COLLATERAL PROBLEMS IN OBSCENITY REGULATION: A UNIFORM APPROACH TO PRIOR RESTRAINTS, COMMUNITY STANDARDS, AND JUDGMENT PRECLUSION

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Since the Supreme Court's declaration in 1957 that obscenity is not speech protected by the first amendment,[1] the Court has struggled with both substantive and procedural problems arising from federal and state attempts to regulate obscenity.[2] Other than briefly

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[1] Roth v. United States, 354 U.S. 476, 485 (1957). In that case, consolidated with Alberts v. California, the Supreme Court for the first time faced the issue of whether obscenity was protected speech. In question were the constitutionality of both a California statute which made it a crime to possess obscene materials for the purpose of sale and to advertise such materials in an obscene manner and also a federal statute which made it a crime to send or advertise obscene matter in the mail. *Id.* at 479–84 & nn.1–2. These cases were not only the Court's first confrontation with the constitutionality of obscenity laws, but they also marked the Court's first attempt to define obscenity.

Justice Brennan, writing for the majority, declared that there was no incompatibility between anti-obscenity laws and the constitutional guarantees of free speech and press because obscenity is in a class of "utterances" which historically have not been considered as falling within the protection of the first amendment. *Id.* at 484–85. It was made clear, however, that sex and obscenity were not to be viewed as one and the same, and that there was a wide range of materials in which the depiction of sex is protected speech. *Id.* at 487. Ultimately, the test of obscenity that emerged was one that had been used in a number of state and federal courts: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489 (footnote omitted).

[2] Although there were sharp dissents, the Court in the ensuing years adhered to the *Roth* test, discussed in note 1 *supra*, clarifying its meaning and defining the areas of its application. For example, in Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), petitioners challenged a determination by the Judicial Officer of the Post Office Department that three different magazines geared to a homosexual audience were nonmailable because they were obscene and because they contained advertisements that directed readers to other sources of obscene materials. *Id.* at 479–81.

A majority of the Justices voted to reverse the determination of the Judicial Officer but differed in their reasoning. Justice Harlan, joined by Justice Stewart, grounded his decision on an interpretation of *Roth*. He reasoned that, under *Roth*, there was not only a requirement that " 'the material taken as a whole appeals to prurient interest' " but also a further requirement that the material be "patently offensive." *Id.* at 482, 486 (quot-

orienting the reader to the test for obscenity articulated by the Supreme Court in *Miller v. California*,[3] this article will not deal with the definitional problems in obscenity litigation, but will focus on pre-hearing prior restraint issues. In addition, the article will examine the considerations in determining the relevant community from which community standards are to be drawn, primarily as that issue relates to the estoppel effect of judgments. Finally, it will analyze the judgment-preclusion effect of a judgment of obscenity or nonobscenity on a subsequent proceeding involving identical materials.

Prior restraint, community standards, and judgment preclusion are issues that arise when the federal government or a state attempts to regulate obscenity. In order to understand their significance fully, it is necessary that one be familiar with the Burger Court's definition of obscenity as rendered in *Miller v. California*.

In that case, the Court, retreating from the more liberal position taken by the Warren Court in the 1960's,[4] returned to the premise

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ing from Roth v. United States, 354 U.S. 476, 489 (1957) (footnote omitted)). Justice Harlan feared that, as in the case at hand, a failure to

> require any determination as to the patent offensiveness *vel non* of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art.

370 U.S. at 487. This fear was based on the fact that much great literature and art might arguably be characterized as having a " 'dominant theme' " which appeals to " 'prurient interest.' " *Id.* Yet, there was no doubt in his mind that *Roth* was a mandate "to tighten obscenity standards" to prevent inroads on the free dissemination of such "worthwhile works." *Id.* He thus concluded that Congress, in enacting the statute, did not intend to exclude from the mails "material whose indecency [was not] self-demonstrating." *Id.* at 487–88.

Applying this rationale to the magazines in question, and using the entire nation as the "relevant 'community' " in applying "community standards," Justice Harlan determined that the magazines could not, by "any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency." *Id.* at 488–89. Although the magazines lacked taste and were designed to appeal to the " 'prurient interest' " of homosexuals, the depictions of the male nudes were no more offensive than similar depictions of female nudes not generally thought of as obscene. *Id.* at 490.

[3] 413 U.S. 15 (1973).

[4] In Jacobellis v. Ohio, 378 U.S. 184 (1964), a movie censorship case, the Warren Court reaffirmed the vitality of the *Roth* test and acknowledged the "patent offensiveness" requirement propounded by Justice Harlan in *Manual*. *Jacobellis* involved the conviction of a theatre owner who had exhibited a film depicting the story of a woman who, tired of her marriage, left her husband and her family for her lover. *Id.* at 193, 195–96. The state had objected primarily to an explicit love scene in the last reel. *Id.* at 196. There had also been advertising touting the scene as being " '[a]s close to authentic amour as is possible on the screen' " and as " 'one of the longest and most sensuous love scenes to be seen in this country.' " *Id.* at 201 n.2 (Warren, J., dissenting).

Reversing the conviction, the Court treated the obscenity issue at hand rather

that obscenity is unprotected speech.[5] More specifically, the majority fashioned a three-pronged test by which determinations of obscenity are to be made. It was required that the trier of fact consider

> (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.*[6]

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routinely. The opinion, however, was significant in two respects. First, Justice Brennan announced

> that, in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

Id. at 190 (footnote omitted). Second, the Court determined that, in making such judgments in state obscenity actions, the nation was the relevant community from which "community standards" would be ascertained and applied to the material. *Id.* at 192–95.

Persistent differences in how each Justice approached the problem of obscenity remained; yet, the Warren Court could be characterized as slowly narrowing the definition of obscenity. This trend, however, was not totally consistent. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 474 (1966) (in borderline cases, evidence of pandering in the sale of the materials may render the material obscene under the *Roth* test); Mishkin v. New York, 383 U.S. 502, 508 (1966) (materials that are acknowledged to have prurient appeal only to deviates can be found to be obscene).

Yet, at the same time that *Ginzburg* and *Mishkin* opened the door to prosecution of a wider group of obscenity defendants, the Court sharply reduced the ability of prosecutors to win on the issue of obscenity *vel non*. In Memoirs v. Massachusetts, 383 U.S. 413 (1966), the Court dealt with a Massachusetts ban on John Cleland's two-century-old novel, *Memoirs of a Woman of Pleasure*, also known as *Fanny Hill*. *Id.* at 415. In reversing the decision, the Court did not reach the issue of whether the material was patently offensive or whether it appealed to prurient interest. *Id.* at 418–19. Rather, Justice Brennan added a new element to the *Roth* test: In order to find material obscene, there must be a showing not only of appeal to prurient interest and patent offensiveness but also a showing that the material is totally lacking in "redeeming social value." *Id.* at 418. Because the trial court had not required that the prosecution demonstrate that the novel totally lacked "redeeming social value," the decision was reversed. *Id.* at 418–19. A comprehensive treatment of these cases may be found in Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7. For another case exemplifying the liberal trend of the 1960's see Redrup v. New York, 386 U.S. 767 (1967).

[5] 413 U.S. at 23. *See* Roth v. United States, 354 U.S. 476, 481 (1957).

[6] 413 U.S. at 24 (quoting from Roth v. United States, 354 U.S. 476, 489 (1957)) (citations omitted) (emphasis added). Chief Justice Burger, writing for the Court, stated that it was returning to the theory of *Roth*, distinguishing obscene expression from expression protected by the first amendment. 413 U.S. at 23–27. He characterized the existing test that had been formulated by the plurality of Justices in Memoirs v. Massachusetts, 383 U.S. 413 (1966), as a sharp departure from *Roth*. 413 U.S. at 21–22. He noted the distinction between *Roth*'s assumption that obscenity lacked social value and *Memoirs*' "virtually impossible" burden on the prosecutor to prove it. *Id.* at 22.

The Court, in laying down the test, stated that it is to be applied only when (1) the offending "conduct [is] specifically defined by the applicable state law, as written or authoritatively construed," and (2) the material "depicts or describes . . . sexual conduct."[7] Chief Justice Burger summarized the effect of the decision as limiting obscenity prosecutions to cases involving " 'hard core' " material which was devoid of "serious literary, artistic, political, or scientific value."[8]

PRIOR RESTRAINTS

Although *Miller* has provided a working definition of obscenity and has delineated a minimum level of patent offensiveness that must be reached before materials—presumptively protected by the first amendment—may be deemed obscene,[9] it is not only at the trial stage that this test becomes operative. First amendment considerations pervade the entirety of an obscenity prosecution, whether criminal or civil, from the outset of the action to the final disposition of an appeal. In particular, initial prosecutorial actions, such as search and seizure and injunction against allegedly obscene materials, present serious threats to first amendment rights because they may act as prior restraints on expression.

In addition to search and seizure and injunction, some states have enacted statutes which provide for nuisance actions against property where obscenity is sold or exhibited.[10] Other states, as well

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For discussions of *Miller* and its companion cases see Fahringer & Brown, *The Rise and Fall of Roth—A Critique of the Recent Supreme Court Obscenity Decisions*, 62 KY. L.J. 731 (1974); Note, *Community Standards, Class Actions, and Obscenity Under* Miller v. California, 88 HARV. L. REV. 1838, 1838–60 (1975); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 160–75 (1973); Comment, *In Quest of a "Decent Society": Obscenity and the Burger Court*, 49 WASH. L. REV. 89 (1973).

[7] 413 U.S. at 24 (footnote omitted).

[8] *Id.* at 26–27.

[9] 413 U.S. at 24–27. Since in *Miller* issues of prurient interest and patent offensiveness were deemed questions of fact, it was arguable that appellate review of trier of fact determinations was sharply limited. Nonetheless, the Court, in Jenkins v. Georgia, 418 U.S. 153 (1974), declared that *Miller* had established minimum levels of patent offensiveness which had to be reached before materials could be deemed obscene and "that juries [do not] have unbridled discretion in determining what is 'patently offensive.' " *Id.* at 160–61. Here, the state's highest court had affirmed a jury determination that the movie "Carnal Knowledge" was obscene. *Id.* at 154–55. The Supreme Court reversed, relying on *Miller* for the propositions that only "hard core" materials could be suppressed and that such materials, at a minimum, would have to contain scenes of "ultimate sexual acts," lewd depictions of genitals or masturbation, and the like. *Id.* at 160. Reviewing the film, the Court concluded that since none of the foregoing acts or depictions had occurred in the film, "Carnal Knowledge" could not constitutionally be deemed obscene. *Id.* at 161.

[10] *See, e.g.*, OHIO REV. CODE ANN. § 3767.01 *et seq.* (Page 1971).

as the federal government, have entrusted administrative agencies with the responsibility of regulating obscenity.[11] All of these procedures are subject to the Supreme Court's unequivocal declaration that "[a]ny system of prior restraints of expression" has "a heavy presumption against its constitutional validity."[12] Although prior restraints are permissible under certain circumstances, the overwhelming thrust of the Supreme Court's activity in this area is to limit sharply such restraints regardless of the manner in which they arise. Thus, whether the restraint has resulted from a search or seizure, injunction, nuisance proceeding, or administrative action, the Court, in determining the constitutionality of the procedure, has employed a functional analysis—an examination of how the restraint operates, the scope of the restraint, and the extent to which it may be more narrowly circumscribed.

For example, the Court, in *Kingsley Books v. Brown*,[13] upheld the validity of a New York injunction procedure which permitted an appropriate official to obtain an injunction halting the sale and distribution of allegedly obscene materials prior to trial of the issue of obscenity.[14] The Court pointed to the fact that the New York statute required a trial within one day of the joining of the issue and a decision within two days of the trial.[15] Examining the operation of the injunction procedure from a functional perspective, the Court concluded that any prior restraints engendered by such a procedure were minimal.[16]

In contrast, where the prior restraint is effective for more than a short period of time, is directed at materials not listed on a warrant, or is implemented under a reduced judicial scrutiny, it will almost

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[11] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 59–60 (1963); Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 414 (D.C. Cir. 1975).

[12] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[13] 354 U.S. 436 (1957).

[14] *Id.* at 437–38 & n.1, 445.

[15] *Id.* at 439.

[16] *Id.* at 441–45. Justice Frankfurter, writing for the Court, described the functional approach:

> The judicial angle of vision in testing the validity of a statute . . . is "the operation and effect of the statute in substance." . . . The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test.

Id. at 441 (quoting from Near v. Minnesota, 283 U.S. 697, 713 (1931)).

The Court's reliance on *Near v. Minnesota* was well founded. That case dealt with the constitutionality of a Minnesota statute which placed prior restraints on periodicals which regularly circulated defamatory matter. 283 U.S. at 700, 713. The Court concluded that the content of the periodical was irrelevant, that state libel laws were sufficient remedy, and thus that the prior restraint violated the fourteenth amendment. *Id.* at 715, 723.

invariably be deemed unconstitutional. These restrictions on prior restraints were articulated by the Supreme Court in *Marcus v. Search Warrant*[17] where under Missouri law a magistrate was permitted to determine that materials were probably obscene merely upon an affiant's conclusory statements and, upon such finding, to issue a search and seizure warrant.[18] The procedure was ex parte and provided no swift post-seizure disposition of the obscenity issue such as there had been in *Kingsley*.[19] Further, in this particular case, there had been a broad seizure of materials not specified on the warrant.[20]

The state had argued that the Missouri procedures were similar to the New York scheme upheld by the Court as constitutional in *Kingsley*.[21] The Court rejected this argument, distinguishing the New York procedure on a number of grounds. Unlike Missouri's procedure, New York's statute provided that a magistrate view the materials in question prior to issuing the injunction and only direct restraints, whether permanent or temporary, against named, specific publications.[22] Moreover, the Court noted that since New York had enjoined distribution rather than seize allegedly obscene materials, distributors might "circulate the publication despite the interim restraint and then raise the claim of nonobscenity by way of defense."[23] In contrast, Missouri's mass seizure precluded any pre-trial distribution unless the appellants obtained new materials.[24] The *Marcus* Court thus reversed the appellants' conviction on fourteenth amendment due process grounds because the Missouri statute failed to provide the appellants a chance to refute the officer's conclusions prior to the issuance of the warrant, and failed to provide guidelines by which the police power could be more narrowly exercised so as to prevent seizure of nonobscene matter.[25]

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[17] 367 U.S. 717 (1961).

