Loyola of Los Angeles Law Review

Volume 4 | Number 1 Article 2

2-1-1971

I Know It When I Seize It: Selected Problems in Obscenity

Richard G. Hirsch

John L. Ryan

I KNOW IT WHEN I SEIZE IT: SELECTED PROBLEMS IN OBSCENITY

by Richard G. Hirsch and*
*John L. Ryan***

freed-men undauntedly craveth knowledge *Anon. c.* 1527

I. INTRODUCTION

Concern over the burgeoning traffic in pornography has thrust upon Congress and the courts the monumental task of determining the scope of obscenity laws in the United States. In 1967 pursuant to a directive of Congress[1] the Commission on Obscenity and Pornography was established whose duties were stated as follows:

> [T]o analyze the laws pertaining to the control of obscenity and pornography; and to evaluate and recommend definitions of obscenity and pornography;
>
> [T]o ascertain the methods employed in the distribution of obscene and pornographic materials and to explore the nature and volume of traffic in such materials;
>
> [T]o study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other antisocial behavior; and
>
> [T]o recommend such legislative, administrative, or other advisable

* Member of the California Bar; former Chief of the Pornography Section, Organized Crime and Pornography Division, Office of the Los Angeles District Attorney.

** Executive Editor, Loyola University of Los Angeles Law Review. The authors wish to express their gratitude to Adolph T. Brugger, without whose faith and confidence this article would not have been possible. Further thanks to Claire Hirsch whose monumental patience made one author available.

[1] Act of Oct. 3, 1967, Pub. L. No. 90-100, § 1, 81 Stat. 253, wherein the justification for such a commission was stated:

> The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels. It is the purpose of this Act to establish an advisory commission whose purpose shall be, after a thorough study which shall include a study of the causal relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography.

> and appropriate action as the Commission deems necessary to regulate effectively the flow of such traffic, without in any way interfering with constitutional rights.[2]

The final report of the Commission[3] indicated that the "national concern"[4] was with the elimination of all restrictions in the traffic of obscenity and pornography, insofar as consenting adults are concerned. Congress, in an unprecedented move, voted overwhelmingly to censure its own Commission and to disregard its findings.[5] The President of the United States disavowed the findings of the Commission and denied responsibility for its conclusions, indicating that it was formed during a previous Administration.[6] Although seemingly paradoxical, this divergence of opinion is no less than that which is found in the decisions of the federal and state courts.

It is not the purpose of this article to define "obscenity". Indeed the courts have struggled to formulate such a definition for more than a decade with a plethora of verbiage and a dearth of guidance.[7] Nei-

---

[2] *Id.* § 5(a), 81 Stat. at 254.

[3] THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY (1970). This report (No. 0-407-250) may be obtained from the Superintendent of Documents, U.S. Gov't Printing Office, Washington, D.C. 20402.

[4] Act of Oct. 3, 1967, Pub. L. No. 90-100, § 1, 81 Stat. 253.

[5] S. Res. 477, 91st Cong., 2d Sess., 116 CONG. REC. 17,903 (daily ed. Oct. 13, 1970).

[6] 6 WKLY COMP. PRESIDENTIAL DOCS. 1454-55 (1970).

[7] Commencing with Roth v. United States, 354 U.S. 476 (1957) through Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), the Justices of the United States Supreme Court have noted this problem. Justice Brennan, author of the majority opinion in *Roth*, has conceded that the formulation of a definition of obscenity is "not perfect". Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). Justice Harlan has indicated that "the central development that emerges from the aftermath of Roth v. United States . . . is that no stable approach to the obscenity problem has yet been devised by [the] Court" and that the tests for obscenity were in a "tangled state of affairs". A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 455-56 (1966) (dissenting opinion) [hereinafter cited as Memoirs v. Massachusetts]. Justice Harlan has more recently described the state of the law as one of "utter bewilderment". Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707 (1967) (dissenting opinion); *see also* Ginsberg v. New York, 390 U.S. 629 (1968) (concurring opinion). Perhaps the most cogent expression of the difficulty in this area was proferred by Justice Stewart, when he candidly asserted that the Court:

> was faced with the task of trying to define what may be indefinable. I have reached the conclusion . . . that . . . criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define [that kind of material] . . . . But I know it when I see it . . . . Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion) (footnotes omitted).

Justices Black and Douglas have adopted the view most recently expressed by the Federal Commission on Obscenity and Pornography that there should be no restriction upon dissemination among consenting adults. They would impose no restrictions upon distribution on the theory that First Amendment guarantees are not qualified but are an absolute right. *See* Ginsberg v. New York, 390 U.S. 629, 652-53 (1968) (dissenting

ther will this article undertake a determination of the extent of the phrase "contemporary community standards",[8] nor will it discuss the

opinion); Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting opinion). *See also* Teeter & Pember, *The Retreat From Obscenity: Redrup v. New York,* 21 HAST. L.J. 175 (1969); Magrath, *The Obscenity Cases: Grapes of Roth,* 1966 SUP. CT. REV. 7 (1966); *cf.* Dibble, *Obscenity: A State Quarantine to Protect Children,* 39 S. CAL. L. REV. 345 (1966).

[8] Roth v. United States, 354 U.S. 476, 489 (1957); In re Giannini, 69 Cal. 2d 563, 572-73, 446 P.2d 535, 541-42, 72 Cal. Rptr. 655, 661-62 (1968), *cert. denied,* 395 U.S. 910 (1969); CAL. PEN. CODE ANN. § 311 (West 1970). The "contemporary community standard" ranges from *national* (Jacobellis v. Ohio, 378 U.S. 184 (1964); Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962); Palladino v. McBrine, 310 F. Supp. 308 (D. Mass. 1970); State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963)) through *statewide* (In re Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655; McCauley v. Tropic of Cancer, 20 Wis. 134, 121 N.W. 2d 545 (1963)) to, inferentially at least, a *local* standard (Roth v. United States, 354 U.S. 476 (1957); Gent v. State, 239 Ark. 474, 393 S.W.2d 219 (1965), *rev'd on other grounds, sub nom.,* Redrup v. New York, 386 U.S. 767 (1967)). In *Roth,* the trial judge instructed the jury:

> ". . . the test is whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .
>
> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.
>
> . . . . .
>
> "In this case, ladies and gentlemen of the jury, *you and you alone are the exclusive judges of what the common conscience of the community is,* and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children." 354 U.S. at 490 (emphasis added).

Indeed, two Justices have spoken in favor of a localized standard:

> It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals. Jacobellis v. Ohio, 378 U.S. 184, 200-01 (1964) (Warren, C.J., & Clark, J., dissenting).

It should be noted that *Roth* was joined for decision with Alberts v. California. *Roth* dealt with the constitutionality of a federal obscenity statute (18 U.S.C. § 1461 (1964)) whereas *Alberts* considered a state obscenity statute (CAL. PEN. CODE ANN. § 311 (West 1970)). While it is arguable that *Roth* involves a federal standard and, therefore, a national test, it seems inferrable from the aforementioned instruction that the test to be applied is that of the locale from which the jury is impanelled.

sociological and psychological aspects of "appeal to the prurient interest".[9]

Attention will be focused upon three areas of obscenity law which, due to the unique nature of First Amendment rights, raise grave doubts as to whether traditional concepts of criminal procedure should apply. Does the general rule that the prosecution must affirmatively plead and prove all elements of a criminal case apply to the "redeeming social value" standard as set forth in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts (Memoirs)*?[10] Must there be a prior judicial determination on the issue of obscenity before the search for or seizure of allegedly obscene material is undertaken? Assuming such a determination is necessary, is there a violation of the Fifth Amendment right against self-incrimination when the court orders the individual to produce a copy of the questioned material for use by the prosecution in a subsequent criminal proceeding? Are the concepts of res judicata and collateral estoppel available to either party in obscenity cases involving a subsequent action concerning the identical material? The quest for the answers to these questions, if indeed answers exist, is one which the courts and the profession are currently pursuing.

II. Redeeming Social Importance

A. Historical Development

It will be useful, as a preface to the discussion of burden of proof, to trace the development of the "redeeming social importance" test. The test first appeared as dicta in the landmark case of *Roth v. United States*.[11] Justice Brennan, for the majority, stated:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance.* (emphasis added)[12]

---

[9] Roth v. United States, 354 U.S. 476 (1957).

[10] Memoirs v. Massachusetts, 383 U.S. 413 (1966); *see* CAL. PEN. CODE ANN. § 311 (West 1970). *See also* Roth v. United States, 354 U.S. 476 (1957); CAL. EVID. CODE § 115 (West 1968) (burden of proof); CAL. PEN. CODE ANN. § 1096 (West 1970) (presumption of innocence).

[11] 354 U.S. 476 (1957).

[12] *Id.* at 484 (footnote omitted). This was the first occasion that a consideration of redemptive qualities had been given in applying the then two part test of obscenity,

The importance of the "redeeming social importance" test was later clarified by dicta in *Jacobellis v. Ohio.*[13] Justice Brennan, again for the majority, said:

> We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is "utterly without redeeming social importance," and that "the portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." It follows that material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection.[14]

A tripartite test of obscenity was finally enunciated by the Court in *Memoirs.*[15] The Court noted that the *Roth* test of obscenity, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest,"[16] had been elaborated in subsequent cases and that:

> [T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is *utterly without redeeming social value.*" (emphasis added)[17]

---

namely, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489 (footnote omitted).

13 378 U.S. 184 (1964).

14 *Id.* at 191 (citations and footnote omitted). Shortly thereafter, Justice Brennan reiterated the view of the Court in a speech delivered to the Harvard School of Law:

> Judges have struggled for many decades to frame an adequate standard; the standard so far evolved withholds protection only from material that portrays sex in a way that justifies treating the material as utterly without redeeming social importance. The line between protected and unprotected portrayal is dim and uncertain, and judges do experience great difficulty in marking it. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 6-7 (1965).

15 383 U.S. 413 (1966).

16 354 U.S. at 489.

17 383 U.S. at 418. It is interesting to note that the Court has used "redeeming social importance" and "redeeming social value" when considering obscenity cases. It is at least arguable that material may have some "social value", however slight, yet be of no "social importance". An analysis of the language in *Memoirs,* set out below, poses an interesting question. The decision states:

> Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness. . . .
> Evidence that the book was commercially exploited for the sake of prurient appeal,

The adoption of this view was not without criticism. In separate dissents[18] Justices Clark and White expressed their belief that the Court had engrafted a new criterion upon the *Roth* test. In addition Mr. Justice White felt that " 'social *importance*' is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material . . . ."[19]

This tripartite test has most recently been recognized and applied as an absolute constitutional requirement in *Stein v. Batchelor.*[20] In *Stein* the publisher of a "bi-weekly underground" publication entitled *Dallas Notes* brought a civil rights action pursuant to the provisions of the United States Code[21] on behalf of himself and a class composed of persons similarly situated. He alleged that he was being harassed and sought injunctive relief from future arrest and indictment, declaratory relief on the ground that the section of the Texas Penal Code[22] under which he was being prosecuted was unconstitutional, and injunctive relief from future seizure of property without a prior determination of obscenity.[23]

Stein alleged that the statute was violative of constitutional guarantees in that it prohibited the mere possession of obscene material; that it was an overbroad regulation of expression since it failed to delineate

---

to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. *Id.* at 419-20 (footnote omitted).

It seems a logical extension of the foregoing to assume that "social value" is of lesser stature (being one element of a number of "values" which coalesce within the designation "social importance") and therefore not equivalent with "social importance".

18 *Id.* at 460-61 (dissenting opinion).

19 *Id.* at 462 (dissenting opinion) (emphasis added).

20 300 F. Supp. 602 (N.D. Tex. 1969) (3 judge court), *prob. juris. noted,* 396 U.S. 954 (1969).

21 42 U.S.C. §§ 1983, 1985 (1964).

22 Article 527 of the Texas Penal Code was cited by the court, in pertinent part, as follows:

> Section 1. Whoever shall knowingly . . . have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene [material] . . . [shall be subject to prosecution].
>
> * * * * *
>
> Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.
>
> * * * * *
>
> Section 5. . . . The provisions of the Act shall not apply to any daily or weekly newspaper. 301 F. Supp. at 603 n.1.

One day later the article was amended, *inter alia,* to incorporate the tripartite test set forth in *Memoirs.* Ch. 468, § 1, [1969] Tex. Laws 61st Leg. 1547.

23 300 F. Supp. at 603-04.

the tripartite test of *Memoirs*, relying instead upon the earlier *Roth* test; and that a provision exempting publications with daily or weekly distribution was violative of the equal protection clause of the Fourteenth Amendment. The Court granted injunctive and declaratory relief but did not reach the issue of harassment since it did not involve an attack on the constitutionality of a statute and was therefore not the subject for a three judge court.[24] Rather, it held that the statute was unconstitutional as an overbroad regulation of expression because it omitted the language "utterly without redeeming social *value*".[25]

B. California Approach

1. Evidentiary Aspects

California has also enacted a statute defining obscenity,[26] but it substantially follows the requirements set forth in *Memoirs*.[27]

---

[24] *Id.* at 604.

[25] The court stated:

> It is clear to us that the Supreme Court in *Memoirs* has added to the definition per se, of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social *value*." Thus without such inclusion the Texas statute is unconstitutional. *Id.* at 608 (emphasis added).

The court sidestepped the issue of the necessity for a prior determination of obscenity before seizure of materials on the grounds that, within the language of the existing statute, there was adequate provision for constitutionally permissible procedures. Nor did the court discuss the Equal Protection argument concerning the exemption of daily and weekly publications. In ruling upon the proscription of mere possession of obscene material, the court relied upon the recent decision of Stanley v. Georgia, 394 U.S. 557 (1969), wherein it was held that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." *Id.* at 568. The *Stein* court found the provisions of the Texas statute to be so interrelated as to be unseverable. The entire statute was held to be unconstitutional as it failed to "confine its application to a context of public or commercial dissemination." 300 F. Supp. at 607. On appeal to the Supreme Court, probable jurisdiction has been noted (396 U.S. 954 (1969)), and among the issues to be considered is whether "the redeeming social value standard must be affirmatively pleaded and proved by the prosecution in obscenity cases." 6 CRIM. L. REP. 4085 (1969). There are two federal district cases which express a view diametrically opposed to *Stein* concerning the stature of "utterly without redeeming social importance." Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662, 668 (E.D. La. 1969), *prob. juris noted, sub nom.*, Perez v. Ledesma, 399 U.S. 924 (1970), and Cambist Films, Inc. v. Tribell, 293 F. Supp. 407, 410 (E.D. Ky. 1968) state that in listing the three elements enumerated in *Memoirs*, Justice Brennan was not making *additional* requirements but was merely explaining the *Roth* test.

[26] CAL. PEN. CODE ANN. § 311 (West 1970). An excellent discussion of the legislative history of the statute is found in Zeitlin v. Arnebergh, 59 Cal. 2d 901, 918-20, 383 P.2d 152, 164-65, 31 Cal. Rptr. 800, 812-13 (1963).

[27] CAL. PEN. CODE ANN. § 311(a) (West 1970), in pertinent part, is as follows:

> "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e.,

In California a judicial requirement had been established by *In re Giannini*[28] that the prosecution must introduce evidence that "[when] applying contemporary community standards, the [material] appealed to the prurient interest of the audience and affronted the standards of decency accepted in the community."[29] By "evidence" the court indicated that it meant "expert testimony".[30] After noting a conflict of authorities on the manner in which community standards are to be proven, the court resolved the dilemma, stating:

> We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards. . . . [T]he determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards".[31]

In 1969 the California Legislature attempted to obviate the strict mandate of *Giannini* through the enactment of Penal Code section 312.1 which provides:

> In any prosecution for a violation of the [obscenity or "harmful matter" laws] neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter which is the subject of any such prosecution. *Any evidence* which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by

---

a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

It may be noted that the language of this statute is susceptible to the "value-importance" distinction mentioned in note 17 *supra*.

28 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), *cert. denied*, 395 U.S. 910 (1969). This case deals primarily with the term "contemporary community standards", and establishes that the term is a qualifying factor in determining whether the "predominant appeal" is to the prurient interest and whether the material is beyond the "customary limits of candor".

29 *Id.* at 567, 446 P.2d at 538, 72 Cal. Rptr. at 658.

30 *Id.* at 574, 446 P.2d at 543, 72 Cal. Rptr. at 663.

31 *Id.* at 574-75, 446, P.2d 543-44, 72 Cal. Rptr. 663-64 (citations and footnotes omitted). The court notes, in footnote 8, that some courts follow a general rule that certain "expressions" may be so patently obscene as to obviate proof of the community standard; however, the court did not undertake to rule whether California has adopted this approach.

either the prosecution or by the defense. (emphasis added)[32]

Although the statute states that expert testimony is not required in an obscenity prosecution and that "any evidence" will suffice, it is submitted that only expert testimony will be relevant, material, competent and therefore admissible. It is difficult to imagine what type of "non-expert" evidence could be offered on the issue of "contemporary community standards". Any witness who testifies concerning any standard seems, at least inferentially, to assume the role of "expert". Despite the mandate of the Legislature, the logic of *Giannini*, concerning the subjective opinion of judge and jury, cannot be disregarded. If the trier of fact is not allowed to temper its judgment based upon its own empirical knowledge, it should not be permitted to rely upon the empirical knowledge of one similarly situated. If it did, the standard before the trier of fact would be the subjective standard of the witness. Given the mandate of *Roth* and its subsequent development, any witness who undertakes to testify concerning "contemporary community standards", may do so only after an appropriate foundation is laid or else the testimony, no matter how relevant and material, will be incompetent.[33] Perhaps evidence of a survey of contemporary attitudes could be offered, rather than the testimony of witnesses. For such a survey to be competent it would be necessary to establish that it was prepared by qualified personnel adhering to procedures which would assure the accuracy of the proffered results. But again, an "expert" would be required to attest to these facts. The legislative enactment which obviated the *Giannini* requirement of expert testimony was an exercise in futility. By its very nature, an obscenity prosecution in California, which requires proof of a statewide[34] "contemporary community standard", necessitates expert testimony due to the uniqueness of the test.

The holding in *Giannini* seems to establish clearly that the prosecution in California, at the very least, bears the burden of proving contemporary community standards of the customary limits of candor and appeal to prurient interest. The decision was silent as to which party bears the burden of proving "redeeming social importance"[35] and, to

---

[32] CAL. PEN. CODE ANN. § 312.1 (West 1970). Government agencies and the American Civil Liberties Union supported passage, since both considered the burden and expense of producing expert testimony prohibitive.

[33] *See generally* Comment, *Expert Testimony in Obscenity Cases,* 18 HAST. L.J. 161 (1966).

[34] In re Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).

