butler v. Dexter, 425 U.S. 262 (1976).

their future exercise. By bearing unequally on different disseminators of expression, the bond inhibits expression the authorities dislike. Such a requirement is equivalent to an unconstitutional attempt to tax knowledge.[248]

On the other hand, a bonding requirement tied to an injunction against particular material that has been adjudicated obscene should be permissible. Such a narrowly drawn bond was approved by an Ohio state court of appeals. In an earlier decision, Ohio's obscenity nuisance statute had been restricted to enjoining particular films declared obscene.[249] Subsequently, in *State ex rel. Leis v. William S. Barton Co.*,[250] the court approved an order requiring a bond for the full value of the business to ensure that a film adjudicated to be obscene would not be exhibited there again. This bonding requirement is not a hardcore restraint since it does not use past illegal conduct to preclude future nonadjudicated conduct, nor can it be said to condition or tax future distribution of presumptively protected expression.[251]

This type of limited bonding requirement more closely resembles an injunction that specifies the penalty for violation, or a coercive contempt award where the judge tells the contemnor what it will cost to violate again, than a hardcore prior restraint. Of course, any bonding requirement ties up assets rather than merely admonishing. But losing litigants traditionally pay taxable expenses for marshalls, sheriffs, and witnesses, and the bond premium can be conceptualized as part of the price of losing instead of a lien on future conduct. Even this narrow form of bonding requirement, however, should be limited in duration and open to modification or dissolution when conditions change.

2. *Unconstitutional Vagueness.* Policymakers frequently employ imprecise directives to deal with irreconcilable interests. When the General Court in colonial Virginia instructed tavern keepers "nor on the Sabbath Day suffer any person to tipple and drink more than is necessary,"[252] it had in mind the comforts of both religion and an occasional nip. But equity requires that injunctions

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[248] Grosjean v. American Press Co., 297 U.S. 233, 244-51 (1936). *Cf.* Speiser v. Randall, 357 U.S. 513 (1958) (unconstitutionality of denial of tax exemption to veterans who refuse loyalty oath).

[249] State *ex rel.* Ewing v. "Without a Stitch," 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974), *appeal dismissed sub nom.* Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975).

[250] State *ex rel.* Leis v. William S. Barton Co., 45 Ohio App. 2d 249, 253-55, 344 N.E.2d 342, 346-47 (1975).

[251] *See* Speiser v. Randall, 357 U.S. 513 (1958); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[252] 6 Hening's Statutes 73 (1748).

delineate proscribed conduct with specificity, to avoid both uncertainty about what is forbidden, and excessive discretion in the way injunctions are enforced.[253]

Statutory vagueness is a well-known vice of constitutional dimension in expression-related areas. Vague injunctions should be set aside on constitutional grounds for some of the same reasons. A criminal statute must be precise enough to give fair notice of the conduct it forbids, and to guide the discretion of enforcement officials.[254] Similarly, an injunction should be clear enough that the ordinary person can discern what conduct it proscribes.[255] *Paris Adult Theatre I v. Slaton*[256] approves injunctions against obscenity, "assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment."[257] As a matter of course, courts refuse to enforce injunctions that, on their face, abridge communication or conduct protected by the first amendment.[258] Impermissibly vague injunctions should also be overturned as unconstitutional.[259]

Imprecise injunctions nevertheless appear in reported decisions. One enjoined "conducting the business of selling obscene literature in violation of [the state obscenity statute]";[260] another forbade the continued existence of the statutory nuisance of obscenity;[261] a third interdicted not only certain specific magazines, books and items, but also what the court called "similar items";[262] a fourth enjoined the showing of *Lysistrata* "or any other motion picture film of the same character."[263] Blanket injunctions with catch-all phrases such as "maintenance of their business so as to annoy the community" are equitable overkill. The first amendment protects a lot

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[253] *See generally* D. DOBBS, REMEDIES § 2.10 (1973).

[254] Rabe v. Washington, 405 U.S. 313 (1972); Walker v. Dillard, 523 F.2d 3 (4th Cir. 1975); Attwood v. Purcell, 402 F. Supp. 231, 234-36 (D. Ariz. 1975); F. SCHAUER, *supra* note 6, at 158-64.

[255] *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437-38 (1976); United States Steel Corp. v. United Mine Workers, 519 F.2d 1236, 1246 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976).

