The Demise of Civil Nuisance Actions in Obscenity Control

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INTRODUCTION

Few areas of the law have presented courts with such vexatious issues as those involved in the regulation of obscenity. Initial judicial attempts to define obscenity have yielded conflicting and confusing results1 with standards often impossible to manage in practice.2 In addition, the enforcement of such standards has proven less than adequate.3

Part of the difficulty of any regulation in this area is its traditional tendency to evoke emotional responses.4 Debate on the advisability of setting limits on sexual expression has raged since the turn of the century.5 Not surprisingly, the courts may at times

*B.S. 1967, Bowling Green State University; J.D. 1974, Cleveland State University.
1. See Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). "One cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting).
3. "For a variety of reasons—chiefly, perhaps, their lack of success in court, due to broad and ambiguous state statutes—district attorneys across the country are unenthusiastic about pornography litigation." Michelson, The Aesthetics of Pornography, reprinted in THE FIRST AMENDMENT IN A FREE SOCIETY 11 (J. Bartlett ed. 1979), originally printed in 226 The Nation 105-08 (Feb. 4, 1978).
4. T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 467 (1970). Professor Emerson states that obscenity appears to be an aberration in the rules governing first amendment analysis. "This state of affairs is probably due in large part to the intense and emotional pressures on the courts from the conventional wisdom which views obscenity, at least when available to others, as highly corrupting of the mind and spirit. Hence, although obscenity usually appears in the form of expression, the courts dare not treat it in the same way as other kinds of expression." Id.
5. This debate has been characterized as evidence of society's reaction to impending changes.

During the last quarter of the nineteenth century, Americans whose values were rooted in a pre-urban, preindustrial nation sought to preserve their culture against the ominous currents of social change that swept across the countryside. These defenders of rural Protestant values in an increasingly heterogeneous urban society battled for purity on many fronts. Purity in print, in Paul S. Boyer's felicitous phrase, was especially critical at a time when new techniques of mass communication portended mass literacy on an unprecedented scale. American
be unclear as to what and whose interests the law should protect. The judiciary is pressured by some segments of society to regulate obscenity, yet is faced with a lack of substantial evidence as to its harmful effects. This problem is further compounded by the strictures of the first amendment, designed to protect all forms of expression.

Despite their defects, laws regulating the suppression of sexual material still comprise part of both the civil and criminal codes. Prosecutors charged with administering this legislation must grapple not only with obscure legal standards but also with a radical change, over the past few years, in both the content and the distribution of questionable material. While earlier obscenity litigation often concerned works of literary stature, the "adult" bookstores and theaters flourishing today offer less "respectable" fare.

This point is graphically illustrated by a comparison of D.H. Lawrence’s *Lady Chatterley’s Lover* and Henry Miller’s *Tropic of Cancer* with the current flood of explicit periodicals and "peep

custodians of Victorian culture joined hands in the vice-society movement, 'a response to deep-seated fears about the drift of urban life in the post-Civil War years'. In an era which was 'perhaps the last in which adults had a fair chance to impose their judgments on young people,' censorship of obscene literature became for many Americans a compelling social obligation. (footnotes omitted).

Auerbach, *Introduction to T. Schroeder, "Obscene" Literature and Constitutional Law at vii (2d ed. 1972).*


8. *But see* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), where Justice Stevens writing for the majority indicates that sexually explicit expression, while protected from total suppression, does not enjoy the same first amendment scrutiny as political speech: "[F]ew of us would march our sons and daughters off to war to preserve the citizens’ right to see 'specified sexual activities' exhibited in the theaters of our choice." *Id.* at 70.

9. Tolerance of more explicit material may be a result of increased freedom of expression.

Today, in the United States, there appears to be a greater measure of freedom for literary, artistic, and cinematic sexual expression than ever before in the American past. The evidence lies in the books and magazines we can obtain from our city newstands, the films we can see at our neighborhood movie houses, and the plays we can attend at our 'off' and 'off-off Broadway and university theaters.


10. *See* Kingsley Int’l Pictures Corp. v. Regents of the Univ. of N. Y., 360 U.S. 684 (1959), where the Court reversed the state’s denial of a license regarding the film version of *Lady Chatterley’s Lover*.

11. *See* Besig v. United States, 208 F.2d 142 (9th Cir. 1953), where the Court described Miller’s work as follows:

The author conducts the reader through sex orgies and perversions of the sex
shows," where a quarter will purchase a minute and a half of sexual movie action. The society which was shocked by the language of Norman Mailer's *The Naked and the Dead* in 1948\(^{12}\) is now confronted with a plethora of explicit, readily available sexual material.\(^{13}\)

Distributors of sexual material have also changed. Celebrated obscenity cases of the 1950's and early 1960's generally involved legitimate publishers or avant-garde film distributors with principles to defend.\(^{14}\) In contrast, the current marketing of sexually explicit expression is a big business enterprise where potentially enormous profits may accrue from continually supplying the public with undistinguished material.\(^{15}\) Furthermore, recent studies speculate that organized crime interests have infiltrated the pornography business.\(^{16}\)

These developments in the character and marketing of sexual materials have frustrated enforcement of the obscenity laws.\(^{17}\) In general, government enforcement agencies have found legal definitions vague, and suppression procedures ponderous and expensive. Criminal investigations have taken years with prosecutions often resulting in hung juries,\(^{18}\) reversals on appeal,\(^{19}\) or acquit-

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Id. at 145.


13. Professor Emerson, referring to this distinction in types of material, stated: "[T]he impact of obscenity laws falls primarily, or would if the laws could be enforced, upon particular groups in our society who happen not to prefer or be able to afford elite pornography." T. EMERSON, supra note 4, at 500.


15. PORNOGRAPHY, OBSCENITY AND THE LAW 31-33 (L. Sobel ed. 1979) [hereinafter cited as PORNOGRAPHY].

16. Media and government sources have speculated that the dissemination of obscenity has been, in large measure, taken over by organized crime interests. A relatively recent study has concluded that in the late 1960's the field of pornography became a logical candidate for entry by organized crime and that the business is now a part of its entrepreneurial network. Id. at 29-34 (citing TASK FORCE ON ORGANIZED CRIME, CRIMINAL JUSTICE STANDARDS AND GOALS (National Advisory Comm. 1976)).


tals stemming from jury frustration with incomprehensible definitions.\textsuperscript{20} Especially troublesome from the government's perspective is the possible financing of criminal defense litigation by profitable business enterprises or even organized crime. The balance of available resources rests clearly with the purveyors in a criminal action, where a trial might result in the conviction of one offender after years of protracted litigation, during which time his business remains open and flourishing.

Because of these problems authorities have looked to civil litigation as a possibly more effective enforcement tool. On first view, a civil trial appears more attractive than a criminal prosecution laden with constitutional safeguards.\textsuperscript{21} The trial itself is less complicated and the remedies available are broader than a single criminal conviction. A variety of legal theories, such as public nuisance law,\textsuperscript{22} general business licensing,\textsuperscript{23} administrative censorship boards enforced by judicial sanctions,\textsuperscript{24} and zoning authority,\textsuperscript{25} give the government a wider choice of remedial options.

