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COMMENTS

Constitutional Law—The Constitutionality of North Carolina's Nuisance Abatement Statute: A Prior Restraint on Nonobscene Speech

In 1977 North Carolina joined a growing number of states that have sought alternatives to criminal obscenity prosecutions by allowing civil abatement of obscenity as a public nuisance.¹ Under North Carolina's abatement statute,² once the state proves at trial that a defendant has created a nuisance by distributing pictorial obscenity, a court may issue a permanent injunction barring distribution of materials judicially found obscene and any similar items.³ The statute has survived constitutional attack on several occasions. The North Carolina Supreme Court upheld the statute against broad constitutional attacks in *State ex rel Andrews v. Chateau X, Inc. (Andrews I)*⁴ and again in *State ex rel Andrews v. Chateau X, Inc. (Andrews II)*.⁵ In 1982 the Fourth Circuit Court of Appeals, in the face of a narrower challenge, agreed that the statute was constitutional in *Fehlhaber v. North Carolina (Fehlhaber II)*,⁶ overturning the district court decision in *Fehlhaber v. North Carolina (Fehlhaber I)*.⁷ In dismissing the attacks, the courts held that North Carolina's abatement statute creates no greater chill on speech than did the state's criminal obscenity statutes. Yet the North Carolina Supreme Court and the Court of Appeals for the Fourth Circuit failed to address adequately the constitutionality of one provision of the abatement statute that permits creation of prior restraints on speech by allowing permanent injunctions against materials never judicially determined obscene.⁸ The position taken by the North Carolina courts and the Court of Appeals for the Fourth Circuit is contrary to

1. As of 1979 at least six other states had passed statutes specifically allowing abatement of obscenity as a public nuisance. These states include Louisiana, Massachusetts, North Dakota, Ohio, Texas, and Virginia. Arizona and California courts interpret existing nuisance statutes to allow abatement of obscenity. *A Nuisance Abatement Statute, That, When Applied to Obscenity, Authorizes a Prior Restraint on the Future Exhibition of Unnamed Films, Violates the United States Constitution*—Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978), 13 GA. L. REV. 1076, 1077 n.11 (1979) [hereinafter cited as *A Nuisance Abatement Statute*]. But see Note, *Alabama's Red Light Abatement Act Held Applicable to Obscene Movies as Permanently Enjoyable Nuisances*, 10 CUM. L. REV. 593, 600 (1980) (noting courts in Michigan, California, Illinois, New Mexico, and Pennsylvania have refused to interpret existing "red light" abatement acts to include obscenity).

2. N.C. GEN. STAT. §§ 19-1 to -8.3 (1978).

3. *Id.* § 19-5. For text of § 19-5, see *infra* note 47.

4. 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated and remanded*, 445 U.S. 947 (1980).

5. 302 N.C. 321, 275 S.E.2d 443 (1981). The North Carolina Supreme Court decisions in *Andrews I* and *II* are discussed in Note, *Constitutional Law—Control of Obscenity Through Enforcement of a Nuisance Statute*—Chateau X, Inc. v. State ex rel. Andrews, 302 N.C. 321, 275 S.E.2d 443 (1981), 4 CAMPBELL L. REV. 139 (1981).

6. 675 F.2d 1365 (4th Cir. 1982).

7. 445 F. Supp. 130 (E.D.N.C. 1978). See *infra* notes 84-88 and accompanying text.

8. N.C. GEN. STAT. § 19-5 (1978). For a discussion of the permanent injunction provision of the abatement statute, see *infra* note 47.

current case law on prior restraints as represented in *Freedman v. Maryland*,⁹ which requires that the censor carry the burden of proof, that pretrial restraints must be limited, and that the defendant must be guaranteed a prompt, final judicial determination on the merits of the case.¹⁰ This comment will examine the law of prior restraints on free speech and the constitutionality of North Carolina's nuisance abatement statute.