[18] *Id.* at 718–19.

[19] *Id.* at 720–21.

[20] *Id.* at 723. Officers seized magazines not named in the warrant based upon their own determination of obscenity. Further, they seized all copies of any magazines deemed obscene. All told, 11,000 copies of various magazines were taken into custody. *Id.*

[21] *Id.* at 734.

[22] *Id.* at 735. In the New York procedure, copies of the allegedly obscene materials were attached to the complaint. *Id.*

[23] *Id.* at 735–36.

[24] *Id.* at 736. Since the distributor would surreptitiously have to obtain other copies of the materials seized by the police, the public would not be able to obtain copies unless the distributor was willing to undergo the risks and was successful in avoiding another police seizure of materials. *Id.*

[25] *Id.* at 731–33.

A statutory scheme providing for mass seizure of allegedly obscene books was also held unconstitutional in *A Quantity of Books v. Kansas*.[26] Although the state attorney general sought to superimpose what he had determined to be the *Marcus* requirements on the warrant procedures, the Court found the Kansas procedures invalid in a number of respects.[27] The plurality initially objected to the lack of judicial scrutiny of all the materials named in the information.[28] They further objected to the state's failure to provide the appellants an adversary hearing similar to New York's and the state's seizure of *all copies* of the named titles.[29] Concluding that a seizure of books could not be effected without a prior adversary hearing, the plurality held that the Kansas statutes violated the fourteenth amendment.[30]

In the cases just discussed, restraints were held unconstitutional when seizures or injunctions were issued against allegedly obscene materials in the absence of or without adequate scrutiny. A more egregious example of a prior restraint is censorship and licensing of materials by administrative boards authorized by statute to identify and suppress pornography.

In *Bantam Books, Inc. v. Sullivan*,[31] for example, the Court confronted a statute charging a state administrative agency with the duty to protect the state's youth by "educat[ing] the public" about materials which were obscene or which "tend[ed]" to corrupt youth.[32] When the commission determined materials to be obscene or corrupt-

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[26] 378 U.S. 205, 206, 213 (1964).

[27] *Id.* at 209–13.

[28] *Id.* at 208–10. The attorney general of Kansas had named fifty-nine books in an information, all of which were published as part of a series entitled "Nightstand Books." *Id.* at 208. At an ex parte hearing the judge perused seven titles in the series and, finding that they were probably obscene, issued a warrant for the seizure of all fifty-nine titles on the basis that any "Nightstand Book" was probably obscene. *Id.* at 208–09.

[29] *Id.* at 210. Two commentators have suggested that the Court was less interested in the lack of an adversary hearing than in the mass seizure and plan to destroy all the materials. Hirsch & Ryan, *I Know It When I Seize It: Selected Problems in Obscenity*, 4 LOYOLA U.L.A.L. REV. 9, 31 (1971).

[30] 378 U.S. at 213. Justice Harlan, dissenting, stated that the Kansas procedures, although allowing materials to be suppressed for a short time before the hearing, did not effect the kind of prior restraint that was of constitutional dimension. *Id.* at 220–22 & n.4. More central to Justice Harlan's argument was his proposition that the doctrine of prior restraint is primarily directed to prevent suppression of political expression detrimental to the interests of public officials. He concluded that obscene matter would rarely implicate a public official's personal interests so as to affect his judgment in determining whether or not to seek suppression of the materials. *Id.* at 224. Since the proceedings were public, and since the prior restraint was, in his view, not unreasonable, he felt the balance was in favor of upholding the Kansas procedures. *Id.* at 220–25.

[31] 372 U.S. 58 (1963).

[32] *Id.* at 59–60.

ing, it would threaten distributors of such materials with civil and criminal proceedings.[33] Though lacking in formal sanctioning power, the commission was effective in causing many books, some of which were not obscene, to be removed from distribution.[34] The Court held this scheme to be unconstitutional, stating that even informal sanctions are enjoinable where threats of legal or other actions are levied and there are "no safeguards . . . against the suppression of . . . constitutionally protected . . . matter."[35]

Similarly, in *Freedman v. Maryland*,[36] the Court found unconstitutional a Maryland licensing plan which required submission of films to a licensing board prior to exhibition.[37] Although acknowledging that there was no " 'absolute freedom to exhibit, at least once, any and every kind of motion picture' " without any prior restraint, the majority pointed to a number of factors which rendered the statutory procedures unconstitutional.[38] First, there was no "judicial participation" in the determination of obscenity.[39] Second, there was a great risk of delay between any unfavorable determination by the licensing board and its possible reversal by a court.[40] Justice Brennan determined that the "teaching" of the opinions to date was that "only a judicial determination in an adversary proceeding . . . suffices to im-

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[33] *Id.* at 61–63 & n.5.

[34] *Id.* at 63–64, 67.

[35] *Id.* at 67, 70.

[36] 380 U.S. 51 (1965).

[37] *Id.* at 52–53, 58–60.

[38] *Id.* at 53–54 (quoting from Times Film Corp. v. City of Chicago, 365 U.S. 43, 46 (1961)).

In *Times Film*, the petitioner challenged a city ordinance which required that films be submitted for review before exhibition. 365 U.S. at 44. Times Film Corporation refused to turn the film over to be inspected and was denied a permit. *Id.* Petitioners sought an injunction, claiming the Chicago ordinance, on its face, violated the first and fourteenth amendments. *Id.* The Court upheld the ordinance, relying in part on Chief Justice Hughes' opinion in Near v. Minnesota, 283 U.S. 697 (1931), where he propounded the principle that the concept of prior restraint was not inflexible and that there were several "exceptional cases" where a prior restraint might be justified, among which was that of "obscene publications." 365 U.S. at 47, 50.

The *Times Film* Court, however, limited its holding to the narrow proposition that the ordinance was not facially unconstitutional. Since the petitioner did not argue the unconstitutionality of any particular provision of the ordinance, it could not be struck down. *Id.* at 49–50.

[39] 380 U.S. at 55. Professor Monaghan considers judicial superintendence of the character of speech "[c]entral to first amendment due process." Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 520 (1970). He points to Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), discussed in note 2 *supra*, as the first unambiguous assertion that "courts alone are competent to decide whether speech is constitutionally protected." Monaghan, *supra* at 520.

[40] 380 U.S. at 55.

pose a valid final restraint."[41] Finally, the Maryland procedure put the burden of proof on the exhibitor, rather than on the censor, thus contravening the mandate of *Bantam Books*—that expression is presumed to be protected.[42]

The majority, however, did not rule that pre-exhibition licensing was per se unconstitutional. Rather, such statutes would be constitutionally viable if (1) a license is granted rapidly, or, alternatively, the censor seeks a court order enjoining exhibition of the film; (2) the pre-trial restraint is of "the shortest fixed period compatible with sound judicial resolution"; (3) a final determination is made by a judicial, rather than administrative, officer; and (4) judgment is promptly rendered.[43]

The Court's sensitivity to the need for judicial rather than nonjudicial determinations of the issue of obscenity *vel non* has led to the imposition of strict standards for the issuance of search and seizure warrants. As previously discussed, in *Marcus v. Search Warrant* the Court determined that "warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge" of the allegedly obscene material, were constitutionally invalid.[44] The infirmities in such a procedure were again emphasized in *Lee Art Theatre, Inc. v. Virginia*,[45] where the Court reversed the petitioner's conviction for possession and exhibition of obscene films.[46] Although expressly avoiding the issue of whether a judge or magistrate need personally view allegedly obscene materials before

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[41] *Id.* at 58 (citations omitted). The Court stated that

> while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression.

Id.

[42] *Id.* at 57–58. *See also* Blount v. Rizzi, 400 U.S. 410, 412–22 (1971) (postal regulations which in effect permitted broad administrative interference with free flow of mail to suspected distributor of pornography and which did not provide for judicial review deemed unconstitutional infringement of first amendment rights); Teitel Film Corp. v. Cusack, 390 U.S. 139, 139–42 (1968) (Chicago Motion Picture Censorship Ordinance providing for administrative censorship held unconstitutional as not comporting with *Freedman* requirement that censor "within a *specified brief period*, either issue a license or go to court to restrain showing the film" (emphasis in original)); Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 414–15 (D.C. Cir. 1975) (forfeiture imposed after administrative finding of obscenity without provision for swift judicial review is a violation of first amendment).

[43] 380 U.S. at 59.

[44] 367 U.S. at 731–33.

[45] 392 U.S. 636 (1968).

[46] *Id.* at 637.

issuing a warrant,[47] the Court concluded that something more than the police officer's opinion was needed:

> The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure "designed to focus searchingly on the question of obscenity" . . . .[48]

This recognition of the need for something more than a police officer's conclusions to support the issuance of a warrant to seize allegedly obscene materials has led to a wide prohibition of warrantless seizures, even when made incident to a valid arrest. In *Roaden v. Kentucky*,[49] the Court found such a seizure, made only on the basis of a sheriff's viewing of a film prior to the arrest, invalid as "unreasonable under Fourth Amendment standards."[50] At the time of the arrest, no warrant had been issued, and there had been no judicial determination of the question of obscenity.[51] The Court employed a contextual analysis, stating that the fourth amendment limitations on the issuance of warrants must be determined by the nature of the materials and the setting in which they are found.[52] The majority distinguished materials which are allegedly pornographic from "instruments of a crime, such as a pistol or a knife."[53] Since the exigencies involved in seizing obscene materials are less weighty than in instances of other crimes, the balance was clearly to be struck in favor of dissemination, where the alternative is to effect prior restraints without judicial superintendence.[54] In the Court's view,

> [a] seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the

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[47] *Id.*

[48] *Id.* (quoting from Marcus v. Search Warrant, 367 U.S. 717, 732 (1961)).

One federal district court, however, has held that there is no requirement of a preliminary judicial finding of probable cause regarding obscenity before a seizure warrant may issue where the warrant is

> issued on the grounds that there [is] probable cause to believe that films which [have] not been submitted to [a] Censor Board for licensing [are] being exhibited.

Star v. Preller, 375 F. Supp. 1093, 1097 (D. Md.), *aff'd mem.*, 419 U.S. 956 (1974).

[49] 413 U.S. 496 (1973).

[50] *Id.* at 499, 504.

[51] *Id.* at 498–99.

[52] *Id.* at 501–04.

[53] *Id.* at 502. That the objects of a search bear on its "reasonableness" may be demonstrated by Coolidge v. New Hampshire, 403 U.S. 443, 471–72 (1971) (dictum), and Stanford v. Texas, 379 U.S. 476, 485–86 (1965).

[54] 413 U.S. at 502, 504.

> right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater . . . invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.[55]

The Court concluded that a nonjudicially supervised seizure would be permitted when, for the purposes of preserving evidence, an immediate seizure is required.[56] Thus, if a seizure made pursuant to a warrant obtained on the basis of "conclusory" assertions by a police officer is invalid, as in *Marcus*, a seizure made without any warrant at all is similarly infirm.[57]

In *Heller v. New York*,[58] a companion case to *Roaden*, the Court enunciated the circumstances under which a seizure may be permissible without a prior adversary hearing. In *Heller*, a warrant for seizure of an allegedly obscene film issued after a judge had personally viewed it at a local theatre.[59] At trial, the petitioner challenged the indictment on fourteenth amendment grounds for failing to provide an adversary hearing prior to the seizure.[60] The majority stated that where there is no " 'final restraint,' " such as an injunction or destruction of the materials, there is no constitutional violation of the first or fourteenth amendments when a state fails to provide a prior adversary hearing before seizing allegedly obscene matter "as evidence in a criminal proceeding." This is so as long as (1) "the seizure is pursuant to a warrant"; (2) the warrant issues on an impartial magistrate's finding probable cause; (3) a prompt adversary hearing and judicial determination follows the seizure if so requested by an interested party; and (4) the exhibitor is accorded the opportunity to make a copy which he may show pending final judicial determination if he can demonstrate that no other copies are available.[61] Thus, the

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[55] *Id.* at 504 (footnote omitted).

[56] *Id.* at 505.

[57] *Id.* at 506.

[58] 413 U.S. 483 (1973).

[59] *Id.* at 485.

[60] *Id.* at 487. The opinion noted that the petitioner had never made any pretrial objection to the seizure of film nor did he seek its return. Further, no request was made for an "expedited judicial consideration of the obscenity issue," which New York would have granted. *Id.* at 490 & n.6.

[61] *Id.* at 490, 492–93.

It is unclear as yet whether the opportunity to make a copy of the seized film to show pending a final determination creates a broad immunity from police interference or merely provides exhibitors with the bare right to obtain a copy which may again be seized if it is commercially exhibited. *Compare* Bradford v. Wade, 386 F. Supp. 1156, 1160 (N.D. Tex. 1974) (although state considered each showing of a film as a separate

Court concluded that while an adversary hearing was not required prior to seizure, "a prior judicial determination of probable cause" and a prompt resolution of the obscenity issue in an adversary hearing were necessary to protect first amendment interests against "gross abuses."[62]

First amendment issues within the prior restraint context, however, have not been fully resolved. Since *Roaden* and *Heller*, the Court has not produced a major opinion dealing with prior restraints

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offense, repeated seizures of film shown by exhibitor during pendency of litigation were an unconstitutional form of censorship where police actions were aimed at closing plaintiffs' business and where costs of purchasing bailbonds and new copies of films would in fact drive plaintiffs out of business) *with* Inland Empire Enterprises, Inc. v. Morton, 365 F. Supp. 1014, 1015–17 (C.D. Cal. 1973) (although state considered each showing of a film as a separate offense, repeated seizures of film exhibited during pendency of litigation was a constitutional exercise of police authority, at least where no bad faith was shown).

It would seem, however, that repeated seizures during the pendency of litigation would render the right to obtain and exhibit a copy nugatory, and thus the intentions of the police should not be a dispositive factor. *See* Universal Amusement Co. v. Vance, 404 F. Supp. 33, 48–50 (S.D. Tex. 1975); Bradford v. Wade, 376 F. Supp. 45, 47 (N.D. Tex. 1974).

[62] 413 U.S. at 493. The Court declared that it had never expressly or impliedly concluded that there was a right to a prior adversary hearing in all cases, emphasizing that an adversary hearing was not absolutely required where, as here, there had been a valid warrant for the seizure of the films. *Id.* at 492–93. Chief Justice Burger distinguished United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), and Freedman v. Maryland, 380 U.S. 51 (1965), as establishing protection against censorship in the form of administrative delay, noting that they did not mandate an adversary hearing "prior to *initial* seizure." 413 U.S. at 489 (emphasis in original).