[35] CAL. PEN. CODE ANN. § 311(a)(2) (West 1970). The only reference to this burden is in a note appended to the decision wherein the court states:

Petitioners do not so much as claim that their convictions should be set aside on

date, *People v. Newton*[36] (Appellate Department of the Los Angeles Superior Court) is the only occasion a California court has been called upon to decide this issue.[37] After a discussion of the qualifications of an expert witness the court continued:

> [A]ppellants would have the People's expert start in a void and prove a negative. The trial court found and the testimony supports the finding that the dances here involved predominately appealed to the prurient interest and exceeded customary limits of candor. It is hard to conceive, although admittedly it is possible, that such material could have redeeming social value. While the burden of persuasion as to lack of redeeming social value is on the prosecution, where the other elements of obscenity exist the burden of going forward should be, and we feel is on the defendant.[38]

Therefore once the prosecution has proven, when applying contemporary community standards, that the material in question predominantly appeals to the prurient interest and exceeds customary limits of candor it has established that the material is obscene. Barring another defense (*e.g.*, lack of scienter), a conviction must follow unless the *defendant* produces evidence sufficient to establish a reasonable doubt as to the lack of redeeming social importance. The clear import of this decision is that it emasculates the tripartite test of *Memoirs* and the California Penal Code, as well as provisions relating to the presumption of innocence,[39] burden of producing evidence,[40] and burden of proof.[41]

2. Burden of Proof

In California, "burden of proof" is defined as "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court."[42] This burden gener-

---

the ground of the "redeeming social value" of [the] dance. Thus we do not reach the problem of whether the dance was "utterly without redeeming social value" and we certainly do not hold that it met that test. 69 Cal. 2d at 573 n.5, 446 P.2d at 542 n.5, 72 Cal. Rptr. at 662 n.5.

While the Penal Code requires "importance", the court speaks of "value", apparently treating the terms as equivalent. *See* note 17 *supra.*

36 9 Cal. App. 3d Supp. 24, 88 Cal. Rptr. 343 (1970).

37 Appellant Newton, and others, appealed from a judgment in which they were found guilty of violating CAL. PEN. CODE ANN. § 314 (West 1970) (indecent exposure). The People's principal witness was qualified by the court as an "expert" concerning appeal to the prurient interest and limits of candor, applying contemporary community standards. 9 Cal. App. 3d Supp. at 26-27, 88 Cal. Rptr. at 344-45.

38 *Id.* at 27-28, 88 Cal. Rptr. at 345.

39 CAL. EVID. CODE § 501 (West 1968); CAL. PEN. CODE ANN. § 1096 (West 1970).

40 CAL. EVID. CODE §§ 115, 500-02, 520 (West 1968).

41 *Id.* §§ 110, 550.

42 *Id.* § 115.

ally falls upon the party who must establish the existence or nonexistence of each fact "which is essential to the claim for relief or defense that he is asserting."[43] It is further provided that "[t]he party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."[44] The burden of producing evidence, *i.e.*, the burden of going forward, is generally construed *in pari materia* with the burden of proof. The Evidence Code provides:

> (a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.
>
> (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.[45]

The Evidence Code further defines the burden of producing evidence to be "the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue."[46]

Although the state generally has the burden of proving the guilt of a defendant beyond a reasonable doubt,[47] on occasion the defendant must bear the burden of producing evidence.[48] This occurs when the defendant has information peculiarly within his knowledge which would negate evidence otherwise tending to establish his guilt. The background and development of this concept is as varied as it is informative. An examination of selected cases in this area may be of interest at this time.

During the Prohibition Era the United States Supreme Court considered a case involving a violation of the Internal Revenue Act which provided that one carrying on the business of a distiller must first execute a bond.[49] No affirmative proof was presented by the prosecution that a bond was not executed. The Court nevertheless held that the failure of the defendant to give such a bond could be inferred:

> [I]t is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.[50]

---

43 *Id.* § 500.
44 *Id.* § 520.
45 *Id.* § 550.
46 *Id.* § 110.
47 *Id.* § 501; CAL. PEN. CODE ANN. § 1096 (West 1970).
48 *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958).
49 Rossi v. United States, 289 U.S. 89 (1933).
50 *Id.* at 91-92. While the Court uses the term "burden of proof", it is discussing "burden of producing evidence" as the term is used in the California Evidence Code.

This exception has also been recognized by the California courts in certain factual situations. In *People v. Boo Doo Hong*,[51] the defendant was charged with practicing medicine without a certificate. The trial court instructed the jury that the defendant had the burden of proving that he had such a certificate and absent this proof "it must be taken as true that he had not procured a certificate to so practice medicine."[52] On this instruction the California Supreme Court ruled:

> [T]here is a well recognized exception . . . where there is a negative averment of a fact which is peculiarly within the knowledge of the defendant. . . . Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor . . . exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.[53]

In *People v. Osaki*,[54] a prosecution for conspiracy to violate the Alien Land Law,[55] which provided that ineligible aliens were precluded from enjoying any benefits in real property, there was a specific provision shifting the burden of proof to the defendant upon an allegation that he was a member of a race ineligible for citizenship.[56] Upon conviction the defendant challenged the constitutionality of the law, on the ground that alienage was a substantive element of the offense and that the burden of proof could not be shifted from the prosecution merely by a negative allegation in the indictment. The court held there was no violation of due process in requiring the defendant to prove his eligibility,[57] and noted futher that judicial approval had been given to similar provisions even without statutory authorization.[58] The general rule was stated to be "when the negative of an issue does not permit direct proof or where the facts come more immediately within the knowledge of the defendant, the *onus probandi* rests upon him."[59] The court noted that this was merely a reiteration of a common law rule which has come to

---

51 122 Cal. 606, 55 P. 402 (1898).

52 *Id.* at 607, 55 P. at 403.

53 *Id.* at 608, 55 P. at 403.

54 209 Cal. 169, 286 P. 1025 (1930).

55 [1921] Cal. Stat. lxxxvii (enacted by voters 1920), *as amended*, ch. 441, § 1, [1923] Cal. Stat. 1020 [repealed ch. 316, §§ 1-5, [1955] Cal. Stat. 767-68; ch. 550, § 1, [1955] Cal. Stat. 2831]; ch. 244, § 1, [1927] Cal. Stat. 434 (enactment of CODE CIV. PROC. § 1983) [repealed ch. 299, § 117, [1965] Cal. Stat. 1297, 1363].

56 *Id.*

57 209 Cal. 169, 188, 286 P. 1025, 1032 (1930).

58 *Id.* at 176, 286 P. at 1027.

59 *Id.*

be known as the "rule of convenience".[60]

The "rule of convenience" is commonly applied in cases involving the use and possession of narcotics and restricted dangerous drugs. In cases involving the use of narcotics the rule is codified.[61] With respect to cases involving possession,[62] sale, furnishing and importing[63] of any narcotic, other than marijuana, and the possession,[64] sale, furnishing and importing[65] of any restricted dangerous drug, cases[66] have held the rule to be applicable to the negative averment "except upon the prescription of a physician, dentist, podiatrist or veterinarian licensed to practice in this state."[67]

No exception is taken with either the aforementioned rule as applied in the situations enumerated or its theoretical basis, which has been stated: "in respect to negative allegations . . . the burden of proof shall rest on the party, who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance. . . ."[68] It seems obvious that were this burden to be placed upon the prosecution it would create a nearly insurmountable obstacle, unduly hampering the efficient administration of justice. However, the policy considerations which compel the application of the rule in the aforementioned situations cannot be said to exist in the area of First Amendment rights, particularly with respect to freedom of speech. While there has been no case specifically dealing with the issue of negative averments in the area of obscenity, the sensitive nature of First Amendment rights is well delineated in the leading case of *Speiser v. Randall*,[69] which dealt with a California provision[70] requiring one seeking a veteran's property tax exemption to first sign a loyalty oath. In overruling the California Su-

60 *Id.* at 184, 286 P. at 1030.

61 CAL. HEALTH & SAFETY CODE ANN. § 11721 (West 1964).

62 *Id.* § 11500.

63 *Id.* § 11501.

64 *Id.* § 11910 (West Supp. 1970).

65 *Id.* § 11912.

66 *E.g.*, People v. Marschalk, 206 Cal. App. 2d 346, 23 Cal. Rptr. 743 (1962) (privilege of possessing must be established by defense); People v. Harmon, 89 Cal. App. 2d 55, 200 P.2d 32 (1948) (failure of proof of prescription establishes presumption of non-existence); People v. Bill, 140 Cal. App. 389, 35 P.2d 645 (1934) (prescription peculiarly within knowledge of defense).

67 CAL. HEALTH & SAFETY CODE ANN. §§ 11500, 11501 (West 1964); *Id.* §§ 11910, 11912 (West Supp. 1970).

68 People v. Osaki, 209 Cal. 169, 180, 286 P.2d 1025, 1029 (1930), *quoting* United States v. Hayward, 26 F. Cas. 240 (No. 15,336) (C.C.D. Mass. 1815).

69 357 U.S. 513 (1958).

70 CAL. REV. & TAX CODE ANN. § 32 (West 1970).

preme Court, which upheld denial of the exemption solely on the refusal to execute the oath[71] the United States Supreme Court held, "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."[72] After emphasizing the uniqueness of the cases which deal with freedom of speech, the Court stated:

> It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."[73]

Considering the mandate of the tripartite test of obscenity set forth in *Memoirs*,[74] recently reiterated in *Stein v. Batchelor*,[75] and reinforced by statute in California,[76] there is absolutely no justification for applying a "rule of convenience" which relieves the prosecution of affirmatively alleging and proving an indispensible element merely because of the negative nature of the averment. There seems nothing peculiarly within the knowledge of the defendant concerning "redeeming social importance" that is not equally within the knowledge of the prosecution. Furthermore, the usual situation in which the rule is invoked does not require proof concerning a substantive element of the offense. Permitting the burden of producing evidence to be shifted to the defense in these matters is patently offensive to the underlying principles of freedom of speech and the presumption of innocence. The prosecution simply has not "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation."[77] Such an approach may inhibit an individual's exercise of free

---

[71] Prince v. San Francisco, 48 Cal. 2d 472, 311 P.2d 544 (1957), *citing* First Unitarian Church v. County of Los Angeles, 48 Cal. 2d 419, 311 P.2d 508 (1957).

[72] 357 U.S. at 519.

[73] *Id.* at 523-24 (citations omitted).

[74] 383 U.S. 413, 418 (1966).

[75] 300 F. Supp. 602, 607 (N.D. Tex. 1969), *prob. juris noted*, 396 U.S. 954 (1969).

[76] CAL. PEN. CODE ANN. § 311 (West 1970).

[77] 357 U.S. at 524.

speech and serve as a prior restraint on this constitutional right. As was noted in *Speiser*, "the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."[78]

Although the reader may feel that undue emphasis has earlier been given to *People v. Newton*,[79] a decision of the Appellate Department of the Superior Court, it should be noted that the practical consequences are grave indeed. At present, in excess of 2,000 obscenity prosecutions are pending throughout Los Angeles County.[80] Virtually all of these will be tried in the Municipal Courts, upon which *Newton* is binding. Of the cases to be tried in the Superior Court, *Newton* will be persuasive authority. Furthermore, since this is the only case that has recently considered the matter, it may serve as authority throughout the State of California.

Nearly a century ago, the United States Supreme Court eloquently set forth the role of the prosecution in a criminal action:

> Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.[81]

The prosecution should be required to affirmatively plead and prove all elements of its case, including "redeeming social importance".

III. Prior Judicial Determination of Obscenity

The concept of an adversary proceeding is one of the cornerstones of Anglo-American jurisprudence. However, the extension of the adversary hearing concept to proceedings prior to search or seizure is an innovation unique to matters involving the First Amendment. Presently a conflict exists between the state and federal courts as to the necessity of a prior adversary hearing. Those courts which hold such a

---

78 *Id.* at 526.

79 9 Cal. App. 3d Supp. 24, 88 Cal. Rptr. 343 (1970).

80 Sheldon Willens, Head of Pornography Section, Organized Crime and Pornography Division, Office of the District Attorney, Los Angeles County.

81 Davis v. United States, 160 U.S. 469, 487 (1895). *See also* Lillianthal's Tobacco v. United States, 97 U.S. 237, 266 (1877):

> In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment.

requirement to be of constitutional dimension adhere to the view that without such a proceeding there exists a substantial risk of an impermissible prior restraint.[82] Those courts holding to the contrary do so pursuant to state procedures which provide for a speedy determination of the issue of obscenity.[83] It should not be assumed that a single issue is the basis for this divergence of opinion, for even those courts which require a prior adversary hearing may feel that it is unnecessary under certain circumstances.[84]

A. United States Supreme Court Decisions

The United States Supreme Court has considered the issue of whether an adversary proceeding is required prior to seizure of allegedly obscene materials and it may reasonably be inferred from its decisions that such a proceeding is required. In tracing the development of the adversary hearing it must be borne in mind that the foundation for requiring such a proceeding was the Court's early concern with impermissible prior re-

---

[82] *See, e.g.*, A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrants of Property, 367 U.S. 717 (1961); Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1970); Cambist Films, Inc. v. Duggan, 420 F.2d 687 (3d Cir. 1969); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); Platt Amusement Arcade, Inc. v. Joyce, 316 F. Supp. 298 (W.D. Pa. 1970); Newman v. Conover, 313 F. Supp. 623 (N.D. Tex. 1970); City News Center, Inc. v. Carson, 310 F. Supp. 1018 (M.D. Fla. 1970); Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969), *aff'd per curiam*, 397 U.S. 592 (1970); Abrams & Parisi, Inc. v. Canale, 309 F. Supp. 1360 (W.D. Tenn. 1969); Morrison v. Wilson, 307 F. Supp. 196 (N.D. Fla. 1969) (3 judge court); H.M.H. Publishing Co., Inc. v. Oldham, 306 F. Supp. 495 (M.D. Fla. 1969); May v. Harper, 306 F. Supp. 1222 (N.D. Fla. 1969); Carter v. Gautier, 305 F. Supp. 1098 (M.D. Ga. 1969) (3 judge court); Overstock Book Co. v. Barry, 305 F. Supp. 842 (E.D.N.Y. 1969); Drive-In Theatres, Inc. v. Huskey, 305 F. Supp. 1232 (W.D.N.C. 1969); Leslie Tobin Imports, Inc. v. Rizzo, 305 F. Supp. 1135 (E.D. Pa. 1969); Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969) (3 judge court); Fontaine v. Dial, 303 F. Supp. 436 (W.D. Tex. 1969) (3 judge court); Cambist Films, Inc. v. Tribell, 293 F. Supp. 407 (E.D. Ky. 1968); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1968); Poulos v. Rucker, 288 F. Supp. 305 (M.D. Ala. 1968); United States v. Brown, 274 F. Supp. 561 (S.D.N.Y. 1967).

[83] *See, e.g.*, A B C Books, Inc. v. Benson, 315 F. Supp. 695 (M.D. Tenn. 1970); Hosey v. City of Jackson, 309 F. Supp. 527 (S.D. Miss. 1970) (3 judge court); Rage Books v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969); Monica Theater v. Municipal Court, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970); People v. de Renzy, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969); People v. Steinberg, 60 Misc. 2d 1041, 304 N.Y.S.2d 858 (Cty Ct. 1969); South Fla. Art Theatres, Inc. v. State *ex rel.* Mounts, 224 So. 2d 706 (Fla. Ct. App. 1969).

[84] *See* United States v. Wild, 422 F.2d 34 (2d Cir. 1969); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Bazzell v. Gibbens, 306 F. Supp. 1057 (E.D. La. 1969); Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969).

straints.[85] In *Lovell v. City of Griffin*,[86] the Court struck down, as a prior restraint, a city ordinance which prohibited the distribution of "circulars, handbooks, advertising, or literature of any kind"[87] without first obtaining a permit. In discussing the concept of prior restraint, the Court alluded to its historical basis, stating:

> The struggle for the freedom of the press was primarily directed against the power of the licensor. . . . [T]he liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.[88]

Lovell relied heavily upon the earlier case of *Near v. Minnesota*,[89] even though *Lovell* dealt with materials at the post-publication stage (but prior to dissemination) and *Near* involved pre-publication restraint. The language in *Near* may, at least inferentially, serve as the basis for the requirement of a prior adversary hearing:

> The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct . . . necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of truth.[90]

In *Kingsley Books, Inc. v. Brown*,[91] a divided court upheld a New York statute which provided for enjoining the dissemination of obscene materials.[92] The statute entitled the individual enjoined "a trial of the issues within one day . . . and a decision . . . by the court within two days of the conclusion of the trial."[93] The Court noted that, unlike *Near*, the instant case dealt with the issue of obscenity and the challenged statute withheld "restraint upon matters not already published and not yet found to be offensive."[94] The dissenting Justices[95]

85 *See* Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931); Gitlow v. New York, 268 U.S. 652 (1925). It is beyond the scope of this article to undertake an exhaustive analysis of prior restraints.

86 303 U.S. 444 (1938).

87 *Id.* at 447.

88 *Id.* at 451-52 (footnote omitted).

89 283 U.S. 697 (1931).

90 *Id.* at 721.

91 354 U.S. 436 (1957) (5-4 decision).

92 N.Y. CODE CRIM. PROC. ANN. § 22-a (McKinney 1958).

93 *Id.* § 22-a(2).

94 354 U.S. at 445.

95 Chief Justice Warren, Justice Brennan and Justice Douglas (with whom Justice Black joined) each wrote separate dissenting opinions. *Id.* at 445-48.

urged that a prior judicial determination of obscenity was a constitutional necessity. One Justice seemed to believe that an ex parte procedure would suffice,[96] whereas three Justices indicated that an adversary proceeding is required.[97] Two of these three Justices stated:

> [T]he provision for an injunction *pendente lite* gives the State the paralyzing power of a censor. A decree can issue *ex parte*—without a hearing and without any ruling or finding on the issue of obscenity. This provision is defended on the ground that it is only a little encroachment, that a hearing must be promptly given and a finding of obscenity promptly made. But every publisher knows what awful effect a decree issued in secret can have. We tread here on First Amendment grounds. And nothing is more devastating to the rights that it guarantees than the power to restrain publication before even a hearing is held. This is prior restraint and censorship at its worst.[98]

The view of the dissent in *Kingsley*, which advocated the necessity for a prior adversary hearing, began to receive a somewhat qualified acceptance in *Marcus v. Search Warrants of Property*.[99] *Marcus* involved a Missouri procedure wherein a warrant for the search and seizure of obscene material could issue solely on the sworn statement of a police officer. There was no provision for an adversary proceeding prior to issuance of the warrant, however such a proceeding was required "not less than five nor more than 20 days after the seizure"[100] and prior to destruction of the material. But no time limit was imposed in which a judge had to render a decision. Search warrants were issued directing the police to seize "obscene materials"[101] without the magistrate having viewed any of the suspect matter. All materials were taken which the police believed to be obscene. This resulted in the seizure of approximately 11,000 copies of 280 publications.[102] Justice Brennan, writing for the Court, found that aside from the fact that petitioners were not afforded an opportunity to contest the propriety of the

---

96 *Id.* at 445 (Warren, C.J., dissenting).

97 *Id.* at 446-48 (Black & Douglas, J.J., dissenting and Brennan, J., dissenting).

98 *Id.* at 446 (Black & Douglas, J.J., dissenting). The Court acknowledges the unique and delicate nature of First Amendment rights and the need for vigilance concerning intrusion. This attitude was clearly expressed the following year in Speiser v. Randall, 357 U.S. 513 (1958), wherein Justice Brennan, writing for the Court, stated, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Id.* at 525.