[256] 413 U.S. 49 (1973).

[257] *Id.* at 55.

[258] United Transp. Union v. State Bar, 401 U.S. 576, 585-86 (1971).

[259] Paris Follies, Inc. v. State *ex rel.* Gerstein, 259 So. 2d 532 (Fla. Dist. Ct. App. 1972) (per curiam); Mitchum v. State *ex rel.* Schaub, 250 So. 2d 883, 886 (Fla. 1971).

[260] Mitchum v. State, 244 So. 2d 159, 159 (Fla. Dist. Ct. App. 1971).

[261] Society to Oppose Pornography, Inc. v. Thevis, 255 So. 2d 876, 878 (La. Ct. of App. 1972).

[262] Moore v. State, 470 S.W.2d 391, 392 (Tex. Civ. App. 1971).

[263] Cactus Corp. v. State *ex rel.* Murphy, 14 Ariz. App. 38, 39, 480 P.2d 375, 376 (1971) (per curiam).

that will "annoy" some people.[264] Such vague injunctions breach the fundamental rule, grounded in equity and constitutional law, that injunctions must be "definite, clear, and concise."[265]

3. *Standards Orders.* Is an injunction that forbids a defendant to disseminate "obscenity" defective when analyzed correctly? Such a standards order could, of course, violate the vagueness doctrine. If it does, it should be invalidated on this basis. But an order that copies the Supreme Court's latest statement of standards seems well within the wit of man. If the order is so precise and specific that "defendants do not even need a dictionary to learn what is prohibited since the parenthetical material following the Latin-derived words makes the order clear,"[266] then the defendant's vagueness attack should fail.

The more serious question is whether such standards orders are constitutionally infirm under the holding of *Near v. Minnesota.*[267] Recall that *Near* invalidated an injunction that prohibited the publication of a "malicious, scandalous or defamatory" newspaper.[268] The exact reason for the Court's ruling is, however, difficult to discover. The decision makes little sense if the Court thought that the injunction was merely a standards order. The Court assumed that penal libel statutes were constitutionally permissible,[269] and the civil injunction merely personalized a parallel criminal statute. Under a standards order, the newspaper could publish, be charged with contempt, and defend on the ground that the statements were not "malicious, scandalous or defamatory." This is nearly identical to the paper defending a criminal libel prosecution by arguing that because the statements were not libelous, it had not violated the statute.

Other language in the opinion indicates that the Court viewed the injunction as compelling the publisher to clear material in advance with the judge.[270] In other words, the injunction created a type of hardcore restraint not unlike an advance licensing scheme. On this reading, the key to understanding *Near* is that it forbids "a judgment [that] would lay a permanent restraint upon the pub-

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[264] Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-12 (1975); Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971).

[265] Teamsters Union v. Vogt, 354 U.S. 284 (1957); Moore v. State, 470 S.W.2d 391, 396 (Tex. Civ. App. 1971). *See also* FED. R. CIV. P. 65(d).

[266] Richards v. State, 497 S.W.2d 770, 780 (Tex. Civ. App. 1973).

[267] 283 U.S. 697 (1931).

[268] *Id.* at 701-02.

[269] *Id.* at 720.

[270] *Id.* at 706, 712. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205.

lisher, to escape which he must satisfy the court as to the character of the new publication."[271] Under this interpretation, which the author accepts, a standards injunction of obscenity that does not put the trial court in the role of an advance censor would not violate the doctrine of *Near*.

In some jurisdictions standards orders may be invalid because of the rule that equity will not enjoin a crime.[272] The traditional ground for the maxim is that the state possesses an adequate remedy at law in a criminal prosecution. In addition, a defendant who breaches an injunction that merely personalizes a criminal statute may be unfairly exposed to both criminal punishment and contempt.[273] Moreover, while a criminal defendant may argue that the statute under which he is convicted is unconstitutional, a defendant in a contempt proceeding may not challenge the constitutionality of the injunction because of the collateral bar rule.[274] Finally, procedural advantages for the state lurk in injunctions personalizing criminal statutes. Under present law, a contemnor can be imprisoned for up to six months without benefit of a jury trial.[275]

Nevertheless, most jurisdictions reject these arguments and permit courts to issue injunctions against crimes.[276] An injunction forbidding "obscenity" or specifying standards is distinguishable from criminal punishment because it gives the defendant one free bite: a court finds the defendant's activity illegal but withholds punishment until he commits a second violation. Thus, the "obscenity" or standards injunction grows out of the practice of allowing the authorities to choose between civil and criminal remedies. By abolishing the criminal sanction, raising the civil burden of proof, and allowing a jury trial of obscenity, the proposed statute obviates much of the unfairness of a standards injunction.