The Court was, however, careful in heading off any possible misinterpretation as to how broadly the opinion was to be read. It specifically endorsed *Marcus* and *A Quantity of Books* as standing for the proposition that a prior adversary hearing is required where large scale seizures are instituted, with destruction of the materials as the ultimate goal. *Id.* at 491.

Chief Justice Burger distinguished *Marcus* and *A Quantity of Books* from the present situation where the requirement of a lawful warrant was sufficient protection. The Court's decision not to require an adversary hearing was based in part on its taking judicial notice of the ease with which films may be disposed of, transported away, or altered. *Id.* at 493.

One federal appellate court has, nonetheless, permitted a mass seizure where there was no state plan to destroy the materials and where the defendants might destroy, secrete, or transport away evidence. In G. I. Distributors, Inc. v. Murphy, 490 F.2d 1167, 1168–70 (2d Cir.), *cert. denied*, 416 U.S. 939 (1974), the Second Circuit upheld as constitutional what was in effect a constructive mass seizure of allegedly obscene materials. The police did not actually take the materials but rather posted a guard on them, preventing their removal "until an adversary hearing could be held . . . the following morning." 490 F.2d at 1168. Plaintiffs argued that *Heller* commanded that seizure of materials in excess of that required for evidentiary purposes was proscribed. *Id.* at 1168. The court, without explanation, rejected the argument as too broad a reading of *Heller*, emphasizing the minimal impact of the restraint. *Id.* at 1169.

in the obscenity area. State and lower federal courts, in contrast, have been extremely active in this area, deciding many questions left unanswered by the Supreme Court and, in many instances, apparently eroding that Court's very extensive anti-restraint strictures.

One of the questions expressly left unanswered by the Supreme Court is whether a magistrate must personally view the allegedly obscene materials before issuing a warrant on probable cause or whether something more than "the conclusory assertions of [a] police officer"[63] suffices.

In *United States v. Sherpix, Inc.*,[64] the United States Court of Appeals for the District of Columbia Circuit upheld a conviction based on a search warrant which had been supported only by an F.B.I. agent's affidavit containing a detailed account of the film.[65] Rejecting the defendant's claim that the magistrate must personally view the materials, the court concluded that the F.B.I. agent's affidavit provided the magistrate with the information necessary to make a reasoned determination that there was probable cause to believe the film obscene and thus to issue the seizure warrant.[66]

Similarly, in *Ellwest Stereo Theatres, Inc. v. Nichols*,[67] a United States district court in Florida upheld the constitutional validity of a procedure whereby seizure warrants were issued by a county judge on the strength of police affidavits describing the details of several designated films.[68] The court cited *Heller* for the proposition that a judicial officer must make a determination of probable cause before a seizure warrant can issue.[69] It was satisfied, however, that the procedure was faithful to the *Heller* mandate in that the affidavits were

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[63] Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968).

[64] 512 F.2d 1361 (D.C. Cir. 1975).

[65] *Id.* at 1368–69.

[66] *Id.* The court relied in part on the rationale it had articulated in a previous case, United States v. Pryba, 502 F.2d 391, 402–04 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975). *See* 512 F.2d at 1368–69. In *Pryba*, the court had rejected the defendant's challenge to the constitutionality of a search made pursuant to a warrant which was based in part on hearsay allegations. 502 F.2d at 402, 404. Here the affiant, an F.B.I. agent, never personally viewed any of the films but rather received his information from an airline freight supervisor. *Id.* at 394–95, 402–03, 410–11.

The court concluded that if the hearsay is credible, and reveals some facts upon which the informant relied in reaching his conclusion "that a crime had been committed," it would be constitutionally acceptable, providing that some showing of the informant's reliability is made. *Id.* at 402–03; *cf.* United States v. Cangiano, 491 F.2d 906, 912 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974).

[67] 403 F. Supp. 857 (M.D. Fla. 1975).

[68] *Id.* at 859, 863.

[69] *Id.* at 860.

very detailed and made no conclusions as to the obscenity of the films.[70] Moreover, the integrity of the procedure was protected by the fact that an affiant would not likely delude a magistrate because the film would, in any event, be reviewed in the subsequent adversary hearing.[71]

Although the foregoing cases held that at a minimum, a valid warrant is necessary for a seizure of allegedly obscene materials, *Roaden* suggested that exigency might be the basis for an exception to the warrant requirement in situations where seizure for evidentiary purposes is a " 'now or never' " choice.[72] A number of courts have attempted to define those circumstances which would call forth such an exception.

In *Smith v. United States*,[73] the Sixth Circuit upheld a warrantless seizure where undercover agents had purchased allegedly obscene materials from appellants, arrested them, and seized approximately 2100 films and 280 tapes.[74] The court based its affirmance on two factors. First, there was no opportunity to obtain a seizure warrant prior to the appellants' having moved the materials from their car to the motel where the transaction was scheduled to take place, because the agents had no knowledge of where the films and tapes were kept.[75] Second, the " 'underground' " quality of the business was such that the court would not " 'presumptively invoke First Amendment protection.' "[76]

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[70] *Id.* at 860–61. *See also* State v. Thompkins, 263 S.C. 472, 479–80, 211 S.E.2d 549, 551 (1975).

[71] 403 F. Supp. at 861.

[72] 413 U.S. at 505.

[73] 505 F.2d 824 (6th Cir. 1974).

[74] *Id.* at 825, 828–29.

[75] *Id.* at 828–29.

[76] *Id.* at 829 (quoting from United States v. Cangiano, 491 F.2d 906, 913 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974)). In *Cangiano*, the Second Circuit upheld as constitutional mass seizures made without first providing an adversary hearing, where the defendants had stored large quantities of pornographic materials in a car, apartment, and basement. 491 F.2d at 911–14.

The court distinguished *A Quantity of Books*, *Marcus*, and *Lee Art Theatre* on the ground that those seizures occurred in commercial bookstores or theatres. The court then quoted *Roaden* for the proposition that the reasonableness of a search of a bookstore or commercial theatre is determined by an interplay of the first and fourth amendments. Reading "bookstore" and "commercial theatre" as exclusive rather than as illustrative terms, the court concluded that " '[t]he setting' . . . [was] hardly such as to presumptively invoke First Amendment protection," since the seizures had not taken place in a bookstore or theatre, but rather in "clandestine storage facilities not intended to be available to the public, but only to its trusted customers." *Id.* at 913.

But see United States v. Alexander, 428 F.2d 1169, 1170–71, 1175 (8th Cir. 1970)

Faced with very similar facts, the Supreme Court of California chose to read *Roaden*'s "exigency" language more narrowly, affirming the trial court's suppression of evidence seized without a warrant.[77] In *People v. Superior Court*,[78] police agents went to the defendants' place of business and negotiated the purchase of stag films which the defendants assured them depicted various ultimate sexual acts.[79] After actually viewing one of the films, an undercover officer arrested one of the defendants and seized the film as well as an album containing still photographs which had apparently depicted scenes from some of the films.[80] When the second defendant returned to the office, he

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(furtive manner in which material is distributed and size of segment of public affected by seizure are not rational bases for eliminating the requirement of a prior adversary hearing pursuant to a mass seizure). *See also* Note, *The Right to an Adversary Hearing on the Issue of Obscenity Prior to the Seizure of Furtively Distributed Films*, 69 MICH. L. REV. 913 (1971).

[77] People v. Superior Ct., 14 Cal. 3d 82, 87–91, 534 P.2d 393, 397–400, 120 Cal. Rptr. 697, 701–04 (1975).

[78] 14 Cal. 3d 82, 534 P.2d 393, 120 Cal. Rptr. 697 (1975).

[79] *Id.* at 86, 534 P.2d at 396, 120 Cal. Rptr. at 700. The state argued that it was unnecessary to obtain a warrant, because the defendant had waived the warrant requirement by his own representations as to the character of the films. The state based its argument on two California cases, one of which relied on Ginzburg v. United States, 383 U.S. 463 (1966). 14 Cal. 3d at 87–88, 534 P.2d at 396–97, 120 Cal. Rptr. at 700–01.

In *Ginzburg*, the defendant had launched a massive advertising campaign with the mailing of millions of brochures announcing the publication of *EROS*, a magazine of "sexual candor." 383 U.S. at 468 & n.9.

Justice Brennan, joined by Chief Justice Warren and Justices Clark, Fortas, and White, provided a major restatement (but not repudiation) of the standard articulated in *Roth*: "[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." *Id.* at 474 (footnote omitted). Examining Ginzburg's conduct, Justice Brennan determined that Ginzburg had been engaged in "the sordid business of pandering," citing two aspects of Ginzburg's behavior: his taste for unusual mailing addresses and his methods of advertising. *Id.* at 467–70. In the Justice's view, these activities revealed " 'the leer of the sensualist.' " *Id.* at 468.

The Court affirmed Ginzburg's conviction, declaring that

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

Id. at 475–76.

In response to the state's argument in *People v. Superior Court* that the *Ginzburg* rationale could be applied as a justification for eliminating the warrant requirement, the Supreme Court of California disagreed, stating that *Ginzburg* was limited to determinations of obscenity and inapplicable in the context of search and seizure. 14 Cal. 3d at 88, 534 P.2d at 397–98, 120 Cal. Rptr. at 701–02.

[80] 14 Cal. 3d at 86, 534 P.2d at 396, 120 Cal. Rptr. at 700.

was also arrested, and the films in the trunk and on the back seat of his car were seized.[81]

The state argued that under *Roaden*, the circumstances constituted " 'a legitimate emergency.' "[82] The court disagreed, finding the exception to be a very narrow one, arising only when two conditions are met: There must be probable cause, and the "opportunity for seizure" must be " 'now or never.' "[83] Here, the films which had been removed from the car were never viewed by the officers; thus, probable cause as to their obscenity was negated.[84] Further, as to the film and photographs seized in the office, a warrant should have been obtained. Since the transaction had occurred at defendants' place of business which was a "continuing enterprise," there was no immediate danger of the evidence being moved.[85]

Another issue which has received much attention by courts today is whether the numerous procedural safeguards against prior restraints may be circumvented through the use of a nuisance proceeding. Traditionally, acts or activities which are deemed immoral are termed "public nuisances." Thus, prostitution, gambling, lewd exhibitions, or other disapproved activities are often prohibited by nuisance statutes.[86] Although public nuisances are dealt with as minor criminal offenses, some states have established procedures whereby a prosecutor may institute civil proceedings in an equity court. This approach has proved very alluring to public officials who attempt to gain tactical advantages in fighting the sale and exhibition of obscene materials.

The use of an equity proceeding eliminates the need for jury trials and offers the weapon of injunctive relief, not only against a particular item, but against the operation of the business as a whole,

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[81] *Id.*

[82] *Id.* at 89, 534 P.2d at 398, 120 Cal. Rptr. at 702.

[83] *Id.*

[84] *Id.*

[85] *Id.* Justice Richardson dissented, finding that both *Roaden* requirements for a warrantless search had been met. First, the probable cause requirement was satisfied by the totality of the circumstances—in particular, the officer's viewing of a film. Second, there was a great likelihood that evidence would be removed or destroyed even though the defendants had a business office. *Id.* at 93–94, 534 P.2d at 401–02, 120 Cal. Rptr. at 705–06.

[86] W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 86–87, at 572–73, 586 (4th ed. 1971). *See also* BLACK'S LAW DICTIONARY 1214 (rev. 4th ed. 1968).

In those states which use nuisance statutes to control obscenity, the proceeding is generally instituted by a district attorney or other law enforcement official. A number of states, however, permit private individuals to file complaints, even without a showing of special injury. *See, e.g.*, CAL. PENAL CODE § 11226 (West 1970); LA. REV. STAT. ANN. § 13:4712 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 4667(a) (Supp. 1975–76).

thereby avoiding litigation over individual items.[87] However, such broad powers to suppress expression are clearly fraught with constitutional issues, and courts have, for the most part, sharply circumscribed the extent to which obscenity may be suppressed through the operation of public nuisance statutes.

In *Gulf States Theatres of Louisiana, Inc. v. Richardson*,[88] the Supreme Court of Louisiana reviewed the constitutionality of a statutory civil action for the abatement of the nuisance of obscenity where the statute provided "for an ex parte temporary injunction and for permanent injunction after hearing on a rule nisi to abate the nuisance perpetually."[89] Violations of an injunction subjected the violator to a contempt penalty.[90] Additionally, the property upon which the nuisance had taken place could be sold to pay the contempt fines.[91] Also, the statute mandated that the premises be closed for up to a year.[92] The nuisance proceeding was initiated upon the allegations of a prosecutor or parish official or the certified allegations of any other complaining party. In either event, a temporary injunction would issue mandatorily.[93] The statute made the judge's participation ministerial, providing no opportunity for judicial evaluation of the " 'merits of the petition.' "[94]

The court in *Gulf States Theatres* held the statute unconstitutional in a number of respects. The majority first determined that the absence of judicial discretion in the granting of a temporary injunction impinged upon first amendment interests by not requiring that probable cause be shown.[95] Moreover, the court determined that a probable cause requirement "for a criminal search warrant" could not "be read into a civil statute for abatement of nuisance."[96] The court then pointed out that the temporary injunction which had been issued by the trial court and directed at all copies of the film constituted a prior restraint as encompassing as the seizures held unconstitutional in *Marcus*.[97] Reasoning that subpoenas duces tecum were

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[87] Comment, *Can an Adult Theater or Bookstore Be Abated as a Public Nuisance in California?*, 10 U. SAN FRANCISCO L. REV. 115, 115–17 (1975).

[88] 287 So. 2d 480 (La. 1974).

[89] *Id.* at 485.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 485–86.

[94] *Id.* at 486 (quoting from State v. Gulf States Theatres of Louisiana, Inc., 255 So. 2d 857, 860 (La. App. 1971)).

[95] 287 So. 2d at 486, 493.

[96] *Id.* at 486.