This article examines the use of civil actions to control obscenity, particularly those based on state public nuisance laws. It reviews the background of civil obscenity regulation and the constitutional problems, both substantive and procedural, stemming from the use of nuisance laws as discussed in federal and state court opinions. The conclusions drawn indicate that heavy procedural burdens imposed by first amendment considerations have rendered such civil actions expensive and unproductive. Although civil nuisance proceedings have been judicially sanctioned, their remedial aspects have been severely weakened and their future utility is in doubt.

surrounding obscenity are so difficult to administer, errors by the trial court will be more frequent. \textit{Id.} at 83.


\textsuperscript{21} In contrast to a criminal action, a civil approach has the following advantages: 1) an injunction against specific material has an immediate effect; 2) a prosecutor is more likely to prevail on a lower standard of proof; and 3) as a back up a prosecutor can request a contempt citation or institute a criminal action. Comment, \textit{The Devil and the D.A.}, supra note 7, at 1331. See J. BARRON \& C. DIENES, \textsc{Handbook of Free Speech and Free Press} 676 (1979); Houge, \textit{Regulating Obscenity Through the Power to Define and Abate Nuisances}, 14 \textit{Wake Forest L. Rev} 1, 15 (1978).

\textsuperscript{22} See, e.g., \textsc{Ohio Rev. Code Ann.} § 3767.01 (Page 1980).


\textsuperscript{24} See \textit{Times Film Corp. v. City of Chicago}, 365 U.S. 43 (1961).

CIVIL REGULATORY APPROACH

Background

States have utilized a variety of civil proceedings to regulate obscenity. Censorship review boards meeting procedural standards were constitutionally approved, but have fallen into disuse in recent years. These types of censorship boards have generally fallen into disuse. One of the last remaining, the Maryland Board of Censors, ceased operation in June, 1981, when the state cut off its funding.26

State laws regulating general business licensing have been invoked to deny permits to pornography distributors, although courts have restricted such denials on first amendment grounds.27 In addition, zoning restrictions have operated, with Supreme Court approval, as a valid exercise of police power to curb obscenity.28 Finally, the state's power to abate nuisances within its jurisdiction has been implemented through general common nuisance statutes and particular legislation aimed at obscenity.30

The Supreme Court has approved the state adoption of obscenity regulation as an alternative to criminal prosecution where restraint occurs only after trial on the issue of obscenity.31 In this context, the Court has reaffirmed its endorsement of state civil proceedings which serve to notify a distributor regarding the obscenity of his material before criminal charges are filed.32 On the strength of this approval, prosecutors have instituted civil actions under state or local nuisance statutes against distributors of explicit materials. Use of such laws, however, has caused critics to challenge their constitutionality on both procedural and substan-

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26. These types of censorship boards have generally fallen into disuse. One of the last remaining, the Maryland Board of Censors, ceased operation in June, 1981, when the state cut off its funding.

27. General business licensing laws have been implemented but a grant of a license cannot be constitutionally conditioned on the content of the material exhibited. Courts have held that a license revocation or denial cannot be based upon prior violations of obscenity laws. See cases cited supra note 23.


31. Kingsley Books, Inc. v. Brown, 354 U.S. 437 (1957). The Court stressed that the acceptability of this procedure turned on the fact that "it studiously withholds restraint upon material not already published and not yet found to be offensive." Id. at 445. See also Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), where the Court rejected the defendants' assertion of a right to exhibit material at least once.

tive grounds. As discussed below, the major flaw of nuisance statutes is their tendency to operate as unconstitutional prior restraints, and it is this defect which has most hampered their application in obscenity control.

**UTILIZATION OF STATE NUISANCE STATUTES**

*Criminal Safeguards Not Present in Nuisance Actions*

Although civil actions to enjoin obscenity nuisances resemble criminal prosecutions in several respects, there are at least two aspects of criminal trials which do not pertain to nuisance cases, the right to a jury and the criminal burden of proof. The elimination of these features would simplify and shorten any trial and thus make a civil action more attractive to a prosecutor.

Judges and commentators have speculated whether a jury need determine the issue of obscenity in light of the Supreme Court's insistence that obscenity be judged by the trier of fact applying contemporary community standards to individual cases. Because a jury uniquely represents the "average person," some have recommended its use in any obscenity litigation, especially where a determination in a civil case could be used in a subsequent criminal action. While at least one state court has required the use of

33. See infra text accompanying notes 54-124. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the Court rejected a defense claim that a theater patronized by consenting adults was protected from regulation by the right to privacy recognized in Stanley v. Georgia, 394 U.S. 557 (1969). The narrow recognition of privacy in the home did not extend to a place of public accommodation such as a theater, and thus state controls did not exceed constitutionally exercised police power. Id at 66-67. In addition, state interests in protecting the quality of community life outweighed the privacy argument. Id. at 58. See BARRON & DIENES, supra note 21, § 10:5.

34. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). The Court held that because of the close similarity between nuisance actions and criminal prosecutions, the doctrine of Younger v. Harris, 401 U.S. 37 (1971), applies to the former as well as the latter.


36. See Miller v. California, 413 U.S. 15 (1973). See also Justice Tobriner's dissent in Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, cert. denied sub nom. Van de Kamp v. Projection Room Theater, 429 U.S. 922 (1976), in which he stated that the Miller test could be consistently applied only with use of a jury. "If this constitutional 'test' can be consistently applied at all, and I have already expressed my serious doubts that it can, it seems clear that a jury, as a microcosm of the community, is the only 'trier of fact' fit to conduct the inquiry contemplated by Miller." Id. at 73, 550 P.2d at 619, 130 Cal. Rptr at 347.


38. One commentary suggests that if a jury trial is available for a contempt citation, the remedy of an injunction would not be very effective because a defendant could violate it and
an advisory jury on the issue of obscenity, the Supreme Court has held, in construing another state’s former nuisance law, that trial by jury was not constitutionally required.

The second procedural benefit derived from the prosecutor’s choice of a civil over a criminal action is a lower standard of necessary proof. Although the burden of proving obscenity remains with the government censor, the Court has recently held that in a civil action for abatement of an obscenity nuisance proof beyond a reasonable doubt is not constitutionally mandated. A state may itself offer defendants in civil suits such protection but, as the Court indicated, the first and fourteenth amendments do not compel it to do so.

Use of civil actions, despite their attractive procedural aspects, have raised issues of substantive unconstitutionality. In most cases, these questions have been resolved in the prosecution's favor.