The proposed statute nevertheless allows the judge to enjoin defendants from disseminating only "matter adjudged to be obscene." This limits injunctions to specific books or films and, by implication, forbids a "standards" order. To be sure, a case can be made for standards orders. As a Texas court pointed out, if courts cannot employ such an injunction, "the State must bring suit each time the defendants change the obscene menu in their passion

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[271] Near v. Minnesota, 283 U.S. 697, 712 (1931).

[272] *See, e.g.*, Richards v. State, 497 S.W.2d 770, 778 (Tex. Civ. App. 1973).

[273] Kuang Hung Hu v. Morgan, 405 F. Supp. 547, 548 (E.D.N.C. 1975).

[274] *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 334 (1967) (Warren, C.J., dissenting).

[275] Maita v. Whitmore, 508 F.2d 143 (9th Cir. 1974).

[276] D. DOBBS, REMEDIES § 2.11 (1973).

pits."[277] But the author thinks that the argument advanced by Justices Brennan and Tobriner carries the day. Obscenity and protected expression are closely related, and the standards for ascertaining obscenity are inherently imprecise. If civil obscenity allows "standards" injunctions, the authorities could secure a "standards" order and threaten the defendant with contempt. Thus, although the statute would repeal criminal statutes, the harassing technique of threatening prosecution—and the resulting chill on the marketplace of ideas—would reenter by the side door. The proposed statute seeks to prevent the authorities from using a "standards" injunction to threaten contempt in the same way they may now use penal statutes.[278]

VII. Post-Injunction Issues

The article will next consider three issues that arise after a judge issues an injunction. First, what principles should govern the award of stays pending appeal? Second, what should become of the material that is declared obscene? And third, what sanctions should courts be permitted to impose for contempt?

A. Stay Pending Appeal

Unless an enjoined litigant obtains a stay, the injunction remains in effect pending appeal. As a general rule, either the trial court or the appellate court may grant a stay, but appellate courts often give considerable deference to trial courts in determining whether to stay an injunction.[279] The proposed statute adopts ordinary rules of appellate procedure with two exceptions. It requires an expedited appeal, and it forces appellate courts to consider independently whether to grant a stay. The latter requirement is designed to ensure that the propriety of a stay pending appeal is considered by a detached tribunal as well as by the trial court.

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[277] Richards v. State, 497 S.W.2d 770, 781 (Tex. Civ. App. 1973).

[278] If a jurisdiction wants to adopt the statute but allow "obscenity" or "standards" injunctions, the legislature should:

1) amend § 13 adding "or any other material which is obscene as defined in § 1." States with the equivalent of federal rule 65(d) cannot incorporate by reference but must define obscenity in the injunction.

2) amend § 15 to provide a contempt procedure commensurate with *Freedman v. Maryland:* notice, an adversary judicial determination, brief or no restraints, and a prompt decision, 380 U.S. 51, 58-59 (1965), in addition to the usual apparatus of criminal contempt.

[279] Mitchum v. State, 234 So. 2d 420 (Fla. Dist. Ct. App. 1970).

B. Destruction of Obscene Material

What happens to the books or film prints found obscene? The Tennessee Supreme Court declared, "Once a film is judicially determined to be obscene it becomes contraband and may properly be destroyed without violating the rights of anyone."[280] Many statutes and reported court orders command officials to "seize and destroy" obscenity.[281] Destruction has its roots in the law of deodands, requiring the forfeiture or demolition of objects that offend, injure, or kill.[282] The Supreme Court approved its use in conjunction with adjudicated obscenity in *Kingsley Books*.[283] Certainly, destruction is an obvious solution to the real risk that the enjoined material will reappear in the stream of commerce.

However, burnt offerings and revenge against objects are anachronisms. Demolition smacks too much of bookburning, a practice incompatible with an open and democratic society. Destruction of obscene materials is also inconsistent with other facets of obscenity law. Although the Supreme Court has permitted the authorities to regulate the dissemination of pornography, private "consumption" of legally obscene material is beyond the ambit of permissible interdiction.[284] Moreover, obscenity doctrine varies through space and time. Tolerance for sexually explicit matter may flourish under city lights but wither in country air. And if recent history is any guide, one generation's "dirty book" is assigned reading for the undergraduates of the next.