[97] *Id.* at 487.

available in a civil proceeding, the court concluded that no exigency could compel the use of an injunction and the shutting down of the theatre.[98]

The prohibitions of future expression effected by the closing of a theatre as well as the contempt fines which are levied when the exhibitor does not comply with the injunction were also held to be prior restraints violative of the Louisiana constitution.[99] The court distinguished prospective abatements of gambling or prostitution from prospective abatements of a means of expression. It concluded that in a freedom-of-expression context "there is a perfectly valid distinction between prior restraint and accountability after abuse."[100]

In *Sanders v. State*,[101] the Supreme Court of Georgia struck down a Georgia nuisance statute which authorized a shutdown of an entire business if it could be proved that a single obscene publication had been sold.[102] The court reasoned that the presence of one ob-

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[98] *Id.* at 489. Although use of a subpoena duces tecum in a civil proceeding presents no constitutional problems, its use in a criminal obscenity proceeding raises fifth amendment issues which have been unevenly resolved by the courts. For example, in Smith v. Fair, 363 F. Supp. 1021 (N.D. Ohio 1973), *aff'd*, 495 F.2d 1373 (6th Cir. 1974), the defendants were charged with showing obscene films. The prosecutor moved for a prior adversary hearing and a subpoena duces tecum issued ordering the defendants to bring the films to the hearing. 363 F. Supp. at 1021–22. The defendants argued that a subpoena requiring production of evidence violated their fifth amendment rights. The state argued that the films were " 'non-testimonial' " and thus not within the protection of the fifth amendment. *Id.* at 1022.

Tracing fifth amendment history, the court concluded that with one exception —Schmerber v. California, 384 U.S. 757 (1966)—all the cases required that the defendant aid in the production of evidence only for purposes of identification. 363 F. Supp. at 1023–25. The court distinguished *Schmerber*, which had held that blood tests used to establish alcohol levels are constitutional, on the basis that the defendant in *Schmerber* was neutral throughout the process of extraction, whereas the defendant in the case at bar would be forced to actively obtain evidence which he might or might not possess and then to bring it to court to be used against him. *Id.* at 1025. Such a result was, in the court's view, unconstitutional. *Id.*

Confronting a similar scenario, the Supreme Court of Colorado decided the case of Houston v. Manerbino, 185 Colo. 1, 521 P.2d 166 (1974). Here, the defendant also objected on fifth amendment grounds to a subpoena duces tecum which required production of allegedly obscene films at an adversary hearing. *Id.* at 4–5, 521 P.2d at 167–68. The court rejected the argument on the basis that the fifth amendment was a bulwark against compelling the production of "testimonial or communicative" evidence. The opinion termed it "ludicrous" that one could publicly exhibit a film and then claim a fifth amendment privilege in order to avoid producing the film at an adversary hearing. *Id.* at 8–9, 521 P.2d at 170.

The law is unclear on this issue, but a recent Supreme Court case indicates that the decision of the Colorado supreme court may be the better one. *See* Fisher v. United States, 96 S. Ct. 1569, 1578–82 (1976).

[99] 287 So. 2d at 491.

[100] *Id.*

[101] 231 Ga. 608, 203 S.E.2d 153 (1974).

[102] *Id.* at 613, 203 S.E.2d at 157.

scene article cannot be the basis for a blanket determination that a business is obscene.[103] The majority also concluded that an injunction against expression, when operating to bar future distribution of possibly nonobscene materials, is unconstitutional.[104]

The Third Circuit has taken an even more negative view regarding the appropriateness of the public nuisance approach as a means of controlling the sale or exhibition of obscenity. In *Grove Press Inc. v. City of Philadelphia*,[105] that court affirmed a federal district court's injunction against state interference with the exhibition of a film, determining that public nuisance concepts "may not be used . . . both to define the standards of protected speech and to serve as the vehicle for its restraint."[106]

The court reasoned that the terms " 'injury to the public' " and " 'unreasonableness' "—declared by the Supreme Court of Pennsylvania to be " 'the essence of a public nuisance' "—lacked the requisite degree of preciseness and narrowness to survive constitutional challenge.[107] The circuit court viewed such terms as "too elastic and amorphous," and further concluded that public nuisance is a "sprawling doctrine" which impinges upon first amendment rights in the same manner as a vague and overbroad statute.[108] Thus, the city's argument that the exhibition of allegedly obscene material is a per se "unreasonable use of expression" was rejected.[109]

Many jurisdictions have, nonetheless, approved the use of public nuisance proceedings to control obscenity.[110] Yet, in most instances,

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[103] *Id.*

[104] *Id.*

[105] 418 F.2d 82 (3d Cir. 1969).

[106] *Id.* at 88, 91.

[107] *Id.* at 87–88.

[108] *Id. See also* General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 666–67, 320 So. 2d 668, 676–77 (1975). The court, although permitting a sharply circumscribed employment of the public nuisance statute to prevent exhibition of obscene films, expressed its dissatisfaction with that approach:

> [P]ublic nuisance doctrine . . . is ill-equipped to cope with the intricacies of First Amendment guaranties. The law of nuisance cannot become a vehicle for the protection of the sensibilities of the overly fastidious; nor can the doctrine of nuisance serve as a means of circumventing these First Amendment safeguards.

Id. at 667, 320 So. 2d at 676–77.

[109] 418 F.2d at 87–88; *accord*, Commonwealth v. MacDonald, 347 A.2d 290, 303 (Pa. 1975), *petition for cert. filed*, 44 U.S.L.W. 3445 (U.S. Jan. 28, 1976) (No. 75–1073).

[110] *See, e.g.*, Grove Press, Inc. v. Flask, 326 F. Supp. 574, 578–79 (N.D. Ohio 1970), *vacated and remanded on other grounds*, 413 U.S. 902 (1973); General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 666–67, 320 So. 2d 668, 676–77 (1975); Cactus Corp. v. State *ex rel.* Murphy, 14 Ariz. App. 38, 41–42, 480 P.2d 375, 378–79 (1971); People *ex rel.* Busch v. Projection Room Theater, 16 Cal. 3d 360, 371–73, 546 P.2d 733, 740–41, 128 Cal.

the nuisance statute, as written or construed, severely limits the restraints that may be placed on expression. Some courts have held that a judicial determination of obscenity must be rendered either prior to[111] or very soon after institution of a nuisance proceeding.[112] Some jurisdictions have refused to permit padlocking of the premises or sale of the fixtures and personalty within the premises as a means of abating the nuisance.[113]

Clearly, the direction taken by most courts is to examine the practical operation of the nuisance statute and gauge its validity in terms of its tendency to create prior restraints as well as its tendency to suppress nonobscene materials. Although the Supreme Court has indicated in dictum that public nuisance statutes are a constitutionally valid method of dealing with obscenity,[114] that Court, however, has held that nuisance laws are subject to the requirements of the first

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Rptr. 229, 236–37 (1976); People *ex rel.* Hicks v. Sarong Gals, 42 Cal. App. 3d 556, 562–63, 117 Cal. Rptr. 24, 28–29 (1974); Mitchem v. State *ex rel.* Schaub, 250 So. 2d 883, 884 (Fla. 1971); Evans Theatre Corp. v. Slaton, 227 Ga. 377, 382, 180 S.E.2d 712, 716 (1971), *cert. denied*, 404 U.S. 950 (1971); Society To Oppose Pornography, Inc. v. Thevis, 255 So. 2d 876, 880–81 (La. App. 1971), *cert. denied*, 257 So. 2d 158 (La. 1972), *appeal dismissed*, 273 So. 2d 653 (La. App. 1973); State *ex rel.* Cahalan v. Diversified Theatrical Corp., 59 Mich. App. 223, 238, 229 N.W.2d 389, 396 (1975); State *ex rel.* Ewing v. "Without A Stitch," 37 Ohio St. 2d 95, 98–99, 103, 307 N.E.2d 911, 914, 917 (1974), *appeal dismissed sub nom.* Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975); Locke v. State, 516 S.W.2d 949, 954–55 (Tex. Civ. App. 1974). *But see* Grove Press Inc. v. City of Philadelphia, 418 F.2d 82, 87–88 (3d Cir. 1969); Olympic Drive-In Theatre, Inc. v. City of Pagedale, 441 S.W.2d 5, 9 (Mo. 1969).

[111] *See, e.g.*, People *ex rel.* Busch v. Projection Room Theater, 16 Cal. 3d 360, 375, 546 P.2d 733, 742, 128 Cal. Rptr. 229, 238 (1976) (although public nuisance statute may provide means to regulate exhibition of obscene films or photos, a prior adversary hearing is required before an injunction may be issued).

[112] *See, e.g.*, General Corp. v. State *ex rel.* Sweeton, 294 Ala. 657, 666, 320 So. 2d 668, 676 (1975).

[113] *See, e.g.*, Society To Oppose Pornography, Inc. v. Thevis, 255 So. 2d 876, 881 (La. App. 1971), *cert. denied*, 257 So. 2d 158 (La. 1972), *appeal dismissed*, 273 So. 2d 653 (La. App. 1973). *But see* State *ex rel.* Cahalan v. Diversified Theatrical Corp., 59 Mich. App. 223, 237, 229 N.W.2d 389, 396 (1975) (padlocking defendant's premises for one year did not constitute a prior restraint because defendant was not precluded from exhibiting nonobscene films; rather, he was only precluded from exhibiting them in the padlocked theater); State *ex rel.* Ewing v. "Without A Stitch," 37 Ohio St. 2d 95, 104–05, 307 N.E.2d 911, 917–18 (1974), *appeal dismissed sub nom.* Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975).

[114] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54–55 (1973) where the Supreme Court in dictum stated that public nuisance proceedings may be a constitutionally acceptable means to enjoin exhibition of obscene films:

> [S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation.

(Footnote omitted.)

amendment.[115] 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.

PRIOR RESTRAINTS—A PROCEDURAL APPROACH

Unquestionably, nuisance statutes, as well as administrative controls, searches and seizures, and injunctions, constitute a variety of methods by which first amendment freedoms are pitted against the state's desire to control the dispersion of items which are possibly obscene. The following suggested procedures are designed to achieve a balance consistent with prevailing constitutional interpretations and to provide guidelines which focus on the nature of the restraint rather than on the nature of the possibly obscene materials.

Whenever the state seeks to seize material on the ground that it is obscene, a court must first determine whether the material in question is or is not probably obscene. At this initial stage, the determination may be ex parte, but it must be made by a judge and must be based upon specific, objective description by an affiant or upon actual observation by the judge. The standard employed should be a strict one, certainly in excess of the normal warrant requirement of probable cause.

If the court initially determines that the material is not probably obscene, the proceedings should halt; no relief may be granted. If, on

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[115] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). Here, the Supreme Court held as facially invalid a city ordinance which made it a public nuisance to exhibit anything which displayed bare human buttocks, genitals, or bare female breasts when such exhibition was visible from public locations. *Id.* at 206–07. The majority reasoned that the "ordinance discriminat[ed] . . . on the basis of content" and that it was insensitive to the potential educational or other value that might inhere in certain films, etc., containing nudity. *Id.* at 211 (footnote omitted). Further, the protection-of-minors argument proved unconvincing in this instance because minors were deemed to have first amendment rights of their own which extend to viewing nudity that is not obscene. *Id.* at 212–13. The argument that such nudity is an invasion of the right of privacy of sensitive individuals was also rejected because, as the Court noted, such individuals can easily avert their eyes. *Id.* at 210–12.

The Court has also indicated that the absence of prior restraints is a significant factor in judging the validity of a public nuisance statute. In approving Georgia's nuisance procedures the Court stated that

> Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54–55 (1973) (footnote omitted).

the other hand, the court finds that the proffered material is probably obscene, it should proceed to the second relevant question: Will the relief sought effectively prohibit the distribution or display of the material? If the answer to this question is affirmative, the relief, as sought, may not be granted without an adversary hearing.

In order to answer this question, it will be necessary for the court to make additional findings of fact, at least on a preliminary basis. The court should inquire into the number of items to be seized and relate that to the total number in possession to determine the degree to which the order acts as a restraint. The seizure from a store of one magazine out of one hundred of that issue, for example, would probably have very little effect on its availability for distribution. Seizing a store's only copy of a particular magazine, on the other hand, would clearly prevent its distribution, at least through that outlet.

With respect to publications or photographs the problems presented to the state by this procedure will probably be slight; a single copy may easily be purchased and preserved. With respect to films, the approach taken in *Heller* suffices: A single copy of a film may only be seized if the distributor or exhibitor is allowed to make a copy which he may show pending final judicial determination.

In any event, a seizure of allegedly obscene materials in excess of that which is required for evidentiary purposes may not be permitted without a prior adversary hearing unless special exigency can be demonstrated. Similarly, since an injunction, unless defied, cuts off the availability of the material to the public, there is little difference in effect between an injunction against distribution or exhibition and a mass seizure. Thus, injunctive relief should, with one exception, never be granted without a prior adversary hearing.

The exception operates where, after an ex parte judicial determination of probable obscenity, it is clear that the materials would be exhibited or distributed to minors. In such a case, a court should be allowed to enjoin this distribution or exhibition to minors providing that an adversary hearing is afforded within a short time—48 hours for example—at which hearing the state would have the burden of proving the obscenity of the materials. This exception to the proposal that there be no injunctions prior to an adversary hearing derives from the traditional deference to a state's interest in protecting minors from the perceived harmful effects of obscene matter that courts have displayed when balancing first amendment rights against restraints on expression.[116]

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[116] *See* Ginsberg v. New York, 390 U.S. 629, 631–43 (1968).

Nuisance statutes, although often creating more extensive prior restraints than those effected by searches and seizures, can nonetheless be written so as to avoid constitutional problems. For example, Ohio's nuisance provisions, as construed by that state's supreme court, avoid many of the pitfalls normally attendant upon a state's attempt to regulate obscenity. First, after the filing of an abatement action and application for a temporary injunction, defendants are required to be notified "of the time and place of hearing on the application . . . at least five days before the hearing."[117] Thus, no restraint may issue prior to a judicial conclusion that the material is obscene. Secondly, an injunction may affect only those materials found to be obscene.[118] Third, although the statute "requires the removal and sale of all personal property used in conducting the nuisance," this penalty may be avoided if within a prescribed time limit, the owner appears in court and demonstrates that he had "neither actual or constructive knowledge that his property was being used to maintain a nuisance."[119] Fourth, an owner may have his establishment reopened by paying the statutory fines, filing a bond in the amount of the full value of the property, and convincing the court that he will prevent a recurrence of the nuisance. The court pointed out that this does not create a prior restraint because an owner is free to exhibit other films not judicially declared obscene in the nuisance proceeding.[120]

Although the Ohio nuisance provisions display sensitivity to first amendment considerations, it is submitted that padlocking and sale of fixtures and personalty are constitutionally deficient methods of abatement in that they clearly restrain the exhibition of possibly non-obscene materials. Hence, these procedures sweep too broadly and clash with the fundamental principle that speech may be restricted only after it is uttered or disseminated and only after a judicial determination that it is unprotected. Further, the methods by which an exhibitor or purveyor may extricate himself from the harsh strictures

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[117] State *ex rel.* Ewing v. "Without A Stitch," 37 Ohio St. 2d 95, 98–99, 307 N.E.2d 911, 914 (1974), *appeal dismissed sub nom.* Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975) (construing OHIO REV. CODE ANN. § 3767.04 (Page 1971)).

