Constitutional Law - Control of Obscenity through Enforcement of a Nuisance Statute

Robert H. Miller II

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Recommended Citation

This Note is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

INTRODUCTION

In the case regarded by authorities as the first obscenity case in Anglo-American jurisprudence,1 Sir Charles Sedley, after becoming drunk, performed a strip tease on the balcony of a London tavern. He also delivered a profane speech and poured bottles of urine on the crowd below. The court fined and imprisoned Sir Charles for breach of the peace.

In the Sedley case, the court imposed penal sanctions after the drunken man committed the offending acts.2 As in the case of Sir Charles, states today provide for the enforcement of obscenity laws through criminal prosecution.3 Criminal obscenity statutes, however, are not the only means available to states in their efforts to control the dissemination of obscene materials.4 States, in their discretion, may choose to regulate obscenity by criminal prosecution, a qui tam action,5 by an injunction, or by some or all of these remedies combined.6 The due process clause does not restrict the states in their selection of the best way to regulate obscenity.7 The fourteenth amendment, however, imposes one restriction on the development of regulatory schemes. States may not regulate ob-

2. King v. Sedley, 1 KEBLE 620 (K.B.), 83 ENG. REP. 1146 (1663).
5. A qui tam action is an action brought by an individual pursuant to a statute which provides for a penalty for the violation of the statute. A portion of the penalty goes to the individual for bringing the action and the remainder of the penalty goes to the state. Such an action provides for a division of recovery on the theory that the state's portion is compensation to the state for permitting the individual to prosecute in his own name. See Salonen v. Farley, 82 F. Supp. 25 (D.C. Ky. 1949); Williams v. Wells Fargo & Co., 177 F. 352 (8th Cir. 1910).
obscenity using a procedure which unreasonably curtails constitutionally protected expression. In order to ensure that constitutionally protected speech is not curtailed by overbroad obscenity regulations, laws which proscribe obscene materials must contain the most rigorous procedural safeguards. Nuisance statutes which have authorized injunctions against allegedly obscene speech before a judicial determination of obscenity have been struck down by courts. Such injunctions risk the possible restriction of constitutionally protected speech and, thus, operate as impermissible prior restraints of protected expression.

North Carolina, like other states, has chosen to regulate the dissemination of obscenity through a nuisance abatement statute, Chapter 19 of the General Statutes, as well as through criminal prosecution. The Supreme Court of North Carolina answered the question of whether the state's nuisance abatement statute violates the fourteenth amendment's proscription against the unreasonable curtailment of protected expression in *State ex rel. Andrews v. Chateau X, Inc.*, hereinafter Chateau X-I. The Court compared the practical effect of an injunction issued under Chapter 19 with the effect of a criminal statute and found that Chapter 19 was nothing more than a personalized criminal statute. Because the Chapter 19 injunction imposed the same restrictions which could be constitutionally imposed by a criminal proceeding, the injunction did not operate as an unconstitutional prior restraint on protected expression.

9. Id.
14. Because the North Carolina Supreme Court rendered a second Chateau X opinion after remand from the United States Supreme Court, the first Chateau X opinion will hereinafter be cited as Chateau X-I.
15. 296 N.C. at 265, 250 S.E.2d at 611.
The United States Supreme Court, in *Vance v. Universal Amusement Co.*,\(^{16}\) struck down a Texas nuisance statute similar to North Carolina's nuisance statute because an injunction issued pursuant to the Texas statute operated as an unconstitutional prior restraint. Under the Texas statute, an exhibitor or distributor of allegedly obscene materials could be penalized for violating the terms of an injunction restraining the material in question even if a court later determined the material not to be obscene.\(^{17}\) The Court found the nuisance statute to be more onerous than a criminal statute because nonobscenity will always be a defense in a criminal proceeding. Because the Texas nuisance statute was more onerous than a criminal statute, it operated as an unconstitutional prior restraint of protected speech.\(^{18}\)

After granting *certiorari*, the United States Supreme Court vacated the *Chateau X-I* decision and remanded to the Supreme Court of North Carolina for further consideration in light of the decision in *Vance*.\(^{19}\) On remand, the Supreme Court of North Carolina reconsidered the constitutional validity of a Chapter 19 injunction in *Chateau X, Inc. v. State ex rel. Andrews*,\(^{20}\) hereinafter *Chateau X-II*.\(^{21}\) The *Chateau X-II* court distinguished *Vance* by pointing out that nonobscenity will always be a defense in a contempt proceeding brought for an alleged violation of a Chapter 19 injunction.\(^{22}\) The North Carolina nuisance statute does not share the constitutional infirmity of the Texas abatement procedure because a defendant can never be found in contempt of a Chapter 19 injunction for showing or selling nonobscene material. Chapter 19, therefore, is not more onerous than a criminal statute. The North Carolina court, in the second *Chateau X* opinion, held that the North Carolina nuisance statute did not constitute an impermissible prior restraint.\(^{23}\)

Prior to the *Vance* decision, the United States Supreme Court had not articulated any specific standards for determining the constitutionality of the regulation of obscenity through nuisance

---

17. *Id*.
18. *Id*.
21. In order to distinguish between the two *Chateau X* opinions, the opinion which is second in time will be referred to as *Chateau X-II*.
22. 302 N.C. at 329-30, 275 S.E.2d at 448-49.
23. *Id. at 329*, 275 S.E.2d at 448.
The sparse Vance opinion and the Court's limited holding make it uncertain whether the Court intended the "more onerous than a criminal statute" language to be the controlling standard for nuisance abatement statutes. Even if the Court's language is intended to be a constitutional test, the full scope of the factors to be considered when applying the test cannot be ascertained from the scant Vance opinion. The North Carolina Supreme Court's holdings in the Chateau X opinions seem to be correct in light of the limited holding in Vance. A substantial number of other states, however, have held that nuisance abatement statutes similar to North Carolina's do operate as unconstitutional prior restraints.6

THE CASE

A. Chateau X-I

The Defendants, a South Carolina corporation, and its officers and employees, operated a theatre and bookstore in Jacksonville, North Carolina. The State filed a complaint pursuant to Chapter 19 of the General Statutes against Defendants, seeking to have the theatre, the bookstore, and the materials exhibited and sold at the establishments declared nuisances. The State also sought a permanent injunction restraining defendants from maintaining the premises in Jacksonville or any other place in North Carolina as a nuisance. Defendants filed an answer and a motion to dismiss based on the ground that Chapter 19 was unconstitutional. The court denied Defendants' motion to dismiss.26

24. The Supreme Court, however, has said that the United States Constitution does not preclude the abatement of obscenity through a civil nuisance statute, provided that first amendment standards are met. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).