The proposed statute does not allow officials to destroy material adjudged obscene. Although the court may enjoin the defendant from disseminating it, the proprietor may keep the matter at home, ship it to a more salubrious environment, or wait for the local climate to change. If time alters community standards or legal doctrine, the defendant may ask the court to modify or dissolve the injunction.[285] The statute confronts the risk that the owner will disobey the injunction, but relies on the power of contempt rather than a bonfire.

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[280] Taylor v. State *ex rel.* Kirkpatrick, 529 S.W.2d 692, 698 (Tenn. 1975).

[281] *See, e.g.*, N.Y. Civ. Prac. Law § 6330(3) (McKinney 1976).

[282] *Exodus* 21:28: "If an ox gore a man or a woman, and they die, he shall be stoned and his flesh not eaten."

[283] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 444 (1957).

[284] Stanley v. Georgia, 394 U.S. 557 (1969).

[285] Fed. R. Civ. P. 60(b)(5); 11 C. Wright & A. Miller, Federal Practice and Procedure 210 (1973).

C. Sanctions For Contempt

Flexibility, the byword of equitable remedies, should guide the choice of remedies for contempt. The proposed statute permits the court to fine, imprison, or "impose any other lesser appropriate sanction" for contempt. Thus, the statute permits retributive sanctions for less than the prescribed maximum. Courts that try criminal contempt cases should apply the appropriate criminal safeguards under the rules and statutes of the jurisdiction.

In addition, the statute allows the court to use civil contempt, either remedial or coercive. Remedial contempt occurs when the judge compels a violator to compensate someone damaged by the breach of an injunction. Commentators have analogized obscenity to assault,[286] and courts should be allowed to use remedial contempt to impose "assault" damages on a breaching defendant. Coercive contempt occurs when the judge tells a violator to comply with the injunction or face a specific penalty, often on a timed basis, for continuing to flout the order. Courts should also be able to use coercive contempt orders to achieve compliance with civil obscenity injunctions.[287]

CONCLUSION

The assumption that language can be refined to distinguish the obscene from the merely explicit is probably fallacious. Minds can identify obscenity, but definition plays a small role in the labeling process. The verbal formula adopted in *Miller v. California*[288] purports to focus the decisionmaker's attention on the issues. But because obscenity is such a cluster of social and psychological forces, definitions are too subjective and morally connotative to bring fairness and predictability to obscenity regulation.

Obscenity regulation consists of people exercising power over people. It is most realistically viewed as a specialized legal process whereby authorities specify particular material as being too sexually explicit for others, and enforce this decision by imposing sanctions for distributing this material. Accordingly, this article has overlooked definition and has examined the process by which a determination of obscenity is reached. It has sought to develop a process

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[286] T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 91 (1966).

[287] Coercive orders cannot include security or the equivalent of security against any future obscenity; this is an impermissible hardcore restraint. *See* State *ex rel.* Leis v. William S. Barton Co., 45 Ohio App. 2d 249, 258-60, 344 N.E.2d 342, 348-50 (1975).

[288] *See* note 5 *supra.*

that makes possible a full and fair accommodation of the competing interests and values at stake.

Civil obscenity is the worst and best of remedies. The equitable approach displays execrable excesses: it can render equity the handmaiden of the criminal law, turn to clandestine ex parte procedure, deprive a defendant of trial by jury, and perpetrate massive seizures and shutdowns.[289] But equity also exhibits exemplary features: it accords a civilized warning, reduces the stigma of state control, and focuses on the critical issue of obscenity rather than irrelevant procedural technicalities. This article and the statute it proposes attempt to eliminate the worst and consolidate the best. The author hopes this modest effort will assist in forming a new consensus about the appropriate role of the state in regulating sexually explicit expression.

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[289] *See* Judge Morgan dissenting in Speight v. Slaton, 356 F. Supp. 1101, 1104-08 (N.D. Ga. 1973), *vacated and remanded,* 415 U.S. 333 (1974); State v. Gulf States Theatres, Inc., 270 So. 2d 547 (La. 1972), *rev'd,* 287 So. 2d 496 (La. 1974).