99 367 U.S. 717 (1961).

100 *Id.* at 720.

101 *Id.* at 722.

102 *Id.* at 723.

seizure, the procedures invoked were constitutionally deficient:

> The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted "obscene . . . publications" . . . . [The officers] were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity.[103]

The Court distinguished *Marcus* from *Kingsley* in that the New York procedure in *Kingsley* provided for the judge to view the allegedly obscene material,[104] sanctions were imposed only as to specifically named publications,[105] and there was a requirement that the decision on the merits be made within two days of trial.[106] The possible requirement of a prior adversary hearing was discussed:

> . . . *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. . . . [T]here is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to a hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in *Kingsley Books* might have had to circulate the publication despite the interim restraint and then raise the claim of nonobscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away.[107]

The Court implied that a judicial determination prior to seizure is required in all instances; but with respect to mass seizures an adversary rather than ex parte proceeding will be required.

Bantam Books, Inc. v. Sullivan[108] involved no search and seizure; rather, it was an action to determine the validity of the powers vested in a commission created by the Rhode Island Legislature.[109] This agency

---

103 *Id.* at 732. *See also* Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) (film seizure).

104 367 U.S. at 735.

105 *Id.*

106 *Id.* at 737.

107 *Id.* at 735-36.

108 372 U.S. 58 (1963).

109 *Id.* at 60 n.1.

was charged with educating the public regarding any material which might tend to corrupt children and, where appropriate, to recommend criminal prosecution. Appellants, several book and magazine distributors, brought an action in the Superior Court of Rhode Island urging that the enactment creating the Commission was violative of the First and Fourteenth Amendments of the United States Constitution. They therefore asked that the actions of the Commission be enjoined. The prayer for injunctive relief was granted but the court refused to declare the enactment unconstitutional. On appeal the state supreme court agreed with the ruling on the constitutional issues but reversed the injunctive relief.[110] The United States Supreme Court invoked jurisdiction on the ground that "the state court judgment sought to be reviewed upheld a state statute against the contention that, on its face and as applied, the statute violated the Federal Constitution."[111] The Court noted that the practice of the Commission was to notify the distributor that certain books or magazines had been found to be objectionable for children under 18 years of age and that listings of these titles were being sent to local police agencies, which generally resulted in the removal of these materials from circulation.[112] Appellants contended that the practices of the Commission "amount[ed] to a scheme of governmental censorship devoid of the constitutionally required safeguards for state regulation of obscenity."[113] The Court agreed, noting:

> The Commission's practice . . . provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter . . . [and thus constitutes] a system of prior administrative restraints . . . . Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. . . . such a system [has been tolerated] only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint. . . . There is no provision whatever for judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness. The publisher or distributor is not even entitled to notice and hearing before his publications are listed . . . as objectionable.[114]

---

110 *Id.* at 61.

111 *Id.* at 61 n.3, *citing* 28 U.S.C. § 1257(2) (1964).

112 372 U.S. at 61-64. During oral argument the State admitted that several of the books included in the notifications were not within the Court's definition of obscene.

113 *Id.* at 64.

114 *Id.* at 70-71 (citations and footnote omitted).

It may be argued the practices under consideration were analogous to a "mass seizure" in that the dissemination of all copies of the material deemed to be questionable was effectively prevented. Although the Court did not expressly so hold, it seems apparent that the distributor must be given an opportunity to be heard prior to listing the publications as objectionable. Further, it seems the "judicial superintendence" of which the Court speaks must be in the nature of a judicial proceeding. Whether the required proceeding need be ex parte or adversary, or whether both might be required at different stages is unclear.

What may well be the landmark case concerning procedures for the search and seizure of obscene materials is *A Quantity of Copies of Books v. Kansas (Quantity of Books).*[115] In *Quantity of Books,* a Kansas statute[116] which authorized the seizure of allegedly obscene publications and required their destruction after an adversary determination of obscenity, was challenged. In a verified information seeking the issuance of a search warrant, fifty-nine book titles were identified and copies of seven books were filed with the document each of which contained the same publishing caption.[117] The judge "conducted a 45-minute *ex parte* inquiry during which he 'scrutinized' the seven books"[118] and determined them to be obscene. He also found "reasonable grounds to believe that any paper-backed publication carrying the [same publishing caption] would fall within the same [paper-backed] category."[119] A warrant was issued for the seizure of all books identified by title in the information. Thirty-one titles, totalling 1,715 books, were seized. A hearing was held ten days later and the warrant was sought to be quashed on the ground that there had been no adversary hearing prior to seizure. The motion was denied and all copies seized were ordered to be destroyed after a final hearing, conducted approximately six weeks later.[120]

The Court discussed *Marcus* and refused to distinguish it, stating:

> It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [the owner] was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient.[121]

---

115 378 U.S. 205 (1964).
116 *Id.* at 207-08 n.1; KAN. GEN. STAT. § 21-1102 *et seq.* (Supp. 1961).
117 378 U.S. at 208.
118 *Id.*
119 *Id.* at 208-09.
120 *Id.* at 209.
121 *Id.* at 210.

Kingsley Books was distinguished because no injunctive measures were imposed until after an adversary hearing on the issue of obscenity.[122] It was further stated:

> A seizure of all copies of the named titles is indeed more repressive than an injunction preventing further sale of the books. . . . We therefore conclude that in not first affording [the owner] an adversary hearing, the procedure leading to the seizure order was constitutionally deficient.[123]

The fact that a full adversary hearing followed the seizure did not satisfy the constitutional requirement, "[f]or if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books."[124]

Justice Stewart noted[125] that the procedures employed would have been valid, "at least with respect to the material which the judge 'scrutinized'",[126] if hard-core pornography were involved. Justice Harlan, with whom Justice Clark joined,[127] dissented on the basis of his dissent in *Jacobellis v. Ohio*.[128] In that case he was of the opinion that the state properly exercised its power in banning the questioned books:

> [T]he states are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government. . . . [the better approach lies] in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein . . . .[129]

In *Quantity of Books*, Justices Harlan and Clark stated that the Kansas statute dealt strictly with seizure and forfeiture, provided adequate "notice", imposed no restraint upon unpublished material and was similar to the injunctive provisions of the civil statute in *Kingsley*. They therefore felt that although the Kansas statute was part of one which imposed criminal sanctions, it was limited to narrowly defined areas and required an expeditious determination of the issues. Further, they said the statute was like a penal sanction, rather than a system of censorship in that the state was required to defend its action at a full hear-

---

122 *Id.*
123 *Id.* at 210-11.
124 *Id.* at 213.
125 *Id.* at 214 (concurring opinion).
126 *Id.*
127 *Id.* at 215 (Harlan & Clark, J.J., dissenting).
128 378 U.S. 184, 203 (1964).
129 *Id.* (Harlan, J., dissenting) (citations omitted).

ing on the issue of obscenity.[130] Justice Harlan also noted that, while not required by statute, the judge conducted an ex parte hearing, the officers had no discretion in executing the warrant, and in light of *Marcus* there was every reason to believe the statute would be applied in a fair manner to avoid undue delay.[131]

A careful analysis of *Quantity of Books* indicates that it stands for the proposition that, at least in a situation involving a mass seizure where there is a provision for the ultimate destruction of the material, a prior judicial determination at an adversary hearing is required prior to seizure. Although the Court at one point discusses a hearing "before the warrant issued"[132] it later refers to "the procedure leading to the seizure order".[133] It would appear that the Court was more concerned with the seizure aspect of the order and, arguably, a different conclusion might result if the warrant only permitted a search.

The emphasis on "mass seizure" as distinguished from other seizures was made by the Court two years later in *Mishkin v. New York.*[134] Affirming a conviction under a state obscenity statute the Court stated it would not consider appellant's claim that the materials introduced into evidence were the fruits of an illegal search and seizure since the record on appeal was incomplete.[135] It is unclear whether the Court in *Mishkin* was suggesting that only when a mass seizure occurs is there potential violation of First Amendment guarantees, or whether it was merely limiting its discussion to the fact situation presented. It should be noted that the Court's continued reliance upon *Quantity of Books* and *Marcus* is further recognition that a prior adversary hearing is at least required in certain instances.

B. United States Courts of Appeals Decisions

With one seeming exception[136] the United States Courts of Appeals

130 *Id.* at 223 (Harlan, J., dissenting).

131 *Id.* at 219-22 (Harlan, J., dissenting).

132 *Id.* at 210.

133 *Id.* at 211.

134 383 U.S. 502 (1966).

135 *Id.* at 503 n.1; N.Y. PEN. LAW ANN. § 1141 (McKinney 1954). Several considerations were set forth which may give some insight as to the factors determinative of a constitutionally valid search:

> [W]hile the search and seizure issue has a First Amendment aspect because of the alleged massive quality of the seizures . . . [citing Quantity of Books and Marcus] the record in this regard is inadequate. There is neither evidence nor findings as to how many of the total available copies of the books in the various bookstores were seized and it is impossible to determine whether the books seized in the basement storeroom were on the threshold of dissemination. 383 U.S. at 513.

136 United States v. Wild, 422 F.2d 34 (2d Cir. 1969).

which have considered the question uniformly hold that an adversary hearing is required prior to the issuance of a search warrant for the seizure of allegedly obscene material. In *Metzger v. Pearcy*[137] four prints of a motion picture film were seized from different theaters by police without a search warrant and contemporaneous arrests were made. A federal district court[138] enjoined the prosecuting officials from further interference with the showing of the film and ordered the return of all seized prints to the owner, with the provision that one print be delivered upon request to the prosecuting attorney for use in the preparation or trial of pending criminal cases.[139] The court of appeals, relying upon *Marcus* and *Quantity of Books*, stated:

> [L]aw enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment to the Constitution of the United States, and is a prior restraint condemned by the Supreme Court.[140]

The court noted that the aforementioned rules apply equally to motion pictures, citing several Supreme Court decisions so holding.[141]

Cambist Films, Inc. v. Duggan[142] also involved multiple seizures of a film print without a search warrant. The court observed that a determination of obscenity was made by police officers without any judicial review:

> We cannot agree with the basic premise of the district court that police officers may, after viewing a motion picture themselves, determine whether it is obscene and, if they determine it to be obscene, proceed to arrest the exhibitor and seize the film without a warrant. On the contrary, it is now settled that the First and Fourteenth Amendments to the Constitution require that there be an adversary judicial hearing and determination of obscenity before a warrant may be issued to search and seize alleged obscene materials [citing *Marcus* and *Quantity of Books*].[143]

---

137 393 F.2d 202 (7th Cir. 1968).

138 The federal courts will generally accept jurisdiction of state obscenity procedures upon application of the defendant. These actions are usually filed alleging infringement upon the civil rights of the defendant(s) pursuant to 42 U.S.C. § 1983 (1964).

139 393 F.2d at 204.

140 *Id.*

141 *Id.* *See* Jacobellis v. Ohio, 378 U.S. 184 (1964); Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

142 420 F.2d 687 (3d Cir. 1969).

143 *Id.* at 689. It is interesting to note that the court relied heavily upon Flack v. Municipal Court, 66 Cal. 2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (1967), wherein the

In *Tyrone, Inc. v. Wilkinson*[144] a film was seized pursuant to a search warrant supported by police affidavits. The magistrate had viewed the film prior to issuance of the warrant. In affirming a district court injunction against further seizures, the court required the return of the film. The court held the principles enunciated in *Quantity of Books* applicable to films, and thereby established the requirement of a prior adversary hearing, analogizing to proceedings involved in an application for a preliminary injunction.[145] *Tyrone* refused to distinguish *Metzger* although no search warrant had been obtained in that case, and since the court there "focused on the lack of the [prior adversary] hearing."[146] Moreover, *Tyrone* like *Metzger,* required that "the theater deliver to the Commonwealth's Attorney, upon request, a copy of the movie for reasonable use in the preparation and trial of the charges now pending in the state court."[147]

A situation virtually identical to *Tyrone* existed in *Bethview Amusement Corp. v. Cahn,*[148] and the court similarly held that the failure to provide for an adversary hearing prior to seizure violated the First Amendment.[149] The prosecution sought to distinguish *Marcus* and *Quantity of Books* on the ground that a mass seizure of books is distinguishable from the seizure of a single print of motion picture film.[150] This contention was rejected by the court:

> We are told that the Bethview Theater has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4,000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from preventing a similarly large number of books from being circulated.[151]

The court suggested that a print of the film could be obtained without

California Supreme Court held that, except where an emergency exists, obscene material may not be seized without first obtaining a search warrant. *Flack* did not discuss the necessity of affording a prior adversary hearing. In fact, this decision had been relied upon for the proposition that none is required. *See* Monica Theater v. Muncipal Court, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970); People v. de Renzy, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969).

144 410 F.2d 639 (4th Cir. 1969), *cert. denied,* 396 U.S. 985 (1969).

145 410 F.2d at 641.

146 *Id.*

147 *Id.* At note 4 on page 641, the court expressly reserves opinion as to whether the film would be admissible in evidence.

148 416 F.2d 410 (2d Cir. 1969).

149 *Id.* at 411-12.

150 *Id.* at 412.

151 *Id.* There is a conflict between the New York state courts and the Second Circuit. *See* People v. Steinberg, 60 Misc. 2d 1041, 304 N.Y.S.2d 858 (Cty Ct. 1969).

the necessity of a seizure either by direction of the court or by means of a subpoena duces tecum.[152] In response to the prosecution's contention that unless a copy of the film were in the possession of the authorities pending an adversary hearing the film might be taken from the jurisdiction or edited to delete the offensive scenes, the court stated "[i]f there is a real threat of such activity it can be controlled by an ex parte restraining order."[153]

A different panel of judges in the same circuit reached an opposite conclusion in *United States v. Wild*,[154] decided almost simultaneously with *Bethview*.[155] In *Wild* the defendants were convicted of conspiracy to use the mails for soliciting the purchase of obscene color slides and photographs. The slides and photographs, the subject of the prosecution, were seized incident to the defendant's arrest. No search warrants had been obtained although arrest warrants had been issued. The court distinguished *Marcus* and *Quantity of Books* from *Wild*:

> These cases are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe *Marcus* and *Quantity of Books* can be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases.[156]

Defendants sought a rehearing in light of *Bethview*.[157] It should be

---

152 416 F.2d at 412.

153 *Id.*

154 422 F.2d 34 (2d Cir. 1969).

155 *Bethview* was argued on July 24, 1969, and decided on October 6, 1969. *Wild* was argued on September 11, 1969, and decided on October 29, 1969.

156 422 F.2d at 38.

157 But the Court, in refusing to reverse its decision, distinguished the two cases:

> First, the *Bethview* court did not have before it an appeal from a conviction in which the seized film had been introduced into evidence; therefore, it did not hold that such a conviction would have to be reversed. While the panel there ordered the film returned, it did not say that the print could not be used by the prosecution in a trial on the outstanding criminal charge. In fact, the court in *Bethview* indicated precisely to the contrary . . . .
>
> * * * * *
>
> Second, the *Bethview* panel analogized "a single print of a motion picture film" to seizure of "a large number of books" because in both instances, without any prior adversary hearing, a large group in the community is denied access to material that may be entitled to First Amendment protection. Thus, the *Bethview* panel pointed out that a single motion picture print could be seen by over 4,000 people in one week. This is not true of other kinds of allegedly obscene material, e.g., a single copy of a magazine or of an underground newspaper, or of a single copy of a slide similar to those involved here. The *Bethview* panel did not hold that it is improper, after a lawful arrest, to seize as evidence a few samples of this kind of allegedly obscene material, each of which can, by its nature, be seen by only a few people. *Id.* at 39 (petition for rehearing) (citations omitted).

noted here that while *Wild* involved an appeal from a federal criminal conviction, *Metzger*, *Cambist*, *Tyrone*, and *Bethview* involved federal injunctive relief to stay state criminal proceedings.

The most recent, and in many respects the most incisive analysis by a circuit court, is found in *Demich, Inc. v. Ferdon.*[158] In *Demich* the defendants were charged with exhibiting motion picture films in violation of California obscenity statutes.[159] The court affirmed a district court order directing the return of the seized films and enjoining further seizures without a prior adversary hearing.[160] The court took this opportunity to express its opinion as to the unique nature of the First Amendment rights involved[161] and then ruled on the narrow issue of "whether the rule of [*Quantity of*] *Books* should apply in the case of seizure of a single copy of film held for exhibition to theater patrons."[162] Although it was urged upon the Court that *Quantity of Books* was applicable only to mass seizures, the court rejected this argument:

> Where First Amendment rights are exercised by distribution and sale of materials, the proportions of the seizure may well bear on the question whether it constituted restraint. Here, however, the rights are exercised not by sale but by exhibition, and restraint clearly follows from seizure of the materials to be exhibited or of the means of exhibition.[163]

---

158 426 F.2d 643 (9th Cir. 1970), *prob. juris. noted,* 39 U.S.L.W. 3067 (U.S. Aug. 11, 1970).

159 CAL. PEN. CODE ANN. §§ 311, 313 (West 1970).

160 426 F.2d at 646.

161 [T]he First Amendment poses problems respecting the seizure of allegedly obscene materials not present in the seizure of other forms of contraband or evidence of crime. Procedures "designed to focus searchingly on the question of obscenity" must be provided to avoid suppression of constitutionally protected publications or the interruption of their dissemination. *Id.* at 645 (citations omitted).

162 *Id.*

163 *Id.* (footnote omitted). An equally cogent and well-reasoned dissent distinguishes the cases relied upon by the majority:

> The prosecution of cases involving obscenity is essentially a state problem. State judges like federal judges are familiar with the provisions of the United States Constitution and must enforce them where applicable.
>
> [*Metzger, Tyrone,* and *Bethview*] have each condemned a seizure of a film without a prior adversary hearing. But each of the cases have inconsistencies which largely destroy the efficacy of the decisions.
>
> (1) Each court directly or impliedly provided the exhibitor must furnish the prosecutor with a copy of the film seized for the purpose of a prosecution, although the original seizure was disapproved.
>
> (2) No satisfactory answer is supplied to the proposition that the defendant may stand on his Fifth Amendment right against incrimination and refuse to deliver the film.
>
> (3) Although the decisions purport to say that the seizure takes from the public the right to view matters which may be within the protection of the First Amendment, by the same token the subsequent delivery of the film for the purpose of the prosecution will tie up the film and rob the public of its right to view matters which may be within the protection of the First Amendment.
>
> (4) Nor do the cases afford any protection against the mutilation or excision

Inferentially the court seemed to express the view that selective seizure of items from a mass of material for distribution or sale requires merely an ex parte judicial determination. Extending this rationale, it may be argued that where several prints of a film are possessed for purposes of exhibition in a lesser number of locations the necessity for a prior *adversary* determination of obscenity may be substantially less compelling.