Substantive Constitutional Problems Raised by Civil Actions

Several states have relied on their general nuisance statutes in bringing civil obscenity suits. Based on common law principles, nuisance laws were originally enacted to abate such annoyances as offensive odors, noises or soot and smoke. Public nuisance laws are generally enforced by the state and govern any interference with the common rights of the public, rather than individual

always relitigate the issue of obscenity. See Note, Obscenity as a Public Nuisance, supra note 18, at 402.

39. McNary v. Carlton, 527 S.W.2d 343 (Mo. 1975). If a jury finds that the material is not obscene, that determination is binding. If the jury finds the material to be obscene, the court must make an independent judgment. Comment, The Devil and the D.A., supra note 7, at 1339.


42. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90 (1981). An issue that remains unanswered by Cooper is the extent to which a criminal burden of proof of obscenity would be required in a criminal contempt action against a distributor for violation of a nuisance injunction. An argument might be made that in order to enforce an injunction with criminal sanctions, the issue of the obscenity of the materials might have to be relitigated and proved beyond a reasonable doubt.

43. Id. at 174. Justice Stevens in dissent stated that the Court should not have decided this case because the state court did not indicate that its decision was based on federal as opposed to state law. If based on state law, the Supreme Court would have no jurisdiction in the matter. Id. at 175-76. (Stevens, J., dissenting).

44. "Public nuisance laws generally cover acts which affect the safety, health, morals, comfort and convenience of the general public. They cover everything from maintenance of
Originally, they were punished as common law crimes. The law of nuisance has been described as an "impenetrable jungle," surrounded by vagueness, uncertainty, and confusion. This is due in large measure to its development through the common law, where it was imprecisely and indiscriminately applied. It is hardly surprising that the application of nuisance laws to first amendment issues, where delicate and precise delineations are necessary, raises serious questions of constitutionality. State courts confronting this problem have found it necessary to apply a significant judicial gloss to otherwise imprecise nuisance actions if their use in obscenity regulation is to be upheld.

Such judicial construction has been accomplished by reliance on constitutional preferences in favor of a statute's constitutionality and by incorporating into state law the standards set by the Supreme Court in Miller v. California. The Miller standards outline for the trier of fact three basic guidelines for determining whether a work is obscene: first, whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interests; second, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and finally, whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

Typical of cases employing a constructional preference in favor of public nuisance laws is Busch v. Projection Room Theater, in

noxious odors to operation of bawdy houses." BARRON & DIENES, supra note 21, at 693.
45. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 605 (1971)
46. Id. at 607.
47. There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is generally agreement that it is incapable of any exact or comprehensive definition. (footnotes omitted).
48. Id. at 592.
50. See Rendleman, supra note 17, at 522.
51. See, e.g., Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, cert. denied sub nom. Van de Kamp v. Projection Room Theater, 429 U.S. 922 (1976). "[S]ome 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." Rendleman, supra note 17, at 526.
53. Id. at 24.
54. 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, cert. denied sub nom. Van de Kamp v.
which the California Supreme Court upheld application of the state's nuisance statute to theaters and bookstores distributing obscene material. The nuisance law provided for abatement of anything "injurious to health, . . . indecent, or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property by an entire community." The defendants challenged such language as being impermissibly vague.

In analyzing the statute, the court found that the proscribed acts were those injurious to health or, alternatively, indecent or offensive to the senses, and that obscenity could qualify as a nuisance under the latter categories as well as under the former. The court, relying on its obligation to construe statutes so as to uphold their validity, held that the standards enunciated in Miller v. California, as incorporated in California's criminal obscenity statute, were likewise a component of the nuisance law, thus saving it from vagueness challenges.

In addition to vagueness, public nuisance laws may also be attacked as facially overbroad, especially when applied to exhibitions of sexual materials. For this reason, courts must construe the statutes narrowly to uphold their constitutionality. The Supreme Court of Kansas, for example, in State v. Motion Picture Entitled "The Bet," construed the word "obscene" in its public nuisance statute to mean only that material which comports with Miller standards. The court justified this construction by referring to its

55. Id. at 49, 550 P.2d at 603, 130 Cal. Rptr. at 49.

56. The Court specifically rejected the application of the California "Red Light Abatement" law to situations involving expression. Id. at 60-61, 550 P.2d at 611, 130 Cal. Rptr. at 339.

57. Id. at 50-51, 550 P.2d at 604-05, 130 Cal. Rptr. at 332-33.

58. Id. at 56, 550 P.2d at 608, 130 Cal. Rptr. at 336 (citing the Supreme Court's directive in United States v. 12 200-Foot-Reels of Film, 413 U.S. 123 (1973)).

59. Id. Justice Tobriner in dissent stated that the vice of vagueness is not cured because the determination of obscenity rests on "subjective preference or a conjecture about the tastes and fancy of one's neighbors." Id. at 72, 550 P.2d at 619, 130 Cal. Rptr. at 347. One commentary describes the results as "a little bizarre . . . [L]ewd" 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." Rendleman, supra note 17, at 526.

Remedial construction such as that used by the California court has met with Supreme Court approval in the context of criminal obscenity cases. See Ward v. Illinois, 431 U.S. 767, 774-75 (1977), where the Court held that the Illinois obscenity statute which had been construed to incorporate the Miller guidelines was not overbroad.

60. Rendleman, supra note 17, at 524-25.

61. 219 Kan. 64, 547 P.2d 760 (1976).

62. Id. at 70-71, 547 P.2d at 767. Young v. American Mini Theatres, Inc., 427 U.S. 50
past difficulties in regulating obscenity and its compliance with the obvious intent of the legislature in declaring such exhibitions a nuisance. As further support, the court cited opinions from nine other jurisdictions which applied a similar construction to uphold otherwise overly broad obscenity laws. However, the first amendment prohibits statutory restrictions which might restrain protected as well as unprotected material, and in such cases not even a narrowing construction will remedy the unconstitutional defect.

The use of public nuisance statutes in obscenity control has also raised questions concerning the constitutional right to privacy. Because a public nuisance must somehow interfere with the common rights of the public, an issue arises as to the application of such laws to the regulation of private exhibitions to consenting and paying adults. Justice Tobriner in his dissent in Busch argued that because California's nuisance law required interference with public sensory perceptions, and not just sensibilities, private showings did not qualify as public nuisances. Additionally, because the California law required interference with the comfortable enjoyment of life, those not entering the theaters or stores in question could not be affected and thus their enjoyment of life was not harmed.


In New York v. Ferber, 102 S. Ct. 3348 (1982), the Court emphasized its inclination to take into consideration the content of material involved when faced with laws suppressing such material despite its failure to meet traditional obscenity standards. In this case, the Court enunciated a separate test for visual or photographic depiction of sexual display or conduct involving children. Id. at 3354-58.

63. 219 Kan. at 67-68, 547 P.2d at 765. The court placed part of the blame for its difficulty on vacillation by the Supreme Court.