[118] State *ex rel.* Ewing v. "Without A Stitch," 37 Ohio St. 2d 95, 99, 307 N.E.2d 911, 914 (1974), *appeal dismissed sub nom.* Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975).

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

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

of the abatement statute do not salvage that statute's constitutionality: Individuals do not have the burden of avoiding prior restraints. Rather, as the cases make clear, prior restraints must be justified by exigency, and the government bears the burden of demonstrating such exigency.

COMMUNITY STANDARDS

The *Miller* opinion's second major area of impact was its determination that in applying community standards in the evaluation of materials, the standards need not be " 'national standards.' "[121] Although it was not until a later case that this rather ambiguous pronouncement was clarified,[122] the Court did make clear that any concept of a " 'national standard' " was "hypothetical and unascertainable," and that, at least in *Miller*, the community would be the state of California.[123] In approving the use of the state as an accepta-

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[121] 413 U.S. at 31. The adoption of the local standards approach by a majority of the Supreme Court resolved a longstanding debate. *See* Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962) (national standards to be applied in federal prosecution) (Harlan, J.); Jacobellis v. Ohio, 378 U.S. 184, 192–95 (1964) (national standards to be applied in state prosecution) (Brennan, J.); *id.* at 200 (local community standard to be applied in state prosecution) (Warren, C.J., dissenting). For discussions of community standards arguments prior to *Miller* see Shugrue & Zieg, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157, 160–66 (1974); *Obscenity: The Lingering Uncertainty*, 2 N.Y.U. REV. L. & SOC. CHANGE 1, 9–12 (1972).

[122] *See* Jenkins v. Georgia, 418 U.S. 153 (1974) (discussed in text accompanying notes 124–27 *infra*).

[123] 413 U.S. at 30–34. In addition to holding that community standards are appropriate, the Court in a companion case, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), held that the state need not introduce " 'expert' affirmative evidence" as to the obscenity of allegedly obscene materials because such items "are the best evidence of what they represent." *Id.* at 56 (footnote omitted).

In a subsequent case, the Court determined that local standards would also obtain where the prosecution is brought under a federal statute. Hamling v. United States, 418 U.S. 87, 105 (1974). Justice Brennan, dissenting, feared that application of local standards in judging the obscenity *vel non* of materials both invaded the congressional prerogative by imposing standards never contemplated by Congress when enacting the statute and chilled the first amendment rights of national distributors who would avoid the risk of a multiplicity of prosecutions. *Id.* at 142–45.

Justice Rehnquist, for the majority, discounted these objections on the basis that since distributors were, in any event, subject to differing liabilities based on state criminal laws, the imposition of varying liability in a federal prosecution did not create a "constitutional impediment." *Id.* at 106. He further noted that authority for applying community standards to federal offenses had been established in United States v. 12 200-Foot Reels of Film, 413 U.S. 123 (1973), which had stated that the *Miller* " 'standards are applicable to federal legislation.' " 418 U.S. at 105 (quoting from United States v. 12 200-Foot Reels of Film, *supra* at 130 (footnote omitted)).

The *Hamling* decision, though opting for nonfederal standards, went on to say that the trial court would not be precluded from admitting evidence pertaining to standards

ble relevant community, the Court left open the questions of whether smaller geographic areas could also be used as acceptable relevant communities and whether it is a requirement that a trial court indicate to the jury the particular relevant community from which they are to draw standards.

Both questions were addressed by the Court in *Jenkins v. Georgia*.[124] In an opinion by Justice Rehnquist, the majority held that there was no constitutional requirement that a trial court in a state obscenity proceeding instruct a jury that the state is to be used as a

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other than those of the district when circumstances indicated that such evidence would assist jurors in their deliberations. *Id.* at 106. This dictum virtually invited the litigation that soon followed, in that the Court neglected to suggest circumstances warranting the use of non-district standards, failed to indicate whether there was any limitation on distance from the district, and failed to indicate the degree to which reliance on non-district standards might supersede reliance on district standards.

In United States v. Elkins, 396 F. Supp. 314 (C.D. Cal. 1975), for example, a California district court dismissed an indictment against distributors of allegedly obscene matter who had mailed some of it to Iowa. *Id.* at 316, 318. The indictment had originally been brought in the northern district of Iowa, but the action was ordered transferred to California, the area most convenient to the parties and witnesses. *Id.* at 316. The Iowa court before ordering the transfer had first determined that the standards to be applied were the community standards of the northern district of Iowa. *Id.* The court then cited *Hamling* and *Miller* for the proposition that the transferee court could allow evidence of the community standards of the transferor court to be introduced at trial and applied by the jurors in place of the California standards. *Id.*

When the case was finally transferred to California, the Government moved for a ruling on whether the standards of Iowa or those of the California district would apply. The California court ruled that expert testimony on the standards of the northern district of Iowa would be admitted but that expert testimony alone was insufficient to establish these standards. *Id.* On reconsideration of that order, the court, distinguishing *Hamling* on its facts, dismissed the indictment, concluding that expert testimony on Iowa community standards would be insufficient,

> because of the special and integral part that the knowledge of a juror of the community from which he comes plays in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

Id. at 316–17.

In contrast, the Ninth Circuit, in United States v. Danley, 523 F.2d 369 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1143 (1976), when faced with a similar issue, affirmed the trial court's use of out-of-state community standards. 523 F.2d at 370–71. In *Danley*, the defendants argued that because the state of Oregon had no statute proscribing the dissemination or sale to adults of obscene matter, pornography was not in conflict with Oregon community standards and that these standards were, then, controlling. *Id.* at 370. At trial, the district court, finding no necessary relationship between the absence of a statute and the conclusion that community standards in Oregon were not offended by pornography, applied Oregon community standards and the standards of those other states where the obscene matter had been transported. *Id.* The Ninth Circuit affirmed, relying on *Hamling* and pointing to the interstate nature of the defendants' activities. *Id.* at 370–71.

[124] 418 U.S. 153 (1974).

relevant community.[125] Further, it was held that the trial court need not specify any particular community whatsoever.[126] The analysis was brief, merely citing *Miller* as authority for the conclusion that

> [a] State may choose to define an obscenity offense in terms of "contemporary community standards" . . . without further specification . . . or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.[127]

Although prior to *Miller* and *Jenkins*, a number of jurisdictions employed "national" community standards,[128] several states, in grappling with the problems of defining the boundaries of the relevant community, determined the boundary to be the state or some smaller geographic area.[129] After *Miller*, some state courts interpreted the somewhat vague *Miller* language as mandating only that the standards employed be community standards and not "national standards."[130] Other courts were more precise in delineating the scope of the community.[131] It is clear, however, that both the local community and state standards approaches are well founded.

On the one hand, use of the local community standard better reflects the tolerance level of the community whose interest in reg-

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[125] *Id.* at 157.

[126] *Id.*

[127] *Id.*

[128] *See, e.g.*, NGC Theatre Corp. v. Mummert, 107 Ariz. 484, 487–88, 489 P.2d 823, 826–27 (1971); State v. Hudson County News Co., 41 N.J. 247, 265–66, 196 A.2d 225, 234–35 (1963); State v. Childs, 252 Ore. 91, 447 P.2d 304, 309 (1968), *cert. denied*, 394 U.S. 931 (1969).

[129] *See, e.g.*, *In re* Giannini, 69 Cal. 2d 563, 580, 446 P.2d 535, 547, 72 Cal. Rptr. 655, 667 (1968), *cert. denied*, 395 U.S. 910 (1969), *overruled on other grounds*, Crownover v. Musick, 9 Cal. 3d 405, 431, 509 P.2d 497, 514, 107 Cal. Rptr. 681, 698 (1973); Felton v. City of Pensacola, 200 So. 2d 842, 848 (Fla. Dist. Ct. App. 1967), *rev'd mem. on other grounds*, 390 U.S. 340 (1968); People v. Butler, 49 Ill. 2d 435, 438, 275 N.E.2d 400, 401 (1971); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 149–50, 121 N.W.2d 545, 553 (1963).

[130] *See, e.g.*, City of Las Vegas v. Swingers, Inc., 89 Nev. 456, 457, 514 P.2d 1189, 1189–90 (1973); Ebert v. Board of Censors, 19 Md. App. 300, 309–10, 313 A.2d 536, 541–42 (1973).

[131] Several state courts have concluded that the state is the relevant community. *See, e.g.*, Pierce v. State, 292 Ala. 473, 479, 296 So. 2d 218, 223 (1974), *cert. denied*, 419 U.S. 1130 (1975); Slaton v. Paris Adult Theatre I, 231 Ga. 312, 317, 201 S.E.2d 456, 460 (1973), *cert. denied*, 418 U.S. 939 (1974); McCrary v. State, 533 P.2d 629, 634 (Okla. Crim. App. 1974); Court v. State, 63 Wis. 2d 570, 576–78, 217 N.W.2d 676, 679–80 (1974). Other states have opted for a more localized approach, using the standards of the county, city, or locality. *See, e.g.*, Kansas City v. O'Connor, 510 S.W.2d 689, 696 (Mo. 1974) (per curiam); Price v. Commonwealth, 214 Va. 490, 491–92, 201 S.E.2d 798, 799, *cert. denied*, 419 U.S. 902 (1974).

ulating obscenity is the source of the litigation.[132] On the other hand, there is virtually no limiting principle which can effectively be employed to define an ultimate grouping of individuals which may be deemed the appropriate community from which standards should be derived.[133] Further, there may be as much diversity within a given community as that found within the state as a whole.[134]

Of paramount importance is the fact that, under a local community standard, undue strain is placed upon the state as well as the defendant, because the estoppel effect of judgments would be sharply

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[132] In Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798, *cert. denied*, 419 U.S. 902 (1974), the Virginia surpreme court held that the standards to be applied are those of the locality rather than those of the nation or state, noting that statewide standards would be impossible to establish because of the disparity in the views of metropolitan as opposed to rural juries. 214 Va. at 491–92, 201 S.E.2d at 799–800.

[133] *See* Pierce v. State, 292 Ala. 473, 296 So. 2d 218 (1974), *cert. denied*, 419 U.S. 1130 (1975), where the court, in opting for state rather than local standards, described the deficiencies of the local standards approach:

> This myriad of possibilities for standards, coupled with the temporal requirement that standards be "contemporary" clearly demonstrates the burden which would be placed on the judicial system in trying to determine which standards are applicable at which location at which time.

292 Ala. at 480, 296 So. 2d at 224.

[134] *See* Pierce v. State, 292 Ala. 473, 480, 296 So. 2d 218, 224 (1974), *cert. denied*, 419 U.S. 1130 (1975). A number of other reasons have been articulated in support of a state standard. For example, in McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963), the court concluded that the state should be the relevant community, reasoning that there would be minimal differences between various localities in the standards of what is obscene. *Id.* at 149, 121 N.W.2d at 553.

The Supreme Court of California also adopted the state as the relevant community in *In re* Giannini, 69 Cal. 2d 563, 578, 446 P.2d 535, 545, 72 Cal. Rptr. 655, 665 (1968), *overruled on other grounds*, Crownover v. Musick, 9 Cal. 3d 405, 431, 509 P.2d 497, 514, 107 Cal. Rptr. 681, 698 (1973). The court determined that in evaluating whether behavior was lewd, state standards were preferable to national standards because it was doubtful that experts could "testify knowledgeably as to that standard." 69 Cal. 2d at 578, 446 P.2d at 546, 72 Cal. Rptr. at 666. Furthermore, administrative efficiency would be served by eliminating the necessity to define the relevant community on a case by case basis and public policy would also be served by the establishment of uniformity in the operation of obscenity law. *Id.* at 580, 446 P.2d at 547, 72 Cal. Rptr. at 667.

Chief Justice Heflin of the Alabama supreme court echoed both the California and Wisconsin supreme courts in his particularly well-reasoned opinion in Pierce v. State, 292 Ala. 473, 296 So. 2d 218 (1974), *cert. denied*, 419 U.S. 1130 (1975). The opinion emphasized the need for uniformity in law, quoting Dean Pound's thesis that civilization requires that a citizen have legal standards on which to rely so that conduct may be adjusted to effectuate his future goals. 292 Ala. at 480–81, 296 So. 2d at 225. Chief Justice Heflin further stated that, in reality, the purported lack of uniformity in the standards of rural as opposed to city dwellers was exaggerated, noting the average American's increased mobility, his susceptibility to the opinion-creating effects of mass media, the large number of rural dwellers who work in cities, and the family and friendship ties that exist between the two groups. *Id.* at 482, 296 So. 2d at 226.

circumscribed.[135] Under the local standards approach, the state, seeking to prevent the distribution of allegedly obscene material, would be obliged to move against the distributor or his agent in a separate action in each local community, because the standards of each locality may differ. Thus no decision could have any estoppel value in another local community.[136]

The problem which this raises for the state in civil as well as criminal litigation is minor compared to the problems it raises for potential defendants. For example, a theatre owner in one county could not rely at all upon the judicial decisions of even an adjoining locality. The threat of simultaneous prosecutions in every community with absolutely no estoppel effect running across community lines would, in its monetary implications and criminal exposure, inhibit chain owners from handling questionable material.[137] As a result, first amendment rights would be chilled. To compel a party to litigate once is probably reasonable, even if it is once in each state. To compel that party to litigate tens of times in each state and hundreds of times nationwide is not.[138]

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[135] This difficulty had been anticipated by the Wisconsin supreme court in McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963). The court opted for a statewide community standard, in part because different standards within the state would frustrate the operation of a criminal statute which allowed "a judgment of obscenity to be used in a criminal trial of any person who was served with notice of it before the alleged violation." *Id.* at 149–50, 121 N.W.2d at 553. Although such a statute is unconstitutional, *see* notes 171–81 *infra* and accompanying text, variations between community standards will limit the estoppel effect of judgments, *see* note 195 *infra*.