26. 296 N.C. at 253, 250 S.E.2d at 605.
After personally viewing two of the State's twenty exhibits, the trial court found the exhibits viewed and the remainder of the exhibits introduced into evidence to be obscene. The trial court found the theatre, the bookstore, and the films and magazines which the state introduced into evidence to be nuisances as defined by Chapter 19. A permanent injunction was issued enjoining De-

27. Id. State's Exhibit Number 15 was a film called "Airline Cockpit." State's Exhibit Number 3 was a magazine entitled "Spread Your Legs." The parties stipulated that all films and magazines listed in the inventory marked as State's Exhibit Number 20 contained substantially similar material as evidenced by the two exhibits viewed by the court.

28. Id. N.C. GEN. STAT. § 19-1.1(2) (1977) provides that: "Lewd matter" is synonymous with "obscene matter" and means any matter:
(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
(b) Which depicts patently offensive representations of:
1. Ultimate sexual acts, normal or perverted, actual or simulated:
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.


Types of nuisances.—The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in N.C. GEN. STAT. § 19-1(a) (1977) is involved:
(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;
(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;
(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;
(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;
(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;
(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of narcotic drugs as defined in the North Carolina Con-
fendants from selling or exhibiting any of the items included in the State's twenty exhibits and from selling or exhibiting any other obscene matter in the future which depicted sexual conduct specified in the trial court's order. ³⁰

Pursuant to N.C. General Statutes § 7A-31(b), ³¹ both parties

trolled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs in the North Carolina Controlled Substances Act, or prostitution, are held or occur.

30. 296 N.C. at 255, 250 S.E.2d at 606. The portion of the trial court’s order which Defendants argued constituted an impermissible prior restraint stated:

2. The defendants . . . are hereby enjoined and restrained from:

   d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

   (1) Persons engaging in sodomy, per os, or per anum,
   (2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or
   (3) Persons engaging in masturbation.

   e. Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without serious literary, artistic, educational, political, or scientific value and that depicts or shows:

   (1) Persons engaged in sodomy, per os, or per anum,
   (2) Enlarged exhibits of the genitals of male or female persons during acts of sexual intercourse, or
   (3) Persons engaging in masturbation.

31. N.C. GEN. STAT. § 7A-31 (1981) provides, in part, that upon motion by either party or by the Supreme Court of North Carolina, the court may, in its discretion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. N.C. GEN. STAT. § 7A-31(b) specifically provides:

   (b) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court before determination of the cause by the Court of Appeals, when in the opinion of the Supreme Court:

   (1) The subject matter of the appeal has significant public interest, or
   (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
   (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or
   (4) The work load of the courts of the appellate division is such
petitioned the Supreme Court of North Carolina prior to a determination by the Court of Appeals. The Court allowed the petition on May 8, 1978. In determining the constitutional validity of the permanent injunction issued against Defendants, the North Carolina Supreme Court used the same form of analysis used by the United States Supreme Court in *Kingsley Books v. Brown*, where the Court reviewed the constitutionality of a statute which authorized a preliminary injunction enjoining the distribution of allegedly obscene materials. As in *Kingsley*, the North Carolina Court found the permanent injunction issued under Chapter 19 not to be an unconstitutional prior restraint on first amendment rights. The Chapter 19 injunction is constitutionally valid because the sanction imposed by the injunction could also be constitutionally imposed through enforcement of a criminal obscenity statute.

Defendants then petitioned the United States Supreme Court for further review. On April 25, 1980, the Court granted certiorari, vacated the decision of *Chateau X-I*, and remanded the case to the Supreme Court of North Carolina for further consideration in light of *Vance v. Universal Amusement Co.*

**B. Vance v. Universal Amusement Co.**

The United States Supreme Court, in *Vance*, scrutinized a Texas civil statute similar to North Carolina's Chapter 19. Plain-
tiff operated an indoor, adults-only motion picture theatre. Defendant, the County Attorney, informed Plaintiff's landlord that the county intended to seek an injunction to abate the public nuisance, and as a result, the landlord advised Plaintiff that its lease would be terminated. Plaintiff filed suit in the United States District Court for the Northern District of Texas, seeking an injunction against Defendant and declaratory relief. Plaintiff claimed that the Texas civil nuisance statute authorized an unconstitutional prior restraint on Plaintiff's first amendment rights.39

Citing Near v. Minnesota ex rel. Olson40 as supporting authority, the District Court held that the Texas procedure operated as an unconstitutional prior restraint. The statute authorized an injunction against future showings of films not judicially determined to be obscene based on a determination that obscene films had been shown in the past. The Court of Appeals affirmed the District Court's determination that the statute violated first amendment rights, holding that the statute would allow the issuance of an injunction against future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute.41 Defendants appealed and the Supreme Court noted probable jurisdiction.42

The Supreme Court limited its review to the issue of whether an injunction issued under the Texas nuisance statute constitutes a greater prior restraint than a criminal statute. The Court agreed with the lower court's assessment that an injunction issued under the Texas statute operates as a prior restraint of indefinite duration on the exhibition of motion pictures which have not been judicially determined to be obscene. An injunction authorized by the Texas statute would be more onerous than a criminal statute because an exhibitor who chose to show films in violation of the injunction would be subject to contempt proceedings for violating the express terms of the injunction even if the films shown were

---

commercial exhibition of obscene material;

(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse.


39. 445 U.S. at 309.
40. 283 U.S. 697 (1931).
41. A panel majority of the Court of Appeals had found the Texas procedure "basically sound." The court granted rehearing and reversed the panel's holding. Universal Amusement Co. v. Vance, 587 F.2d 159 (1978).
42. 442 U.S. 928 (1979).
finally determined not to be obscene. Because nonobscenity will always be a defense in a criminal prosecution, the civil injunction would be more onerous than a criminal obscenity statute.\textsuperscript{43}

C. Chateau X-II

On remand, the Supreme Court of North Carolina distinguished Vance, upholding its prior ruling that the injunction issued pursuant to Chapter 19 did not operate as an unconstitutional prior restraint. Using the same form of analysis that it had used in Chateau X-I, the Supreme Court of North Carolina noted that the infirmity of the Texas statute lay in the possibility that an exhibitor who violated an anti-obscenity injunction could still be subjected to contempt proceedings even if a court later finds that the materials subject to the injunction are not obscene. The North Carolina statute does not share the same infirmity because, as pointed out in the Chateau X-I decision, nonobscenity will always be a defense to any contempt action for violation of a Chapter 19 injunction. The Court incorporated by reference the Chateau X-I opinion and reaffirmed its prior decision that a Chapter 19 injunction did not operate as an unconstitutional prior restraint because such an injunction is no more onerous than a criminal obscenity statute.\textsuperscript{44}

BACKGROUND

The first amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”\textsuperscript{45} Freedom of speech and press means “principally, although not exclusively, immunity from previous restraints or censorship.”\textsuperscript{46} If a court determines that speech, once uttered or published, is not protected by the first amendment, the proper remedy is to impose sanctions on the party responsible for the expression. Modern constitutional analysis of first amendment issues relies on the concept of free speech as expressed by Blackstone when he wrote: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications. . . .”\textsuperscript{47} Any governmental

\textsuperscript{43} 445 U.S. at 316.
\textsuperscript{44} 302 N.C. at 330, 275 S.E.2d at 449.
\textsuperscript{45} U.S. CONST. amend. I.
\textsuperscript{46} Near v. Minnesota \textit{ex rel.} Olson, 283 U.S. 697, 716 (1931).
\textsuperscript{47} 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (2d
action which seeks to restrain speech prior to its publication or distribution to the public constitutes a prior restraint."