The court distinguished between the procedure required prior to search and that required prior to seizure:

> So far as the *Fourth* Amendment is concerned, probable cause can be shown as it always has been shown—*ex parte* and, without recourse to the film itself, by a showing of obscenity through use of affidavits, testimony, or still photographs, such as was made here. All that *Books* requires in deference to the *First* Amendment is that before seizure a prior adversary hearing be afforded. Should the film exhibitors, on hearing, choose not to produce the film to rebut the showing of probable cause and should an order for seizure follow they would have waived any right to complain that the magistrate had failed to consider the film as a whole. Should the film exhibitors choose not to avail themselves of the opportunity afforded them for a hearing, they would effectively have waived their First Amendment rights and execution of a warrant for seizure forthwith would be entirely proper.[164]

It seems permissible that, pursuant to a warrant issued after an ex parte proceeding, a search may be conducted to discover whether specified allegedly obscene material is present at a location. It seems equally permissible, under the "plain view" doctrine,[165] that *any* material observed will not be immune from seizure. While it is incumbent upon the authorities to afford an adversary hearing prior to seizure, it is reasonably inferable that this hearing may also encompass those materials observed during the permissible search. Also, any additional

---

of the film before it is turned back to the possession of the prosecution. There is a showing in the record [that one of the defendant's deleted] portions of the film between the time it was seen by the officer and the time it was seized by the same officer. An affidavit by the officer stated that [defendant] deleted the most objectionable portions of the film.

Until the United States Supreme Court authoritatively decides the issue of seizure and use of a film for the purpose of a criminal prosecution, I would follow the California state decision. *Id.* at 646-47 (citations omitted), *citing* People v. de Renzy, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969).

The decision which the dissent would follow, while noting the delicate nature of First Amendment rights, held that "state law enforcement officers, acting under authority of a search warrant, may seize at least one copy of [material] when necessary for use as evidence in a later adversary proceeding." *Id.* at 386, 79 Cal. Rptr. at 780.

164 426 F.2d at 646.

165 *See* Chimel v. California, 395 U.S. 752 (1969); Harris v. United States, 390 U.S. 234 (1968); People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).

materials would be equally subject to the protective order suggested by the court in *Demich*.[166] Whether such "protective order" would afford any more than illusory protection from alteration or destruction of the materials observed incident to the permissible search, but not within the scope of the warrant, is a problem which every magistrate must face when issuing orders of this nature.

Without belaboring the point it will suffice to note that while a prior adversary determination on the issue of obscenity may be required in certain instances, it may not be constitutionally required under all circumstances. A further consideration of federal and state decisions will serve to illustrate the divergence of opinion as to what procedures are required in a given factual setting.

C. *United States District Court Decisions*

1. Materials Other Than Films

Discussion of federal district court cases, which have been called upon to consider the necessity of a prior judicial determination of obscenity before the seizure of material, will initially focus upon cases involving the mass seizures of books, magazines and materials other than films.

In *United States v. Brown*,[167] following an ex parte proceeding, a warrant was issued ordering the seizure of sixteen cartons of allegedly obscene books. The Commissioner neither viewed any of the materials, though the contents of three cartons had been inspected by an FBI agent,[168] nor was there any prior determination of obscenity. Agents proceeded to seize 419 cartons of materials, subsequent to which the defendant was charged with transporting sixteen cartons of obscene material in interstate commerce.[169] Defendant sought the suppression and return of the materials pursuant to the Federal Rules of Criminal Procedure.[170] The government urged that the seizure was valid as incident to a lawful search warrant and, in the alternative, it was incident to a lawful arrest and therefore valid. The court met the contention that the seizure could be justified as incident to a lawful arrest:

> This result cannot be avoided by the rubric of a search incident to a lawful arrest. . . . [T]he Supreme Court has apparently determined

166 426 F.2d at 646.
167 274 F. Supp. 561 (S.D.N.Y. 1967).
168 *Id.* at 562.
169 18 U.S.C. §§ 1462, 1465 (1964), *cited in* 274 F. Supp. at 561-62.
170 FED. R. CRIM. P. 41(e).

that borderline speech must be protected by the application of relatively elaborate procèdures prior to suppression via seizure. Such procedures are impossible to follow in a seizure incident to arrest. As the Supreme Court of California recently noted "within the precinct of the First Amendment, only the requirement that a search warrant be obtained prior to any search or seizure assures a free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field."[171]

The court also stated:

Although the Supreme Court has not set down the precise constitutional standards for a conventional search and seizure of obscene materials in a criminal case, it has had occasion to express its view on such searches and seizures in the context of three civil forfeiture cases. [citing *Quantity of Books, Marcus* and *Kingsley*] . . . . A search and seizure for the purpose of gathering evidence for a criminal obscenity prosecution imparts at least the same potential restraint on the dissemination of material protected by the First Amendment as one made solely for the purpose of commencing forfeiture proceedings.

The common thread running through recent Supreme Court decisions on the seizure of allegedly obscene matter is that because the line between protected and unprotected speech is so difficult to draw, dissemination of a particular work should be completely undisturbed, at least until an independent determination of obscenity is made by a judicial officer. Complete restraint on any work must await a final judicial determination of obscenity.[172]

It was emphasized that publications must be guaranteed unobstructed circulation prior to a determination of obscenity and that the procedures followed in *Kingsley* "approach the minimum safeguards allowable under the federal constitution."[173] The evidence seized in *Brown* was suppressed since a mass seizure had taken place, none of the materials had been examined by the commissioner ordering the seizure, the defendant was not given an opportunity to be heard prior to seizure, no publications were listed by name, and 403 cartons of materials were taken in addition to those listed in the warrant.[174]

Although apparently neither party raised the issue, the court took the opportunity to discuss modern United States Customs practices, where customs officials may hold and inspect allegedly obscene imports to de-

---

171 274 F. Supp. at 565, *citing* Flack v. Municipal Court, 66 Cal. 2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (1967).

172 274 F. Supp. at 563 (citations omitted).

173 *Id.* at 564.

174 *Id.* at 565.

termine whether forfeiture proceedings shall ensue,[175] as an example of a permissible non-judicial restraint. These statutes are not subject to constitutional infirmity if procedures are established which set up narrow guidelines for the expeditious determination of the issue of obscenity.[176] With respect to books and magazines, the court notes that these, like all imports, are subject to inspection; however, it qualifies what may be done thereafter, stating:

> Once this period of detention for general customs purposes has ceased, however, it would seem that under *Kingsley*, *Marcus* and *A Quantity of Copies of Books*, the customs officials should be required to turn over the publications to the claimant, subject to later injunctive proceedings, rather than holding onto them, as they do now, until after a judicial determination on the question of obscenity.[177]

The court concluded that the customs cases are distinguishable since statute and practice in that area have created rigid procedural safeguards and the rapid judicial determination of obscenity.[178]

It is arguable that *Brown* has been superceded, at least as to seizures which are incident to a lawful arrest, by *Wild*,[179] which held such seizures to be permissible. However, *Wild* can be distinguished since it involved an appeal from a conviction rather than a motion to suppress as in *Brown*. Moreover, only a few slides were seized in *Wild* compared with 419 cartons of material in *Brown*.

In *Delta Book Distributors, Inc. v. Cronvich*[180] multiple defendants[181] were arrested and their publications were seized without a warrant. There was an adverse determination of the constitutional issues in the state court[182] and they subsequently took the case to the federal district court. In each instance officers had previously purchased materials similar to those seized. The seizures were comparatively "selective", and though substantial, were not of the "mass" dimensions in the sense

---

175 *Id.* *See* Tarrif Act of 1930, 46 Stat. 688, *as amended*, 19 U.S.C. § 1305 (1964).

176 274 F. Supp. at 565.

177 *Id.* at 566.

178 *Id.* at 565-66.

179 422 F.2d 34 (2d Cir. 1969). *See also* Chimel v. California, 395 U.S. 752 (1969). Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969) seems controlling in that Circuit as to the necessity for an adversary proceeding prior to seizure at least with respect to films and large quantities of material.

180 304 F. Supp. 662 (E.D. La. 1969) (3 judge court).

181 Individual plaintiffs on removal were commercial distributors in two Louisiana parishes, while the corporate plaintiff was a New York based supplier. The actions were joined for decision by the federal court.

182 304 F. Supp. at 664. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2281 (1964) and 42 U.S.C. § 1983 (1964).

used previously.[183] Relying in part upon *Books, Metzger,* and *Brown,* the court discussed a broad spectrum of requirements concerning cases involving First Amendment rights:

> Since prior restraint upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.
>
> We are mindful of the fact that even attempts to regulate obscenity incorporating procedures for affording the required adversary hearing would themselves constitute prior restraints. . . . Nonetheless, it is apparent that there must be some permissible prior restraint, be it however subtle, if obscenity is not protected by the First Amendment and State attempts to regulate it are to be enforceable. . . . [Such procedures] may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity.[184]

The court found that the procedures utilized in the *Delta Book* seizures, even with respect to the items purchased, were constitutionally impermissible since no prior adversary determination was made[185] and all materials were ordered suppressed and returned.[186] In extending the requirement of a prior adversary hearing further than the previously discussed cases, *Delta Books* seems to torture the concept of prior restraint. The very fact that prosecutions result from enforcement of obscenity laws creates a "chilling effect"[187] on the dissemination of marginal material; but if there is to be any enforcement of these laws a practical procedure must be devised which intrudes only to the slightest degree on the rights of the alleged offender while permitting the state to implement the mandate of the legislature and the courts.

A detailed presentation of the facts in two recent cases is set forth below to illustrate the potential abuse in permitting law enforcement officials to operate "within their sound discretion."

In *Miske v. Spicola,*[188] law enforcement officers[189] purchased two

---

183 One seizure involved virtually the entire stock of the material during a two month period, and this may, in effect, qualify as a "mass seizure".

184 304 F. Supp. at 667 (footnotes omitted).

185 *Id.*

186 *Id.* at 670.

187 *See* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

188 314 F. Supp. 962 (M.D. Fla. 1969).

189 City of Tampa, Florida.

publications from a store and after an ex parte proceeding in which these items were the only "evidence", obtained a search warrant. The warrant was served that day and approximately 1,059 publications and 158 films were seized.[190] One month later the store owner was charged in a criminal information with selling obscene magazines. Another information filed the same day charged the owner with possession for sale of "certain allegedly obscene publications".[191] Five months later two additional magazines were purchased at the same location by officers. Subsequently another search warrant was obtained, also after an ex parte hearing, and a seizure pursuant to this warrant resulted in the confiscation of "magazines, films, checks, business records and other materials listed in a 17 page inventory."[192] Three months later a third warrant was issued, again after an ex parte proceeding, based upon the two magazines purchased during the previous visit. Among the items seized were "magazines, paperback books, phonograph records [numbering 1,111] a cash register tape, an electric and a water bill, a metal box with $10.00 therein, a money bag, and money from the cash register in the total amount of $98.12."[193] The allegation was also made that approximately 12,000 copies of material were seized, without a warrant and without any prior judicial proceeding, from a truck driver who arrived at the location during the seizure.[194] Additional criminal charges were brought following the seizure.

In *City News Center, Inc. v. Carson*,[195] decided three months later,[196] police officers entered a store and purchased two cellophane-wrapped publications, removed the wrappers and inspected the contents. The manager of the location was then advised that the officers intended to arrest the clerk who had sold them the items. A signal was given by one of the officers and nine additional officers entered the store and commenced removing magazines from the shelves. Pursuant to their "sound discretion", 103 titles representing some 900 volumes of material were seized in addition to twelve coin-operated arcade machines containing films. Four prisoners from the local jail accompanied the officers as well as two trucks which were utilized to transport the items

190 314 F. Supp. at 963.

191 *Id.* The criminal charge included items obtained in the seizure.

192 *Id.*

193 *Id.* at 964.

194 *Id.*

195 310 F. Supp. 1018 (M.D. Fla. 1970).

196 The instant seizure occurred April 10, 1969, while the second *Miske* seizure occurred April 11, 1969.

seized. The police had invited several newspaper reporters and television cameramen to witness the seizure, and they were permitted to enter the location. There was neither a warrant for the seizure nor a prior judicial determination of obscenity.[197] It was further noted that the officer who made the initial purchase had no prior training in the area of obscenity and his sole test as to what was obscene was subjective, encompassing only "whether private organs were exposed in a 'suggestive' or 'lewd and lascivious manner'."[198]

In both instances the courts unhesitatingly found the procedures utilized to be violative of constitutional guarantees, in that there had been no prior adversary hearing, and each ordered the return of the materials. The *Miske* court, after declaring a prior adversary hearing to be a constitutional guarantee,[199] suggested a possible approach to this requirement indicating that it need not be a "fully matured action" and "such a matter could be determined on an application for a preliminary injunction in an appropriate State court, after notice to the adverse party and an opportunity for him to be heard."[200] The court further suggested that a "civil action for declaratory relief" with eventual destruction of the materials, analogous to a civil forfeiture proceeding, might suffice.[201] The *City News* court in a strongly worded opinion stated "a prior evidentiary hearing" must be held "in all cases involving seizures, whether of films or books",[202] then proceeded to discuss the contention of respondent police officers that the seizures were valid as incidental to an arrest:

> In making such an arrest, the officer necessarily was placed in the position of having to determine probable cause that the materials being sold were in fact obscene before the arrest could be made. An ad hoc determination of obscenity by a single officer [inexperienced and unfamiliar with] constitutional principles is grossly insufficient to protect against unwarranted infringement of freedom of expression.
>
> Even with the benefit of experience and briefing on the law, such a procedure would be inadequate because probable cause as to whether obscenity exists has come to be recognized as a matter of *constitutional judgment*, unique in the law because of the fragile nature of the right protected, and incapable of determination by a policeman, grand jury, or judge acting *ex parte*, without a prior finding of probable

197 310 F. Supp. 1021 (M.D. Fla. 1970).
198 *Id.* at 1020.
199 314 F. Supp. at 964.
200 *Id.*
201 *Id.* (citations omitted).
202 310 F. Supp. at 1021.

cause in a judicially-supervised adversary hearing. . . .

Not only would it be constitutionally impossible for a policeman to decide, under the conditions of this seizure, that probable cause existed to justify arrest, the courts themselves have had great difficulty in deciding what is obscene, even after an adversary hearing. . . .

Consequently . . . a prior adversary hearing is necessary before an arrest can be made, even where the sale of allegedly illegal materials takes place in the presence of the arresting officer.[203]

Gable v. Jenkins,[204] one of the most recent occasions upon which a court has been asked to consider the necessity for prior judicial determination of the issue of obscenity, involved the arrest of an individual and the seizure of several books incident to the arrest.[205] The court initially disposed of the contention that the Georgia statute[206] was "vague and facially overbroad",[207] and then discussed whether the statute was unconstitutional because it failed to "provide for a prior judicial determination [of obscenity] with an adversary proceeding before arrest."[208] Although the issue is framed as one relating to "arrests" the court goes on to discuss "seizures". The court does not distinguish between seizures incident to an arrest and those which are pursuant to a search warrant; in fact, the only mention of utilizing a search warrant is a comment in a footnote to the opinion.[209] The court accepted as a matter of law that a prior adversary proceeding is constitutionally necessary before the seizure of obscene material[210] and stated:

There is proper procedure existing in the Georgia law that can achieve constitutional standards, i.e., a prior adversary judicial proceeding before the seizure of the allegedly obscene items. Accordingly, [the statute] is not unconstitutional in that it does not establish a prior judicial hearing within itself.[211]

The court then undertakes to set forth procedures which might be followed by the State in order to satisfy the constitutional requirements:

As examples, the following are presented: When a search warrant

203 *Id.* at 1021-22 (citations omitted).

204 309 F. Supp. 998 (N.D. Ga. 1969) (3 judge court), *aff'd*, 397 U.S. 592 (1970).

205 309 F. Supp. at 999.

206 *Id.* at n.1 (quoting Georgia statute).

207 *Id.* at 1000-01.

208 *Id.* at 1001.

209 *Id.* at n.3.

210 *Id.* at 1001. The court noted that this was particularly true with respect to the seizure of motion picture film. *See also* Leslie Tobin Imports, Inc. v. Rizzo, 305 F. Supp. 1135 (E.D. Pa. 1969) (seizure of allegedly obscene political slogan buttons pursuant to warrant issued without a prior judicial determination of obscenity).

211 309 F. Supp. at 1001 (footnote omitted).

> is applied for to seize the alleged obscene materials, the person possessing the same could be given notice of the intent to apply for the search warrant, and be given an opportunity to be present at such time, and present evidence in opposition to the issuance of the search warrant. Or an order to show cause why the alleged obscene film is not obscene could be served on the possessor, or a petition to have the film declared contraband, and subject to destruction could be served on the possessor.[212]

In what may superficially appear a somewhat solicitous attempt to justify its holding and mollify law enforcement officials the court adopts the *Carter v. Gautier*[213] rationale for the requirement of an adversary judicial determination of obscenity prior to seizure, not as an adverse reflection upon law enforcement officials, but on the assumption that a judicial officer is "better equipped than they to pass upon the important and sometimes difficult question of obscenity." There is no distinction drawn, as in *Demich,* between the procedures prior to search and those prior to seizure. A strict interpretation of these constitutional guarantees would seem to support the *Gable* approach. If the two-step *Demich* procedure is utilized,[214] undoubtedly some degree of prior restraint would be imposed since it would be necessary to protect the material to be seized from alteration or destruction. The inherent delay involved could prevent the material from being disseminated without a valid court order.

However, situations exist where the *Gable* approach, if strictly adhered to, would unduly hamper the prosecution and perhaps make its task impossible. For example, if an investigation has led officers to facts which establish probable cause to believe that a particular business is engaged in the preparation of obscene material and a warrant is desired to search the premises for such material, it may be impossible to have an adversary hearing on the issue of obscenity at that time since there is no specific material available to be brought before the court. Also, if the information is obtained through a reliable informant who describes the material as photographs of persons engaged in acts of intercourse and oral copulation with no accompanying text, this may be

---

212 *Id.* at n.3.

213 305 F. Supp. 1098, 1101 (M.D. Ga. 1969) (3 judge court) (seizure of one print of motion picture film). *See also* 309 F. Supp. at 1001. The "solicitous" use of this language should be noted. The following language appeared after the quoted language in the decision relied upon, but was deleted in the instant opinion. This is so because "The separation of legitimate from illegitimate speech calls for more sensitive tools . . . ." Speiser v. Randall, 357 U.S. 513, 525 (1958).

214 426 F.2d at 646.

sufficient to establish probable cause to enter the premises and search pursuant to a warrant; however, such information may not be sufficient for a determination of obscenity that would satisfy the mandates of the First Amendment. The *Demich* approach, therefore, seems to be the most reasonable and practical.

Two district court decisions have refused to interpret the requirement of a prior adversary hearing as broadly as the foregoing cases. In *Rage Books, Inc. v. Leary*[215] state statutes[216] were upheld since an adversary hearing prior to arrest or seizure was not prohibited and the statute could be constitutionally applied.[217] The court interpreted the rule in *Quantity of Books* to be limited to the "seizure of substantial quantities of books or other matter"[218] and upheld a seizure incident to arrest:

> No decision has thus far prohibited the normal police function of effecting an arrest and the seizure of sample evidence of a suspected crime being committed. Such an arrest and a limited supporting seizure are not tantamount to a prior restraint since the jeopardy faced is essentially the restraint of obscenity law itself in respect of the remainder of the wares on the shelves and self-censorship in respect thereof at the option of the merchant.[219]

The court went on to conclude:

> It seems ludicrous to suggest that apprehension of suspected criminals and their unsavory wares requires adversary court proceedings to stamp the contents as probably obscene and to obtain authorization for an arrest and a seizure of the evidence supporting the arrest.[220]

The *Rage* court concluded that while a court is determining the question of obscenity the "peddlers and purveyors of smut"[221] could continue to sell their materials, perhaps to a greater extent due to the publicity generated by the proceeding, and the danger would exist that the material would become unavailable for the prosecution. The court held that "a seizure limited to specimens of the allegedly obscene materials to substantiate an arrest by the evidence thereof is a reasonable and not unconstitutional exercise of the police power and function."[222]

---

215 301 F. Supp. 546 (S.D.N.Y. 1969).