[136] *Cf.* note 195 *infra*.

[137] The inhibitory effect on distribution would seem to be exacerbated by the Supreme Court's holding in *Jenkins* that juries need not be instructed to apply the standards of any particular community. 418 U.S. at 157. A distributor or exhibitor would thus be hard-pressed to map out "safe zones" based on past litigation because there is no assurance that juries in a particular community would be applying the same standards as those employed by prior juries within the same community.

[138] *Harvard Law Review* has recently argued that the way to avoid this multiplicity of litigation and attendant chilling of first amendment rights is for distributors to file class action declaratory judgment suits on the issue of " 'serious literary, artistic, political, or scientific value.' " Note, *supra* note 6, at 1861–74. Essentially, the argument is that determinations of " 'serious literary, artistic, political, or scientific value' " are of constitutional dimension, *id.* at 1854, and thus "capable of being given national effect." *Id.* at 1861. Hence, federal class action declaratory relief "initiated against classes of possible prosecutors" on the "serious value" issue, if obtained, will protect national distributors from multiple prosecutions. *Id.* at 1861, 1861–74.

Although the argument is extremely appealing, it is possible that the Supreme Court would find that such a class action is inappropriate because distributors, through skillful forum shopping, could litigate in jurisdictions which are extremely protective of first amendment interests. In so doing, they might obtain a declaratory judgment from federal judges who will find "serious value" in virtually anything in order not to suppress distribution.

In contrast, using the state as the relevant community has a number of advantages, although admittedly it is less responsive to community values. First, there are no problems in defining the relevant community. Second, state standards are no more a fiction than local standards since, in many instances, a juror applying local standards may not come from that community.[139] Most important, litigation is reduced sharply because, as will be discussed in the following section, there may be broad estoppel effect to a judgment rendered under a state standard.

ESTOPPEL EFFECT OF JUDGMENTS

The theory of res judicata derives from the public policy of putting matters in dispute to rest.[140] Essentially, the theory of res judicata is that a decision on the merits by a court of competent jurisdiction, unless reversed on appeal, is binding on the parties to the suit and their privies in regard to the issues of fact and law actually litigated; hence, parties to the proceeding may not relitigate, in the same or any other cause of action, issues that have been decided.[141] This holds true even if the decision is not appealed, be-

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The *Harvard* Note itself, in footnote 19, suggests that in instances where the public is hostile to placing restrictions on consenting adults to read and view what they please, juries may find that the item in question is not obscene.

Even if the government successfully appeals that lower court determination of nonobscenity, commercial pornographers may have distributed or exhibited the materials in the interim. Since most pornography is produced on a low budget, the exhibitors or distributors may have made substantial profits before the judgment is reversed. Thus, the Supreme Court may reject the use of a class action declaratory judgment as potentially disruptive of the state-federal balance that *Miller* sought to achieve.

[139] For example, if jurors are selected from county lists, a juror from a highly urbanized section of a county may sit on a case arising in a rural community of the same county. It is as possible for the standards within the county to differ as much as those of the state as a whole.

[140] The principle of res judicata as it is known today was developed in 1776 but had originated much earlier. R. VON MOSCHZISKER, STARE DECISIS, RES JUDICATA AND OTHER SELECTED ESSAYS 30 (1929) [hereinafter cited as VON MOSCHZISKER]. Actually, res judicata serves private needs as well as public needs. For the individual litigant, res judicata serves to promote "peace and quiet in the community through the creation of certainty in the relations of men." *Id.* at 31. Res judicata serves the public interest by helping courts economize in the expenditure of time. *Id. See* H. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW § 61, at 193–94 (1912); 2 A. FREEMAN, THE LAW OF JUDGMENTS § 626, at 1318–20 (1925) [hereinafter cited as FREEMAN].

[141] Chief Justice von Moschzisker has stated that

> the rule of res judicata means that when a court of competent jurisdiction has determined, on its merits, a litigated cause, the judgment entered, until reversed, is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination of the con-

cause the application of res judicata does not derive from the status of the court rendering the decision;[142] rather, it rests on the ground that the party had an

> opportunity for the judicial determination of an issue by a tribunal having the requisite authority and proceeding in a manner recognized as due process of law.[143]

The tentative draft of the *Restatement (Second) of Judgments* has identified two subdivisions of res judicata: *Direct Estoppel*, which "precludes relitigation of issues actually litigated and determined in the first action when a second action is brought on the *same* claim," and *Collateral Estoppel*, which also precludes relitigation of issues where "the second action is brought on a different claim."[144] Traditionally, courts generally held that the plea of res judicata required

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troversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation and affect the fund or other subject matter then before the court.

VON MOSCHZISKER, *supra* note 140, at 32–33 (footnote omitted).

[142] 2 FREEMAN, *supra* note 140, § 634, at 1336. Freeman also concludes that another tribunal hearing the matter should apply res judicata where appropriate even though the "rules of law, practice or evidence" are not the same as those of the first tribunal. *Id.* § 641, at 1349.

[143] *Id.* § 641, at 1349–50.

[144] RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment *b* at 146 (Tent. Draft No. 1, 1973) (emphasis added). *See also* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1012 (1966).

Res judicata and collateral estoppel are often discussed as if they are completely separate concepts—res judicata applying to preclusion of issues in a subsequent proceeding on the same cause of action, and collateral estoppel applying to preclusion of issues decided previously when such issues are raised in a new cause of action. *See, e.g.*, Hirsch & Ryan, *supra* note 29, at 71; Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 724 (1967). This terminology has been adopted by the Supreme Court. *See* Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 326 (1955). The RESTATEMENT OF JUDGMENTS § 68, at 294–95 (1942) [hereinafter cited as RESTATEMENT] states that

> The doctrine of collateral estoppel is operative where the second action is between the same persons who were parties to the prior action, whether the second action is brought by the plaintiff or by the defendant in the original action. It is operative whether the judgment in the first action is in favor of the plaintiff or of the defendant. A judgment for the defendant in the first action may have the effect of furnishing a complete defense to the second action. . . . A judgment for the plaintiff in the first action may have the effect of enabling him to recover in the second action without proving the facts constituting his cause of action, provided that those facts were litigated and determined in the prior action; but the defendant is not precluded from defending the second action on grounds not litigated and determined in the first action.

See also Compania Mexicana v. Jernigan, 410 F.2d 718, 726 (5th Cir.), *cert. denied*, 396 U.S. 905 (1969).

identity of parties as well as identity of factual issues. It had been felt that equity demanded that there be "mutuality of estoppel," meaning essentially that it was looked on as unfair[145] that an individual who was not a party to a judicial proceeding and who risked nothing in that proceeding should reap the benefits of another party's victory.[146] Thus, persons who were not parties to the original action in which the factual issues had been determined could not plead the original judgment in a different cause of action, even though the factual issues were the same.

In 1942, with Justice Traynor's opinion in *Bernhard v. Bank of America National Trust & Savings Association*,[147] the doctrine of mutuality was sharply eroded. Here, the Supreme Court of California affirmed a lower court's holding that the plaintiff was bound by the issues determined in a prior judgment rendered against her, even though the defendant who pleaded the prior judgment in the present cause of action against the plaintiff had not been a party in the prior action.[148] Justice Traynor thought it nonsensical that a nonparty not be allowed to plead a judgment "against a party who was bound by it."[149] One commentator, however, concluded, with some reserva-

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[145] *See* 35 YALE L.J. 607, 608–09 (1926).

[146] *See* Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 284 n.6 (1957).

Traditionally, the operation of a judgment as res judicata has depended on identity of parties or their privies. VON MOSCHZISKER, *supra* note 140, at 32–33. A "party" has been defined as "one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment.' " Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942) (quoting from 1 S. GREENLEAF, THE LAW OF EVIDENCE § 523, at 661 (15th ed. 1892)).

Privies are parties who, after a judgment has been entered, obtain "an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, *supra* at 811, 122 P.2d at 894.

[147] 19 Cal. 2d 807, 122 P.2d 892 (1942).

[148] *Id.* at 810–14, 122 P.2d at 894–95. Today, the *Bernhard* doctrine is widely accepted. *See, e.g.*, Brown v. DeLayo, 498 F.2d 1173, 1175–76 (10th Cir. 1974); Cardillo v. Zyla, 486 F.2d 473, 475–76 (1st Cir. 1973); Rachal v. Hill, 435 F.2d 59, 61–62 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); Technograph Printed Circuits, Ltd. v. Packard Bell Elec. Corp., 290 F. Supp. 308, 318 (C.D. Cal. 1968). Some authorities, however, still support the mutuality requirement. *See, e.g.*, 1B J. MOORE, FEDERAL PRACTICE ¶ 0.412[1], at 1809–12 (2d ed. 1974); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TULANE L. REV. 301, 330 (1961).

[149] 19 Cal. 2d at 812, 122 P.2d at 895. Justice Traynor noted that the mutuality requirement had already been eroded in that some courts had dispensed with mutuality, limiting the privity requirement "to the party against whom the plea of res judicata is asserted." *Id.* Justice Traynor further noted that a majority of jurisdictions had already abandoned mutuality and privity by carving out an exception for those instances where

tions, that because courts would not have the wherewithal to make themselves aware of the underlying conditions that had obtained in the original litigation, such a nonparty estoppel should be allowed only against the party who was the plaintiff in the prior litigation. As plaintiff, he would have had a greater opportunity to control the course of the litigation and thus to ensure that the determinations would be fairly made.[150]

Years later, that same commentator, upon examining the law that had developed in the wake of *Bernhard*, confessed that his apprehensions about the ability of courts to adequately scrutinize the circumstances of the original cause of action had been premature.[151] Courts have in fact displayed the ability to make sensitive inquiries into the circumstances obtaining in the original proceeding and thus have not limited the use of nonparty estoppels to those asserted against parties who were plaintiffs in the prior cause of action. Rather, the approach taken is a determination of whether "the party against whom the prior judgment [was] asserted . . . had a 'full and fair opportunity' to litigate the issue in the prior suit."[152]

Nonetheless, one limitation on the use of collateral estoppel, suggested by *Bernhard* and the ensuing cases, has persisted. A collateral estoppel may not later be used by a successful party in the original cause of action against an individual or entity not a party to that action.[153]

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for those instances where a defendant who is pleading res judicata has his liability a defendant who is pleading res judicata has his liability "dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts." *Id.* (citations omitted).

[151] Currie, *Civil Prodecure: The Tempest Brews*, 53 CALIF. L. REV. 25, 28 (1965).

[152] James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 461 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); *See also* Brown v. DeLayo, 498 F.2d 1173, 1175–76 (10th Cir. 1974); Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Technograph Printed Circuits, Ltd. v. Packard Bell Elec. Corp., 290 F. Supp. 308, 319–20 (C.D. Cal. 1968); United States v. United Air Lines, Inc., 216 F. Supp. 709, 728–29 (E.D. Wash. & D. Nev. 1962), *aff'd in part sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); Schwartz v. Public Administrator, 24 N.Y.2d 65, 69–70, 246 N.E.2d 725, 727–28, 298 N.Y.S.2d 955, 958–59 (1969); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 145–48, 225 N.E.2d 195, 197–99, 278 N.Y.S.2d 596, 599–602 (1967). For a discussion of the *DeWitt* case see Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 738 (1967), where the author concludes that the current trend in judicial thinking is to implement the "full-and-fair-opportunity standard" rather than approaches which focus on whether the parties in the prior suit were plaintiffs or defendants or whether the estoppel is being used "offensively or defensively." *Id.*

[153] This limitation was enunicated by Chief Justice Traynor in *Bernhard*:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res

For example, in *Beall v. Kearney & Trecker Corp.*,[154] Beall sued the defendant corporation for breach of an employment contract.[155] Beall formerly had been a patent examiner who, at retirement, was hired by the corporation as a patent consultant.[156] During the course of his employment, he worked on securing a reissue of a patent that he had examined while working in the patent office.[157] When this fact was discovered during the course of an infringement suit, the corporation fired him and relinquished all claims under the reissued patent in order to preserve its original patent.[158] When the case reached the Seventh Circuit, the court held that Beall's conduct constituted both a statutory conflict of interest and a violation of patent office policy and thus invalidated Kearney & Trecker's entire patent.[159]

In Beall's breach of contract suit against Kearney & Trecker, the company stated that it had dismissed Beall for cause, arguing that the judgment of the Seventh Circuit was decisive of the issue and that Beall should be estopped from litigating this issue.[160] The district court rejected the corporation's argument, pointing out that Beall had never been a party to the infringement suit and that any findings regarding his activities which were determined in favor of his employer's cause in the infringement suit were not available as an estoppel against him in the assertion of his damage claim.[161] The court stated that the due process clause of both the fifth and fourteenth amendments precluded an estoppel in this instance because the plaintiff had no part in any aspect of the prior litigation, and thus the customary tools available to the litigant—presentation of witnesses and challenges to evidence—were never available to him.[162] To let his rights be determined by the outcome of a suit in which he was not a party clearly violated his constitutional right to due process.[163]

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judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided.

19 Cal. 2d at 811–12, 122 P.2d at 894.

[154] 350 F. Supp. 978 (D. Md. 1972).

[155] *Id.* at 980.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 980–81.

[161] *Id.* at 981–82.

[162] *Id.* at 982.

[163] *Id.* The court noted that it could not locate any decision which would support the use of an estoppel in those circumstances. *Id.* There is, however, a Fifth Circuit opinion which affirmed a federal district court's permitting the plea of estoppel against

Similarly, in *Humphreys v. Tann*,[164] the Sixth Circuit reversed the district court's granting of summary judgment, concluding that a collateral estoppel "may be applied *in favor of* a stranger to the first actions, but only *against* a party to that action."[165] Here, the personal representative of a decedent who had been killed in a collision involving a TWA airliner and a small plane owned by the Tann Company sued Tann in a federal district court in Michigan.[166] There were also a number of similar suits filed by other plaintiffs.

