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Thomas L. Davis
Indiana University School of Law

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DEFECTS IN INDIANA'S PORNOGRAPHIC NUISANCE ACT

Since the 1957 United States Supreme Court decision in *Roth v. United States*,[1] the Court has been plagued with "the intractable obscenity problem."[2] The Supreme Court has experienced difficulty in formulating a workable definition of obscenity which successfully balances the recognized state interest in suppressing obscene material and the protections of the first amendment. Faced with shifting and unclear Court standards, states have been creative in their attempts to control the dissemination of obscene material.[3] Although the Court acknowledges the states' dilemma, it has not upheld all attempts.[4]

After the most recent Supreme Court formulation of obscenity standards in *Miller v. California*,[5] the constitutionality of many state obscenity statutes is in doubt. Applying these standards, the Indiana Supreme Court recently held two state obscenity statutes unconstitutional.[6] Indiana's Pornographic Nuisance Act,[7] now the state's sole obscenity statute, is also likely to fail.

UNITED STATES SUPREME COURT DEVELOPMENT OF OBSCENITY STANDARDS

In *Roth* the Supreme Court for the first time explicitly held that obscenity, because it was "utterly without redeeming social importance," was beyond the bounds of constitutional protection.[8] Obscenity was to

1. 354 U.S. 476 (1957).

2. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., dissenting).

3. MD. ANN. CODE art. 66A, § 2 (1970) (state board of censors); MASS. ANN. LAWS ch. 272, § 28C-G (1968) (civil proceeding); MO. ANN. STAT. § 542.380 (1949) (search and seizure); OHIO REV. CODE ANN. §§ 3767.01-.11 (Page 1971) (nuisance); ORE. REV. STAT. §§ 167.060-.100 (1971) (criminal proceedings, limited to distribution to minors).

4. *E.g.*, Redrup v. New York, 386 U.S. 767 (1967) (criminal prosecution); Freedman v. Maryland, 380 U.S. 51 (1965) (state board of censors); Marcus v. Search Warrant, 367 U.S. 717 (1961) (ex parte search warrant procedure); Times Film Corp. v. Chicago, 365 U.S. 43 (1961) (license); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (seizure and destruction).

5. 413 U.S. 15 (1973).

6. Two criminal statutes controlling distribution of obscene material were struck down in August, 1973 in Mohney v. State, —— Ind. ——, 300 N.E.2d 66 (1973) and Stroud v. State, —— Ind. ——, 300 N.E.2d 100 (1973). The two statutes involved were codified at IND. CODE §§ 35-30-10-1, -3 (1971), IND. ANN. STAT. §§ 10-2803, -2803a (1956 Repl.).

7. IND. CODE §§ 35-30-10.5-1 to -10 (1973), IND. ANN. STAT. §§ 9-2711 to -2720 (Supp. 1973) [hereinafter referred to as the Act].

8. Roth v. United States, 354 U.S. 476, 484-85 (1957).

be defined by its impact on the average person.[9] If the fact finder, applying contemporary community standards, found that the dominant theme of the material, viewed in its entirety, appealed to the average person's prurient interest, it was obscene.[10] However, this standard of contemporary community standards was inconsistently applied by the state courts.[11] The inconsistency led the Court in *Jacobellis v. Ohio* to explicitly state that "contemporary community standards" requires use of a national rather than a local standard.[12]

Nine years after *Roth* a plurality of the Court formulated a new test in *Memoirs v. Massachusetts*.[13] Three elements had to be present:

> (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.[14]

Mr. Justice Harlan thought the last element meaningless.[15] Others have criticized it for imposing a virtually impossible burden of proof on the prosecution.[16]

Most recently, in *Miller v. California*,[17] the Court attempted to clarify *Roth* in order to define the permissible scope of state and federal regulation. For the first time since *Roth*, a majority of the Justices joined in a single obscenity opinion. *Jacobellis* and *Memoirs* were discarded, and a new constitutional standard of obscenity was adopted.

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9. *Id.* at 488-89. Previously, following the doctrine of Regina v. Hicklin, [1868] L.R. 3 Q.B. 360, courts had determined obscenity by the effect of isolated passages upon the most susceptible persons, including children. *But see* United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933).

10. 354 U.S. at 488-90.