The Supreme Court has said, "Any system of prior restraint of..."
expression comes to this Court bearing a heavy presumption against its constitutional validity." In the area of obscene speech, prior restraint may take one of two forms. (1) Prior restraint occurs when allegedly obscene material is seized or preliminarily enjoined prior to a judicial determination of obscenity. States have accomplished this form of restraint through criminal laws or civil nuisance statutes. (2) Prior restraint also occurs through the requirement that motion pictures or books be approved by a licensing or review board before the material is distributed or exhibited to the public.

In *Roth v. United States*, the United States Supreme Court addressed the question of whether obscene speech deserved first amendment protection. Prior to the *Roth* decision, the Court had always assumed, without so holding, that the guarantee of free speech and of the press did not protect obscenity. The *Roth* Court, when analyzing the constitutional status of obscene speech, recognized that the first amendment protects any idea which has the "slightest" redeeming social value. Implicit in the history of that amendment is the idea that obscenity lacks any redeeming social value and thus is undeserving of constitutional protection.

52. 354 U.S. 476 (1957).
53. Dicta in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) and Beauharnais v. Illinois, 343 U.S. 250, 255-56 (1952) indicated that lewd and obscene expression was beyond the protection of the first amendment guarantee of free speech. *Roth* was the first opinion where the Court expressly held that obscenity did not deserve first amendment protection. J. NOWAK, CONSTITUTIONAL LAW, 833 (1978).
54. 354 U.S. at 485. The United States Supreme Court articulated the current standard for determining obscenity:

(1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests;

(2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Roth* was the first opinion where the Court expressly held that obscenity did not deserve first amendment protection. J. NOWAK, CONSTITUTIONAL LAW, 833 (1978).

54. 354 U.S. at 485. The United States Supreme Court articulated the current standard for determining obscenity:

(1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests;

(2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973). While the *Miller* Court recognized that state regulatory schemes must be derived by state legislatures, the Court sug-
Because obscenity is totally lacking in redeeming social value, the Court's previous assumption concerning obscene speech became a rule of law when the Court held that "obscenity is not within the area of constitutionally protected speech or press."

Consistent with the Court's later holding in Roth, dictum in Near v. Minnesota ex rel. Olson indicated that obscenity might be an exception to the general rule that the government may not impose restraints on speech prior to its publication. In Near, a Minnesota statute authorized injunctions restraining newspapers which published malicious, scandalous and defamatory speech.

The United States Supreme Court struck down the Minnesota statute because it authorized restraint of future expression based on a finding of a past statutory violation. While articulating the general rule prohibiting prior restraint of expression, the Near Court also recognized several possible exceptions, including obscenity. The Court said that the requirements of decency could justify restraint of obscene speech prior to its publication.

Many states have enacted both criminal and civil procedures for the regulation of obscene speech. Prosecutions for the viola-

gested examples of what a state statute could define under part (2) of the Miller test: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions, of the genitals." Id. at 25.


The nuisance statute, unlike the criminal statute, distinguishes between written matter and other matter. The nuisance statute excludes all written matter from the definition of obscenity. Other matter is excluded only if it has serious literary, artistic, political, educational, or scientific value "when considered as a whole and in the context in which it is used. . . ." N.C. GEN. STAT. § 19-1.1 (1977). The language "in the context in which it is used" is additional language which does not appear in the criminal statute. One commentator has suggested that if this language creates a "narrower range of exclusions than Miller," and encompasses matter not covered by Miller, the Chapter 19 definition of obscenity is unconstitutional. Hogue, supra note 3, at 40.

55. See supra note 53.
56. Id.
57. 283 U.S. 697, 716 (1931).
58. Id. at 716.
59. See F. Schauer, supra note 3. The following state laws are examples of statutes which authorize the regulation of obscene expression through enforcement of nuisance abatement statutes: LA. REV. STAT. ANN. § 13.4711 (West 1968); MASS. GEN. LAWS ANN. ch. 272, §§ 28C-28H (West Supp. 1977); N.D. CENT. CODE
tion of criminal obscenity laws do not present any first amendment problems because the violator is only being punished for speech which has already been uttered or published. Consistent with the first amendment's guarantee against previous restraint, the alleged violator was not hindered or prevented from publishing the expression. Unlike a criminal statute which punishes after the fact of publication, an injunctive prohibition against future publication of allegedly obscene material can bring about the very governmental action the first amendment was intended to prevent, the restraint of protected speech before the communication takes place. The evil of prior restraint of allegedly obscene speech lies in the possibility that the state may restrain protected speech as well as unprotected speech. 60

The United States Supreme Court has never decided whether a permanent injunction restraining obscene materials not yet adjudicated to be obscene constitutes an impermissible prior restraint. 61 In *Kingsley Books, Inc. v. Brown,* 62 however, the Su-

---


60. See generally J. Nowak, *Constitutional Law* 742 (1978); F. Schauer, *The Law of Obscenity* 228-29 (1976). The line of demarcation between protected speech and unprotected speech is "finely drawn." Any system of regulation which seeks to control unprotected speech must use "sensitive tools" to ensure that the control of unprotected speech does not also include control of expression which the first amendment protects. Speiser v. Randall, 357 U.S. 513, 525 (1958).