These latter actions were transferred to Ohio, but some were not consolidated.[167] In one such suit against TWA and Tann, judgment was entered against TWA and the suit against Tann was dismissed.[168] After the dismissal, Tann moved for summary judgment on the pending Humphreys claim, urging that the dismissal in the prior suit collaterally estopped Humphreys from arguing Tann's negligence.[169] Reversing the district court's granting of the motion, the court of appeals determined that to permit an estoppel against Humphreys would deprive him of due process.[170]

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a subsequent plaintiff who was not a named party in the original suit. In Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir.), *cert. denied*, 389 U.S. 1009 (1967), the appellant plaintiffs had filed a cemetery desecration suit in federal court. *Id.* at 877. The court continued the case awaiting a disposition of identical actions by numerous other parties who had filed thier cases in the state courts. *Id.* The plaintiffs had testified as witnesses in the state proceeding, and the attorney who had represented the state plaintiffs also represented the federal plaintiffs. *Id.* The plaintiffs admitted on appeal that the issues tried in the federal court would be identical to those tried by the state court plaintiffs. Moreover, the appellants conceded that there would be no new evidence or testimony. *Id.* at 878.

The court pointed out that this made it clear that all the evidence favorable to the plaintiffs had been "rejected by the state courts." *Id.* Although noting the normal requirement of mutuality, the court determined that the current trend was to view the requirement "less rigidly," *id.*, and that under the "unusual facts of the case" an estoppel against the plaintiffs was appropriate, *id.* at 879.

[164] 487 F.2d 666 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974).

[165] 487 F.2d at 671 (emphasis in original).

[166] *Id.* at 667.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at 671. *See* Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971), where in dictum Justice White stated that

> [s]ome litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

See also Cardillo v. Zyla, 486 F.2d 473, 475–76 (1st Cir. 1973); Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 47–53 (1963).

Recently, the Supreme Court has affirmed the validity of the rationales underlying the conclusions reached in *Beall* and *Humphreys*, at least to the extent of precluding a state from using a judgment of obscenity obtained in a civil proceeding as decisive of the issue in a criminal proceeding against a different defendant.

In *McKinney v. Alabama*,[171] "certain mailable matter" had been declared obscene in a civil equity proceeding in an Alabama county circuit court, to which McKinney was not a party.[172] Shortly thereafter, state officers presented McKinney, a bookseller, with a letter informing him of the decree of obscenity against certain magazines.[173] Subsequently, the officers returned to the bookstore and purchased a magazine which had been listed in both the court decree and the letter. McKinney was charged with the sale of obscene mailable matter.[174]

At trial, he argued that he was entitled to a trial by jury on the issue of obscenity, but the court refused, allowing only trial on the issue of the sale of the magazine.[175] McKinney was convicted, and the conviction was upheld by the Alabama supreme court on the ground that the civil decree of obscenity was in rem and thus binding on him in a later criminal prosecution despite the fact that "he had not been a party to the earlier equity proceeding."[176]

In the United States Supreme Court, McKinney argued that the trial court's refusal to allow him an opportunity to demonstrate the nonobscenity of the materials violated his first and fourteenth amendment rights.[177] The Court agreed with McKinney, reversing the conviction on both grounds.[178] First, the Court noted that the procedures did not display " 'the necessary sensitivity to freedom of expression.' "[179] Secondly, the Court, apparently using a due process rationale, reasoned that lack of notice of the equity proceeding precluded the defendant from arguing the nonobscenity of the magazines.[180] Thus, the in rem decree could, in the Court's view, be

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[171] 96 S. Ct. 1189 (1976).

[172] *Id.* at 1191–92.

[173] *Id.* at 1192.

[174] *Id.*

[175] *Id.*

[176] *Id.* The state supreme court had concluded that the equity proceeding was both in personam and in rem. McKinney v. State, 292 Ala. 484, 488, 296 So. 2d 228, 231 (1974), *rev'd*, 96 S. Ct. 1189 (1976).

[177] 96 S. Ct. at 1192.

[178] *Id.* at 1192, 1194.

[179] *Id.* at 1193 (quoting from Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

[180] 96 S. Ct. at 1193. The Court noted that McKinney had not been informed of the

analogized to a unilateral, nonreviewable "*ex parte* determination of a state censorship authority," which determination would be unconstitutional.[181]

Discounting the state's argument that the equity proceeding was adversary and thus comported with the mandates of *Freedman v. Maryland* and *Heller v. New York*, the Court pointed out that McKinney had not been a party to or in privity with the named parties in the equity proceeding, and thus the judgment could not bind him.[182] The Court vacated the conviction, holding that a criminal conviction on the basis of a finding of obscenity "in a civil proceeding to which [the defendant] was not a party and of which he had no notice" was procedurally inadequate "where First Amendment interests are at stake."[183]

One argument glossed over by the *McKinney* Court was the state's contention that judgments of obscenity are in rem and thus conclusive against the world. Even assuming that *McKinney*, read narrowly, only precludes the use of a civil judgment of obscenity against a different defendant in a subsequent criminal proceeding, the in rem argument is equally inappropriate where the state seeks to apply a civil judgment of obscenity against a nonparty defendant in a subsequent civil proceeding.

This is because a judgment in rem is a determination against some person or object or is an adjudication of that person's or object's status, the effect of which is to bind all persons who have an interest in the proceedings.[184] The in rem proceeding, a creature of Roman law, is "one of convenience and of necessity" established in order to

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equity proceeding nor had he been given an opportunity to be heard. In addition, the state did not make "available to him any judicial avenue for initiating a challenge to the . . . declaration as to . . . obscenity." *Id.* The Court further noted that at the time of the equity proceeding McKinney may not have been in possession of any of the magazines subsequently declared obscene. *Id.* at 1193 n.3.

[181] *Id.* at 1193.

[182] *Id.* at 1193–94.

[183] *Id.* at 1194. The Court did not unqualifiedly reject the validity of the in rem argument but rather focused on the failure to afford McKinney notice and on the lack of identity of interests between the parties named in the equity proceeding and McKinney. *Id.* at 1193.

[184] 3 FREEMAN, *supra* note 140, § 1517, at 3111. Freeman distinguishes a proceeding in rem from one in personam in this way:

> [A] proceeding purely in personam is not intended or calculated to affect the rights or relations of strangers with respect to the subject matter of the litigation, differing in this respect from a proceeding in rem which is designed and intended to dispose of or produce a legal effect upon the subject matter which will be final as to all persons having or claiming an interest therein.

Id. § 1520, at 3116. *See* RESTATEMENT, *supra* note 144, at 5–7.

deal with instances where it would be impossible to determine the individuals against whose property the proceeding is directed.[185] The theory is that the seizure of the property will make the persons with an interest in the property "attentive"—that is, seizure puts these individuals on notice so that they may assert their claims.[186] Thus, in an in rem proceeding, a court normally takes custody of the property in dispute. This seizure acts as one form of notice to all interested parties that they may assert their rights in the forthcoming legal proceeding; a litigant who fails to assert his interests will, nonetheless, be bound by the outcome.[187]

While in the context of an obscenity proceeding allegedly obscene materials which are in the custody of the court may be considered as having their status affected by the judgment, seizure of one defendant's allegedly obscene materials would not constitute notice to any other potential defendants possessing identical materials. The *Restatement of Judgments* concludes that in any in rem proceeding where a right in property or a status is determined,

> [a] judgment . . . is void, unless a method of notification was employed which was reasonably calculated to give [this defendant] knowledge of the attempted exercise of jurisdiction and an opportunity to be heard.[188]

Even if the proceeding could be designed to afford notice to all interested parties, such a proceeding is still not properly one in rem because many parties would not have an interest in the litigation until after it has concluded. For example, if film *A* is the subject of the litigation, many exhibitors not aware of or not in possession of film *A* at that point in time would have no interest in any proceeding against film *A*. They might, however, at some later date obtain a copy of the film for intended exhibition. To hold that they are bound by the outcome of a litigation in which they had no interest and of which they had no notice or opportunity to be heard would be a violation of due process.

Clearly, the denominating of an obscenity proceeding as one in rem is analytically unsound.[189] To conclude that because an obscenity

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[185] 3 FREEMAN, *supra* note 140, § 1517, at 3111.

[186] *Id.* Thus a proceeding is not in rem unless the court attempts through reasonable means to give notice to all parties who may be interested in the property at issue so that they may appear in court to protect their interests. *Id.* § 1520, at 3116.

[187] *Id.* §§ 1517, 1524, at 3111, 3130.

[188] RESTATEMENT, *supra* note 144, § 33, comment *b* at 134. *Compare id. with id.* § 32, comment *f* at 130–31.

[189] Ironically, the Supreme Court of New Hampshire rejected a *defendant's*

proceeding determines a status it is in rem is to mistake form for function. Moreover, judicial economy, the raison d'etre of in rem proceedings, is of diminished importance where sensitive first amendment rights are endangered.

If then, the in rem analysis is unsound, it is necessary to rely on the previously discussed principles of estoppel to ascertain when the state or a defendant may assert an estoppel in a subsequent proceeding. Before setting out the analysis, it must be noted that underlying the following discussion are the assumptions that a decision on the obscenity *vel non* of the materials was actually rendered in the first proceeding[190] and that the materials which are the subject of the second proceeding are identical,[191] unedited copies of the materials upon which the judgment was issued in the first proceeding. It is also assumed that the subsequent litigation occurs within the same "relevant community" as did the first proceeding.[192]

The hypotheticals posed in this section are intended to demonstrate a theoretical structure which may serve as a guideline in a case

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argument that a determination of nonobscenity against a prior defendant was in rem. State v. Hentschel, 98 N.H. 382, 101 A.2d 456 (1953). The court concluded that the statute under which the defendant was charged was intended to punish individuals and was not intended to provide for forfeiture of obscene matter, and thus the criminal action was in personam, not in rem. *Id.* at 457–58. *But see* Hirsch & Ryan, *supra* note 29, at 76–77, where the authors conclude that an obscenity proceeding is both in rem and in personam.

[190] *See* United States v. International Building Co., 345 U.S. 502, 504–06 (1953); Sealfon v. United States, 332 U.S. 575, 578–79 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352–53 (1876); Hirsch & Ryan, *supra* note 29, at 74.

[191] RESTATEMENT, *supra* note 144, § 68(2), at 293. *See* Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972), where the court acknowledged that an estoppel might otherwise be appropriate but reversed the district court's acceptance of defendants' plea of collateral estoppel because the trial judge failed to determine if the same issues actually had been adjudicated in the prior action. *Id.* at 327. *See also* United States v. Cantrell, 62 F.R.D. 96, 97 (E.D. Wis. 1974) (defendant's state conviction on gambling offense insufficient to establish facts necessary for civil tax assessment by federal government).

[192] In *McKinney* the Court had indicated

> that obscenity must be determined by applying "contemporary community standards" and that a State may adopt a "state" rather than a "national" community standard. . . . When a State adopts such a "state" or "national" community standard, a civil proceeding brought in one part of the State could constitutionally be employed as a conclusive determination anywhere in the State with respect to an accused who was a party to that proceeding. . . . However, a State might adopt the standard of a smaller community—for example, a city-wide community; it could not then make it a crime to disseminate material judicially determined to be obscene in a civil proceeding in which the accused participated, unless the civil proceeding also transpired in the same "community" as the criminal proceeding.

96 S. Ct. at 1201 n.6 (citations omitted).

in which all the requisite elements are present. However, it is clear that the virtually unlimited supply of films, books, photographs, and magazines allows distributors and exhibitors to avoid the necessity of dealing in items which are identical with those that have been judicially determined to be obscene. The following chart illustrates the various combinations of parties, judgments, and intended uses of judgments in a subsequent proceeding.

No.	Party involved in second proceeding	Nature of first proceeding	Nature of second proceeding	Is estoppel permitted?
GOVERNMENT PREVAILS OVER DEFENDANT A IN FIRST PROCEEDING AND ASSERTS ESTOPPEL AGAINST DEFENDANT IN SECOND PROCEEDING				
1	Defendant *A*	Civil	Civil	Yes
2	Defendant *A*	Civil	Criminal	No
3	Defendant *A*	Criminal	Civil	Yes
4	Defendant *A*	Criminal	Criminal	No
5	Defendant *B*	Civil	Civil	No
6	Defendant *B*	Civil	Criminal	No
7	Defendant *B*	Criminal	Civil	No
8	Defendant *B*	Criminal	Criminal	No
DEFENDANT A PREVAILS AGAINST GOVERNMENT IN FIRST PROCEEDING AND PARTY IN SECOND PROCEEDING ASSERTS ESTOPPEL AGAINST GOVERNMENT				
9	Defendant *A*	Civil	Civil	Yes
10	Defendant *A*	Civil	Criminal	Yes
11	Defendant *A*	Criminal	Civil	No
12	Defendant *A*	Criminal	Criminal	Yes
13	Defendant *B*	Civil	Civil	Yes
14	Defendant *B*	Civil	Criminal	Yes
15	Defendant *B*	Criminal	Civil	No
16	Defendant *B*	Criminal	Criminal	Yes

In the chart, defendant *A* symbolizes an individual who was a party in a civil or criminal proceeding against a particular piece of allegedly obscene matter and who is now a party in a new civil or criminal proceeding against identical material. Defendant *B* symbolizes an individual who is a party in a new civil or criminal proceeding regarding material identical to that which was a subject of a prior

civil or criminal proceeding and who was not a party in that proceeding. Thus, for example, in hypothetical (1), the state has won a judgment of obscenity in a prior civil proceeding and wishes to estop the same individual from challenging the obscenity *vel non* of the material in a subsequent civil proceeding. The estoppel should be permitted, even under pre-*Bernhard* common law, because there is mutuality and identity of factual issues.[193] Further, the standard of proof in each proceeding would be a preponderance of the evidence.

In hypothetical (2), the state should not be permitted to raise an estoppel because the standard of proof in the second proceeding is beyond a reasonable doubt, whereas in the first proceeding it was a mere preponderance. Since all elements of an offense must be proved beyond a reasonable doubt,[194] there can be no estoppel here.[195]

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[193] *See* notes 145–46 *supra* and accompanying text.

[194] The United States Supreme Court has determined that the "beyond a reasonable doubt" standard is constitutionally mandated in a criminal case. *In re* Winship, 397 U.S. 358, 361–63 (1970); Speiser v. Randall, 357 U.S. 513, 525–26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Miles v. United States, 103 U.S. 304, 312 (1881). In *Winship*, Justice Brennan stated that

> [t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. . . ."
>
> Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.