11. State v. Martin, 3 Conn. Cir. 309, ——, 213 A.2d 459, 460 (1965) (national); State v. Hudson County News Co., 41 N.J. 247, 266, 196 A.2d 225, 234-35 (1963) (national); People v. Brooklyn News Co., 174 N.Y.S.2d 813, 817-18 (Kings County Ct. 1958) (local); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 149-50, 121 N.W.2d 545, 553 (1963) (state).

12. 378 U.S. 184, 192-95 (1964).

13. 383 U.S. 413 (1966).

14. *Id.* at 418.

15. *Id.* at 459 (Harlan, J., dissenting).

16. In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. . . . Thirty-one cases have been decided in this manner.

Miller v. California, 413 U.S. 15, 22 (1973) (citation omitted).

17. 413 U.S. 15 (1973).

The Court held that state regulation of obscenity must be limited to hard core pornography, defined by the following guidelines:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[18]

The most publicized of these guidelines was the adoption of local community standards. The *Miller* jury was permitted to employ its own perception of the contemporary standard of the state of California.[19] The Court held that state, rather than national, standards were adequate because states differ in their tastes and attitudes.[20] This diversity should not be strangled by the "absolutism of imposed uniformity."[21] The Court also defined potentially obscene material "by its impact on an average person, rather than a particularly susceptible or sensitive person."[22]

THE INDIANA PORNOGRAPHIC NUISANCE ACT

As a result of two recent Indiana Supreme Court decisions,[23] Indiana no longer has criminal obscenity statutes, except those pertaining to juveniles. After remand by the United States Supreme Court for consideration in light of *Miller*,[24] the Indiana Supreme Court

18. *Id.* at 24. Dissenting in a companion case, Justice Brennan, joined by Justices Stewart and Marshall, concluded that the state interest in curtailing sexually oriented materials should be more severely restricted. The dissenters would hold that in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the first and fourteenth amendments prohibit the state and federal governments from suppressing sexually oriented materials. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 113 (1973) (Brennan, J., dissenting).

19. 413 U.S. at 30-31.

20. *Id.* at 33, 34. It should be noted that the Court, while upholding a statewide standard, made no mention of more confined geographical boundaries. The Court's arguments appear to also support the adoption of municipal standards, but no case yet has decided the issue.

21. *Id.* at 33. The danger of suppressing protected expression may be greater in applying a single nationwide standard than in allowing local tastes to prevail. Roth v. United States, 354 U.S. 476, 506 (1957) (Harlan, J., dissenting).

22. 413 U.S. at 33; *see* note 8 *supra.*

23. Mohney v. State, —— Ind. ——, 300 N.E.2d 66 (1973); Stroud v. State, —— Ind. ——, 300 N.E.2d 100 (1973).

24. Stroud v. Indiana, 413 U.S. 911 (1973); Mohney v. Indiana, 413 U.S. 911 (1973).

unanimously held the general criminal obscenity statutes[25] unconstitutional for failing to meet the second *Miller* criterion requiring specification of those acts which constitute violations.[26] Although other obscenity statutes may eventually be passed by the General Assembly, at present only the 1973 Pornographic Nuisance Act remains in the state's anti-obscenity arsenal.[27] This statute bears scrutiny for two reasons. First, as the state's only tool for controlling obscenity, it may be extensively employed. Second, the Act's potential for abuse by both private individuals and by the state poses a threat of harassment due to the Act's lack of procedural safeguards and its severe sanctions.

In the statute, a nuisance is defined as

> any place in . . . which lewdness, assignation, or prostitution is conducted, . . . or upon which lewd, indecent, lascivious, or obscene films . . . are photographed, . . . or shown, and the personal property . . . used in conducting . . . any such place. . . .[28]

Establishments falling within this definition are subject to a civil action for abatement as a public nuisance.[29] This action may be brought by the

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25. The following persons were subject to criminal liability:

> Whoever knowingly sells or lends, or offers to sell or lend, or give away . . . or has in his possession with, or without intent to sell, . . . any obscene, lewd, undecent or lascivious book . . . .

IND. CODE § 35-30-10-1 (1971), IND. ANN. STAT. § 10-2803 (1956 Repl.); and

> [a]ny person, whether or not he is a citizen of this state, who knowingly sends or causes to be sent into this state, any obscene, lewd, indecent, or lascivious literature . . . .