216 N.Y. PEN. LAW § 235.10(1) (McKinney 1967); N.Y. CODE CRIM. PROC. § 791 *et seq.* (McKinney Supp. 1970-71).

217 301 F. Supp. at 548.

218 *Id.*

219 *Id.* at 549.

220 *Id.*

221 *Id.*

222 *Id.* at 551. In ruling upon the reasonableness of the search and seizure, the

In *ABC Books, Inc. v. Benson*[223] plaintiffs sought a declaratory judgment that certain state statutes[224] were unconstitutional, and injunctive relief to prohibit their future enforcement.[225] The statutes provided two types of injunctive relief available to the prosecution.[226] Plaintiffs contended in part that the statutes were prima facie unconstitutional in not providing for a prior adversary hearing;[227] however, the court held that since such a hearing was not prohibited the statute could be constitutionally applied.[228] It was also urged that the statutes were impermissible prior restraints in that there was no provision for notice or a speedy judicial determination of obscenity prior to the ex parte issuance of the temporary injunction.[229]

Appellants argued that two recent Supreme Court cases controlled, but the court distinguished their factual settings. *Carroll v. President and Commissioners of Princess Anne*[230] involved the exercise of First Amendment rights in the realm of political expression, and the *ABC* court, citing *Quantity of Books,* noted that the issue of "timeliness" may be critical in allowing unhindered dissemination of ideas:

---

court stated:

> Possession of six specimens of a book or magazine has been made, by statute, presumptively a holding intended for commercial promotion. . . . Thus, seizure of six specimens of each title or issue alleged to be obscene and present at any one time in plaintiff's store is a reasonable and proper seizure, reasonably needed for evidentiary purposes. *Id.* at 551 (citation omitted).

223 315 F. Supp. 695 (M.D. Tenn. 1970) (3 judge court).

224 TENN. CODE ANN. §§ 39-3003, 39-3004, 39-3005, 39-3007 (Bobbs-Merrill Supp. 1970).

225 315 F. Supp. at 697.

226 The first was a criminal provision which permitted the issuance of a temporary injunction enjoining an individual from removing allegedly obscene material from the jurisdiction pending an adversary hearing on the issue of obscenity when it is believed that he has violated the provision and which requires the hearing to be "within two (2) days after joinder of issues" and following the issuance of the injunction. If an indictment issues, the material must be delivered to the court or prosecution for use as evidence. TENN. CODE ANN. § 39-3003 (Bobbs-Merrill Supp. 1970); 315 F. Supp. at 697-98 n.1. The statute further stated: "This [statute] shall not be construed to permit the seizure or suppression of any material, obscene or otherwise, such seizure or suppression to be lawful only as expressly provided by law." TENN. CODE ANN. § 39-3003 (Bobbs-Merrill Supp. 1970). The second statute was strictly a civil injunctive provision which created an action to enjoin the display or dissemination of obscene material, with the defendant entitled to a court trial within two days after issuance of the temporary injunction and joinder of issues, further providing that the court must render its decision within two days after the trial. In the event of a permanent injunction, the defendant was required to surrender all material for destruction. *Id.* § 39-3005; 315 F. Supp. at 698-99 n.3.

227 315 F. Supp. at 698-99.

228 *Id.* at 699.

229 *Id.* at 698-99.

230 393 U.S. 175 (1968) (attempted enjoinment of future white supremacy rally).

> It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely particularly topical interest.[231]

Teitel Film Corp. v. Cusack,[232] which involved state film censorship provisions imposing an unconscionable delay prior to judicial scrutiny, was distinguished on its facts.[233]

The *ABC* court found the time limit within which to initiate post-injunctive proceedings to be an adequate constitutional safeguard even though the temporary injunctions issued without notice to the parties[234] and constituted a limited prior restraint.[235] This was justified in light of *Freedman v. Maryland*[236] which involved a statute requiring the submission of films to a censorship board prior to exhibition and was devoid of the safeguards of judicial superintendence. After a discussion of the required minimal standards to avoid impermissible prior restraint,[237] it was held:

> Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. . . . to minimize the deterrent effect of an interim and possibly erroneous denial of a license.[238]

The *ABC* court held that the Tennessee provisions:

> [S]ufficiently limit the preservation of the status quo prior to an adversary hearing and final determination of the question of obscenity, as required by *Freedman*. . . . since it is constitutionally permissible for the Tennessee statutes to authorize such a limited temporary injunction, there is no necessity for a provision for notice in the statutes.[239]

In distinguishing *Carroll* the court emphasized the critical nature of timeliness in safeguarding the democratic process, as opposed to the comparatively less "topical" nature of free expression in the area of obscenity. The court should have more closely considered the broader

231 315 F. Supp. at 700, *citing* A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting).

232 390 U.S. 139 (1968) (Fifty to fifty-seven day administrative delay before initiation of judicial proceeding).

233 315 F. Supp. at 701.

234 *Id.*

235 *Id.* at 700.

236 380 U.S. 51 (1965).

237 *Id.* at 58.

238 *Id.* at 59.

239 315 F. Supp. at 701.

ramifications of the language therein. In light of the following they might have arrived at a conclusion contrary to that reached:

> There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.[240]

2. Films

The federal district courts which have been called upon to consider the question of the seizure of motion picture films, without a prior judicial determination on the issue of obscenity, have generally agreed with the circuit courts that such a procedure is constitutionally invalid.[241]

The characteristics peculiar to this mode of expression are such that, to date, the two cases which have discussed the seizure of a single print of motion picture film have held that such a seizure is indistinguishable from the "mass seizure" technique employed in the realm of publications.[242]

The approach taken by the federal district court in *Carroll v. City of Orlando*[243] is representative of the decisions of the federal district courts. Police officers seeking a search warrant for the seizure of a motion picture film presented affidavits to a municipal court judge who executed the warrant solely on the basis of these affidavits. There was no prior adversary determination on the issue of obscenity. Pursuant to the warrant a single copy of the film was seized and the exhibitor was arrested. Defendant's motion to suppress the film as evidence and to compel its return was denied.[244] Defendant-exhibitor sought relief in the federal court, which agreed to consider the matter.[245] After accepting "the general proposition that a prior adversary judicial determi-

---

240 393 U.S. at 180.

241 *See* Newman v. Conover, 313 F. Supp. 623 (N.D. Tex. 1970); Carroll v. City of Orlando, 311 F. Supp. 967 (M.D. Fla. 1970) (3 judge court); Carter v. Gautier, 305 F. Supp. 1098 (M.D. Ga. 1969) (3 judge court); Cambist Films, Inc. v. Tribell, 293 F. Supp. 407 (E.D. Ky. 1968); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

242 Carroll v. City of Orlando, 311 F. Supp. 967 (M.D. Fla. 1970) (3 judge court); Cambist Films, Inc. v. Tribell, 293 F. Supp. 407 (E.D. Ky. 1968).

243 311 F. Supp. 967 (M.D. Fla. 1970) (3 judge court) and cases cited therein.

244 *Id.* at 971-72 (App.).

245 *Id.* at 967 n.2.

nation must be made before obscene material may be seized",[246] the court stated the principal issue was "whether law enforcement officers may for the purpose of obtaining evidence for use in a criminal prosecution seize a single print of film . . . without having an adversary judicial hearing prior to the seizure."[247] Recognizing a conflict of authority[248] the court adopted the reasoning in *Bethview Amusement Corp. v. Cahn*[249] which held that, although a single item of material had been seized, the practical effect of the seizure was to deny a substantial segment of the public access to material presumptively protected by the First Amendment until proven to the contrary. The film was ordered suppressed as evidence and returned to the exhibitor, thereby effectively terminating the prosecution.[250]

Two federal district courts have unqualifiedly refused, in film cases, to require a prior adversary determination of obscenity as a prerequisite to seizure. In *Bazzell v. Gibbens*[251] owners and operators of a theater were arrested for exhibiting a film and one print was seized pursuant to a search warrant which had been issued after an ex parte proceeding to determine probable cause.[252] The only issue presented to the court was "whether or not the Constitution of the United States compels, in all cases, an adversary hearing on the question of obscenity prior to seizure of the thing alleged by the state to be obscene."[253] The court noted that circuit court decisions have relied upon *Quantity of Books* as authority for requiring adversary proceeding prior to the seizure of a motion picture film; however, the court refused to extend the rule in *Quantity of Books* beyond the facts of that case.[254] *Quantity of Books*

246 *Id.* at 968.

247 *Id.*

248 *Id.*

249 416 F.2d 410 (2d Cir. 1969).

250 311 F. Supp. at 969.

251 306 F. Supp. 1057 (E.D. La. 1969). This cause was brought in federal court pursuant to 28 U.S.C. §§ 1343(3), 1343(4) (1964) and 42 U.S.C. § 1983 (1964).

252 306 F. Supp. at 1058-59.

253 *Id.* at 1059.

254 The *Bazzell* court stated:

> [N]othing in the case law to indicate that in every case where a seizure of alleged obscene material is to be made, a pre-seizure adversary hearing is constitutionally required. Whether or not such a hearing is required must depend upon the nature and purpose of the seizure. If the seizure is made for the purpose of destroying the thing seized and for the purpose of preventing the dissemination of the material involved, then [*Quantity of Books*] teaches that an adversary hearing prior to the seizure and/or destruction of the material is required in order not to run afoul of the First Amendment guarantee to the right of freedom of expression. But where, as here, a single copy of a film is seized for the sole purpose of preserving it as evidence to be used in a criminal action to be brought pursuant to a state statute already held, in all respects pertinent hereto, to be constitutional on its face, such a

and *Delta Books* were considered distinguishable in that both involved seizures of materials in excess of that which could conceivably be required for evidentiary purposes, raising a strong inference that the seizures were to prevent dissemination.[255] In *Bazzell* the court noted:

> It is true that the seizure of the film here would prevent that particular film from being shown by the plaintiffs . . . for as long as it remained in the custody of the State officials, but that is merely a collateral effect of the seizure necessary to the criminal prosecution to follow.[256]

The court's distinction seems at best illusory in considering permissible the seizure of a single print of film for evidentiary purposes. There is an absolute disregard for the ultimate effect of the seizure. For what more effective contravention of public access can there be than to preclude the exhibitor from utilizing the print? This seems particularly true in light of *Bethview*.[257] The *Bazzell* court also notes that two circuit court decisions where films have been returned for lack of a prior adversary hearing have required the exhibitor to make a copy of the film print available to the prosecution for use in preparation for trial and at the trial itself, and concludes that there is no distinction between the prosecution obtaining the film by a court order or by seizure.[258] Again the court seems to disregard the "chilling effect" created by a seizure as opposed to allowing the film to remain in the possession of the distributor with the understanding that it will be made available to the prosecution for a limited purpose.

In *Hosey v. City of Jackson*[259] police officers visited a theater, viewed a motion picture in its entirety, then seized the film without a warrant and without a judicial determination of any kind.[260] Apparently the

---

seizure cannot be said to be violative of the First Amendment's guarantees albeit a side effect of such a seizure coincidentally prevents that one particular copy of the film from being further disseminated pending the outcome of the criminal proceedings. Unlike the situation in [*Quantity of Books*], the seizure made here was not made for the purpose of preventing the dissemination of the information contained in the film. . . . On the contrary, it was made in order to preserve the film and to use it in proceedings to decide whether or not its dissemination by these plaintiffs, or by anyone else, does in fact violate the Louisiana obscenity statute. *Id.* at 1059-60 (citations omitted).

255 *Id.* at 1060.

256 *Id.*

257 The *Bethview* decision was rendered October 6, 1969 by the Second Circuit, while *Bazzell* was rendered December 9, 1969 by a district court in the Fifth Circuit and the *Bazzell* court may have been unaware of *Bethview*. Although one circuit is not bound by another, incisive logic should not be susceptible to the impediment of arbitrary geographic boundaries nor the vagaries of temporal coincidence.

258 306 F. Supp. at 1061.

259 309 F. Supp. 527 (S.D. Miss. 1970) (3 judge court).

260 *Id.* at 529.

officers' sole guideline was their subjective opinion that it constituted obscenity, the dissemination of which was proscribed by statute. The exhibitors were arrested and subsequently convicted. State appellate proceedings were stayed pending a determination of constitutional issues by the district court.[261] In discussing whether a prior judicial determination was required the court held that "the seizure of an allegedly obscene film as incident to lawful arrests for a crime committed in the presence of arresting officers . . . does not exceed constitutional bounds in the absence of a prior judicial hearing on the question of its obscenity."[262] This reasoning is clearly contrary to every decision in the federal courts. In no prior cases were police officers permitted to effect such an arrest and seizure to absolutely bar further dissemination. The court justified this extraordinary decision on the grounds that to require a judge to attend a showing in a theater would be untenable and to require officers to obtain a judicial determination prior to seizure or order the film brought into court could result in disposal or alteration of the film.[263]

Assuming *arguendo* that a judicial hearing prior to seizure may occasionally frustrate statutory provisions concerning dissemination of obscene matter, it must be borne in mind that permeating all such provisions are the guarantees of the First Amendment, whose delicate nature have traditionally been considered transcendent to the vagaries of convenience. Though delicate in nature, these rights weigh heavily on the scales of justice and must be given priority over the possibility that an individual prosecution might be avoided.

It seems no less untenable to myopically presume that the sole means of judicial scrutiny prior to seizure is the somewhat ludicrous scenario

---

[261] *Id.* at n.2. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343(3), 1343(4), 2281, 2284 (1964) and 42 U.S.C. § 1983 (1964).

[262] 309 F. Supp. at 533.

[263] The court stated:

> [A]ny judicial hearing prior to the seizure of an allegedly obscene film at the time of exhibition would completely frustrate the purpose and operation of [the statutory provision] prohibiting the exhibition of obscene movies. Certainly, if a prior judicial hearing were required, it would be necessary for the hearing judge to view the film as exhibited on the occasion giving rise to the prosecution. To require a judge to proceed from one theater to another or attend numerous showings of a film at a particular theater with the mere possibility of viewing an obscene version is untenable. Furthermore, to require that the film be brought into Court or that arrangements be made for a private showing of the film in a particular theater provides no guarantees against the cutting or alteration of the film prior thereto. Finally, if police officers, after viewing an obscene film, were required to leave the theater in order to obtain a judicial determination on the question of obscenity by merely reporting the contents to the proper judicial officer, a judicial determination under such conditions would not only be extremely difficult and subject to error, but by the time a seizure could be made, the film might be altered or even shipped to another theater or location. *Id.* at 535.

of conveying a member of the bench hither and thither in pursuit of an allegedly obscene exhibition. An ex parte proceeding may be conducted upon the strength of verified affidavits. Should an adversary proceeding be required, this might also be satisfied through the filing of verified affidavits of all parties setting forth their contentions concerning the matter. This would be minimal satisfaction of such a requirement.

In meeting the contention that no guarantee exists to preclude the possibility of alteration or destruction of potentially damning segments of the film it is certainly within the court's authority to issue a protective order restraining such alteration or destruction. Though it is arguable that such an order might well constitute an idle gesture, such infirmity might readily be remedied through the testimony of competent witnesses.

The court's final contention clearly illustrates the policy underlying the necessity for a prior adversary judicial determination before the seizure of a motion picture film. It is the fact that an ex parte determination would be "subject to error" which compels both sides to litigate the issue of probable cause before seizure. Moreover, it is more probable there will be error when an officer is allowed to render a constitutional judgment on the question of obscenity in the field. If there is a real and apparent danger of the film being removed while a court order is being obtained then the print could undoubtedly be seized under an emergency exception.[264] Any such seizure would have to be defended at a subsequent motion to suppress the evidence.

D. California Decisions

The California position concerning the minimal requirements to justify search and seizure of allegedly obscene matter requires a narrowly drawn search warrant, supported by affidavit issued after an ex parte judicial proceeding.[265] A post-seizure adversary determination of obscenity is available before trial, as is appellate review of such determination.[266] While California has ruled upon the distinction between mass and single copy seizures of publications, it has not considered the analogy of a single print film seizure to the mass seizure of publications. California apparently does not permit indiscriminate mass seizure of

264 *See, e.g.*, Flack v. Municipal Court, 66 Cal. 2d 981, 991 n.10, 429 P.2d 192, 198 n.10, 59 Cal. Rptr. 872, 878 n.10 (1967).

265 *Id.* at 990-91, 429 P.2d at 198, 59 Cal. Rptr. at 878.

266 CAL. PEN. CODE ANN. §§ 1538.5, 1539 (West 1970); Monica Theater v. Municipal Court, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970); Childress v. Municipal Court, 8 Cal. App. 3d 611, 87 Cal. Rptr. 383 (1970).

any material.[267]

The foremost case delineating the procedural elements which must be satisfied prior to the seizure of allegedly obscene matter is *Flack v. Municipal Court*,[268] where petitioners sought a writ of mandate to compel the return of a motion picture film seized by police officers incident to an arrest.[269] There was neither an arrest nor search warrant. The court held, under procedures available at the time, that a writ of mandate would lie to compel the relief sought,[270] and then proceeded to discuss the requisite specificity and judicial superintendence necessary to the issuance of a search warrant for the seizure of material falling within the ambit of the First Amendment. The court noted that in this area civil and criminal procedures do not differ since "purported obscenity maintains, until such time as it is judicially determined to be unprotected speech, the same 'preferred position' as does free speech generally and the ordinary rules of search and seizure are inapplicable to it."[271] The court in adopting the reasoning of *Aday v. Municipal Court*[272] stated:

> While it is settled that in the ordinary case a search incident to an arrest is not "unreasonable" if the arrest itself is lawful, the First Amendment compels more restrictive rules in cases in which the arrest and search relate to alleged obscenity. The lesson . . . is that since constitutionally protected speech is involved, "*Determination by police officers* of the status of suspected books, papers, etc.—whether to be classified as obscene or not obscene—*is not enough protection* to the owner to constitute due process."
>
> Thus, with the exception of a situation involving a legitimate emergency [defined by *Aday* as arrest situations involving a high probability that evidence may be lost, destroyed, or spirited away, and may under appropriate circumstances justify seizure without a warrant] even if the search is contemporaneous with an arrest, a search warrant must be secured prior to any search for or seizure of material alleged to be obscene.[273]

---

267 People v. de Renzy, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969).

268 66 Cal. 2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (1967).

269 *Id.* at 983, 429 P.2d at 193, 59 Cal. Rptr. at 873. Relief in the form of alternative writ is no longer available to the defendant in a misdemeanor prosecution in California. CAL. PEN. CODE ANN. § 1538.5(j) (West 1970).