64. Id.

65. Id. at 70-71, 547 P.2d at 767 and cases cited therein. But see City of Chicago v. Festival Theater Corp., 88 Ill. App. 3d 216, 410 N.E.2d 341 (1981), where the court refused to incorporate Miller standards in a nuisance action against live performances.


67. For example, in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Supreme Court held that a nuisance law forbidding the display of films containing nudity on drive-in movie screens was impermissibly broad even if its purpose was the protection of youth. Id. at 213. Because the legislation could not be subjected to a narrowing construction, it was unconstitutional. Id. at 216.

68. Comment, The Devil and the D.A., supra note 7, at 1333.

69. Busch, 17 Cal. 3d at 65, 550 P.2d at 614, 130 Cal. Rptr. at 342.

70. Id. at 66, 550 P.2d at 615, 130 Cal. Rptr. at 342.
The *Busch* majority rejected this construction and similar contentions based on a right to privacy and held instead that a state may constitutionally conclude that obscenity injures the community.\(^{71}\) The court stated that merely because a film is exposed only to the paying, consenting public does not transform it into an exhibition not interfering with community interests.\(^{72}\) Courts other than *Busch* have reached similar conclusions in rejecting a privacy challenge to obscenity regulation.\(^{73}\)

While the foregoing issues of statutory construction have provoked much discussion by the courts considering constitutional challenges to nuisance statutes, for the most part their resolution has favored the prosecution and has not significantly damaged the utility of such laws in obscenity regulation. Challenges predicated on the doctrine against unlawful prior restraint, however, have stymied the courts' application of nuisance laws to obscenity cases. This, in turn, has generally had a devastating effect on the remedial aspects of nuisance laws and has rendered them virtually worthless when directed toward forms of expression.

**Procedural Requirements Imposed to Avoid Unlawful Prior Restraint**

One of the more attractive aspects of the civil regulation of expression is the availability of broad remedies which might operate to halt the distribution of obscenity. A civil injunction prohibiting any future display of offensive materials or an order closing an objectionable business would certainly be an effective weapon for the government to wield against obscenity. The doctrine of prior restraint, however, severely curtails the use of such a weapon. Prior restraint has been defined as the governmental use of a censorship system, court injunction, or other means to prohibit or restrict expression in advance of publication, even though such expression may be suppressed lawfully after publication.\(^{74}\)

In the landmark case of *Near v. Minnesota*,\(^{75}\) the Supreme

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\(^{72}\) 17 Cal. 3d at 52-53, 550 P.2d at 606, 130 Cal. Rptr. at 334.


\(^{75}\) 283 U.S. 697 (1931).
Court applied the doctrine of prior restraint to a statute allowing an injunction against publication of a newspaper that contained allegedly libelous material. The Court held that but for a few narrow exceptions restrictions on expression prior to publication were unlawful; obscenity constituted one such exception. Subsequent cases have held that prior to an adjudication as to the character of the material, it is deemed protected by the first amendment and cannot be suppressed. In Freedman v. Maryland and Southwestern Promotions, Ltd. v. Conrad, the Court outlined specific procedural steps which must be taken before suppression may occur. Although decided in the context of administrative censorship, these standards apply to adjudicatory proceedings as well and impose on civil actions safeguards similar to those required in a criminal case.

In Freedman v. Maryland, an exhibitor was convicted for showing a film before he submitted it to the Maryland State Board of Censors for approval. Although the Court did not find prior restraint unconstitutional per se, it found serious flaws in the Maryland procedure which did not provide for a judicial hearing before censorship nor give any assurance of prompt judicial review. The Court reversed the conviction and enunciated several procedural safeguards, which, if adhered to, would avoid a finding of unconstitutionality. After placing the burden of proving obscenity on the attempted censor, the Court held that only a judicial determination of obscenity would support a final decision to ban distribution. In view of this requirement, any restraint ordered by an administrative agency must be limited to the shortest possible time before a final judicial decision can be ren-

76. Id. at 702.
77. Id. at 716. Professor Emerson speculate that the ad hoc balancing engaged in by the Burger Court has weakened the prior restraint doctrine by depriving the exceptions of their categorial nature. Emerson, supra note 74, at 455.
82. 380 U.S. 51 (1965).
83. Id. at 52-53.
84. Id. at 53.
85. Id. at 55.
86. Id. at 58.
87. Id.
dered.88 A prompt final determination is required, the Court stated, to prevent a chilling effect on otherwise protected expression.89 Because the Maryland procedure lacked such safeguards, it was deemed an invalid prior restraint.90 In concluding, the Court stressed the necessity of relieving the exhibitor from the undue burden and consequent chill of having to institute judicial proceedings to secure his right to expression.91

The Court reaffirmed its Freedman guidelines ten years later in Southeastern Promotions, Ltd. v. Conrad.92 The petitioner, a promoter for the musical road company production of “Hair,” brought suit to force Chattanooga, Tennessee officials to allow performances in the municipal auditorium after an administrative board had denied its request.93 After examining the procedure followed by the city board, the Court concluded that the denial amounted to a prior restraint because the city required the promoter to apply for permission to use the theater and the board had full discretionary authority to grant or deny permission depending on the content of the performance.94 Moreover, none of the limited exceptions to the prior restraint doctrine were applicable95 and the nature of the board’s restraint was permanent and final.96 In striking the denial of a permit, the Court reiterated the rule of Freedman that the burden of instituting actions belongs with the censor, and that any temporary restraint of expression must be brief and final judicial determinations of obscenity prompt.97

Courts applying the requirements of Freedman and Southeastern Promotions have prohibited restraint of expression prior to an adjudicatory hearing on the question of obscenity, thereby limiting the sanctions of nuisance injunctions to material previously judged obscene.98 The Supreme Court has approved the use of civil regulations only where the authorities involved made no attempt to

88. Id. at 59.
89. Id.
90. Id. at 60.
91. Id. at 59.
93. Id. at 549.
94. Id. at 554.
95. Id. at 554.
96. Id. at 557.
97. Id. at 562.
censor before a judicial determination of obscenity.\textsuperscript{99} Broad injunctions and closure orders which operate irrespective of a prior hearing have been uniformly rejected even in cases where the nuisance statutes themselves were upheld.\textsuperscript{100}

For example, the nuisance law at issue in \textit{Busch v. Projection Room Theater}\textsuperscript{101} did not specifically provide for an adversary hearing on obscenity as \textit{Freedman} required.\textsuperscript{102} The defendants claimed that this deficiency was fatal and argued that the court should not "read into" the statute a provision not included originally.\textsuperscript{103} Engaging in some "judicial redrafting" and noting its power to construe laws in order to avoid constitutional infirmities, the \textit{Busch} majority judicially required an adversary hearing prior to governmental restraint.\textsuperscript{104}