IND. CODE § 35-30-10-3 (1971), IND. ANN. STAT. § 10-2803a (1956 Repl).

The Indiana juvenile obscenity statutes, IND. CODE §§ 35-30-11-1 to -7 (1971), IND. ANN. STAT. §§ 10-817 to -823 (Supp. 1973), have never been challenged in a reported case. These statutes, unlike the adult criminal obscenity statutes, appear consistent with the *Miller* requirement of specificity. They prohibit descriptions or representations of sexual conduct, sexual excitement, sado-masochistic abuse or nudity which are harmful to minors. The definition of "harmful to minors" parallels the earlier standard set forth by the Supreme Court in Memoirs v. Massachusetts, 383 U.S. 413 (1966). IND. CODE §§ 35-30-11-1 (c), (d), (e), (b), (f) (1971), IND. ANN. STAT. §§ 10-817(c), (d), (e), (b), (f) (Supp. 1973).

26. *See* text accompanying note 18 *supra*.

27. The 1974 General Assembly adjourned without enacting a new criminal obscenity statute. The Senate tabled a compromise bill because some senators felt the state would be better off with no law than an ineffective one. Indianapolis Star, Feb. 15, 1974, at 6, cols. 7-8.

28. IND. CODE § 35-30-10.5-1 (1973), IND. ANN. STAT. § 9-2711 (Supp. 1973).

29. IND. CODE § 35-30-10.5-3 (1973), IND. ANN. STAT. § 9-2713 (Supp. 1973). Interestingly, the new Indiana act does not appear to include bookstores within its definitions even though Kaplan v. California, 413 U.S. 115 (1973), a companion case to *Miller*, held that words, even absent pictorial illustration, may be obscene. *Id.* at 118-20. The omission, however, is understandable since criminal obscenity statutes were in force when the act was passed.

state Attorney General, the county prosecuting attorney or by any private citizen residing in the same county as the alleged nuisance. To reduce the possibility of harassment, the private citizen must post a $1000 bond to insure good faith. Should he or she prevail at the trial, the plaintiff may recover reasonable attorney's fees.[30]

After filing, the plaintiff may apply for a temporary injunction pendente lite. While an adversary hearing must be held within ten days of the application, the court may issue an ex parte restraining order to preserve any evidence and prevent its removal from the court's jurisdiction. If the defendant, having been notified at least five days in advance, requests a continuance, the temporary injunction is automatically issued.[31]

The temporary injunction restrains the defendant, and any other persons, from continuing the alleged nuisance.[32] In addition, the court issues an order closing the establishment until the final hearing, unless the owners of the real and personal property satisfy the court that certain criteria have been met: (a) bond has been posted, (b) the nuisance is abated and will not be re-established, and (c) they were unaware of the use of their property as a nuisance and that even with reasonable care and diligence, such use could not have been known.[33]

If the plaintiff prevails and a nuisance is established, a permanent injunction is issued against both the establishment and the defendant. The personal property used in conducting the nuisance will be removed and sold; obscene material will be confiscated and destroyed. The final order closes the establishment for one year, unless sooner released.[34]

Whenever a permanent injunction issues, a "tax" of $300 is imposed on both the nuisance and the owner. If the defendant is found innocent or has permanently abated the nuisance in good faith, this "tax" is not collected.[35]

30. IND. CODE § 35-30-10.5-3 (1973), IND. ANN. STAT. § 9-2713 (Supp. 1973).
31. IND. CODE § 35-30-10.5-4 (1973), IND. ANN. STAT. § 9-2714 (Supp. 1973).
32. *Id.*
33. *Id.* Testimony pertaining to the general reputation of the place is prima facie evidence of the existence of the nuisance and of the knowledge, acquiescence and participation by the defendant. IND. CODE § 35-30-10.5-5 (1973), IND. ANN. STAT. § 9-2715 (Supp. 1973). The conviction of the defendant in a related criminal proceeding is conclusive proof against that defendant as to the existence of the nuisance. IND. CODE § 35-30-10.5-10 (1973), IND. ANN. STAT. § 9-2720 (Supp. 1973).
34. IND. CODE §§ 35-30-10.5-5, -6 (1973), IND. ANN. STAT. §§ 9-2715, -2716 (Supp. 1973). The closing order may be released by following a similar procedure to the temporary injunction release in § 3 of the Act. IND. CODE § 35-30-10.5-3 (1973), IND. ANN. STAT. § 9-2713 (Supp. 1973).
35. IND. CODE § 35-30-10.5-8 (1973), IND. ANN. STAT. § 9-2718 (Supp. 1973).