270 66 Cal. 2d at 985, 429 P.2d at 194, 59 Cal. Rptr. at 874.

271 *Id.* at 989, 429 P.2d 197, 59 Cal. Rptr. at 877 (citation omitted).

272 210 Cal. App. 2d 229, 26 Cal. Rptr. 576 (1962).

273 66 Cal. 2d at 990-92, 429 P.2d at 198-200, 59 Cal. Rptr. at 878-80 (cititations and footnote omitted). The court also notes the incongruity which would arise should "unfettered discretion in seizures" incident to an arrest without warrant be permitted, yet condemned if pursuant to an overly broad warrant.

The court, cognizant of the potential burden placed upon law enforcement agencies in their task of interdicting the corrosive influence obscenity exerts upon the fabric of modern society, issued the following admonition:

> [C]ourts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity. Thus, enforcement agencies must realize that there is no royal road to enforcement; hard and conscientious work is required.[274]

The California Supreme Court has not been called upon to rule whether an adversary determination of the issue of obscenity might be necessary before seizure. However, in two recent decisions,[275] the California Court of Appeal has ruled upon the safeguards provided by California compared with those of the weight of authority in the federal courts, holding the state provisions adequate. In *People v. de Renzy*[276] police officers seized two reels of allegedly obscene motion picture film pursuant to a search warrant. There had been no prior adversary determination of obscenity[277] and it may be assumed that the warrant issued upon the strength of police affidavits at an ex parte judicial proceeding. The exhibitor sought and was denied suppression of the prints and their return pursuant to the California Penal Code.[278] On appeal the superior court affirmed but, upon motion of the exhibitor, certified a transfer to the court of appeal to determine the force and effect of *Metzger v. Pearcy*[279] on California law. The court agreed to hear the matter stating the sole issue as "whether, even under an otherwise valid search warrant, such matter may be seized without a prior determination of obscenity at an adversary judicial proceeding."[280] The exhibitor contended "as an absolute rule that there may be no seizure of matter, although established by oath or affirmation to the satisfaction of a magistrate as probably obscene, without a prior adversary judicial proceeding."[281] The court noted that, while lower federal court decisions were

274 *Id.* at 993, 429 P.2d at 200, 59 Cal. Rptr. at 880, *quoting* Jacobellis v. Ohio, 378 U.S. 184, 202 (1964) (Warren, C.J., dissenting).

275 Monica Theater v. Municipal Court, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970); People v. de Renzy, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969).

276 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969).

277 *Id.* at 383, 79 Cal. Rptr. at 778.

278 CAL. PEN. CODE ANN. §§ 1538.5 (West 1970).

279 393 F.2d 202 (7th Cir. 1968).

280 275 Cal. App. 2d at 383, 79 Cal. Rptr. at 778.

281 *Id.*

entitled to great respect, they were not binding authority on the states, even on constitutional matters.[282] It was of the opinion that while caution was necessary in the preservation of the integrity of constitutional guarantees

> [w]e must nevertheless not interpret [First and Fourth Amendments] in such a manner as to deny to California the power to enforce its obscenity laws. Any construction of a constitutionally granted right which *prevents* the enforcement of a constitutionally enacted criminal statute is itself a constitutional impairment.[283]

In declining to follow what may be considered the federal approach, the court set forth the following reasons:

> If the rule argued for by [the exhibitor] be the law, then California's law enforcement authorities, . . . are faced with a curious dilemma. They are permitted by the state and federal Constitutions, and directed by statute, to enforce the state's obscenity laws. On the other hand they may not seize alleged obscene materials, even under a search warrant, without a prior adversary proceeding. Any court process designed to compel production of the questioned material would obviously impinge upon the possessor's Fifth Amendment rights. Thus, although seizure of obscene material is conditioned upon a prior adversary hearing, the state would be without power to produce the evidence essential to that hearing. This result is unreasonable and should be avoided. We recognize that there may be circumstances where, by fortuity, obscene matter may be produced by the state without need of search or seizure or court process, e.g., books offered for public sale. In such cases any seizure without prior adversary proceedings obviously would be constitutionally impermissible. But we do not believe that enforcement of a vital state criminal statute must necessarily rest upon some chance windfall of evidence.[284]

Distinguishing *Metzger* the court discussed the fact that reliance in that decision was placed upon *Quantity of Books* and *Marcus*, each of which involved mass seizures of all copies of particular publications. The court stated:

> Nothing is found in *Metzger*, *Books* or *Marcus* that condemns a narrow, discriminating seizure, under a search warrant issued upon a reasonable finding of probable cause therefor by a magistrate, of so much obscene material as is reasonably necessary for a later adversary proceeding.[285]

---

282 *Id.*, *citing* People v. Willard, 238 Cal. App. 2d 292, 305, 47 Cal. Rptr. 734, 742-43 (1965); *see* Stock v. Plunkett, 181 Cal. 193, 194-95, 183 P. 657 (1919).

283 275 Cal. App. 2d at 384, 79 Cal. Rptr. at 779.

284 *Id.* at 384, 79 Cal. Rptr. at 779 (citation omitted).

285 *Id.* at 386, 79 Cal. Rptr. at 780.

It is suggested that the *Metzger* court recognized the necessity for the prosecution to obtain copies of the material under consideration in that a print of the film was ordered to be given to the prosecutor for use in the pending trial. The court then stated:

> [L]aw enforcement officers, acting under authority of a search warrant, may seize at least one copy of an alleged obscene . . . material when necessary for use as evidence in a later adversary proceeding, without doing violence to the First or Fourth Amendment.[286]

The *de Renzy* court based its decision upon the distinction between mass seizures of publications as opposed to a single print of film, as well as the potential denial of essential evidence to the prosecution, the inadequacy of state procedural safeguards and Fifth Amendment considerations concerning compulsory production of evidence. As previously noted the seizure of a single print of film may be virtually indistinguishable, in its ultimate effect, from a mass seizure of other material in that both situations involve substantial curtailment of public access.

Monica Theater v. Municipal Court,[287] the most recent California decision to consider a prior adversary determination of obscenity, presents a more detailed analysis of the statutory provisions and their rationale. In *Monica* a search warrant was prepared for the seizure of a single print of commercially exhibited motion picture film. The warrant was subsequently signed and issued by a judge of the Municipal Court relying solely upon the affidavit which accompanied the warrant. Criminal proceedings were instituted against the exhibitor who promptly moved to quash the search warrant and obtain the suppression and return of the film seized.[288] A hearing was held in the municipal court thirteen days after seizure at which time the supporting affidavit and declarations of the defendant and his attorney were received in evidence. The affiant and the district attorney who assisted in preparing the warrant were cross-examined, the film seized was viewed and admitted in evidence, and comparable material offered by the defendant was viewed.[289] It was the contention of the defendant that the procedure prior to issuance of the warrant was deficient since there had been no

286 *Id.* at 386, 79 Cal. Rptr. at 780.

287 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970).

288 *Id.* at 4-5, 88 Cal. Rptr. at 72-73. The warrant was issued on November 22, 1967.

289 *Id.* at 6, 88 Cal. Rptr. at 73-74. The defense submitted films of a comparable nature which had previously been found not to be obscene, as well as one which had not been adjudicated which the defense urged was obscene. While the court viewed these, none were introduced into evidence.

prior adversary hearing on the issue of obscenity, the magistrate had not viewed the film, the description of the film in the affidavit was inadequate, the officer did not evaluate the film applying contemporary community standards and customary limits of candor, and the hearing established the officer had incorrectly described the film. Probable cause, the defendant argued, was not established for its seizure. The court rejected each contention of the defendant and found the seizure to be valid.[290]

One month later the defendant filed a petition for a writ of mandate in the superior court raising the same points urged at the previous hearing and further alleging that the procedures followed constituted a prior restraint, a denial of due process, and a constitutionally impermissible seizure. The superior court issued an alternative writ and 75 days later, upon hearing, ruled in favor of the prosecution and found that the procedure followed was sufficient to establish probable cause. On appeal, defendant contended:[291]

> 1. The issuance of the warrant for and the seizure of the motion picture film and the photographs without a prewarrant adversary proceeding or ex parte view of the material violated the free speech, due process, and seizure provisions of the Constitutions of the United States and California.
>
> 2. The issuance of the warrant and the seizure of the film and photographs, solely in reliance upon the affidavit of [the officer], which was allegedly conclusional and formulated under unconstitutional standards, was violative of all of said constitutional provisions.
>
> 3. The failure of the People, at the probable cause hearing before the magistrate, to adduce any evidence that the film goes beyond customary limits of candor in the description of sex matters, appeals to the prurient interests of the average person, and is utterly without redeeming social importance, renders the continued holding of the film violative of said constitutional provisions.
>
> * * * * *
>
> 5. The warrant, seizure, hearing and review procedures pursued in the instant case did not provide a speedy determination of the question of whether the film and photographs were protected by or excepted from free speech provisions of the Constitution.

The court concluded, in an opinion delivered *944 days after the initial seizure*[292] that:

---

290 *Id.* at 6, 88 Cal. Rptr. at 74.

291 *Id.* at 7-8, 88 Cal. Rptr. at 74-75 (footnote omitted).

292 Certified and filed for publication on June 23, 1970, by the Second Appellate

> In California, by means of a section 1538.5 motion, *a very prompt adversary judicial proceeding can be secured.* . . . Conceivably the review of the initial nonadversary judicial evaluation or a de novo consideration can be under way within 24 hours, or less, of the seizure. The section does not specify a time within which the magistrate must rule, *but he will be aware of the prior restraint doctrine* particularly applicable to films currently being shown *and of the need to rule promptly in order to be in harmony therewith* and not to jeopardize his ruling. (emphasis added)[293]

The court was of the opinion that the only issue before it was the question of probable cause and not the procedures for conducting a pretrial on-the-merits determination of obscenity, although it concluded the latter was available to a defendant.[294] The court noted where there is a challenge based upon lack of probable cause for issuance of a warrant or a blatant violation of federal or state constitutional standards, a motion under section 1538.5 is the exclusive remedy for the return or suppression of property.[295]

The *Monica* court expressed the view that no United States Supreme Court decision had squarely dealt with the issue of pre-warrant adversary hearings or an ex parte viewing of the film by the issuing magistrate. Instead it turned to *Flack* and *de Renzy,* distinguishing the former and relying upon the conclusion in the latter that "an adversary proceeding and view of the film are promptly and readily obtainable after the issuance of a warrant through the medium of a section 1538.5 motion."[296] The court discussed the California procedures in light of

---

District, Division Five, of the Court of Appeal (2d Civ. No. 33606). *Id.* at 1, 88 Cal. Rptr. at 71. It should be noted that the film was not released during this period.

293 9 Cal. App. 3d at 14, 88 Cal. Rptr. at 80 (footnote omitted). The court does note that the defendant pursued appellate review in an improper manner. This may have contributed to the 75 day delay before resolution of the matter in the Superior Court. The court is silent, however, as to the ensuing 814 day time lapse at the appellate level. Also, the court was quite explicit in expressing that it dealt with a misdemeanor concerning a film.

294 *Id.* at 8-9, 88 Cal. Rptr. at 75-76. *See also* Id. at 9 n.7, 88 Cal. Rptr. at 76 n.7.

295 *Id.* at 10-11, 88 Cal. Rptr. at 77, *citing* Childress v. Municipal Court, 8 Cal. App. 3d 611, 87 Cal. Rptr. 383 (1970). CAL. PEN. CODE ANN. § 1538.5(a)(2) & (m) (West 1970). Parenthetically, the court discusses the avenues of review available from an adverse ruling on a 1538.5 motion, concluding that in a misdemeanor prosecution both the People and the defense have the right to an appeal, whereas, in a felony prosecution, a writ of mandate or prohibition lies, directed to the Court of Appeal. 9 Cal. App. 3d at 11-12, 88 Cal. Rptr. at 78. There may be a qualification to the foregoing where an alternative writ may lie for the defense upon a showing of undue hardship imposed due to the unavailability of a duplicate print of film. *Id.* at 12, 88 Cal. Rptr. at 78.

296 9 Cal. App. 3d at 13, 88 Cal. Rptr. at 79.

Freedman v. Maryland[297] and concluded that its provisions were not contrary to the spirit of this decision,[298] in that initial consideration was by a judge knowledgeable in the law and sensitive to the protection of constitutional guarantees. Special considerations were noted. In the event the exhibitor possessed only one copy of the film, release could not be effected until expiration of the time for the prosecution's appeal (ten days) from an adverse ruling on a section 1538.5 motion. In such instances, the exhibitor may be entitled to an alternative writ or preference on appeal.[299] This would not seem to lessen the "chilling effect" of the proceeding in that the exhibitor might still be subject to further arrests and seizures for future showings of the same film.

The court refused to follow the line of federal authority in that "[t]hese noncontrolling decisions are not sufficiently persuasive to require a ruling that the present California system . . . is unconstitutional."[300] In particular, the court distinguished *Demich, Inc. v. Ferdon*[301] noting that the court of appeals did not consider the adequacy of the California statutory provisions, and adopted the reasoning of the dissenting opinion. Not only did the court feel that the potential prior restraint was brief, it found the California pre-warrant procedure adequate:

> [O]ne or more affidavits submitted to the magistrate in support of a request for a seizure warrant can be composed in a manner to focus searchingly on the question of obscenity. Detailed pictorial word descriptions of the continuity of the film plus the opinions of experts, whose qualifications are adequately given, can serve this purpose initially.[302]

While the foregoing may be true, the court itself indicated that the affidavit upon which the warrant was based was "not exactly overpowering, particularly with respect to the officer's expertise and knowledge of contemporary standards and limits of candor."[303] It must be noted the court found language in the affidavit "which would support an inference by the magistrate" that the affiant was sufficiently qualified to render an opinion as to the obscene nature of the matter.[304] The lan-

---

297 380 U.S. 51 (1965).

298 It was noted that in one Maryland case "the initial determination took four months and the final vindication on appellate review after six months." 9 Cal. App. 3d at 14, 88 Cal. Rptr. at 79-80. Contrast this with the length of time required for final determination in *Monica*.

299 *Id.* at 15 n.18, 88 Cal. Rptr. at 80 n.18.

300 *Id.* at 16, 88 Cal. Rptr. at 81.

301 426 F.2d 643 (9th Cir. 1970).

302 9 Cal. App. 3d at 16, 88 Cal. Rptr. at 82.

303 *Id.* at 16-17 n.19, 88 Cal. Rptr. at 82 n.19.

304 *Id.*

guage upon which the court relied was the officer's description of the film as "candid" and his allusion to "the meaning of the . . . opinions of the United States Supreme Court,"[305] buttressed by the magistrate's personal familiarity with the officer. Extending this logic, it seems some degree of familiarity with the affiant combined with conclusory allegations capable of supporting an inference of expertise could be sufficient to establish the probable cause necessary to justify a seizure. Such a holding seems clearly unsupportable in light of *Marcus v. Search Warrants of Property*.[306] The *Monica* court then proceeded to excuse the necessity of providing guidelines for the issuing magistrate by which he may judge the probable obscene nature of the questioned matter:

> [W]e feel that at the probable cause level a magistrate, certainly one serving in an area as exposed to the broad scope of the entertainment media as West Hollywood, would know by what standards the law requires allegedly obscene material to be gauged, would have some knowledge about contemporary standards and customary limits of candor, and would apply such knowledge when evaluating fact recitals in an affidavit.[307]

This statement, though seemingly contrary to the *Giannini* requirement of expert testimony[308] was distinguished in that *Giannini* involved an actual trial and not merely the issue of probable cause.[309] However, in *Giannini* it seems the California Supreme Court was establishing a broader principle when it stated:

> . . . the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards."
>
> Moreover, since we designate the State of California as the relevant "community" . . . we cannot realistically expect the trier of fact to understand intuitively how the community as a whole would react to allegedly obscene material.[310]

---

305 *Id.*

306 367 U.S. 717 (1961). Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene. *Id.* at 731-32.

307 9 Cal. App. 3d at 17, 88 Cal. Rptr. at 82 (footnote omitted).

308 69 Cal. 2d 563, 574, 446 P.2d 535, 543, 72 Cal. Rptr. 655, 663 (1968).

309 9 Cal. App. 3d at 17 n.20, 88 Cal. Rptr. at 82 n.20.

310 69 Cal. 2d at 575-76, 446 P.2d at 544, 72 Cal. Rptr. at 664 (footnote omitted), *quoting in part* Smith v. California, 361 U.S. 147 (1959). *Accord*, 9 Cal. App. 3d 1, 21, 88 Cal. Rptr. 71, 85 (1970) (dissenting opinion).

If a statewide standard is to be applied, then the magistrate in West Hollywood would be no more qualified than the magistrate in Weed since neither would reach a determination based upon anything but the standards and limits of candor in his particular community. Although the West Hollywood area may be somewhat more urbane and sophisticated than others, and perhaps certain magistrates may be subjected to a higher degree of exposure to such material, with the advent of the statewide community this type of determination is no longer permissible. The court declined to discuss whether and to what extent evidence may be offered, at a probable cause hearing after seizure, to the issues of contemporary standards and limits of candor. If the court is implying that a determination of obscenity is not forthcoming at this hearing then the speedy remedies available under the California statutes are illusory at best. As to the requisite burden on the issue of probable cause, the *Monica* court stated:

> [T]he question would be whether a person of ordinary intelligence and receptivity would conscientiously entertain a strong suspicion that the material had any of the listed characteristics.[311]

It should be noted that, although it is highly probable the court intended no such result, a literal application of this language would endanger a substantial element of constitutionally protected expression. For if all that is requisite to create probable cause sufficient for seizure is the conscientious entertainment of a strong suspicion that *any* of the characteristics are present in the mind of a person of ordinary intelligence and receptivity, many motion picture, radio, and television broadcasts, as well as many political publications and newspapers, could be subject to seizure.

Exception must be taken with the holding in *Monica* and particularly with the court's reasoning. In setting forth the relevant provisions of section 1538.5, the court deleted certain language which is important to a full understanding of the statute. The statutory language of subsection (a) follows, with omission by the court italicized:

> A defendant may move for the return of property or to suppress as evidence any *tangible or intangible* thing obtained as a result of a *search or* seizure on either of the following grounds:
>
> (1) *The search or seizure without a warrant was unreasonable;*
>
> (2) The *search or* seizure *with a warrant* was unreasonable because (i) *the warrant is insufficient on its face;* (ii) *the property or evidence obtained is not that described in the warrant*; (iii) there was not

[311] 9 Cal. App. 3d at 20, 88 Cal. Rptr. at 84.