In addition to the questionable constitutionality of the lack of an obscenity hearing, the possible sweeping scope of a remedial injunction raised severe constitutional problems. The California court authored two opinions in \textit{Busch}. The original opinion held that an injunction need not be limited to materials already adjudicated as obscene. This holding would have given trial courts the power to grant closure orders that operated as final restraints of any exhibition on the premises.\textsuperscript{105} By withdrawing its first opinion and issuing a second which greatly limited the scope of any permissible injunction,\textsuperscript{106} the court imposed upon law enforcement officials the task of litigating the obscenity of each particular book or film in question. The second \textit{Busch} opinion, recognizing that closure orders were beyond the power of the judiciary,\textsuperscript{107} concluded

\begin{footnotesize}
\begin{enumerate}
\item[99.] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
\item[100.] See Edelstein & Mott, supra note 98, at 565.
\item[102.] \textit{Id.} at 59, 550 P.2d at 610, 130 Cal. Rptr. at 338.
\item[103.] \textit{Id.}
\item[104.] \textit{Id.} at 60, 550 P.2d at 611, 130 Cal. Rptr. at 339. In his dissent, Justice Tobriner makes the following observation:

The majority justifies this judicial rewriting of the statute by referring to the principle that laws should be construed so as to uphold their validity. There is, however, an alternative way to construe the statutes involved in this case so as to render them immune to constitutional attack: They can be interpreted as inapplicable to private behavior. Given that the applicability of the statute's language to private behavior is, at best, highly dubious, this reading would seem the more judicious way to construe the statute so as to uphold its validity.

\textit{Id.} at 74 n.7, 550 P.2d at 620 n.7, 130 Cal. Rptr. at 348 n.7.
\item[105.] Note, \textit{Obscenity as a Public Nuisance in California}, supra note 18, at 395.
\item[106.] \textit{Id.} at 396.
\item[107.] \textit{Busch}, 17 Cal. 3d at 59, 550 P.2d at 610, 130 Cal. Rptr. at 338. The court stated: "We
\end{enumerate}
\end{footnotesize}
that abatement must be directed at particular obscene material and not at the premises where such material is exhibited.\textsuperscript{108}

In \textit{State ex rel. Ewing v. "Without a Stitch,"}\textsuperscript{109} the Ohio Supreme Court construed the state nuisance statute to allow a temporary injunction only after a hearing at which both parties could offer evidence on the issue of obscenity.\textsuperscript{110} The court also judicially imposed a requirement of scienter on the part of a theater owner before the nuisance sanctions could be levied against him.\textsuperscript{111} The court reviewed the statutory remedies considered mandatory upon the trial court’s finding of nuisance\textsuperscript{112} and noted that its decision would possibly compel a one year closure order.\textsuperscript{113} Recognizing this as an improper prior restraint, the court construed the remedy provisions narrowly, stating that the restriction could be lifted upon the property owner’s guarantee that the obscene film in issue would not be shown.\textsuperscript{114} The release provision included a bond requirement for the entire value of the property,\textsuperscript{115} and a penalty requiring forfeiture of box office receipts from the exhibition of a film after it had been judged obscene.\textsuperscript{116}

In contrast to Ohio and California, the Supreme Court of Louisiana decided that its nuisance law as applied to obscenity was

\textsuperscript{108} Although Justice Clark indicated that the Supreme Court had not yet ruled out the possibility of a total closure, 17 Cal. 3d at 62, P.2d at 612, 130 Cal. Rptr. at 340, that issue has been effectively foreclosed by the Court’s opinions in \textit{Vance v. Universal Amusement Co., Inc.}, 445 U.S. 308 (1980), and \textit{Brockett v. Spokane Arcades}, 454 U.S. 1022 (1981). See infra text accompanying notes 134-65.

\textsuperscript{109} 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974).

\textsuperscript{110} \textit{Id.} at 99, 307 N.E.2d at 914.

\textsuperscript{111} \textit{Id.} at 101, 307 N.E.2d at 915 (citing \textit{Smith v. California}, 361 U.S. 147 (1957), as requiring this result).

\textsuperscript{112} \textit{Id.} at 103, 307 N.E.2d at 917.

\textsuperscript{113} \textit{Id.} at 104-05, 307 N.E.2d at 917.

\textsuperscript{114} \textit{Id.} at 105, 307 N.E.2d at 918. The court recognized its inability to order an injunction against \textit{any} obscene film as this would be an impermissible prior restraint.

\textsuperscript{115} \textit{Id.} At least one other court has held this to be too harsh a restriction on first amendment rights. See \textit{Gulf States Theatres of La., Inc. v. Richardson}, 287 So. 2d 480 (La. 1973). See infra text accompanying notes 125-27.

\textsuperscript{116} 37 Ohio St. 2d at 105, 307 N.E.2d at 918. Because the enjoined nuisance is only the particular film in question, bond forfeiture would not occur upon the showing of any other films, but a bond requirement might have the effect of placing an economic burden on the theater owner and thus cause him to engage in self censorship in the future. One court has stated that such a requirement deprives the owner of his property without due process of law. \textit{Gulf States Theatres of La., Inc. v. Richardson}, 287 So. 2d 480, 492 (La. 1973). Nevertheless, the \textit{Ewing} court did not address this problem.
irredeemably unconstitutional when tested against *Freedman* standards. Suit was originally brought by theater owners to enjoin local officials from interfering with the exhibition of the film "Last Tango in Paris." In response, the officials sought an injunction against exhibition of the film under the state nuisance abatement law. That law provided for an ex parte temporary injunction which the trial court was required to issue upon a statement from the district attorney, on his information or belief, that the challenged material was obscene; no judicial determination of obscenity was required. The court found the provision for an ex parte injunction unconstitutional on its face and, therefore, unenforceable. In addition, the court found that the remaining provisions constituted an illegal prior restraint because they lacked those *Freedman* safeguards which allowed restraint only after an adversary hearing and an assurance of a prompt judicial determination of obscenity. In its analysis of the closure power provided in the statute, the court pointed out that when, as in this case, a law designed to control gambling and prostitution was amended to regulate obscenity first amendment problems intensified. Thus, the antiquated and minimum safeguards incorporated originally were insufficient to sustain the constitutionality of closure orders in the area of expression.

Like the Ohio statute in *Ewing*, the Louisiana statute provided that a property owner, with or without knowledge of objectionable material on the premises, could apply for release of his property if

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117. *Gulf States Theatres*, 287 So. 2d at 492.
118. *Id.* at 483.
119. *Id.*
120. *Id.* at 485.
121. *Id.*
122. *Id.* at 487.
123. *Id.* at 489.
124. The *Gulf States Theatres* court stated:

> This particular constitutional defect [padlocking] ... probably results from the fact that the two situations [prostitution and gambling versus obscenity] were analogized. [The nuisance law] originally abated the particular public nuisance of houses of prostitution. The amendment ... in 1960 to include obscenity, an exception to the First Amendment right, simply treated obscenity as a nuisance. Defendants ... use a 1918 procedure providing only the minimal safeguards for abatement of houses of prostitution to close a First Amendment protected tool of communication, a motion picture theatre.