DEFECTS IN THE INDIANA PORNOGRAPHIC NUISANCE ACT

A state may constitutionally declare any place kept and maintained for an illegal purpose a common nuisance.[36] The theory behind state control rests on the fact that public nuisances produce a common damage. This damage may include intangible injuries resulting from the immoral, indecent and unlawful acts which become nuisances by their deleterious influence on the morals of society.[37] In order to protect society, the state police power has been held the source of an equitable right to abate public nuisances.[38] This right includes the power to destroy private property.[39]

Although disagreement exists among state courts on the constitutionality of nuisance statutes to suppress obscene materials,[40] a number of states utilize nuisance actions in place of criminal proceedings[41] because equity affords greater efficiency and speed. But, sensitive tools must be employed when state power is directed against recognized forms of expression[42] and motion pictures have been held to be protected by the first amendment.[43] The Indiana Pornographic Nuisance Act may be too crude a tool to regulate the first amendment rights of theatre owners and the viewing public.

Inadequate Safeguards in Preliminary Injunction Proceedings

The issuance of a preliminary injunction utilizes a devastating power which should be employed only in the exceptional case,[44] but because of the lack of safeguards in the Indiana Act, it may be used indiscriminately. The Act requires the court to issue the temporary injunction if the petition's allegations are sustained to its satisfaction.[45] While other jurisdictions require that statutory criteria for the issuance of a

36. Mugler v. Kansas, 123 U.S. 623, 658, 669 (1887).

37. H. WOOD, THE LAW OF NUISANCES § 14 (2d ed. 1893). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 86, 88 (4th ed. 1971).

38. Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878); Carleton v. Rugg, 149 Mass. 550, 555, 22 N.E. 55, 56 (1889).

39. Mugler v. Kansas, 123 U.S. 623, 658 (1887).

40. Grove Press Inc. v. Philadelphia, 418 F.2d 82, 88 (3d Cir. 1969) (public nuisance may be used to restrain conduct specifically prohibited by other constitutionally appropriate standards); Oregon Bookmark Corp. v. Schrunk, 321 F. Supp. 639 (D. Ore. 1970) (nuisance regulation held inconsistent with first amendment); Harmer v. Tonylyn Productions, Inc., 23 Cal. App. 3d 941, 943, 100 Cal. Rptr. 576, 577 (1972).

41. *See, e.g.*, LA. REV. STAT. ANN. §§ 13:4711-:4717 (1968); OHIO REV. CODE ANN. §§ 3767.01-.11 (Page 1971).

42. Speiser v. Randall, 357 U.S. 513, 525 (1958).

43. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

44. Warner Bros. Pictures v. Gittone, 110 F.2d 292 (3d Cir. 1940).

45. IND. CODE § 35-30-10.5-4 (1973), IND. ANN. STAT. § 9-2714 (Supp. 1973).

temporary injunction supercede common law criteria,[46] Indiana leaves the issuance of the injunction to the judge's discretion.[47] In the absence of statutory guidelines, the Indiana judge must still utilize the classic common law criteria.[48] These include: (1) the irreparability of harm to the plaintiff pendente lite,[49] (2) the balance of the potential harm to each party,[50] and (3) the public interest.[51] Applying these criteria to an obscenity case, it is doubtful the plaintiff can successfully satisfy them.

First, the plaintiff usually cannot demonstrate that he or she suffers irreparable harm. Only those persons who voluntarily pay the admission price are exposed to the potential harm of a film. While some have argued that drive-in theatres inadvertantly subject passers-by to the harms of questionable material,[52] an otherwise unobjectionable film does not necessarily become obscene in the "context of its exhibition."[53] Thus, unless a general, irreparable harm can be shown to stem from the presence of the film or the theatre in the locality, it will be difficult for a plaintiff to meet the irreparable harm criterion.