The principle that men should be allowed to speak freely, unencumbered by government regulation, is deeply rooted in American social and legal tradition.¹¹ This notion lies at the heart of the first amendment prohibition against laws abridging the freedom of speech and press.¹² Yet the right of free speech confronts an equally strong force: the human tendency to suppress ideas viewed as immoral, dangerous, or wrong.¹³ The tension created by these opposing fundamental concepts surfaces in several areas of constitutional law,¹⁴ but the conflict is most noticeable in the area of obscenity regulation.¹⁵

9. 380 U.S. 51 (1965). For a discussion of *Freedman*, see *infra* notes 29-30 and accompanying text.

10. *Id.* at 58-59.

11. The early English press was controlled by the Crown through a system of licensing, and opponents of the government were subject to prosecution for seditious libel. The licensing system ended in the 17th century, but seditious libel prosecutions continued. The framers of the U.S. Constitution and the first amendment were intent on ensuring the freedom of the American press from such restraints. G. GUNTHER, CONSTITUTIONAL LAW, 1107-08 (10th ed. 1979). See *infra* note 24 and accompanying text.

12. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. CONST. amend. I. The first amendment is applicable to the states through the fourteenth amendment, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931). The fourteenth amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States: nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

13. The urge to repress ideas repugnant to one's own has been recognized by the Supreme Court as a threat to first amendment freedoms:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But . . . the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

14. Only two Supreme Court justices, William O. Douglas and Hugo Black, have ever advocated an "absolutist" view of the first amendment, in which freedom of speech and press may not be infringed for any reason. Bosmajian, *Introduction* to W.O. DOUGLAS, JUSTICE DOUGLAS AND FREEDOM OF SPEECH at xiv-xv (1980); G. GUNTHER, *supra* note 11, at 1113. The prevailing approach of the Supreme Court is to require a balancing of the first amendment and other interests at stake. *Id.* The difficulty of striking the correct balance, of course, increases with the perceived evil or danger posed by the speech and the state's corresponding desire to suppress it. Certain kinds of speech deemed to present particularly great danger have been excluded from first amendment protection entirely. One example is speech posing a "clear and present danger" of illegal action. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Libel was at one time considered to be completely outside the protection of the first amendment, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), but this view was repudiated by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

15. Ironically, religious and governmental censorship in early England was concerned more

Regulation of obscenity poses particularly difficult problems because of the strong competing interests involved. The desire to protect freedom of speech may clash head-on with the wish to suppress material believed to undermine the moral standards of society, the right of parents to raise children as they wish, and even the economic and aesthetic value of neighborhoods. Judicial and legislative attempts to balance these conflicting interests have created a body of law unequaled in confusion and instability.¹⁶ Decisions are fre-

with political and religious themes than with obscenity. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 657 (1978). During the 17th century the influence of Puritanism in England brought with it increasing restrictions against sexually-oriented materials. Nevertheless, there was virtually no common-law rule against obscenity in the American colonies before the Revolution, and Massachusetts was the only state with a statute on obscenity. *Id.* The greatest growth in regulation of obscenity in the United States occurred between 1820 and 1860. *Id.* at 657-68. By 1942 Justice Murphy was able to state unequivocally that obscenity was unprotected by the first amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Numerous objections have been raised against obscenity and in support of regulation. Obscenity has been described as "shameless exploitation of the frustrated and the compulsive," a depiction of man "reduced to the sorry sum of his basest appetites." L. TRIBE, *supra*, at 668. It has been viewed as a threat to moral training of children, an assault on the sensibilities of unwilling adults, R. LISTON, *THE RIGHT TO KNOW* 66-67 (1973), and a detriment to the economic and aesthetic value of neighborhoods. *Young v. American Mini Theatres*, 427 U.S. 50, 55 (1976). There may be psychological and sociological reasons behind the intense emotions roused by obscenity. "Suppression of the obscene persists because it [obscenity] tells us something about ourselves that some of us, at least, would prefer not to know. It threatens to explode our uneasy accommodation between sexual impulse and social custom—to destroy the carefully-spun social web holding sexuality in its place." L. TRIBE, *supra*, at 669-70. Another author explains the debate as a matter of social class tensions: "Resentment emerges as a secret, unconscious, unfocused tension felt in members of [the lower middle class] who vaguely sense their inferior social position, their lack of power and whose rage is contained by transforming self-denial into a virtue." MC-WILLIAMS in *CENSORSHIP: FOR & AGAINST* 89 (H. Hart ed. 1971).