287 So. 2d at 491 n.2. *See also* Universal Amusement Co., Inc. v. Vance, 587 F.2d 159, 165 (5th Cir. 1978).
125. 37 Ohio St. 2d at 105, 307 N.E.2d at 918.
he posted a bond for its full value. Unlike the Ewing court, however, the Louisiana court ruled this a deprivation of due process because rendering full value was as much a restraint as the state's retention of the property itself. Also unacceptable was the provision that proof of a nuisance would be based on the general reputation of the premises involved. The court asserted that one could not be found guilty of a new infraction solely on the basis of past exhibitions of obscene material.

State courts, in recognition of Freedman, have acknowledged their inability to restrain sexually expressive materials prior to a hearing on obscenity. The result has been that broad injunctions providing for closure orders have been denied even when the nuisance law itself has been upheld. The Supreme Court in two recent decisions has further clarified the doctrine applied by the states.

Supreme Court Reaction to Civil Regulation

The foregoing discussion illustrates that judicial efforts to deal with the problem of obscenity regulation from a civil perspective have raised a number of substantive and procedural problems. In addition, the lack of cultural consensus regarding obscenity reflects the consequent inappropriateness of harsh criminal remedies. Thus, critics have advocated the abolition of all criminal regulation in favor of a totally civil scheme. Their approach calls for civil regulation as a temporary compromise during the period of time that society's attitudes are shifting away from censorship of sexual material.

What appears to be happening, however, is a growing shift both by courts and law enforcement agencies favoring the use of crimi-

126. 287 So. 2d at 492.
127. Id.
128. Id. at 492-93.
129. Id. at 493.
130. Rendleman, supra note 17, at 509.
131. Id. at 510. While advocating a civil approach, the author cautions against retaining a dual system of control citing the potential danger of prosecutorial harassment and the resulting chill of distributors' first amendment rights. Id. at 514-21. See also BARRON & DIENES, supra note 21, at 676 (1979).
nal sanctions. Although civil actions are being instituted, the recent Supreme Court trend to limit the remedies available under nuisance abatement statutes has rendered them generally ineffective.

Vance v. Universal Amusement Co.

In Vance v. Universal Amusement Co., Inc., the Supreme Court affirmed by per curiam opinion the decision of the Fifth Circuit Court of Appeals invalidating a Texas civil nuisance statute as applied to obscenity. Because the Supreme Court opinion is quite brief, the Fifth Circuit’s decision is significant. In that opinion, the court directed its attention to the following three issues: (1) whether the provisions of the Texas statute providing for closure of the premises for one year could be constitutionally applied in an obscenity context; (2) whether the state could fashion an injunction against unnamed films not directly before the court; and (3) whether the statute provided procedural safeguards required by constitutional law. With regard to the first issue, the court, in order to save the statute, held that the state’s closure power was limited to other activities listed in the legislative scheme, namely, gambling, prostitution, and liquor violations and that the state was limited solely to an injunctive remedy only in those areas touched by the first amendment. A broader reading of the remedy available for abatement of obscenity, according to the court, would render the law an unconstitutional prior restraint.

The second issue considered by the court of appeals was the state’s ability to enjoin the showing of unnamed films not directly before the trial court by merely prohibiting exhibition of specific acts listed in the Texas obscenity statute. In this way an injunction could be enforced against future films without a specific determination as to the obscenity of each. The court held that such a broad ban could not withstand a claim of invalid prior restraint.

132. See infra text accompanying notes 165-70.
133. See infra text accompanying notes 165-67.
136. Id. at 166.
137. Id. at 166 n.13 (citing twelve other decisions in accord). The Supreme Court accepted this statutory construction and declined an opportunity to consider its merits. Vance, 445 U.S. at 315 n.11. Given the trend of its previous decisions, however, there is no indication that the Court would sanction a closure remedy. But see discussion infra note 162.
138. 587 F.2d at 167-68.
139. Id. at 169.
The third and interrelated issue before the Fifth Circuit was the alleged failure of the statute to provide sufficient procedural safeguards required by constitutional law.\textsuperscript{140} The Texas procedure, it was argued, failed to treat obscenity nuisance actions with the special sensitivity required in a first amendment context.\textsuperscript{141} Under Texas law it was possible for a trial court to issue an ex parte restraining order and a temporary injunction based only on the state's showing of "probable right" (or probable eventual success).\textsuperscript{142} On appeal of such an order, the exhibitor had no opportunity to argue nonobscenity;\textsuperscript{143} only at a full trial on the merits could the character of the material be litigated.\textsuperscript{144} The Fifth Circuit held this scheme deficient under \textit{Freedman} standards.\textsuperscript{145}

The Supreme Court accepted the appellate court's procedural construction of the Texas law\textsuperscript{146} and only cursorily examined the statute involved. Review was limited to two specific issues: first, whether the practical operation of an obscenity nuisance injunction produced no greater prior restraint than did a criminal law, and second, whether the court of appeals had ruled that prior restraint of expression was never available.\textsuperscript{147}

In addressing the appellant's claim of comparability to criminal law, the Court reviewed the procedural aspects of the Texas civil nuisance statute.\textsuperscript{148} Texas procedure allowed unlimited injunctions against exhibitors of films that were not yet finally judged obscene.\textsuperscript{149} Violation of an injunction posed the threat of criminal sanctions for the violator, regardless of whether the films were ultimately declared not obscene after full review of the merits.\textsuperscript{150} Because of this result, the Supreme Court found the civil nuisance statute more objectionable than the criminal law which sanctioned violators only after an adjudication of obscenity.\textsuperscript{151}

The Court dismissed the second issue raised by the appellants in one short paragraph. According to the state, the Fifth Circuit had

\begin{thebibliography}{99}
\bibitem{140} Id.
\bibitem{141} Id. at 171.
\bibitem{142} Id. at 170.
\bibitem{143} Id.
\bibitem{144} Id. at 171.
\bibitem{145} Id. at 172.
\bibitem{146} 445 U.S. at 316 n.14.
\bibitem{147} Id. at 314-15.
\bibitem{148} Id. at 315-17.
\bibitem{149} Id. at 316.
\bibitem{150} Id.
\bibitem{151} Id.
\end{thebibliography}
incorrectly ruled that no prior restraint of expression was ever available. The Supreme Court refused to accept this characterization of the appellate court's holding, stating only that the decision merely found the particular statutes under review constitutionally deficient.\textsuperscript{152}

At first blush, \textit{Vance} does not appear to add significantly to the issue of the use of civil proceedings to restrain obscenity. However, by reaffirming the necessity of a prior determination of obscenity before suppressing each film or publication, the Supreme Court has imposed on the states the burden of litigating the merits of a voluminous amount of material, without a remedy which might make such litigation worthwhile. Indeed, one comment concludes that \textit{Vance}'s requirement of \textit{Freedman}-like safeguards indicates that "the Court wants to restrict the states' enforcement of obscenity cases to the criminal system or at least to a system which requires the same essential safeguards as the criminal process."\textsuperscript{153}

Since the \textit{Vance} opinion lacks detail and discussion, it is unclear whether the Court actually intended this result. Nonetheless, the practical effect of placing \textit{Vance}'s limitations upon the government is that civil litigation is encumbered severely.