Second, the potential harm of the temporary injunction to the defendant often substantially outweighs the harm to the plaintiff. Restraining the exhibition of a film, even for one week, may have drastic economic repercussions on the defendant.[54] Also, since most films are

46. State v. O.K. Transfer Co., 215 Ore. 8, 14-15, 330 P.2d 510, 513 (1958). In this case, involving the violation of a criminal statute, the court held that the requirement that the plaintiff make a "proper showing" did not include the need to meet the common law standards of irreparable harm and inadequacy of a legal remedy. *Id.*

47. *E.g.*, Tuf-Tread Corp. v. Kilborn, 202 Ind. 154, 157, 172 N.E. 353, 354 (1930).

48. Although one of the traditional common law requirements for the issuance of a temporary injunction is the probability of the plaintiff's success on the merits, J. HIGH, A TREATISE ON THE LAW OF INJUNCTION § 5 (4th ed. 1905), in Indiana a plaintiff need only make out a prima facie case. State *ex rel.* Haberkorn v. DeKalb Circuit Court, 251 Ind. 283, 291, 241 N.E.2d 62, 67 (1968).

49. Meiselman v. Paramount Film Distrib. Corp., 180 F.2d 94 (4th Cir. 1950); Webb v. Board of Educ., 223 F. Supp. 466 (N.D. Ill. 1963). "A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one." Owen v. Phillips, 73 Ind. 284, 288 (1881).

50. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740, 743 (2d Cir. 1953), Meiselman v. Paramount Film Distrib. Corp., 180 F.2d 94, 96 (4th Cir. 1950).

51. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742-43 (2d Cir. 1953).

52. In an Indiana case, a municipal ordinance applied against a licensed drive-in was held unconstitutional. Cinecom Theatres Midwest States Inc. v. Fort Wayne, 473 F.2d 1297 (7th Cir. 1973). The court stated that although brief exposure to a film is inevitable, in the absence of a showing that the presentation is too obtrusive to be avoided by passers-by, the plaintiff's alleged privacy interest could not support such sweeping legislation. *Id.* at 1303.

53. Rabe v. Washington, 405 U.S. 313, 315-16 (1972).

54. Some theatres may receive gross revenue in excess of $20,000 for one week's exhibition. *See, e.g.*, Meyer v. Austin, 319 F. Supp. 457, 460 (M.D. Fla. 1970) (more than 7,000 patrons saw the film "Vixen" in the week following the injunction of state proceedings).

leased for a short period, a temporary injunction, even if dissolved, may effectively prohibit a film's exhibition in a certain area.[55] The plaintiff will find it difficult to assert an interest which will override the hardship which a temporary injunction would inflict on the defendant.

Third, the judge must consider the public interest before issuing an injunction. The public has the right, supported by the first amendment, to view motion pictures which are not obscene. A temporary injunction could effectively prevent large numbers of potential viewers from ever seeing films that a few have asserted to be obscene.[56]

The Absence of Jury Participation

By labeling the nuisance proceedings equitable, the Indiana Act may eliminate the use of a jury in an obscenity trial. Although it has been held that a jury determination of obscenity is not required in an equity proceeding,[57] *Miller* suggests that:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.[58]

In a post-*Miller* case, the federal government argued that "only an Iowa jury can properly apply 'Iowa community standards.' "[59]

On the other hand, the same day as *Miller* was decided, the United

55. Some films are leased for ten days to two weeks. Since the Indiana Act allows for ten days between the temporary injunction and the final hearing, the theatre owner may not be able to extend his lease. *Cf.* Freedman v. Maryland, 380 U.S. 51, 59 (1965); Meyer v. Austin, 319 F. Supp. 457, 467 (M.D. Fla. 1970).

56. Although the Act provides for an adversary hearing within ten days after a petition for a temporary injunction is filed, the act also provides that an injunction shall issue as a matter of course if the hearing is continued at the defendant's request. IND. CODE § 35-30-10.5-4 (1973), IND. ANN. STAT. § 9-2714 (Supp. 1973). This provision penalizes, without a hearing, legitimate requests for delay. Thus, without a hearing on the merits of the nuisance action, a procedural request may suppress a constitutionally protected film. Although the United States Supreme Court recently held there is no absolute right to a prior adversary hearing before seizure of allegedly obscene materials in Heller v. New York, 413 U.S. 483 (1973), the film was neither enjoined from exhibition nor threatened with destruction. In Indiana, however, much more is at stake. Should the film be found to be obscene, the theatre owner may be enjoined from showing *any* film until the final hearing. IND. CODE § 35-30-10.5-6 (1973), IND. ANN. STAT. § 9-2716 (Supp. 1973).