16. The Supreme Court's efforts to distinguish obscenity from protected speech have "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit Inc. v. Dallas*, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring in part).

The first reported obscenity case in the United States was *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815), a Pennsylvania decision cited in L. TRIBE, *supra* note 15, at 658. Prior to the late nineteenth century, however, few cases attempted to define obscenity. L. TRIBE, *supra* note 15, at 658. American courts instead adopted the standard of an English case, *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868), which defined obscenity as that which has a tendency "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Id.* at 368. This standard, which defines obscenity in terms of the effect of isolated passages on the most susceptible audiences, prevailed in American courts until the mid-1930s, when courts began to adopt a standard based on the effect of the dominant theme of the work as a whole on the average reader. L. TRIBE, *supra* note 15, at 659. The Supreme Court fully addressed the question of the proper standard for the first time in *Roth v. United States*, 354 U.S. 476 (1957): "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489. The *Roth* standard proved difficult to apply, however, and for the next fifteen years the Court's opinions divided sharply on the issue of obscenity. It was not until 1973, in *Miller v. California*, 413 U.S. 15 (1973), that five justices agreed on a modified version of the *Roth* test:

The basic guideline for the trier of fact must be: (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.

Id. at 24.

quently inconsistent,¹⁷ and standards are difficult to apply.¹⁸ Of the few established rules that have emerged from the obscenity decisions, perhaps the most important is the rule placing material judicially pronounced obscene outside the protection of the first amendment.¹⁹ This rule is accompanied by a caveat, however; because the line between protected and unprotected speech is often "dim and uncertain,"²⁰ states are not free to regulate suspected obscenity in any way they choose. Rather, they are required to observe certain rules and procedural safeguards.²¹

The need for these safeguards is especially great when state obscenity regulations create prior restraints on material presumptively protected by the first amendment. A prior restraint is a restraint "imposed before the communication takes place, as distinguished from restrictions of speech imposed by subsequent punishment."²² Prior restraints have long been viewed with great suspicion by American courts²³ because such restrictions forever deprive the audience of the speaker's message. Indeed, the principle against prior restraints is traceable to Blackstone: "Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publish what is improper, mischievous or illegal, he must take the consequences of his own temerity."²⁴ Blackstone's sentiments are repeated in the leading case discussing prior restraints, *Near v. Minnesota ex rel. Olson*.²⁵ In *Near* the Supreme Court struck down a state procedure for abatement of defamatory and scandalous newspapers as public nuisances. The Court noted that a prime motive behind the enactment of the first amendment was the framers' desire to avoid the restrictions and prior restraints of speech that were typical of early England.²⁶ Although any system

17. "[T]he present . . . standards are so intolerably vague that even-handed enforcement of the law is a virtual impossibility. . . . [G]rossly disparate treatment of similar offenders is a characteristic of the criminal enforcement of obscenity law." *Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part, dissenting in part).

18. Justice Brennan, who wrote the majority opinion in *Roth*, abandoned his own test of obscenity sixteen years later in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). Justice Brennan concluded that "none of the available formulas . . . can reduce the vagueness to a tolerable level. . . ." *Id.* at 84 (Brennan, J., dissenting). Justice Stewart as well seems to have despaired of finding a useable definition of obscenity. "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

19. *Roth* held that obscenity is not "speech" in the first amendment sense, 354 U.S. at 485 (citing dictum in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)), but acknowledged that regulation of obscenity may raise serious constitutional issues. "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press. . . ." 354 U.S. at 488. See also *Miller v. California*, 413 U.S. 15, 24 (1973) (discussed *supra* note 16). See discussion of *Roth*, *supra* note 16.

20. *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). For further discussion of *Marcus*, see *infra* note 33.

21. *Id.*

22. G. GUNTHER, *supra* note 11, at 1374.

23. *Id.*

24. 4 W. BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 152 (1902).

25. 283 U.S. 697, 713-14 (1931).