61. 296 N.C. at 263, 250 S.E.2d at 610. Although such an injunction has not been examined by the United States Supreme Court, the Court has laid down procedural guidelines for states seeking to regulate obscenity prior to its publication. In *Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965), the Court articulated the following guidelines: (1) the censor must afford the accused party a prompt hearing; (2) the censor has the burden of showing that the material is obscene; and (3) the censor must seek a final judicial determination of the obscenity issue. While the Supreme Court has yet to deal with the precise question of whether a permanent injunction restraining future distribution of unnamed obscene materials is unconstitutional, the following is a list of courts which have dealt with the regulation of obscenity through nuisance abatement statutes: Fehl aber v. State, 445 F. Supp. 130 (E.D.N.C. 1978); *General Corp. v. State ex rel. Sweeton,* 294 Ala. 657, 666-67, 320 So. 2d 668, 676 (1975), *cert. denied,* 425 U.S. 904 (1976); *Cactus Corp. v. State ex rel. Murphy,* 14 Ariz. App. 38, 41-42, 480 P.2d 375, 378-79 (1971); *People ex rel. Busch v. Projection Room Theater,* 16 Cal. 3d 360, 371-73, 546 P.2d 733, 740-41, 128 Cal. Rptr. 229, 236-37, *cert. denied,* 429 U.S. 922 (1976); *Evans Theatre Corp. v. Slaton,* 227 Ga. 377, 180 S.E.2d 712, *cert. denied,* 404 U.S. 950 (1971); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d

Published by Scholarly Repository @ Campbell University School of Law, 1981
The Supreme Court upheld the validity of a preliminary injunction restraining the distribution of allegedly obscene materials for a short period of time pending trial. In determining the constitutional validity of the injunction, the Court compared the practical effect of the injunction with the practical effect of a criminal law prohibiting the distribution of obscene material. The Court first recognized that both statutes interfered with the distribution process precisely at the same time. The imposition of restraint, whether by use of an injunction or by use of a criminal complaint, occurs after publication but possibly before the material is sold to the public. In each instance, the distributor of the allegedly obscene material is put on notice that the sale of the materials in question during the period pending trial may subject him to penal consequences. A violation of either a preliminary injunction pending trial or a criminal statute will result in the same penalty, fine and imprisonment. The Court reasoned that restraining the distribution of allegedly obscene material through a temporary injunction or a criminal proceeding resulted in the same deterrent effect, "the threat of subsequent penalization." 63

**ANALYSIS**

**A. Chateau X-I**

The Defendants argued that the trial court's order automatically constituted a prior restraint because the restraints that the court imposed were in the form of an injunction. In answer to the Defendants' argument, the Supreme Court of North Carolina first noted that in the area of obscenity, prior restraints may take one of two forms: (1) a seizure of allegedly obscene material or an injunction restraining the dissemination of allegedly obscene material prior to a judicial determination of obscenity; 64 and (2) licensing boards which require board approval before an exhibitor or distributor can solicit the public. 65 The Court did not decide in


63. Id. at 442-43.
Chateau X-I whether the Chapter 19 injunction constituted a prior restraint. Rather, it summarily dismissed the issue by saying that the United States Supreme Court had never struck down an injunction such as the one issued in Chateau X-I and further noted that no United States Supreme Court decision could be found that even labelled such an injunction a prior restraint.66

The Supreme Court of North Carolina reached the merits of the prior restraint issue by assuming that the permanent injunction operated as a prior restraint. Recognizing that prior restraints are not per se unconstitutional,67 the Court utilized the technique used by the United States Supreme Court in Kingsley Books, Inc. v. Brown.68 The Court recognized that the injunction issued in Kingsley was a temporary injunction pending trial, rather than, as in Chateau X-I, a permanent injunction issued after trial. Despite this procedural difference, the Supreme Court of North Carolina thought that the Kingsley decision offered guidance when determining the constitutionality of the permanent injunction. The Supreme Court of North Carolina compared the effect of a Chapter 19 injunction in practical operation with the practical effect of a criminal statute which proscribes the distribution of obscene material.69

The Court first noted that the trial court's order specified in detail the material prohibited by the injunction. While the trial court could have made the scope of the injunction broader by restraining all materials which fall within the statutory definition of obscenity, the trial court's order described the prohibited material with even more specificity than the obscenity statute.70 Because of the specificity of the trial court's order, the Defendants in this case suffered from less indecision concerning the materials which were actually prohibited than would be the case had the State chosen to prosecute under a criminal statute.

The Court also referred to the nature of the possible penalties which the court could impose if the Defendants violate the permanent injunction. As the United States Supreme Court noted in Kingsley, the North Carolina Court pointed out that a violation of either a permanent injunction proscribing the sale of obscenity or a

66. 296 N.C. at 263, 250 S.E.2d at 610.
69. 296 N.C. at 264, 250 S.E.2d at 611.
70. For a comparison between the statutory definition of obscenity and the wording of the trial court's order, see supra notes 28 and 30.
criminal statute proscribing the sale of obscenity will result in the same penalties, fine and imprisonment. Whether a distributor or exhibitor of obscene speech violates the terms of an injunction or the terms of a criminal statute, the same penal sanctions flow from either violation.\textsuperscript{71}

The Court, while noting that a violation of either legal remedy results in the same penal sanctions, also noted that enforcement of obscenity through an injunction was actually more favorable to a defendant than enforcement of a criminal obscenity statute.\textsuperscript{72} A defendant in a criminal proceeding is subject to penalties resulting from the initial violation of the criminal statute. A defendant in a Chapter 19 proceeding, however, will not be subject to fines and imprisonment until he has violated the terms of the injunction. Unlike the criminal defendant, the defendant in a nuisance abatement proceeding is not subject to criminal penalties for the initial dissemination of obscene materials. Because a defendant gets a "second chance" before the court imposes criminal penalties, a Chapter 19 injunction imposes a lesser burden on defendant's rights than does a criminal obscenity statute.\textsuperscript{73}

The Supreme Court of North Carolina continued its comparison of a Chapter 19 injunction and a criminal obscenity law by analyzing the procedural similarities between the two means of obscenity regulation. In a Chapter 19 proceeding, just as in a criminal obscenity proceeding, the defendant can always defend on the ground that the allegedly obscene material is not obscene. If the court determines that the material in question is not legally obscene, the court cannot issue a permanent injunction restraining the dissemination of such material as a nuisance, nor can the court

\begin{footnotes}
\item[71] 296 N.C. at 264, 250 S.E.2d at 611. The obscenity related statutes in Chapter 14 of the North Carolina General Statutes provide that violation shall be punishable as a misdemeanor. A person found guilty of a violation shall be fined or imprisoned in the discretion of the court. \textit{See generally} N.C. GEN. STAT. \S\ 14-190.1 \textit{et seq.} (1973). N.C. GEN. STAT. \S\ 19-4 provides:

\begin{quote}
Violation of injunction; punishment.—In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment.
\end{quote}

\item[72] 296 N.C. at 264, 250 S.E.2d at 611.
\item[73] \textit{Id.}
\end{footnotes}
impose sanctions under a criminal statute. In both a Chapter 19 proceeding and a criminal prosecution, the State has the burden of proof on the obscenity issue. The standard of proof is also the same in either a Chapter 19 proceeding or a criminal trial. In either proceeding, the State must prove beyond a reasonable doubt that the material in question is obscene.

The final procedural similarity between a Chapter 19 proceeding and a criminal proceeding that the Court addressed was the right to a jury trial. A person subject to an injunction issued under Chapter 19 does not have a right to a jury trial in a contempt proceeding for violation of the injunction. Under the federal constitutional standard, a defendant in a criminal contempt proceeding similarly has no right to a jury trial if the authorized penalty or the penalty actually imposed does not exceed imprisonment for six months. In North Carolina, the penalty authorized in a criminal contempt proceeding does not exceed imprisonment for six months. Thus, defendants in both a Chapter 19 contempt proceeding and a criminal contempt proceeding do not have a right to a trial by jury. The lack of a right to a jury trial does not alter the conclusion that a Chapter 19 injunction and a criminal obscenity statute achieve the same effect on the dissemination of obscene speech.