57. Star v. Preller, 352 F. Supp. 530 (D. Md. 1972). There is no constitutional infirmity in determining obscenity in an equity proceeding as long as the constitutional safeguards of notice and fair hearing are provided. *Id.* at 539.

58. Miller v. California, 413 U.S. 15, 26 (1973).

59. United States v. Lang, 361 F. Supp. 380, 381 (C.D. Cal. 1973).

States Supreme Court held that a jury trial is not required in state civil obscenity proceedings.[60] That case, however, involved an action under a Virginia statute[61] directed against obscene materials themselves, rather than against individual defendants. Massachusetts, which has a statute similar to Virginia's, allows any person interested in the sale, loan or distribution of the book to demand a jury trial on the issue of obscenity.[62] Moreover, at common law the question of nuisance was decided by a jury trial before an injunction issued.[63] Therefore, the Court's affirmance of the Virginia statute should not be read as approving statutes, such as Indiana's, which subject *individuals* to penalties without a jury trial.

Some have argued that a jury determination of obscenity is inconsistent with an objective first amendment standard.[64] However, a jury is designed to represent a cross section of the community, and therefore is especially well-suited to reflect the views of the average citizen.[65] Since a case would not go to the jury if the judge found the material not obscene as a matter of law, a jury could provide a theatre owner with additional protection.[66]

Thus, under the Indiana statute, because the action is directed against the theatre and its owner, a jury trial would provide needed safeguards, even if not constitutionally required.

Vagueness

The Pornographic Nuisance Act provides for proceedings against any establishment where "lewd, indecent, lascivious, or obscene" films are shown.[67] This wording makes the statute unconstitutionally vague. The standard employed requires that a statute not be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[68]

Statutes which are vague are declared void on constitutional grounds because they do not provide "sufficiently definite warning as

60. Alexander v. Virginia, 413 U.S. 836 (1973).
61. VA. CODE ANN. § 18.1-236.3 (1950).
62. MASS. ANN. LAWS ch. 272, § 28D (1968).
63. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 923 (13th ed. 1886). *Contra,* Mugler v. Kansas, 123 U.S. 623, 673 (1887).
64. *See, e.g.,* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 527 (1970) [hereinafter cited as Monaghan].
65. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 448 (1957) (Brennan, J., dissenting).
66. Monaghan, *supra* note 64, at 531.
67. IND. CODE § 35-30-10.5-1 (1973), IND. ANN STAT. § 9-2711 (Supp. 1973).
68. Connally v. General Const. Co., 269 U.S. 385, 391 (1926); *see* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

to the proscribed conduct."[69] The prominence which obscenity litigation has gained attests to the difficulty which courts, as well as "men of common intelligence," have in defining standards such as those found in the Indiana statutes.[70]

In addition, the Indiana statute does not meet the *Miller* test which requires that the proscribed conduct be specifically described.[71] *Miller* requires the specific description of "patently offensive 'hard core' sexual conduct" in order to "provide fair notice to a dealer in such materials."[72] Language identical to the Pornographic Nuisance Act was used in the criminal obscenity statutes recently held unconstitutional by the Indiana Supreme Court in light of *Miller*.[73] Furthermore, even though some Indiana cases have indicated that vague statutory language may be saved by presuming that the legislature intended to follow the prevailing constitutional standard of obscenity,[74] the *Miller* decision appears to have foreclosed this approach.[75]

Prior Restraint

Besides an injunction, the Act provides that the court may issue an order closing the theatre for one year, unless sooner released.[76] This closing order places a prior restraint on first amendment freedoms.

In *Near v. Minnesota*,[77] a newspaper was enjoined as a nuisance, from further publication of "malicious, scandalous and defamatory" material.[78] The United States Supreme Court reversed, finding that the purpose of the statute was not punishment, but suppression of first amendment rights.[79]

Although some prior restraint may be necessary to effectuate the state's obscenity statutes,[80] the closing power of the Indiana Act is too extensive. It allows the courts to close the theatre for a year even when

69. Roth v. United States, 354 U.S. 476, 491 (1957) (dicta); United States v. Petrillo, 332 U.S. 1, 7-8 (1947) (dicta).

70. Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 222 (1955).