397 U.S. at 361–62 (citation omitted). Furthermore, the government must meet this standard of beyond a reasonable doubt for every element of the offense charged. *Id.* at 364; *accord*, Davis v. United States, 160 U.S. 469, 493 (1895); Piano v. State, 161 Ala. 88, 93, 49 So. 803, 805 (1909).

[195] 96 S. Ct. at 1199 (Brennan, J., concurring). This conclusion was also reached by Chief Justice Heflin in his dissent in McKinney v. States, 292 Ala. 484, 489, 296 So. 2d 228, 232 (1974), *rev'd*, 96 S. Ct. 1189 (1976). He reasoned that the Alabama statutes, which allowed a civil judgment to be conclusive of one element of a criminal offense, deprived the defendant of his right to be proven guilty beyond a reasonable doubt. 292 Ala. at 489–90, 296 So. 2d at 232–33. The weight of authority supports this position. *See, e.g.*, 3 WHARTON'S CRIMINAL EVIDENCE § 654, at 391–92 (13th ed. C. Torcia 1973), where the author states:

> A judgment rendered in a civil case is not admissible in a criminal prosecution . . . . However, where the judgment is offered to prove a collateral fact in the case, and not to show guilt or innocence, it may be allowed in evidence.

(Footnotes omitted.) *See also Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 878 (1952) [hereinafter cited as *Developments*].

Justice Brennan has stated that a civil judgment of obscenity could be used against the same defendant in a subsequent criminal prosecution if the defendant had participated in the civil proceeding and the standard of proof in the civil proceeding was "beyond a reasonable doubt." McKinney v. Alabama, 96 S. Ct. 1189, 1200 n.5 (1976) (concurring opinion). Justice Brennan, however, would allow the defendant to argue

Another reason to preclude the estoppel is that in the civil proceeding, defendant *A* may have been compelled to testify, and thus a judgment based in part on compelled testimony would be unconstitutional if applied as binding in a criminal proceeding.[196]

In hypothetical (3), an estoppel is appropriate because there is mutuality and identity of factual issues. Furthermore, the standard of proof in the first proceeding was higher than that required in the second and thus the defendant is not prejudiced in any way.[197]

In hypothetical (4), an estoppel is probably inappropriate. Here, the issue is whether the requirement of proving every element of the offense beyond a reasonable doubt is satisfied where this proof has been made in a prior criminal proceeding against the same defendant.[198] Estoppel, as previously noted, derives from public policies based on numerous factors present in the civil context. Since in the criminal context many different factors come into play, sensitivity to a defendant's due process rights militates against the wholesale importation of estoppel principles into the criminal sphere, at least in those instances where to do so would prejudice a defendant.[199]

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that the community standards had changed between the first and second proceedings, and if the defendant made such a showing, the Justice would require the state to again prove the obscenity of the materials. *Id.* at 1200–01.

Another very important problem in the state's attempt to apply a civil judgment as dispositive of an element of a criminal offense is that it may result in depriving a defendant of his sixth amendment right to a jury trial. Thus where the penalty for a criminal offense is a year or more, failure to have the issue of obscenity tried by a jury is unconstitutional. Baldwin v. New York, 399 U.S. 66, 69 (1970); *see* McKinney v. Alabama, *supra* at 1200 (Brennan, J., concurring); McKinney v. State, *supra* at 489, 296 So. 2d at 232–33 (dissenting opinion); Helms v. State, 35 Ala. App. 187, 187–88, 45 So. 2d 170, 171, *cert. denied*, 253 Ala. 467, 45 So. 2d 171 (1950); Vestal, *supra* note 170, at 53–54, 69 COLUM. L. REV. 515, 521–24 (1969).

[196] Helms v. State, 35 Ala. App. 187, 188, 45 So. 2d 170, 171, *cert. denied*, 253 Ala. 467, 45 So. 2d 171 (1950).

[197] *See* Local 167, Teamsters v. United States, 291 U.S. 293, 298–99 (1934); United States v. Frank, 494 F.2d 145, 160 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); Willard v. United States, 422 F.2d 810, 811 (5th Cir.), *cert. denied*, 398 U.S. 913 (1970); Breeland v. Security Ins. Co., 421 F.2d 918, 921–22 (5th Cir. 1969); Bressan Export-Import Co. v. Conlew, 346 F. Supp. 683, 685 (E.D. Pa. 1972); United States Fidelity & Guar. Co. v. Moore, 306 F. Supp. 1088, 1094–95 (N.D. Miss. 1969); *Developments*, *supra* note 195, at 878–80. *See generally* Cowen, *The Admissibility of Criminal Convictions in Subsequent Civil Proceedings*, 40 CALIF. L. REV. 225 (1952).

[198] *See* United States v. De Angelo, 138 F.2d 466, 468 (3d Cir. 1943) (dictum); United States v. Carlisi, 32 F. Supp. 479, 482 (E.D.N.Y. 1940). *See also* Hirsch & Ryan, *supra* note 29, at 79–80; *Developments*, *supra* note 195, at 875–76. *But cf.* Pena-Cabanillas v. United States, 394 F.2d 785, 787–88 (9th Cir. 1968); United States v. Rangel-Perez, 179 F. Supp, 619, 626 (S.D. Cal. 1959) (estoppel appropriate in subsequent alienage proceeding as necessary to deter illegal entries into United States).

[199] The Supreme Court has acknowledged the appropriateness of applying estoppel

In hypotheticals (5), (6), (7), and (8), an estoppel is inappropriate under the theory of *McKinney*, *Beall*, and *Humphreys*. In all these instances, the state would be using the prior judgment against defendants who were not a party to the first proceeding, and thus to allow an estoppel would deprive these defendants of due process.[200]

Hypotheticals (9) through (12) illustrate instances in which a defendant who has won a judgment of nonobscenity as to certain materials is seeking to estop the state from relitigating that question against identical materials in a new civil or criminal action. In hypothetical (9), the elements of mutuality and identity of factual issues create a situation where an estoppel is warranted. These same elements exist in hypotheticals (10) and (12). The fact that in these latter cases the estoppel would issue in a criminal context does not lessen its validity, because such estoppel would aid, rather than prejudice, the defendant. Further, in example (10), the state in the first proceeding had been unable to prove obscenity even by a preponderance of the evidence. Hence, it would be illogical to expect the state to prove obscenity in the second proceeding where the standard of proof is higher—beyond a reasonable doubt. In hypothetical (11), there are mutuality and the identity of factual issues; however, the defendant should not be allowed to assert an estoppel. Although he

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principles in criminal proceedings. In Ashe v. Swenson, 397 U.S. 436 (1970), the Court held that collateral estoppel was embraced by the fifth amendment proscription "against double jeopardy" and binding on the states by virtue of Benton v. Maryland, 395 U.S. 784 (1969). 397 U.S. at 442, 445. The Court emphasized, however, that the rule must be applied "with realism and rationality." *Id.* at 444. Such an approach requires courts to

> "tak[e] into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Id. (footnote omitted) (quoting from Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960)). *See also* Dranow v. United States, 307 F.2d 545, 556–57 (8th Cir. 1962).

[200] *See* text accompanying notes 154–83 *supra*. *See also* Hirsch & Ryan, *supra* note 29, at 79, where the authors conclude that if res judicata and collateral estoppel were

> operative in a vacuum of pure theory, independent of other considerations, the foregoing would seem to permit the prosecution's utilization of these concepts in subsequent proceedings. However, to permit such affirmative use of the concepts by the prosecution would affront one of the fundamental guarantees of the Bill of Rights—the right of confrontation.
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> . . . The ultimate effect of such application would be to confront the defense with the core of the prosecutor's case, in documentary form with no provision for cross-examination or confrontation. Such procedures were early condemned indeed, were deemed of primary importance in the enactment of the Sixth Amendment.

(Footnotes omitted.)

has won a judgment of nonobscenity in this first trial, such judgment was rendered where the standard of proof was beyond a reasonable doubt. Thus, it is conceivable that the state could make its case in the context of a civil proceeding where the standard of proof is a lesser one.[201]

Hypotheticals (13) through (16) illustrate cases where a defendant not a party in the first proceeding tries, in a new civil or criminal action, to take advantage of a judgment of nonobscenity won by a prior defendant in a case involving identical materials. In hypotheticals (13), (14), and (16), an estoppel is appropriate under the principles of *Bernhard* and its progeny. The state having had a "full and fair opportunity" to present its case in the first proceeding should be bound by an adverse judgment.[202] Hypothetical (15), however, like hypothetical (12), presents circumstances which should preclude the defendant from asserting an estoppel in that the state may be able to prove its case in the subsequent proceeding where the standard of proof is reduced.

Having charted the major factors that determine the appropriateness of permitting an estoppel, it is necessary to consider additional factors that may, in limited circumstances, militate against allowing a party to assert an otherwise warranted estoppel. One factor is the *Miller* mandate that determinations of obscenity *vel non* be based on community standards.[203] Since community standards are

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[201] *See* Helvering v. Mitchell, 303 U.S. 391, 397 (1938) (standard of proof in civil and criminal cases is different and thus application of res judicata is barred); Stone v. United States, 167 U.S. 178, 188 (1897); United States v. Alcatex, Inc., 328 F. Supp. 129, 133–34 (S.D.N.Y. 1971).

[202] *See* notes 151–70 *supra* and accompanying text. *See also* Hirsch & Ryan, *supra* note 29, at 78. *But see* Zeitlin v. Arnebergh, 59 Cal. 2d 901, 907, 383 P.2d 152, 156, 31 Cal. Rptr. 800, 804 (1963); People v. Seltzer, 25 Cal. App. 3d supp. 52, 54–57, 101 Cal. Rptr. 260, 262–64 (Super. Ct. App. Dep't 1972).

The principal arguments against allowing a defendant not party to the original obscenity proceeding to estop the state in a subsequent proceeding when the state had previously lost are that the court would be interfering with the enforcement of the obscenity laws, that the policy reason behind res judicata—preventing harassment of a defendant—would not be served, and that anomalous results would be produced. People v. Seltzer, *supra* at supp. 56–57, 101 Cal. Rptr. at 263.

These objections, however, do not seem compelling. First, there is another aspect of res judicata and collateral estoppel—economy of litigation—which would be served. Second, although a subsequent proceeding against a new defendant is not harrassment of that defendant, it may be viewed as a continuing attempt to suppress a particular work in that the prosecutor seems unwilling to accept the determination of the jury or judges who found the material nonobscene in the first proceeding. For a response to the contention that estoppels produce anomalies see p. 587 *infra*.

[203] *See* text accompanying note 6 *supra*.

normally dynamic, time may bring about a change in what a given community may find acceptable.

In such cases, the imposition of an estoppel may frustrate attempts by a community to have the distribution or exhibition of materials reflect the currently prevailing community attitudes on patent offensiveness, prurient interest, and, perhaps, serious artistic, scientific, or literary value.[204] In these instances, an estoppel should not be permitted as long as certain conditions are met.

First, no determination of changed community standards should be made ex parte. Second, the burden of proving a shift in standards should be on the party alleging it. Third, where it is the *state* asserting a shift in standards, some period of time—three or four years, for example—should have passed since the obscenity *vel non* of the material was last contested. This will prevent the state from frivolously opposing a defendant's legitimate plea of estoppel. However, where a *defendant*, in arguing changed community standards, opposes an estoppel being pleaded against him, first amendment considerations dictate that no minimum time need have elapsed between the prior proceeding and the present one, and thus his claim of changed standards should be entertained.[205]

There are, however, other arguments against allowing defendants to take advantage of determinations of nonobscenity won by prior defendants in another cause of action. One argument is that a lower civil court's determination may bind the entire relevant community. Although this would appear true, the state always may appeal the judgment; thus a final resolution may be obtained from an intermediate appellate court or, perhaps, from the state's highest court. Even where a state has lost in a criminal proceeding and is precluded

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[204] It is uncertain as to whether the "serious value" prong of the *Miller* test is to be judged by local or national standards. *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 169 (1973).

[205] Justice Brennan in *McKinney* has suggested that a defendant with knowledge of a civil determination of obscenity in which he was a party be allowed to argue in a criminal proceeding that the obscenity of the materials must be proven again because community standards have changed. 96 S. Ct. at 1200–01 (concurring opinion). Such an approach seems appropriate regardless of whether the first proceeding was civil or criminal.

The approach also seems valid when the objection to the estoppel is made by the state because the community standards mandate was designed to give the states greater control over obscenity. To allow an estoppel permanently to foreclose the state even when standards have become more conservative would render the state powerless to make distribution or exhibition subject to contemporary values. *Cf.* Hirsch & Ryan, *supra* note 29, at 78. Of course, there are always minimum constitutional standards which may not be violated. *See* note 9 *supra*.

by double jeopardy from relitigating the issue against the same defendant on the same charge, it may, if provided for by statute, move against the defendant in a civil proceeding and ultimately get a determination by an appellate court.

A less convincing argument against allowing the plea of estoppel is that to allow a subsequent defendant's victory to foreclose the state from relitigating the issue of the obscenity of identical items in future cases would create an anomalous situation. There might be one or more defendants who have been fined, imprisoned, or enjoined from exhibiting or distributing the same film, books, magazines, etc., which may now be freely dispensed or exhibited by anyone. Yet, such anomalies may be justified on a number of grounds. First, a finding of non-obscenity after one or more previous findings of obscenity may be viewed as a reflection of changed community standards such that the issue need not be litigated again. Second, to reject the plea of estoppel may create far more anomalies as verdicts conflict from case to case. At least with a consistent application of an estoppel, the issue, absent a shift in community standards, is finally resolved, and the anomalies exist only as to past defendants. These individuals may always be released from jail by the state where imprisonment was the penalty imposed, or if released at the end of their sentence, may now, in any event, exhibit or distribute the item in question. Furthermore, the fact that present determinations are inconsistent with the sanctions imposed on past defendants may also be justified on the ground that the prior defendants committed their acts during a period of more restrictive community standards—thus, they bore the risk of their actions.

CONCLUSION

This article has focused on the problems of restraints of expression and has sought to provide guidelines for minimizing these restraints without rendering governmental attempts to regulate obscenity futile. Accepting the Burger Court's granting to the states and the federal government ample latitude to move legally against purveyors and exhibitors of obscene materials, it is nonetheless crucial that the procedures employed be carefully scrutinized and limited so as not to impinge on first amendment rights. It must be remembered that in the area of obscenity regulation, the cure is almost always more dangerous than the disease.