After comparing the characteristics of a Chapter 19 injunction and a criminal obscenity statute, the North Carolina Supreme Court concluded that a contempt proceeding initiated for a Chapter 19 injunction is no more than a "personalized criminal statute." The North Carolina Legislature could constitutionally impose the same restrictions on the dissemination of obscenity through a criminal statute. The effect of Chapter 19 in practical operation is no different than the effect of a criminal obscenity statute. Because an injunction restraining the future exhibition or distribution of obscene materials does not impose greater restrictions on free speech interests than does a criminal obscenity statute, the regulation of obscenity through North Carolina's nuisance abatement statute does not operate as an unconstitutional prior restraint.

75. Id.
76. 296 N.C. at 265, 250 S.E.2d at 611.
77. Id.
78. Id.
B. Vance v. Universal Amusement Co.

In Vance v. Universal Amusement Co., the Fifth Circuit Court of Appeals found a Texas nuisance abatement statute to be unconstitutional because it operated as an impermissible prior restraint on free speech interests. The United States Supreme Court reviewed the limited issue of whether Texas' nuisance abatement statute operated as a greater prior restraint on speech than does a criminal obscenity statute. The Court agreed with the Court of Appeals' statement that a regulation of forms of speech such as motion pictures must comply with more stringent safeguards than are necessary for the regulation of other types of nuisances. Consistent with the preference for subsequent punishment rather than prior restraint, the Court also said that the burden of supporting an injunction prohibiting future expression is greater than the burden of supporting criminal sanctions after the expression has already occurred.

The Court found that the Texas nuisance abatement statute, when coupled with the Texas Rules of Civil Procedure, authorized injunctions restraining the exhibition of motion pictures for an indefinite period of time prior to a judicial determination that the motion pictures are obscene. The Court reasoned that an exhibitor who was subject to such an injunction could be penalized for violating the terms of the injunction pending a final adjudication on the obscenity issue, even if a court later determines that the motion pictures are not obscene. Under the Texas procedure, nonobscenity would not be a defense to a charge that the express terms of the injunction had been violated. Unlike the Texas nuisance abatement proceeding, the defense that the material is not obscene will always be available in a criminal proceeding. Because a contempt proceeding lacked the procedural safeguard of nonobscenity, an injunction authorized by the nuisance statute would be more


80. The second issue which the Court agreed to decide was whether the "Court of Appeals erroneously held that no prior restraint of possible First Amendment materials is permissible." Id. at 315. The majority summarily dismissed this issue by disagreeing with appellant's interpretation of the scope of the Court of Appeals' decision. The Court said that the Court of Appeals simply held that the Texas statutes were procedurally deficient, and that the statutes authorized a procedure more onerous than is permitted by Freedman v. Maryland, 380 U.S. 51 (1965), and Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). Id. at 317.

onerous and objectionable than a criminal obscenity statute. The Texas nuisance abatement procedure was more onerous and objectionable than a criminal obscenity statute, and thus, operated as an unconstitutional prior restraint. 82

C. **Chateau X-II**

As the North Carolina Court noted, the United States Supreme Court’s sparse opinion in *Vance* rendered the North Carolina Court’s reconsideration of the prior restraint issue difficult. 83 Despite this difficulty, the *Chateau X-II* Court again noted that the nonobscenity of the allegedly obscene material will always be a defense in a contempt proceeding brought for an alleged violation of a permanent injunction. Unlike the procedure in *Vance*, a person subject to a Chapter 19 injunction cannot be found in contempt if the materials exhibited or distributed in alleged violation of the injunction are judicially determined not to be obscene. Because a Chapter 19 injunction allows the defense of nonobscenity in a contempt proceeding, the statute is no more onerous or objectionable than a criminal obscenity statute. The decision in *Vance*, therefore, is not controlling and an injunction authorized by Chapter 19 does not constitute an impermissible prior restraint on pro-

82. *Id.* at 316. The Court, at footnote 14 of the majority opinion, noted that the District Court and the Court of Appeals had also construed the Texas procedure to authorize the issuance of a temporary restraining order on the basis of an *ex parte* showing. The lower courts also believed that a temporary injunction of indefinite duration could be obtained on the basis of a showing of probable success on the merits.

The dissent in *Vance* argued that the Texas courts should have the opportunity to interpret Texas law. The dissent felt that the record did not sufficiently justify the assumptions concerning the Texas procedure that the lower courts had made. The dissent also felt that the federal court’s interpretations of the Texas procedure were dubious in light of *Locke v. State*, 516 S.W.2d 949 (Ct. App. 1974), which made a *de novo* on-the-merits review of a trial court’s determination of obscenity. The dissent pointed out that the *de novo* review in *Locke* would seem to discredit the federal court’s interpretations of the Texas procedure, especially the interpretation that a temporary restraining order could be issued on a showing of probable success on the merits. 445 U.S. at 320 (Burger, C.J., dissenting). A second dissent, written by Mr. Justice White, with whom Mr. Justice Rehnquist joined, will be discussed *infra* at note 84.

83. The North Carolina Court said that the brief treatment of the prior restraint issue rendered the task of determining the precise holding “quite difficult.” The North Carolina Court proceeded on what it believed was the most logical basis for the *Vance* decision. 302 N.C. 327, 275 S.E.2d at 447, n.7.
Justice Exum wrote a dissenting opinion in *Chateau X-II* which incorporated all of the arguments made in his *Chateau X-I* dissent and also articulated additional reasons why *Vance* should control the North Carolina Court's decision. Justice Exum felt that *Near v. Minnesota ex rel. Olson* controlled the prior restraint issue, requiring a finding that a permanent injunction issued under Chapter 19 operates as an unconstitutional prior restraint. The dissent in *Chateau X-I* cited decisions of three other states' highest courts which have found nuisance statutes "virtually identical" to Chapter 19 to be unconstitutional prior restraints. He also re-

84. *Id.* at 329, 275 S.E.2d at 449. While the holding in *Vance* was phrased to include both named and unnamed films, the North Carolina Court interpreted the procedures in *Vance* to be unconstitutional only as to named films. The North Carolina Court presumed that, in Texas contempt proceedings for violation of an injunction, the state must prove that the films shown allegedly in violation of the injunction are obscene. If, however, the injunction restrained the sale or exhibition of named films which subsequently are determined by a court not to be obscene, a contemnor could be penalized for violating the express terms of the injunction, regardless of the judicial finding that the named films are not obscene. The North Carolina Court seems to have based its named-unnamed distinction on the *Vance* majority's answer to the dissenting opinion of Mr. Justice White. Mr. Justice White argued that the Texas procedure was not unconstitutional because an injunction granted under the Texas statute will be phrased in terms of the *Miller v. California*, 413 U.S. 15 (1973), definition of obscenity. 445 U.S. at 321 (White, J., dissenting). The *Vance* majority disagreed, saying that a temporary injunction prohibiting the exhibition of specific, named films could be entered on a showing of probable success on the merits. 445 U.S. 312, n. 4.