71. Miller v. California, 413 U.S. 15, 24 (1973).

72. *Id.* at 27.

73. Mohney v. State, —— Ind. ——, 300 N.E.2d 66 (1973); Stroud v. State, —— Ind. ——, 300 N.E.2d 100 (1973).

74. *E.g.*, Henley v. Wise, 303 F. Supp. 62, 69 (N.D. Ind. 1969); Stroud v. State. —— Ind. ——, 273 N.E.2d 842, 844-45 (1971).

75. 413 U.S. at 24; *see* text accompanying note 18 *supra*.

76. IND. CODE § 35-30-10.5-6 (1973), IND. ANN. STAT. § 9-2716 (Supp. 1973).

77. 283 U.S. 697 (1931).

78. *Id.* at 701.

79. *Id.* at 711.

80. *See, e.g.*, Delta Book Distrib. Inc. v. Cranvich, 304 F. Supp. 662 (W.D. La. 1969).

no evidence exists that obscene films may be exhibited there in the future. In the context of books, it has been held:

> If the enjoining of future issues of a publication is impermissible, then enjoining complete use of the press and the building is much more impermissible, for that results in no future issues of *any* publication, and not only the unprotected obscene.[81]

Similarly, a theatre owner may not only suffer serious economic repercussions, but also may lose his or her first amendment right to show all films.

Chilling Effect

The Indiana Act also imposes a "chilling effect" on the exercise of first amendment rights by theatre owners. This term was coined by the Supreme Court to describe the inhibition of the exercise of first amendment rights by statutes which are overbroad in their sweep or imprecise in their language.[82]

Any prosecution under a statute regulating expression involves imponderables which may inhibit first amendment freedoms.[83] However, when the statute is overbroad or vague, the chilling effect on these rights becomes critical.[84] Under the Indiana Act, if a court finds a theatre has shown an obscene film, the theatre and its owner will be perpetually enjoined from maintaining a nuisance.[85] Both the injunction and the threat thereof have a chilling effect on theatre owners, because it does not warn them which films are prohibited.[86] Moreover, the chilling effect may be intensified because the trial judge retains the power to summarily try and punish the defendant for violations of the injunction.[87] Further, this provision is inconsistent with the jury preference in *Miller*.[88] Thus, in attempting to comply with the statute and the court order, a theatre owner would hesitate to schedule any films which could

81. Society to Oppose Pornography, Inc. v. Thevis, 255 So. 2d 876, 881 (La. App. 1972). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).
82. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).
83. *See, e.g.*, Smith v. California, 361 U.S. 147 (1959).
84. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).
85. IND. CODE § 35-30-10.5-5 (1973), IND. ANN. STAT. § 9-2715 (Supp. 1973).
86. A number of courts have emphasized the need for specificity in order to give adequate notice of proscribed conduct in first amendment cases. Freedman v. Maryland, 380 U.S. 51 (1965); Mitchem v. State *ex rel.* Schaub, 250 So. 2d 883 (Fla. 1971), *citing* Smith v. California, 361 U.S. 147 (1959). Because an injunction may place an unacceptable burden on one's freedom to sell publications, a publication which is to be suppressed must be specifically named. Marcus v. Search Warrant, 367 U.S. 717, 735 (1961).
87. IND. CODE § 35-30-10.5-7 (1973), IND. ANN. STAT. § 9-2717 (Supp. 1973).
88. *See* text accompanying note 58 *supra*.

be considered objectionable. Fearing judicial action, he or she will voluntarily restrict the theatre's offerings, even to the point of refusing to show protected films.

ALTERNATIVE APPROACHES FOR INDIANA

Several alternatives remain available if Indiana wishes to control the distribution of obscene materials. First, the state could decide to leave control to the local communities. This approach would recognize the "community standards" formulation of *Miller*, and bring control more closely in line with local thinking.[89] Some Indiana localities have adopted municipal ordinances to control obscene materials. Evansville acted prior to *Miller*, passing an ordinance which follows the language of the Indiana juvenile statutes.[90] Indianapolis enacted an ordinance which incorporated the *Miller* guidelines.[91] While these ordinances do not resolve all of the difficulties inherent in obscenity control legislation, they nevertheless appear constitutional.