> probable cause for the issuance of the warrant; (iv) *the method of execution of the warrant violated federal or state constitutional standards;* or (v) there was any *other* violation of *federal or state* constitutional standards.[312]

Initially it may be noted that the statute seems to distinguish between a search and a seizure. That such a distinction exists was alluded to by the court in *Demich,*[313] which stated that while probable cause may be shown ex parte by means of affidavits, a prior adversary hearing is required before seizure.[314] Since the usual film seizure is pursuant to a warrant the omission of subsection (1) will not be discussed. There is always the possibility that the warrant will be insufficient on its face in that the film described may not contain any pornographic matter, in which case it would be protected as a matter of law. Further, if the description in the affidavit is at variance with the film seized, a challenge may be successful on the basis of subsection (ii). Most important, the deletion of subsection (iv) begs the very question before the court, *i.e.* whether the execution of the warrant without a prior adversary judicial determination of obscenity is constitutionally impermissible. By inclusion of this section the Legislature recognized the constitutional considerations inherent in determining the validity of a particular search.

The *Monica* court stated that a review of an ex parte determination of obscenity "can be underway within 24 hours, or less, of the seizure";[315] however, this seems highly improbable within the framework of section 1538.5. Although there is provision, in a felony proceeding, for a hearing on the motion "prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time,"[316] no such provision is included for misdemeanor prosecutions. While the *Monica* court indicates, "[the magistrate] will be aware of the prior restraint doctrine particularly applicable to films currently being shown and of the need to rule promptly in order to be in harmony therewith and not to jeopardize his ruling,"[317] this does not necessarily follow. Although the court is of the opinion that the "open-ended" nature of the 1538.5 procedure is not violative of the precepts of *Freedman v. Maryland,*[318]

---

312 CAL. PEN. CODE ANN. § 1538.5(a) (West 1970).

313 426 F.2d 643 (9th Cir. 1970).

314 *Id.* at 646.

315 9 Cal. App. 3d at 14, 88 Cal. Rptr. at 80 (footnote omitted).

316 CAL. PEN. CODE ANN. § 1538.5(i) (West 1970). It should be noted that there is no limit on the time which may elapse, this apparently being within the sole discretion of the court.

317 9 Cal. App. 3d at 14, 88 Cal. Rptr. at 80.

318 380 U.S. 51 (1965).

it seems that the California provisions are patently offensive both to the spirit and the letter of the law as enunciated by the United States Supreme Court. To vest in an inferior court virtually absolute discretion in determining the calendar date for a 1538.5 motion seems as unconscionable as it is untenable. *Freedman* stated unequivocally that " '[a]ny system of prior restraints of expression bears . . . a heavy presumption against its constitutional validity.' . . . '[U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity.' "[319] Further, discussing a Maryland procedure, the Court stated:

> [T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. *Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.* (emphasis added)[320]

The *Monica* court distinguished between a hearing pursuant to section 1538.5(a) and proceedings brought under 1538.5(n)[321] noting that the former is a probable cause hearing while the latter may be a pretrial on-the-merits determination of obscenity. If this in fact is the case, then the "judicial determination on the merits" compelled by *Freedman* may not be held until after the people have exhausted their appellate remedies from a granting of defendant's motion under section 1538.5(a). It seems inconceivable that this would preserve the status quo for the shortest fixed period of time.

The California provision has the effect of placing the burden upon the exhibitor, at every stage of the proceeding, of removing the stigma of prior restraint. At no time are the people called upon to defend their action except upon motion of the defense.[322] Not only must the defense move for suppression and return of the evidence (a hearing to follow at an uncertain date) but, should the motion be successful, the defense must endure an additional delay of ten days pending the people's

---

319 *Id.* at 57 (citations omitted).

320 *Id.* at 58-59.

321 CAL. PEN. CODE ANN. § 1538.5(n) (West 1970) states: "Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions . . . ."

322 CAL. PEN. CODE ANN. § 1538.5(a) (West 1970). *Cf.* Blount v. Rizzi, 39 U.S.L.W. 4120 (U.S. Jan. 14, 1971).

decision whether to bring an appeal.[323] The effect of this further restraint is minimal in comparison to the potential for further sequestration of the material. Should the people pursue their appeal rights the film is retained pending the outcome. Although *Monica* indicated the defense may pursue a writ of mandate in circumstances of undue hardship, this right may be illusory due to its discretionary nature. Further, the consequent monetary and temporal burden imposed upon the defense is inconsistent with the fundamental abhorrence of prior restraint upon free expression. The *Monica* court apparently perceived no inequity in permitting the fortuitous coalescence of conclusory allegations and personal acquaintance to raise a mere inference to the level of probable cause, thereby thrusting the exhibitor into a maelstrom of litigation and effectively barring public access to material as yet not deemed unworthy of constitutional protection on the basis of a proceeding devoid of constitutional safeguards.

In the rather unique circumstance where the exhibitor has been deprived of the material through seizure and criminal proceedings have not been initiated, if he desires its return no relief is available under 1538.5 since this section is restricted to "defendants". Rather, he must undertake an action in the superior court pursuant to other statutory provisions[324] which lack procedures for expeditious determination. Although such matters as this usually receive some degree of priority there is no explicit statutory compulsion, and the matter is therefore left to the discretion of the court. Should the exhibitor be unsuccessful in his motion for the return of his property, his only remedy would be that of an extraordinary writ to the court of appeal. Throughout this period the exhibitor is denied the benefit of use of the material. This denial of public access is an effective form of censorship. This would also seem to create an impermissible prior restraint, since, at the time the exhibitor brings his action, the state has not chosen the course of action it intends to pursue. Should the exhibitor subsequently become a criminal defendant he may be in the unenviable position of pursuing two actions—the extraordinary writ and a motion pursuant to 1538.5. It would seem the latter motion would be made for both suppression and return. Though the prosecution might oppose this additional attempt for return, claiming the exhibitor has had his day in court and the matter is in the appellate process, this would be rather effectively rebutted by the interim change in posture from petitioner to "defendant". Further,

323 *Id.* § 1538.5(e).
324 *Id.* §§ 1539-40.

should the ruling on the 1538.5 motion conflict with the writ, the former would seem to control (subject to appeal rights of the adversely affected party) due to the change in circumstance. That a procedure exists which may subject an individual to such extraordinary inconvenience and expense, merely upon the strength of an affidavit supportive of an inference that probable cause exists, seems contrary to the principle of fundamental fairness upon which our system of jurisprudence is said to have its foundation.

It is submitted that the California procedures do not afford adequate safeguards for an expeditious determination of obscenity without a concomitant impermissible prior restraint. So long as criminal sanctions are to be imposed, the bifurcated procedure which permits an ex parte judicial determination prior to the issuance of a search warrant followed by an adversary hearing prior to seizure seems to satisfy best the requirements of the Federal and State Constitutions. In those cases where commercially disseminated material is the subject of the action there may be no "search" stage to the proceeding since generally the material will have been previously viewed by the affiant and only the seizure remains. At this juncture notice must be afforded the parties and an adversary proceeding must ensue. Nothing less than this will avoid an impermissible prior restraint. On the other hand, where the subject of the action has not been disseminated and a search is necessary to ascertain the exact nature of the material, the bifurcated approach must be utilized.

IV. Fifth Amendment Considerations

Permeating virtually every procedure suggested by courts which have attempted to satisfy the demands of the First and Fourth Amendments has been an awareness of possible infringement upon the Fifth Amendment privilege against self-incrimination. Various aspects of this problem, in the context of compulsory production of allegedly obscene material at an adversary proceeding, will be noted.

That the Fifth Amendment, granting one the privilege to decline to testify in a criminal proceeding, is applicable to the states was settled by *Malloy v. Hogan* in 1964.[325] The limits of this privilege have been delineated in *Schmerber v. California*,[326] where a blood

[325] 378 U.S. 1 (1964). In *Malloy*, the Court stated:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence. *Id.* at 8.

[326] 384 U.S. 757 (1966).

sample was taken from a drunk driving suspect in spite of his protest and admitted into evidence at a subsequent trial. The Court held:

> [T]he privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . . But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though . . . such acts are compelled to obtain the testimony of others.[327]

A further clarification of "testimonial" and "non-testimonial" evidence was made by the Court:

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony", but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.[328]

The crux of the problem is whether compulsory production of allegedly obscene material is merely the source of "real or physical" evidence, or is material of a "testimonial or communicative" nature. The answer depends upon the factual setting in which the question is presented. A review of the "real or physical" examples presented in *Schmerber* reveals that these are facts of an independent physical nature which are not themselves the subject of the action. In the area of obscenity the material itself is the subject of the judicial proceeding and has the attributes of contraband the moment it is alleged to fall within the purview of the proscriptive provision.

A determination of the characteristics of the material involved and their evidentiary impact is necessary. *Schmerber* holds that the Fifth Amendment guarantees the accused the right not to testify against himself "or otherwise provide the State with evidence of a testimonial or communicative nature"[329] while excluding certain "non-communi-

---

327 *Id.* at 761 & n.5.

328 *Id.* at 763-64 (citation and footnote omitted); *see also* Holt v. United States, 218 U.S. 245 (1910).

329 384 U.S. at 761 (footnote omitted).

cative acts".[330] In compelling the production of suspect material at *any* adversary proceeding to determine the issue of obscenity, it is clear that the State contemplates further action and that this material will provide a "link in the chain" of evidence (as in the case of the extraction and analysis of blood) necessary for imposition of sanctions. The *Schmerber* plurality indulges in a remarkable exercise in semantic gymnastics seemingly in an attempt to reason back from a conclusion based upon public policy[331] in which they justify a defendant's compulsory production of the most damning piece of evidence available on the ground that:

> Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved . . . [h]is participation, except as donor, was irrelevant to the results . . . which depend on [expert] analysis and on that alone. Since the . . . evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.[332]

It seems inconceivable that the Court could conclude that such an intrusion by the state could be considered anything but compulsory production of evidence of a communicative nature. The dissent states a more tenable position in noting that:

> The sole purpose of this project . . . was to obtain "testimony" from some person to [establish guilt] . . . the purpose of the project was certainly "communicative" in that the analysis . . . was to supply information to enable a witness to communicate to the court and jury [guilt].[333]

The foregoing is no less applicable to films and publications. The compulsory production of the material for judicial scrutiny, and expert analysis, gives it a testimonial and communicative capacity. As previously mentioned, the moment it is alleged that the material is obscene, it assumes the nature of contraband and is itself on "trial". As elementary as it may seem, just as the defendant in *Schmerber* was on trial so was his blood. The composition of the blood at the time of the alleged transgression, not at the moment of trial, was at issue. The only individual who had the ability to disclose this information was the defendant. He was compelled to produce this information for analysis and consideration by a third party. The analogous situation exists in the case of obscene films or publications where the only individual possessing

330 *Id.* at n.5.
331 *Id.* at 761-62.
332 *Id.* at 765 (footnote omitted).
333 *Id.* at 774 (Black, J., dissenting).

the information is required to produce the primary source of his potential guilt. The only distinction is one of form. While the former represents compelled production of material for chemical analysis, the result of which would represent the ultimate question bearing upon guilt, the latter would require production of the means by which a sociological-psychological analysis would be undertaken, the result of which would represent the ultimate question determinative of prosecution. The argument invariably to be raised concerning a film or publication already in existence is that it represents an independent physical entity much akin to a fingerprint, photograph or handwriting. However, it must be remembered that such "non-testimonial" items are generally already in the possession of the prosecution, the additional sample being required merely for comparison. Should production of the material be compelled, the disseminator would be forced to produce the primary evidence of his potential guilt.

Some may argue a distinction between films and publications which have been commercially exhibited or disseminated and those awaiting distribution. By making such materials readily accessible to the public and law enforcement agencies, it may be argued, he indicates that the distribution has been undertaken only after balancing the potential risk involved. Therefore, he may be said to have waived his Fifth Amendment right. On the other hand it might be argued that the individual who merely warehouses or otherwise collects the material for ultimate distribution has not so waived this privilege since he may still exercise his judgment against dissemination. A compulsory production of such material would be analogous to the compulsory production of private books and papers.[334] However there is no constitutional significance to this distinction. That extrajudicial conduct in the exercise of business judgment on the part of the distributor may be taken as an irrevocable waiver of a constitutional right seems untenable. Were this to be accepted it would be equally permissible for the State to compel the reiteration of a speech already given in public over the express invocation of the Fifth Amendment privilege on the ground that the content of such speech was the ultimate question presented for determination in a criminal proceeding.

It is therefore submitted that any compulsion exerted upon an individual to supply material, the analysis of which is determinative of the criminal proceeding, is a compulsion to produce "evidence of a testimonial or communicative nature" in violation of Fifth Amendment

334 Boyd v. United States, 116 U.S. 616, 634 (1886).

guarantees.

In the context of an adversary hearing prior to seizure, in which production of the material is not compelled by court order, the exhibitor-distributor may be left no practical alternative but to produce the questioned material to rebut its depiction as obscene. Such rebuttal might also require presentation of testimonial evidence on behalf of the material. The question then becomes whether such an offering is admissible against the exhibitor-distributor in a subsequent criminal proceeding. In light of *Simmons v. United States*[335] it appears the answer is in the negative. In holding that an individual's exercise of privileges available through the Fourth Amendment could not be considered a waiver of his Fifth Amendment privilege, the Court stated "we find it intolerable that one constitutional right should have to be surrendered in order to assert another".[336] The Court's rationale may also be extended to First Amendment rights. In discussing the prior practice of considering as admissible "voluntary" and uncompelled testimony, the Court states:

> A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created.[337]

In the framework of an adversary hearing to justify exercise of First Amendment privileges, a surrender of Fifth Amendment privileges might otherwise be required, thereby creating a classic example of the "damned if you do damned if you don't" dilemma.

The principles which underlie the *Simmons* rationale are no less compelling in the California 1538.5 procedure. Although the material may be in possession of the state, any testimony offered by the defendant should be for the limited purposes of that proceeding only and inadmissible in any subsequent proceeding arising out of the seizure.

The requirement in *Metzger* and *Tyrone* that a copy of the illegally seized film be made available to the prosecution for the preparation and trial of the action, and the suggestion in *Bethview* that a subpoena

335 390 U.S. 377 (1968).
336 *Id.* at 394.
337 *Id.* at 393-94 (footnotes omitted).

duces tecum be utilized for the same purpose, are unrealistic in light of the foregoing discussion. It is illogical to say that the state may obtain by court order that which it cannot obtain without a prior adversary hearing. If it could, the appropriate procedure would never be invoked. Moreover the same principles which operate to preclude such production at the trial stage are also applicable to the pre-trial stage. The only conceivable use of the material is for an analysis which would be introduced into evidence by the state to establish the defendant's guilt. It is equally incongruous to advance the theory that compulsory production at this level is not contrary to the spirit of the Fifth Amendment.

Some federal decisions have stated that an adversary proceeding must not only be conducted prior to seizure, but to arrest as well.[338] Such a suggestion is highly unusual and controversial. Others assume the contrary, more traditional posture.[339] This conflict presents a difficult and somewhat delicate problem. Prior discussion has focused upon the chilling effect and impact upon public access exerted by seizure of allegedly obscene material, whereas in the area of arrest the problem is the seizure of the individual who possesses the material. The former concerns interference with commercial freedom, the latter with personal freedom. There seems little doubt that such an arrest may create an ultimate "chilling" of public access, since the threat of incarceration with its attendant expense might well deter individuals from exercising these rights. If mixed questions of constitutional law and fact are presented which preclude the magistrate from making an ex parte determination of probable cause for seizure of material, elementary logic compels the conclusion that this must also preclude the seizure of an individual. However, tempering logic with practical considerations, it would be quite absurd in any other area of suspected criminal conduct to require law enforcement officials to contact a suspect and request his voluntary appearance before a magistrate to discuss whether or not he should be arrested. So long as the exercise of First Amendment rights in this area involves potential criminal proceedings this virtually insoluble conflict will exist.

V. Res Judicata and Collateral Estoppel

A. Background and Development

The obscenity prosecution generally involves multiple prosecutions

338 City News Center, Inc. v. Carson, 310 F. Supp. 1018 (M.D. Fla. 1970); Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969) (3 judge court).

339 Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969)

concerning the same material within a given jurisdiction. Thus, the potential for harrassment of an individual presents substantial problems and a framework within which the concepts of res judicata and collateral estoppel may be operative.[340] What is to many the best known and most frequently used expression of the concepts, and the distinction to be drawn is found in *Cromwell v. County of Sac*:[341]

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel *only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.*[342]

Res judicata operates to preclude parties from relitigating identical issues arising from the same transaction in a proceeding subsequent to one in which final determination has been rendered as to those issues. The concept of collateral estoppel differs from that of res judicata in that a different cause of action is pursued. Those issues previously determined, which are again controverted, may not be relitigated by one upon whom such determination is binding. The rule has been stated as follows:

> Where collateral estoppel is involved between the same parties as those to the original suit the one who claims its benefit (proponent) must show that the very fact or point now in issue was, in the former action, (1) litigated by the parties; (2) determined by the tribunal; and (3) necessarily so determined.[343]

Although most commonly utilized in the area of civil litigation, the

---

(3 judge court), *aff'd*, 397 U.S. 98 (1970); Rage Books, Inc. v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969).

340 *See* F. JAMES, JR., CIVIL PROCEDURE 549-610 (1965); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952). It should be noted that these concepts are applicable to civil actions concerning allegedly obscene matter.

341 94 U.S. (4 Otto) 351 (1876); *see* F. JAMES, JR., *supra* note 340, at 549-52.

342 94 U.S. (4 Otto) at 352-53; *contra*, CAL. VEH. CODE ANN. § 40834 (West 1968).

343 F. JAMES, JR., *supra* note 340, at 576 (footnote omitted).

application of the concepts of res judicata and collateral estoppel to criminal actions is no longer subject to question. In what is considered to be the landmark decision extending these principles to the area of criminal law, *United States v. Oppenheimer*,[344] the reasoning of an earlier English decision[345] was adopted:

> Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.[346]

The earlier decisions stated the requirement that the "same parties" were requisite to the application of these principles. This approach, termed "mutuality", has been the subject of increasing controversy in recent years, with federal and state decisions in conflict.[347] California rejected the mutuality requirement as to who may assert the plea in *Bernhard v. Bank of America*:[348]

> No satisfactory rationalization has been advanced for the requirement of mutuality. . . . Many courts have abandoned the requirement . . . and confined the requirement of privity to the party against whom the plea of res judicata is asserted . . . . The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.
>
> In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[349]

More recently, a federal court in *United States v. United Air Lines, Inc.*[350] relying upon *Bernhard*, held:

> While it is true that the general rule requires that there be identity of parties to invoke the doctrine of *res judicata*, nevertheless, the Courts, increasingly so in the last 20 years, have not adhered to that doc-

344 242 U.S. 85 (1916). *See also* Coffey v. United States, 116 U.S. 436, 445 (1886).

345 242 U.S. at 88, *quoting* the Queen v. Miles, 24 Q.B.D. 423, 431 (1890).

346 *Id.*

347 Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 38-46 (1965); *see also* F. JAMES, JR., *supra* note 340, at 603-10.

348 19 Cal. 2d 807, 122 P.2d 892 (1942).

349 *Id.* at 812-13, 122 P.2d at 895. *See also* Teitlebaum Furs, Inc. v. Dominion Ins. Co., Ltd., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962).

350 216 F. Supp. 709 (D. Nev. 1962) (Civil).