The Court has previously approved civil sanctions where the government censor did not attempt to restrain expression before an adjudication of obscenity.\textsuperscript{154} That the Court now may, in fact, prefer the use of criminal procedures when restraint is contemplated may be implied from its statement that prior civil restraints carry a heavier presumption against constitutionality than do post hoc criminal sanctions: "[b]ehind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of speech \textit{after} they break the law than to throttle them and all others beforehand."\textsuperscript{155}

One commentator has suggested that \textit{Vance} turned upon a lack of procedural safeguards and not upon restraint itself and that by requiring procedures similar to those in the criminal system, the Court meant to compel states to abandon civil proceedings in favor of criminal actions.\textsuperscript{156} While this analysis may go too far in discerning the Court's deliberate preference, the \textit{Vance} opinion cer-

\begin{itemize}
\item \textsuperscript{152} Id. at 317.
\item \textsuperscript{153} Note, \textit{Vance}, supra note 81, at 206.
\item \textsuperscript{154} Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
\item \textsuperscript{155} \textit{Vance}, 445 U.S. at 316 n.13. \textit{See also} \textit{Near} v. Minnesota, 283 U.S. 697 (1931).
\item \textsuperscript{156} Note, \textit{Vance}, supra note 81, at 207.
\end{itemize}
Certainly does not offer states much hope of designing a civil obscenity scheme which would reach any farther than particularly adjudicated material.\textsuperscript{157} State attempts to use nuisance laws as a broad and sweeping remedy have thus been curtailed by \textit{Vance}. The Supreme Court has subsequently confirmed this position.

\textbf{Brockett v. Spokane Arcades, Inc.}

In \textit{Spokane Arcades, Inc. v. Brockett},\textsuperscript{158} the Ninth Circuit Court of Appeals upheld certain provisions of a Washington moral nuisance law which authorized the issuance of a temporary restraining order prohibiting owners from removing from their property allegedly obscene material, but not prohibiting its sale or exhibition.\textsuperscript{159} The remainder of the law, however, was ruled invalid. Relying on \textit{Vance, Freedman} and \textit{Southeastern Promotions}, the court held that the statute did not provide the necessary constitutional safeguards for issuance of an abatement injunction.\textsuperscript{160} Its deficiencies included authorization for a judge to grant discretionary temporary orders without assurance of a prompt judicial determination of obscenity, the possibility that an injunction could issue which would prevent future exhibitions or sales of unreviewed

\begin{footnotesize}
\textsuperscript{157} Even prior to the \textit{Vance} opinion, Texas officials recognized the problem inherent in its nuisance law. The transcript of the oral argument as quoted by Chief Justice Burger in his dissent includes the following exchange:

\begin{quote}
QUESTION: Well, what does it—why, then, do you need (this statute), if it is the equivalent of the Texas criminal law?
MR. ZWEINER: I am not sure that we do, to be frank; but—
QUESTION: What does it add to the criminal law. It changes the burden of proof, it deprives a person of a jury trial.
MR. ZWEINER: I don't think it adds anything. As a matter of fact, I think it is a cumbersome process and I don't know that the prosecutor after more than two rounds will ever use it again.
\end{quote}

\textit{Vance}, 445 U.S. at 318 n.1 (Burger, C.J., dissenting). The state's lack of enthusiasm toward its own law is demonstrated by its nine-page brief which defended the statute in a "perfunctory fashion," "out of a sense of duty." \textit{Id.} at 318-19 n.2.

\textsuperscript{158} 631 F.2d 135 (9th Cir. 1980).


\textsuperscript{160} 631 F.2d at 138.
\end{footnotesize}
material, and relief provisions which resulted in an impermissible shift of the burden of proof to the owner or operator.\(^1\) In addition, the court deemed Washington’s closure order remedy an impermissible prior restraint, while acknowledging that a closure order which conformed to first amendment standards might be upheld.\(^2\)

Although affirmed without opinion by the Supreme Court,\(^3\) *Brockett* is further evidence of the Court’s commitment to requiring strict procedural standards in the civil regulation of obscenity. Lower court decisions have generally interpreted the Court’s directives as broadly prohibiting any restraint of unadjudicated material and as requiring the rejection of civil schemes which fail to provide adequate safeguards before sanctions are imposed.\(^4\) In sum, the Court’s message to the states appears to be that, although civil nuisance actions will be allowed, the proceedings must conform in all respects to guidelines which not only complicate the litigation but which reduce the effectiveness of the statutes’ ultimate remedies.

\(^1\) Id.
\(^2\) Id. at 139. In light of the development of the law in this area, it is difficult to conceive of a closure power which would meet these requirements. *But see* Avenue Book Store v. City of Tallmadge, Ohio, 103 S. Ct. 356 (1982), where the Supreme Court denied certiorari in a case involving the issuance of a permanent closure order directed to the rear portion of a bookstore held to be a common law public nuisance. The court of appeals decision left intact by the denial held that because no punishment could be imposed until after a contempt hearing, which includes a determination of the obscenity issue, the restraint was not unlawful in practice. It did not “carry with it any of the dangers of a censorship system” because the purveyor was not barred from selling protected material and no final restraint or punishment was possible until after a hearing on a contempt charge. Id. at 357 (White, J., dissenting) (citing App. to Pet. for Cert. at 48-49).

Justice White in dissent stated that the application of nuisance laws to obscenity regulation and the necessary attendant procedural safeguards raised unsettled constitutional questions. Id. at 357. The consequent chilling effect of such a closure order which is not directed to specifically adjudicated material seems self-evident. See *Freedman v. Maryland*, 380 U.S. 51 (1965).

\(^3\) 454 U.S. 1022 (1981). Justices Burger, Powell and Rehnquist filed strenuous dissents in *Brockett*. They argued that because the law had been recently enacted and never applied or construed by state courts, principles of comity and federalism prevented federal court interference. Id. at 1023.