Second, the state could decide merely to codify the *Miller* guidelines in a specific statute which was not subject to the usual constitutional objections.[92] This statute would allow differing applications in different areas due to different formulations of local standards. The General Assembly would have to be careful in drafting such a statute to leave room for these local differences, while not being impermissibly vague or overbroad.

Third, the state might decide to stay out of the obscenity control arena entirely.[93] Public pressure might then be substituted for state control of obscenity. Under this approach, the market place would control the supply of obscene material within a given area.[94] If the prevailing community standards oppose obscene material, then the pressure created by a low demand would force the materials and those who offered them out of the community. Even if there were high demand, political and

89. *See* note 20 *supra* & text accompanying.

90. Evansville, Ind., Ordinance G-72-13, April 5, 1972. The Indiana Juvenile Statutes are codified at IND. CODE §§ 35-30-11-1 to -7 (1971), IND. ANN. STAT. §§ 10-817 to -823 (Supp. 1973).

91. Indianapolis, Ind., Ordinance 46, October 16, 1973.

92. In *Miller*, the court offered two examples of statutory language which would satisfy the requirement of specificity. Miller v. California, 413 U.S. 15, 25 (1973).

93. "The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer . . . ." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973).

94. If the magazines in question were truly "patently offensive" to the local community, there would be no need to ban them through the exercise of the police power; they would be banned by the marketplace which provided no buyers for them.
Trinkler v. Alabama, 94 S. Ct. 265, 266 (1973) (Douglas, J., dissenting).

social pressure might be used by anti-obscenity forces to lower the demand. This approach would support the view of some that obscenity is incapable of definition but is merely a matter of taste and social custom.[95]

Finally, since it is doubtful that the state will leave the obscenity control arena, a more neutral procedure could be adopted. Before bringing a civil or criminal action against a dealer in obscene materials, the state could provide for a declaratory judgment action against the specific material alleged to be obscene.[96] A finding that it was obscene could then result in punishment of any person who subsequently distributed it in the community. Each offense after a determination of obscenity could be punished separately, thus obviating the need to resort to injunction. In this manner, potential defendants would be put on notice of their illegal conduct, and only specific violations would be punished.[97]

CONCLUSION

The recent obscenity decisions have had a noticeable effect on anti-obscenity prosecutions. Thinking that the Court has returned the power that previous decisions had limited, state and local governments are taking bold actions against allegedly obscene materials.[98]

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95. I. BRANT, THE BILL OF RIGHTS 491-92 (1965); *see* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

96. Massachusetts and Virginia have such procedures. MASS. ANN. LAWS ch. 272, § 28C (1968); VA. CODE ANN. § 18.1-236.3 (1950).

97. The President's Commission on Obscenity and Pornography has suggested this procedure be adopted:

> The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorizing prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions . . . .
>
> A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is an existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for any threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material.

THE PRESIDENT'S COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 63 (1970). Justice Douglas in his dissent in *Miller* also suggested this procedure. Miller v. California, 413 U.S. 15, 42-44 (1973) (Douglas, J., dissenting).

98. *See, e.g.*, N.Y. Times, July 1, 1973, § D, at 1, col. 6; Keating, *Green Light to Combat Smut*, READERS DIGEST, Jan. 1974, at 147. Perhaps the states overreacted and misinterpreted the *Miller* guidelines. The Supreme Court has agreed to clarify its decision. Jenkins v. Georgia, 42 U.S.L.W. 3337 (U.S. Dec. 4, 1973).

With the exception of the juvenile statutes, the Pornographic Nuisance Act is the only Indiana statute left to combat obscenity. Assuredly, it will be declared unconstitutional as were the criminal obscenity statutes. Even if the vague language is clarified, the nuisance act is too imprecise a tool to regulate obscenity. The state's legitimate interest in barring obscene materials does not outweigh the individual's interest in exercising first amendment rights with a clear knowledge of what materials and actions are outside the Constitution's protection. Indiana has available several alternatives which would allow both interests to be effectuated.

THOMAS L. DAVIS