> trine, and have held that no constitutional right is violated where *the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and did actually litigate it.*[351]

Whether mutuality is requisite to interposing such a plea in a criminal action has also been the subject of some doubt. However, it seems this doubt may well have been laid to rest in *Ashe v. Swenson*,[352] wherein the Court states as a "rule of federal law":

> [I]t is much too late to suggest that this principle [collateral estoppel] is not fully applicable to a former judgment in a criminal case, either because of lack of "mutuality" or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain.[353]

As the decision infers, the question has arisen in both criminal and civil proceedings whether the ultimate determination of a fact may be used as conclusive of some intermediate step in establishing this fact.[354] It is significant to note that the literal import of the preceding may well be to establish as a "rule of federal law", that the ultimate determination of a fact is of necessity conclusive as to those intermediate facts necessary to establish that ultimate fact. Phrased differently, in a subsequent action the final determination of a fact may be raised as conclusive of all subordinate facts by which it is established, thereby estopping their relitigation as well. In the obscenity prosecution, where all elements must coalesce for the material to be deemed obscene,[355] there are no intermediate facts and this problem will not arise.

Ashe is of further significance in that it elevates the concept of collateral estoppel to constitutional dimensions:

> [I]f collateral estoppel is embodied in [the Fifth Amendment's guarantee against double jeopardy], then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of "fundamental fairness," but a matter of constitutional fact we must decide through an examination of the entire record.
>
> * * * * *
>
> The ultimate question to be determined, then, in the light of *Benton*

351 *Id.* at 725-26.
352 397 U.S. 436 (1970).
353 *Id.* at 443, *quoting* United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961).
354 397 U.S. at 443-44.
355 Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

> *v. Maryland*, . . . is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to "run the gantlet" a second time.[356]

The question of whether a prior judgment was rendered upon a general or special verdict may be critical in applying the concepts of res judicata and collateral estoppel. In determining whether the issue decided in the prior proceeding is identical with that under consideration in the later case, the court must ascertain what was determined within the confines of the first judgment and then consider its application to the case at bar.[357] If a special verdict has been rendered this task is not particularly burdensome since the issues are specifically stated and decided. However, where the prior proceeding involved a jury trial resulting in a general verdict, the court asked to apply either concept must look beyond the verdict to determine the underlying basis for the jury's finding. In *Sealfon v. United States*,[358] the defendant had been acquitted on federal conspiracy charges in a jury trial and was subsequently tried and convicted of the substantive offense. Defendant attempted to quash the indictment in the second proceeding alleging res judicata, and upon refusal of the lower court to entertain the motion, the United States Supreme Court granted the petition for a writ of certiorari. The Court adopted the principle that res judicata is applicable to criminal proceedings "and operates to conclude those matters in issue which the verdict determined though the offenses be different."[359] Although the Court framed its discussion in terms of res judicata, it seems that the issue was one of collateral estoppel. The issue determinative of application of the concept was stated to be

> [w]hether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. . . . depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.
>
> * * * * *
>
> The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.[360]

356 397 U.S. at 442-43, 445-46 (citations and footnote omitted).
357 289 F.2d at 913-14.
358 332 U.S. 575 (1948).
359 *Id.* at 578.
360 *Id.* at 578-79.

Since the identical material was necessary for a conviction of either offense, the Court found this evidence to be "the core of the prosecutor's case"[361] in both instances, and the concept of collateral estoppel, although framed in terms of res judicata, was applied to bar the second prosecution.

More recently the Court in *Ashe* elaborated upon the factors to be considered when viewing the issues determined within the framework of a general verdict vis-à-vis collateral estoppel in a second criminal action:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking 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." The inquiry "must be set in a practical frame, and viewed with an eye to all the circumstances of the proceedings." Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.[362]

It is apparent that the classification of general as opposed to special verdict will not itself be determinative of the question of whether the rules of res judicata and collateral estoppel will be applicable. Attention must now be focused upon a determination of that point in time at which the judicial determination becomes "final".

The constituent elements of a final judgment seem somewhat elusive, with decisional law primarily concerned with finality for purposes of appeal.[363] Finality for appeal differs significantly from the requisite finality for application of the concepts of res judicata and collateral estoppel in the obscenity prosecution.[364] Generally, during the pendency of

---

[361] *Id.* at 580.

[362] 397 U.S. at 444 (citation and footnotes omitted).

[363] Berman v. United States, 302 U.S. 211 (1937); Loring v. Illsley, 1 Cal. 24 (1850); Belt v. Davis, 1 Cal. 134 (1850); 3 CAL. JUR. 2d *Appeal and Error* §§ 39-40 (1952).

[364] An excellent discussion of the conflict concerning finality may be found in United States v. United Air Lines, Inc., 216 F. Supp. 709, 718-25 (D. Nev. 1962) (Civil) and Annot., 9 A.L.R.2d 984, 994-1010 (1950). The federal courts, and a majority of jurisdictions, consider a trial court determination of issues of *fact* final for purposes of these concepts unless review is by way of a trial *de novo*. 216 F. Supp. at 723-25. The issue of obscenity, being a matter of constitutional judgment, must be determined *de novo*. *See* Jacobellis v. Ohio, 378 U.S. 184 (1964). Obscenity is peculiarly susceptible to "suspension of finality" in California due to the decision in Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963), wherein

appellate consideration, there is no "finality" sufficient to invoke these concepts. To qualify as final for purposes of res judicata and collateral estoppel, a judgment on the merits must have withstood scrutiny throughout the appellate process or, alternatively, the parties have permitted their respective appeal rights to lapse.

It must be noted that the statement that the identical issue raised has been the subject of a final judicial determination on the merits in a court of competent jurisdiction estops a party bound thereby from relitigating that issue in a subsequent proceeding, is subject to qualification. Of course, if the issue involved is not identical to that previously determined, the plea may not be successfully interposed. Further, should there be a substantial change in the controlling circumstances which led to the prior determination, the plea may not be available.[365] Finally, application of either concept in criminal matters is further tempered due to the reluctance on the part of the courts to arbitrarily hinder effective law enforcement, in contravention of public policy.[366]

B. Applicability to Obscenity Prosecutions

The obscenity prosecution, as a genre, is somewhat of a procedural hybrid. It is neither solely *in rem* nor solely *in personam*, nor can it be said to be *quasi in rem*. It is, rather, a combination of both *in rem* and *in personam*, with the *in rem* aspect functioning as the threshold issue determinative of whether subsequent *in personam* proceedings shall be pursued.[367] The common thread permeating all prosecutions is the term "obscene". Any proceeding must, therefore, determine the char-

---

the court held that not only was the issue of obscenity a matter of constitutional judgment for the court, rather than the jury, but that it was a matter for "independent examination" on appeal regardless of the trial court's determination. *Id.* at 909-11, 383 P.2d at 157-58, 31 Cal. Rptr. at 805-06; *cf.* Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[365] *See* United States v. Moser, 266 U.S. 236, 241-42 (1924), *quoting* New Orleans v. Citizens' Bank, 167 U.S. 371, 396 (1897):

> The estoppel resulting from the thing adjudicated does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has *under identical circumstances and conditions been previously concluded by a judgment.* . . . (emphasis added).

Compare Yates v. United States, 354 U.S. 298, 338 (1957) *with Developments, supra* note 340, at 844-45.

[366] *See* F. JAMES, JR., *supra* note 340, at 605.

[367] The initial determination of the issue of obscenity is generally undertaken in a proceeding designed to "focus searchingly" solely upon that issue. If the ultimate determination is favorable to the prosecution, thereby deeming the material contraband and subject to forfeit (*see* note 374 *infra*), it will usually be the basis for an *in personam* criminal proceeding against the distributor; but if the material is held to be within the

acter of the material presented prior to consideration of any other requisite element, as the presence or lack thereof is meaningless should the material be deemed protected. The nature of the material, and the material itself, therefore, are the *sine qua non* of the proceeding, the very core of the prosecutor's case. Since further consideration of the concepts must be undertaken within a reasonably defined framework, specific attention will be directed to California.

Assuming the appellate procedure has been exhausted, the tribunal determining the issue of obscenity will be an appellate court; however, should no appeal be taken the "final determination on the merits" will have been rendered by an inferior court.[368] The standard to be applied is enunciated by *In re Giannini*[369] to be "a community comprised of the entire State of California."[370] Applying the rules of res judicata and collateral estoppel, the net effect of permitting an inferior court decision to become binding is to extend the jurisdiction of such court to the entire statewide community. This seems to follow since, as previously noted, the threshold issue in an obscenity prosecution is an essentially *in rem* determination of the character of the material. The material itself is the subject of the proceeding. The result is the final judicial determination of the nature of the material involved, with both the material and the People of the State as parties to the action in a court of competent jurisdiction. In any subsequent proceeding, the potential effect of the application of the concepts of res judicata and collateral estoppel is devastating.

Assume that X county undertakes, in the name of the People of the State, prosecution of A for violation of the obscenity laws, the threshold issue being the obscene nature of certain material. The trial court determines, on the merits, that the material falls within First Amendment guarantees, applying the statewide standard, and the People do not pursue their appeal rights, if any, permitting this determination to become final. Of course, any further proceeding against this same defendant concerning the identical material is barred by the Fifth Amendment guarantee against double jeopardy. Should "People of the State" in Y county, or in any number of such judicial districts, subsequently

---

purview of the First Amendment guarantees, further action will be precluded. The "pandering" aspect of distribution discussed in Ginzburg v. United States, 383 U.S. 463 (1966) is not within the scope of this article.

368 The majority of obscenity prosecutions, being misdemeanors, are adjudicated in the municipal court. *See* CAL. PEN. CODE ANN. § 1462 (West 1970).

369 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).

370 *Id.* at 580, 446 P.2d at 547, 72 Cal. Rptr. at 667.

initiate proceedings involving the identical material, against a different defendant, the threshold issue must again be that of obscenity. This defendant, although not charged in the prior proceeding, may avail himself of the concept of collateral estoppel. The issue of obscentity concerning this material was the identical issue presented in the prior adjudication; that adjudication was final "on the merits"; and the party against whom this adjudication is raised was a party to the prior adjudication.

The foregoing is susceptible to challenge on two separate grounds, previously mentioned as qualifications to the concept of collateral estoppel. The first concerns timeliness. Should the subsequent action be initiated at a point in time sufficiently distant from that of the prior adjudication, the People might successfully interpose the argument that the controlling circumstance in the prior adjuciation has undergone a substantial change. That circumstance is the statewide community standard. Competent expert evidence[371] that the statewide community standard had undergone substantial change during the intervening period would be sufficient, if believed, to preclude an estoppel. The second, and more nebulous rebuttal, is the assertion that a ruling favorable to the defense would constitute an arbitrary hindrance to effective law enforcement. While both assertions combined might buttress each other in a marginal situation, this assertion alone would seem weak, at best. One of the cornerstones of the concepts of res judicata and collateral estoppel is the presumption that a decision on the merits of a claim is the product of a comprehensive presentation of all matters pertinent to that decision. As the "People" were a party to the prior action, undeniably representing their interest in effective law enforcement, so in the subsequent proceeding do they represent this identical interest. An assertion to the effect that this interest was not adequately and fully litigated at the prior proceeding, if allowed, would effectively emasculate the concept.

The People may also wish to avail themselves of the concepts of res judicata and collateral estoppel. Assume the previous factual setting, however the People of the State prevail as to the issue of obscenity and defendant A is convicted in X county. When the defense does not undertake an appeal, the inferior court's determination becomes "final" in the requisite sense. The material, deemed obscene, is now contraband

371 The requisite degree of proof is intentionally not discussed. However, it is reasonable to assume that the burden in the prior proceeding concerning the standard's initial existence will be that which the proponent of alleged change must bear upon assertion of such change.

and will be forfeit.[372] Subsequently, the People undertake prosecution of defendant B in Y county, or any number of defendants in numerous counties, concerning the identical material. The threshold issue is again the obscene nature of the identical material. The People may attempt to raise the prior adjudication on this element as the subsequent action(s) concerns the identical issue; there is a final adjudication on the merits by a court of competent jurisdiction; and the party against whom the adjudication is raised, the material, was a party to the prior adjudication. Affirmative use of the concepts by the People would, of course, be subject to the same potential infirmity mentioned in the previous section, *i.e.*, substantial change in the controlling circumstance of the statewide community standard. Were these concepts 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.[373]

This guarantee was held applicable to the states in *Pointer v. Texas*.[374] Under the instant facts, the People, through utilization of the prior *in rem* judgment of obscenity would, if permitted, supply the *sine qua non* of the *in personam* criminal proceedings merely by pleading that judgment and interposing the plea of collateral estoppel in answer to any defense attempt to litigate the issue of obscenity. 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.[375]

In relation to the concept of collateral estoppel, in a criminal proceeding, courts have been quite reluctant to allow its application in a

372 CAL. PEN. CODE ANN. § 312 (West 1970). Should the material be deemed obscene, yet no conviction ensue, the material is nonetheless forfeit. *See* Aday v. Superior Court, 55 Cal. 2d 789, 800, 362 P.2d 47, 54, 13 Cal. Rptr. 415, 422 (1961); Barnard v. Municipal Court, 142 Cal. App. 2d 324, 327-28, 298 P.2d 679, 681-82 (1956).

373 U.S. CONST. amend. VI. This would equally be true should the prosecution of a defendant be undertaken in other judicial districts.

374 380 U.S. 400 (1965); *see also* Douglas v. Alabama, 380 U.S. 415 (1965).

375 In Douglas v. Alabama, 380 U.S. 415 (1965), the Court stated:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury

manner adverse to the defendant. This reluctance is admirably presented in what may be considered the two leading cases in the field. *United States v. Carlisi*[376] stated the principle to be:

> In transplanting the doctrine . . . to criminal law. . . . [a] prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt.[377]

United States v. De Angelo[378] emphatically restated the foregoing:

> An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto.[379]

While the foregoing decisions considered the applicability of the concept in the realm of a subsequent prosecution of the defendant in a prior action, the rationale precluding application if negative to the defendant is even more compelling in proceedings directed against an individual not an actual party to a prior proceeding, the results of which compel him to defend an *in personam* criminal proceeding.

The California procedures available to a defendant in an obscenity prosecution offer two levels prior to trial at which the requisite final judicial determination of the obscenity issue may be available. The first is the 1538.5 motion for suppression and return of the material wherein both parties have a right of appeal from an adverse ruling. Should an appeal be taken by either party and the defense prevail upon the issue of obscenity, it seems this determination might be raised in a subsequent proceeding concerning the identical material, by way of estoppel. The net effect of such determination is that probable cause to believe the material obscene did not exist. The other level is at the pre-trial stage of the proceedings. The appellate remedy available to the adverse party at this level is by way of petition for a writ of prohibition or mandate. In the event the defense prevails upon the issue of obscenity, this determination would bear the requisite finality to estop future proceedings concerning the identical material. The foregoing are subject to the

---

in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Id.* at 418-19, *citing* Mattox v. United States, 156 U.S. 237, 242-43 (1895).

But cf. United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Cal. 1959); People v. Majado, 22 Cal. App. 2d 323, 70 P.2d 1015 (1937). *Cf.* United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940).

376 32 F. Supp. 479 (E.D.N.Y. 1940).

377 *Id.* at 482.

378 138 F.2d 466 (3d Cir. 1943).

379 *Id.* at 468.

same qualifying factors as a final determination at the trial level.

An ancillary problem exists, arguably within the arbitrary hindrance of effective law enforcement qualification to the application of these concepts. Recent years have witnessed an attempt to discourage "forum shopping"[380] and establish a modicum of uniformity in the area of civil litigation. The potential impact of the concepts of res judicata and collateral estoppel in obscenity prosecutions is to promote "forum shopping" among the judicial districts of the state of the rankest sort. It may be stated that the disseminator chooses the forum within which the matter will be determined. Any prosecution will be undertaken within the jurisdiction in which the individual transacts his business. While the foregoing may seem elementary, there is an inherent weakness in any strict or formalistic application of these concepts. The law in California as it presently exists not only encourages the disseminator to select the most liberal jurisdiction available should he contemplate prosecution concerning marginal material, but also permits, under the circumstances previously discussed, an inferior court in that jurisdiction to determine the issue of obscenity for the entire state. The potential for abuse is particularly evident in light of the recent decision in *Ashe* elevating these concepts to constitutional dimensions.

VI. EPILOGUE

This article has attempted to discuss, in some detail, three limited areas of the First Amendment and the law concerning obscenity. Perhaps no other area of constitutional law is changing so rapidly, with federal and state courts groping for effective means by which to balance the substantial government interest of protecting the public good with the fundamental individual rights involved. Permeating their efforts to strike this delicate balance is an awareness that a misstep may result in censorship of the sort this nation sought to ban at its formation.

The interpretation of that which is "obscene" is a relatively new concept on the judicial scene and determining what is meant by the term has eluded courts throughout the nation. One court noted:

> This particular aspect of constitutional law is so much in the "still developing" stage that between June 24, 1957, the date of *Roth* . . . and April 22, 1968, the members of the Supreme Court have written fifty-five separate opinions in thirteen cases on the subject of obscenity and have not been able to agree upon what it is or how to cope with it.[381]

---

380 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965).

381 Carter v. Gautier, 305 F. Supp. 1098, 1102 (M.D. Ga. 1969).

As the struggle continues to define what may be the indefinable,[382] certain basic concepts which have been enumerated throughout this article, must be borne in mind. Courts must remain aware of the delicate and sensitive nature of the First Amendment rights involved and the fine line which separates protected from unprotected speech. Any procedure invoked must "focus searchingly" upon the issue of obscenity and provide for a speedy judicial determination so as to avoid an impermissible prior restraint on dissemination and infringement upon Fifth Amendment privileges. Their vigilance, far from crippling effective law enforcement as some have urged, is in the finest tradition of American jurisprudence ever wary of encroachment upon individual liberty.

POSTSCRIPT

On February 18, 1971, *People v. Luros*[383] was decided by the Supreme Court of California holding, *inter alia,* that evidence of contemporary community standards was not required to establish probable cause sufficient to sustain an indictment for an alleged 1966 conspiracy to violate obscenity laws. *Luros* is only tenable if limited strictly to its facts as a local community standard was applied at the time of the indictment. In post-*Giannini* proceedings, *Luros* would not control since the standard is a statutory element of the conclusion "obscene" and *Giannini* requires a statewide community. Competent evidence of this element must be introduced[384] in light of the *Luros* majority reliance upon an earlier case stating an indictment will be invalid if "there is a total absence of evidence supporting a necessary element of the crime charged."[385] Parenthetically, it seems *Giannini* is not to be given retrospective application.

---

382 *Contra,* United States v. 11¼ Dozen Packages of Article Labeled in part Mrs. Moffat's Shoo Fly Powders for Drunkenness, 40 F. Supp. 208 (W.D.N.Y. 1941), *relying upon* United States v. 23 7/12 Dozen Bottles, 35-Cent Size, and 12⅔ Dozen Bottles, 70-Cent Size, of an Article of Drugs Labeled in Part "Lee's Save the Baby", 44 F.2d 831 (D. Conn. 1930).

383 Crim. No. 13153 (filed Feb. 18, 1971).

384 *See* pp. 16-18 *supra.*

385 People v. Aday, 226 Cal. App. 2d 520, 527, 38 Cal. Rptr. 199, 204 (1964).