\(^4\) *Vance* has been cited as authority by the Seventh Circuit which, in two separate cases involving business licensing statutes, ruled that a license denial could not be based upon prior arrests under the obscenity laws, Chulchian v. Indianapolis, 633 F.2d 27 (7th Cir. 1980), and that a procedure authorizing license revocation of a theater based on an administrative determination of the obscenity of prior films was invalid. Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). See also *Yuclan Enterprises v. Arre*, 488 F. Supp. 820 (D. Hawaii 1980); *Cornflower Entertainment Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980); but see *Chateau X, Inc. v. Andrews*, 275 S.E.2d 443 (N.C. 1981), where the court applied a much narrower reading of *Vance* based on the distinction between the severity of criminal and civil remedies.
Practical Applications

When viewed from the perspective of law enforcement officers attempting to deal effectively with the ever increasing supply of sexually explicit periodicals and films, a civil nuisance action simply is not very satisfactory. First, effective enforcement of a nuisance injunction involves two separate hearings: the original hearing at which an order is rendered, and a criminal contempt action if the injunction is violated. The possibility of criminal sanctions raises issues regarding the necessity of a jury trial and the appropriate burden of proof. First amendment standards may even mandate a relitigation of the obscenity issue or at least the introduction of evidence on changes in community standards from the time the injunction was issued.\textsuperscript{165}

In addition, civil nuisance enforcement is a costly and time consuming process and while litigation progresses, distributors can continue to reap huge profits from the exhibition of obscene materials.\textsuperscript{166} Moreover, should the state succeed in suppressing one film or publication, the victory is hollow because most of the material in question is so similar and is produced on such a mass scale that there already exists a replacement for the banned article which may not be suppressed before the protracted litigation is repeated.

In contrast to the civil regulatory approach, criminal prosecution can be relatively quick\textsuperscript{167} and definite. Although it too reaches only specifically adjudicated material, a criminal action which results in imposition of a fine and possible jail sentence eliminates

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In another opinion striking a revocation of a business license statute for past violations of obscenity laws, a Utah district court judge stated his view of the proper means of obscenity control as reinforced by the decision in \textit{Vance}:

> The struggle against pornography has seen various methods used to try to eliminate it from the community. Some of these ignore the constitutional dangers of prior restraint of speech. There are methods, however, that are consistent with the constitution and that can be effective. The teachings of the Supreme Court decisions emphasize the desirability of criminal prosecution as a means to control those who traffic in constitutionally unprotected obscene materials. It is the long experience of this court that there is nothing more effective in deterring criminal conduct than certainty of fine and/or imprisonment, according to the severity of the offense, after an expeditious trial.


\textsuperscript{166} See \textit{PORNOGRAPHY, supra} note 15, at 45.

\textsuperscript{167} Criminal court dockets usually move more quickly than civil dockets because of the speedy trial requirements under the sixth amendment. It is questionable whether placing civil nuisance actions on a priority schedule is worth the added burden on the system when the rewards of injunction include only the restraint of a limited amount of material.
the need for subsequent litigation. In addition, because an injunction restraining only one item of expression is less harsh a penalty than a criminal conviction, the latter sanction may produce a greater deterrent effect and thus be the preferred prosecutorial remedy.

Apparently recognizing the drawbacks of choosing a civil over a criminal action, state and local officials seem to rely less and less on civil obscenity laws. One defense lawyer active in the field has found, for example, that his clients are no longer seriously threatened by civil injunctions, even though the state in which he practices has a judicially approved nuisance statute related specifically to obscene films. In his opinion, a civil determination of obscenity is still useful in that it informs distributors that the materials they are contemplating selling are obscene. In a subsequent criminal trial, such a determination could be introduced as evidence of obscenity, though not conclusive evidence, and thus aid the prosecutor in meeting his burden of proof.

A civil determination of obscenity would also add a higher degree of certainty to the operation of a business dealing in marginal "adult" materials. Although this system would serve a salutary purpose, it is not being utilized. The prior restraint problems associated with any nuisance injunctive action to abate obscenity force the government to litigate the merits of questionable exhibitions individually. Because of the fungible nature of most of the sexual material presently available, a distributor can replace quickly and inexpensively materials judged obscene with nearly identical items not yet subject to judicial scrutiny. The civil process must then be reinitiated with little hope of actually controlling distribution.

170. Interview with Bernard A. Berkman, Cleveland, Ohio.

Other prosecutors echo these sentiments. In one local jurisdiction contemplating the use of civil nuisance proceedings, a county attorney has concluded that such laws are not suited to the regulation of sexual expression and that any control must remain in the criminal sector. Interview with county attorney who requested anonymity.

Another community, which had successfully defended an attack on its nuisance ordinance by a local bookstore, settled the case at the appellate level with an agreement not to enforce the ordinance against the bookselling plaintiffs involved. Although the community had no immediate plans to invoke the ordinance against these plaintiffs, the government attorney suggested that under Vance the law which permitted a closure injunction based on prior criminal obscenity convictions was unconstitutional, and that any subsequent attempt to enforce it would ultimately prove unsuccessful. In addition, the government
CONCLUSION

While the Supreme Court endorsement of civil obscenity laws seemed to promise relief for states trying to cope with the problems of obscenity regulation, that promise has proved illusory.\textsuperscript{1} The effect of judicially imposed and constitutionally required standards has left the states with the fruitless task of litigating the obscenity of each particular film or magazine before sanctions may be imposed. Although this requirement is present in the criminal system, the remedial aspects of criminal prosecution offer a more worthwhile result. The social stigma of an arrest, criminal trial, and possible jail sentence looms as a greater penalty than does a long and drawn out civil suit which, at worst, would only restrain the distribution of already outdated materials. The possibility of criminal prosecution might, therefore, cause distributors who are operating in a marginal area to monitor their stock more closely.\textsuperscript{1,2}

A nuisance action might be worthwhile when directed toward full length films which are expensive to produce. These are not as easily replaced as the average peep-show production and an injunction might deter such films in the future. However, in the typical case of sexual material distributed on a mass scale, a nuisance action is simply not cost effective. The investment of public funds in a civil trial, with its attendant hearings and delays, is clearly not justified by its results: an injunction restraining the usual individual magazine or film displayed in most adult bookstores.

Perhaps even more telling in weighing the relative merits of civil and criminal actions are the stricter standard of proof and the right to a jury trial which inhere in a criminal case. In a society where the line between obscene and nonobscene material is nebulous, application of these requirements in a civil proceeding to determine obscenity may better promote first amendment princ-

\textsuperscript{1} Attorney expressed the opinion that presently structured civil remedies have been rendered ineffective and the only possibility of their continued use would be if special provisions were included to allow officials immediate court access to litigate each particular publication offered for sale by the defendant, without having to initiate new litigation. Interview with county attorney who requested anonymity.

\textsuperscript{1}1. "Since it is evident that any nuisance statute must provide both substantive and procedural first amendment safeguards in order to withstand constitutional attack, the public nuisance approach may lose its special appeal to prosecutors as a means of controlling obscenity." Edelstein & Mott, supra note 98, at 563.

\textsuperscript{1,2} This is not to imply that the distributor's choice of material should in any constitutional sense be "chilled" by the prospect of criminal charges.
ples. Perhaps a state should of its own volition comply with the stricter criminal law standards whenever it seeks to regulate expression. The Supreme Court has certainly indicated its preference for criminal procedural safeguards in cases of civil obscenity regulation and this preference should be reflected by discontinuing the use of antiquated and imprecise nuisance laws in such cases.