85. 283 U.S. 697 (1931).

86. *Parish of Jefferson v. Bayou Landing Ltd.*, 350 So. 2d 158 (La. 1977); *Mitchem v. Schaub*, 250 So. 2d 883 (Fla. 1971); *New Riviera Arts Theatre v. State*, 219 Tenn. 652, 412 S.W.2d 890 (1967). Like the defendants in *Chateau X*, bookstore owners in *Mitchem* were enjoined from further operation of the store as a nuisance and were also restrained from disseminating in the future any obscene materials. Similar injunctions were also issued in *Parish of Jefferson* and *New Riviera Arts Theatre*. The courts in all three cases held that a permanent injunction restraining the dissemination of unnamed obscene materials was constitutionally overbroad. The Tennessee Supreme Court also said that only specific, named films adjudicated to be obscene may be permanently enjoined. The above three decisions are directly contrary to the North Carolina Supreme Court's holding in *Chateau X*. One commentator has said, "Nuisance proceedings, to be valid, must be restricted to materials already determined to be obscene, and if those proceedings include any blanket ban on future sales, publications, or exhibitions, they are constitutionally impermissible." F. *Schafer*, *supra* note 1, at 240. In *State v. Hess*, 540 P.2d 1165 (Okla. 1975), the Oklahoma Supreme Court held that a permanent injunction restraining the sale of materials not adjudicated to be
ferred to *Felhaber v. State,* a decision by the federal district court for the Eastern District of North Carolina which held that as to materials "not previously adjudged" to be obscene, a Chapter 19 injunction would operate as an unconstitutional prior restraint. 88

Despite the fact that the statute in *Near* restrained the future dissemination of political speech rather than obscene speech, the dissent felt that the similarities between the *Near* injunction and the *Chateau X* injunction brought the restraint imposed by the court in *Chateau X* within the general rule that the government cannot restrain speech prior to a judicial determination that the speech is not protected. In *Near,* as in *Chateau X,* the trial court imposed a restraint on the dissemination of speech not yet published and not yet adjudicated to be unprotected speech. While the *Chateau X* majority distinguished *Near*'s prohibition against prior restraint on the ground that the first amendment does not protect obscenity, Justice Exum was not persuaded. He relied on *Near* and *New York Times Co. v. United States* when arguing that the illegal nature of the speech does not alter the constitutional prohibition against prior restraint. In light of the fact that the *Near* court said that the "primary requirements of decency may be enforced against obscene publications," Justice Exum's concern with a Chapter 19 injunction seems to be not that injunctions may be issued against speech which has been judicially determined to be obscene, but that protected speech may be restricted by an injunction which merely incorporates a statutory definition of ob-

---

88. Id. The same rationale that courts have used to invalidate permanent injunctions restraining future dissemination of unnamed materials has also been used by courts to strike down statutes which authorize the complete closing of establishments for a definite period of time because of previous sales or exhibitions of obscene materials. See *People ex rel. Busch v. Projection Room Theater,* 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976); *State v. Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *Sanders v. State,* 231 Ga. 608, 203 S.E.2d 153 (1974); *Gulf States Theatres of Louisiana, Inc. v. Richardson,* 287 So. 2d 480 (La. 1974); *General Corp. v. State ex rel. Sweeton,* 294 Ala. 657, 320 So. 2d 668 (1975). The United States Supreme Court has granted *certiorari* to decide whether a nuisance abatement statute which provides for a one year closure of real property after a finding of obscenity constitutes a prior restraint. *United States Marketing, Inc. v. Idaho,* 631 P.2d 622 (Id. 1981), *cert. granted,* No. 81-741 (Jan. 12, 1982).
89. 296 N.C. at 267, 250 S.E.2d at 612.
90. 403 U.S. 717 (1971).
91. 283 U.S. at 716.
scenity. Justice Exum felt that allegedly obscene material must be "judicially seen" before the government can permanently restrict obscene expression.\(^92\)

The dissent also reasoned that the procedures used by the United States Supreme Court in \textit{Kingsley} did not apply to the type of injunction issued by the trial court in \textit{Chateau X-I}. Justice Exum quoted the \textit{Kingsley} court as saying that the New York statute authorized a limited injunction issued under specific procedural safeguards. Justice Exum noted that the majority opinion in \textit{Kingsley} pointed out that New York's procedure "studiously withholds restraint upon matters not already published and not yet found to be offensive."\(^93\) Because the Chapter 19 injunction issued in \textit{Chateau X-I} restricts the future dissemination of speech which a court has not yet found to be obscene, Justice Exum concluded in his dissent that a permanent injunction issued against the dissemination of unnamed speech operates as an unconstitutional prior restraint.\(^94\)

In his dissent in \textit{Chateau X-II}, Justice Exum again reasoned that the decision in \textit{Near} prohibits an injunction restraining future expression based on a finding that unprotected speech has occurred in the past. Justice Exum felt that the \textit{Vance} decision provided further support for the rule against prior restraints which was first articulated in \textit{Near}. He referred to the portion of the \textit{Vance} opinion which said the burden of justifying a ban on future expression is even heavier than the burden of justifying criminal penalties for expression which has already been uttered. Justice Exum said that the distinction between the Texas procedure and North Carolina's procedure was "finely spun;" the distinction was without a difference when judging the constitutionality of a permanent injunction against future expression.\(^95\)

Despite the North Carolina Supreme Court's reaffirmance of Chapter 19's constitutionality, it is not totally clear that the permanent injunction issued by the \textit{Chateau X} trial court is constitutional. The \textit{Chateau X} decisions may be questionable in light of the fact that the United States Supreme Court has not yet established clearly defined guidelines for states desiring to regulate obscenity through nuisance abatement statutes. The \textit{Kingsley} ap-
proach of comparing the practical effect of a criminal obscenity statute and an injunction restraining obscenity seems to be a permissible means of analysis in light of the Court's holding in Vance. As in Kingsley, the court in Vance compared the effect of an injunction with the effect of a criminal statute, indicating that the standard for determining the constitutional validity of injunctions restraining the dissemination of obscene speech is determined by referring to the practical effect of criminal obscenity laws.96

The difficulty with the Vance opinion lies in the fact that if the constitutional test is whether the nuisance abatement statute is more onerous than a criminal statute, the factors which courts can consider when applying this test remain undefined. The limited holding in Vance indicates that one factor which the courts may consider is whether the nuisance statute, like a criminal obscenity statute, allows for the defense of nonobscenity. As Justice Exum pointed out in his Chateau X-I dissent, other possible factors exist which could arguably render a nuisance abatement statute more onerous than a criminal statute.97 Differing burdens of proof in civil actions and criminal proceedings is one such factor.98 The criminal element of scienter, if lacking in a contempt proceeding for violation of an injunction, could also be a factor which would render the contempt proceeding more onerous than a comparable criminal proceeding.99 Justice Exum also pointed out that the right to jury trial in criminal cases is a factor which would render a summary contempt proceeding more onerous than a trial

96. The Court ruled that the Texas procedure operated as an unconstitutional prior restraint because the restraint imposed by an injunction was more onerous and more objectionable than a criminal obscenity statute. 445 U.S. at 316.

97. 302 N.C. at 331, 275 S.E.2d at 449.

98. In Cooper v. Mitchel Brothers' Santa Ana Theatre, ___ U.S. ___, 102 S. Ct. 172 (1981), the United States Supreme Court held that in a public nuisance action brought against a motion picture theatre, the first and fourteenth amendments do not require proof of obscenity beyond a reasonable doubt. The Court said that requiring proof beyond a reasonable doubt in an obscenity case is solely a matter of state law. The Court's decision in Cooper would seem to indicate that the burden of proof in an obscenity case is not a factor to be considered when determining if a nuisance abatement statute is more onerous than a criminal obscenity statute. As the Supreme Court of North Carolina noted in Chateau X-I, North Carolina requires proof beyond a reasonable doubt in obscenity cases. 296 N.C. at 264, 250 S.E.2d at 611. See N.C. GEN. STAT. 5A-15(f) (Cum. Supp. 1977). This provision of the statute provides that in a plenary proceeding for contempt, the "facts must be established beyond a reasonable doubt."

99. 302 N.C. at 331, 275 S.E.2d at 449.
authorized by a criminal obscenity statute.\(^{100}\)

The criminal element of scienter is the defendant's guilty knowledge and intent.\(^{101}\) If scienter is a factor which courts should consider when comparing the effects of a nuisance abatement statute and a criminal obscenity statute, the lack of the element of scienter may render North Carolina's nuisance abatement statute more onerous than a criminal statute.\(^{102}\) North Carolina's criminal obscenity statute has been judicially construed to require proof of "guilty knowledge" and intent before a defendant can be found guilty of violating the statute.\(^{103}\) While several sections of Chapter 19 refer to knowledge,\(^{104}\) the provisions do not expressly require that a defendant possess guilty knowledge before he is found to be in violation of a Chapter 19 injunction.\(^{105}\) If Chapter 19 proceedings do not require the state to prove the element of scienter before a defendant is penalized for violation of an injunction, the absence of this element would render a Chapter 19 proceeding more onerous than a criminal obscenity statute.\(^{106}\)

\(^{100}\) Id.


\(^{103}\) See generally N.C. GEN. STAT. § 14-190.1 (1973). The North Carolina Court of Appeals has held that this section requires a finding of intent and guilty knowledge before a person can be convicted of a violation. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913 (1973).

\(^{104}\) N.C. GEN. STAT. § 19-1.1(1) (1977) provides, in part, that "'[K]nowledge' or 'knowledge of such nuisance' means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter . . . ."

N.C. GEN. STAT. § 19-1.3 (1977) provides, in part, that "[W]here circumstantial proof warrants a determination that a person had knowledge of the nuisance prior to such service of process, the court may make such a finding."

\(^{105}\) See 302 N.C. at 331, 275 S.E.2d at 450 (Exum, J., dissenting). See supra note 71 for the text of the statute authorizing a summary contempt proceeding.

\(^{106}\) The United States Supreme Court has held that a criminal statute which makes the dissemination of obscene materials a criminal offense without requiring scienter is unconstitutional. Absent a scienter requirement, the Court said that a criminal obscenity statute would have a tendency to inhibit constitu-
The lack of a right to a jury trial in a Chapter 19 contempt proceeding could also render the practical effect of a Chapter 19 injunction more onerous than a criminal obscenity statute. While the Chateau X-I Court rejected such a contention, the Court's analysis of this issue is not wholly satisfactory. The Court's determination that the right to a jury trial does not exist in either a Chapter 19 contempt proceeding or a criminal contempt proceeding does not present any analytical problems when a Chapter 19 injunction only restrains specific, named films. The determination of obscenity would be made in the initial abatement proceeding and at that stage the defendant would have a right to a jury trial if he so desired. Where, however, the trial court restrains the future dissemination of obscene materials not specifically named in the order, a defendant in a Chapter 19 contempt proceeding will not have the initial determination of obscenity made by a jury. Because the material in question was not adjudicated obscene by the court issuing the injunction, the question of whether the previously unnamed material is obscene must be determined before the court can decide whether the permanent injunction has been violated. As to material which was not specifically named in the injunction but which arguably falls within the statutory definition of obscenity, the issue of obscenity is not determined until the state initiates the contempt proceeding.

The parallel proceeding under a criminal obscenity law is not a criminal contempt proceeding but, rather, an initial criminal trial on the merits. A criminal trial on the merits is analogous to a Chapter 19 contempt proceeding because, in both instances, penal sanctions will not be imposed until a court finds that the material

itionally protected speech. Smith v. California, 361 U.S. 147, 153-55 (1959). In light of the Court's decision in Smith, if Chapter 19 does not require proof of scienter before the court imposes penalties for violating an injunction, it could be argued that the injunction inhibits protected speech.

107. 296 N.C. at 265, 250 S.E.2d at 611.
109. N.C. GEN. STAT. § 19.2-1 (1977) provides that the Attorney General, district attorney, or any private citizen may maintain a civil action to abate a nuisance under this Chapter. A defendant in such a nuisance abatement action has the right to a trial by jury. See N.C. CONST. art. I, § 25; N.C. CONST. art. IV, § 13.
110. N.C. GEN. STAT. § 19-4 (1919) authorizes the judge to summarily try and punish the offender for violation of the injunction.
111. 296 N.C. at 264, 250 S.E.2d at 611.
112. Id.
in question is obscene. 113 While the defendant in the initial Chapter 19 proceeding had a right to trial by jury, a Chapter 19 contempt proceeding will determine the status of material which was previously unnamed without the right to a jury trial. In both a criminal trial on the merits and a Chapter 19 contempt proceeding where previously unnamed material has been disseminated, the constitutional status of allegedly obscene material is being determined for the first time. Yet, the defendant in the criminal trial has the right to a jury trial, while the defendant in the Chapter 19 contempt proceeding does not. Thus, as to materials not specifically named in the initial injunction, a Chapter 19 contempt proceeding could be deemed to be more onerous than a criminal obscenity statute. 114

North Carolina is one of the few states which allows a jury trial in equitable proceedings as well as in actions at law. 115 North Carolina's strong public policy in favor of jury trials is exemplified by the state constitution which provides that in all civil actions "there shall be a right to have issues of fact tried before a jury." 116 In a Chapter 19 contempt proceeding where the court finds, as a matter of fact, that previously unnamed materials are obscene, such a finding arguably contravenes North Carolina's strong public policy in favor of jury trials, if not the state constitution itself.

A Chapter 19 proceeding may also be more onerous than a criminal statute because the nuisance abatement statute provides for a different definition of obscenity. In a Chapter 19 abatement...


114. Justice Exum, in his Chateau X-II dissent, regarded the lack of a jury trial in a Chapter 19 contempt proceeding as one factor which may render such a proceeding more onerous than a criminal obscenity statute. 302 N.C. at 331, 275 S.E.2d at 449.


proceeding, the fact finder will define obscenity using a contemporary community standard.\textsuperscript{177} The standard which will be applied in a criminal proceeding is a statewide community standard.\textsuperscript{178} Arguably, a standard which includes the varying tastes and attitudes of the entire state populace would be more lenient than a standard which includes the tastes and attitudes of only one community. Thus, while material may not be obscene under a statewide standard, the same material may be obscene under a community standard.\textsuperscript{179} If the Chapter 19 community standard is stricter than the criminal statewide standard, the Chapter 19 proceeding could be more onerous than the criminal obscenity statute.\textsuperscript{180}

CONCLUSION

The United States Supreme Court has said that the states are free to choose the means by which they will regulate obscenity.\textsuperscript{181} While the most popular means of enforcement is through criminal obscenity laws,\textsuperscript{182} some states, including North Carolina, have also chosen to regulate obscenity through a nuisance abatement statute.\textsuperscript{183} Subsequent criminal punishment after unprotected speech has been uttered does not unconstitutionally infringe upon first amendment rights.\textsuperscript{184} A civil injunction, however, which purports

\begin{itemize}
  \item 118. N.C. GEN. STAT. § 14-190.1(b)(2) (1973).
  \item 119. Hogue, \textit{supra} note 3, at 41.
  \item 120. The argument can be made, however, that a statewide community standard is not the more lenient standard. When one considers that there are far more small, rural communities in North Carolina than there are large, cosmopolitan areas, the statewide standard could be interpreted to be the standard of the more numerous, smaller communities. The standards of rural North Carolina would arguably be stricter than the standards of North Carolina's metropolitan areas.
  \item Jury instructions which specifically illustrate for the jury the proper factors in determining the standard to be applied could render the problem of differing statutory definitions moot. N.C.P.I.—Crim. § 226.90, however, merely reiterates verbatim the language of the criminal obscenity statute. The author could not find any pattern jury instructions for the Chapter 19 definition of obscenity.
  \item For an excellent discussion of the tactical considerations in choosing a jury trial in obscenity cases, see F. Schauer, \textit{supra} note 1, at 253. Professor Schauer also includes in his treatise suggested jury instructions on all obscenity related issues. For suggested instructions concerning contemporary community standards, see F. Schauer, \textit{supra} note 1, at 306-07.
  \item 122. F. Schauer, \textit{supra} note 1, at 228. \textit{See also supra} note 4.
  \item 123. \textit{See generally} Hogue, \textit{supra} note 3.
\end{itemize}
to perpetually restrain speech which falls within the statutory definition of obscenity, raises the issue of whether such an injunction operates as an unconstitutional prior restraint.\textsuperscript{128}

In \textit{Chateau X, Inc. v. State ex rel. Andrews},\textsuperscript{129} the North Carolina Supreme Court upheld the constitutionality of a Chapter 19 injunction which perpetually enjoined the dissemination of obscene speech despite \textit{Vance v. Universal Amusement Co.}\textsuperscript{127} where the Supreme Court of the United States declared unconstitutional a nuisance abatement statute similar to North Carolina's statute. The procedure in \textit{Vance} was unconstitutional because an exhibitor of allegedly obscene films subject to a temporary injunction could be punished for violating the express terms of the injunction, even if a court later found that the films in question were not obscene. Because the injunction procedure in \textit{Vance} did not allow for the defense of nonobscenity, as would a criminal obscenity law, the nuisance abatement statute was "more onerous and objectionable" than a criminal obscenity statute, and, thus, operated as an unconstitutional prior restraint.\textsuperscript{128}

Upon remand in light of \textit{Vance v. Universal Amusement Co.}, the North Carolina Supreme Court, in its second \textit{Chateau X} decision, distinguished \textit{Vance} by relying on the first \textit{Chateau X} decision. In \textit{Chateau X-I}, the North Carolina Court reasoned that a person subject to a Chapter 19 injunction could never be punished for disseminating protected speech because nonobscenity would always be a defense in a contempt proceeding brought for alleged violation of a Chapter 19 injunction.\textsuperscript{129} After analyzing other procedural characteristics of a Chapter 19 injunction, the Court concluded that Chapter 19 was nothing more than a personalized criminal statute\textsuperscript{130} since the civil injunction had the same practical effect as a criminal obscenity statute. The \textit{Chateau X-II} decision reiterated this view, distinguishing \textit{Vance} on the basis that nonobscenity will always be a defense in a Chapter 19 contempt proceeding.\textsuperscript{131}

If the test for determining the constitutionality of prior restraints is to compare a nuisance abatement statute's effect with

\begin{itemize}
\item \textsuperscript{125} F. Schauer, \textit{supra} note 1, at 228.
\item \textsuperscript{126} 302 N.C. 321, 275 S.E.2d 443 (1981).
\item \textsuperscript{127} 445 U.S. 308 (1980) (per curiam).
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} 296 N.C. at 264, 250 S.E.2d at 611.
\item \textsuperscript{130} \textit{Id.} at 265, 250 S.E.2d at 611.
\item \textsuperscript{131} 302 N.C. at 329, 275 S.E.2d at 448.
\end{itemize}
the effect of a criminal obscenity statute, the United States Supreme Court’s decision in *Vance* has left the scope of the test unclear. If the defense of nonobscenity is the only factor which courts may consider when determining the constitutionality of civil injunctions restraining obscene speech, then North Carolina’s Chapter 19 is a constitutional means of regulating obscenity. If, however, the lack of scienter or the lack of a right to a jury trial are also factors to be considered, a Chapter 19 contempt proceeding may be more onerous and objectionable than a criminal obscenity statute. Chapter 19’s definition of obscenity may also prove to be more onerous than its criminal counterpart if the contemporary community standards of Chapter 19 are a stricter standard than the statewide criminal standard. In light of these additional factors, the constitutional status of North Carolina’s nuisance abatement statute, when applied to allegedly obscene speech, could still be uncertain.

Robert H. Miller, II