26. "[L]iberty of the press, historically considered and taken up by the Federal Constitution,

of prior restraint comes before a court with a strong presumption against its validity,²⁷ prior restraints are not per se invalid. For instance, in *Near* the Court noted that a prior restraint may be allowed to prevent obstruction of military recruiting, harm to military troops, or violence or overthrow of the United States Government as well as to uphold "the primary requirements of decency."²⁸

In *Freedman v. Maryland*²⁹ the Supreme Court held that prior restraints may also be tolerated when certain procedural safeguards are provided. Before a prior restraint on presumptively protected materials will be allowed, a state must ensure that the would-be censor bears the burden of proving the material obscene. Furthermore, restraints prior to judicial review must be limited to preservation of the status quo and will be allowed only for the shortest period compatible with sound judicial procedure. Finally, the state must assure a prompt, final judicial determination on the question of obscenity.³⁰

While the prior restraint discussed in the *Freedman* case arose from a state film-licensing statute,³¹ other forms of regulation may also constitute illegal restrictions on speech. Because first amendment concerns pervade the entire area of obscenity regulation,³² the rules against prior restraints may severely limit the options available to a state seeking to regulate adult speech. Procedures that have been stricken by courts as illegal prior restraints include certain kinds of seizures of materials before trial on the merits,³³ some licens-

has meant, principally, although not exclusively, immunity from previous restraints or censorship." 283 U.S. at 716.

27. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1968).

28. 283 U.S. at 716. The applicability of this particular phrase in nuisance abatement actions against obscenity was discussed by the majority in *Andrews I*, 296 N.C. at 266, 250 S.E.2d at 612 and the dissent in *Fehlhaber II*, 675 F.2d at 1371.

29. 380 U.S. 51 (1965).

30. *Id.* at 58-59, cited in *Andrews II*, 302 N.C. at 325 n.5, 275 S.E.2d at 446 n.5.

31. Maryland law required motion picture operators to submit films to a state board of censors for approval before the films could be shown publicly. 380 U.S. at 52 n.2.

32. Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion*, 7 SETON HALL L. REV. 543, 546 (1976).

33. In a number of cases the Supreme Court has emphasized that seizures of presumptively protected material may constitute an illegal prior restraint if adequate safeguards are not provided.

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), the Court struck down a Missouri statute that allowed mass seizure of allegedly obscene magazines prior to trial on the issue of obscenity. In *Marcus* a city policeman filed a sworn complaint with the state trial court, alleging that the appellant-bookstore owners were selling obscene publications. The trial judge issued a broad warrant, which did not name any specific items to be seized, after an *ex parte* hearing and without seeing any of the allegedly obscene materials. The Court held that the Missouri procedure afforded insufficient safeguards against infringement of nonobscene materials that might be sold by appellants. The Court distinguished the pretrial seizure upheld in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), discussed *infra* note 60. In *Kingsley* the complaint named particular publications to be seized, and copies were attached for the judge to inspect before he issued a search warrant. Further, the pretrial restraint was effective only against specific, named publications, and state law required a prompt judicial decision on the question of obscenity of the seized materials. 367 U.S. at 735-36. For a discussion of the *Marcus* decision, see Note, *Constitutional Law—Search and Seizure—Procedures for Seizure of Obscene Publications*, 26 MO. L. REV. 501 (1961).

New York's pretrial seizure provisions were upheld by the Court in *Heller v. New York*, 413 U.S. 483 (1973). In *Heller*, a trial judge viewed an allegedly obscene film before issuing a warrant

ing systems,³⁴ harassment or arrests of distributors of sexually-oriented materials,³⁵ and forced closures of businesses dealing in adult material.³⁶ Courts

based on his finding that there was probable cause to believe the movie obscene. Only one copy of the film was seized, for purposes of preserving evidence for trial, and there was no allegation that the copy was the only one owned by the defendants. The Court held that there is no absolute right to an adversarial hearing on the question of obscenity prior to seizure of allegedly obscene materials. *Id.* at 488. Due process safeguards are sufficient when material is seized pursuant to a warrant based on probable cause and the sole purpose of the seizure is the preservation of evidence. *Id.* at 490. If a defendant alleges that the copy seized is the only one available, he must be allowed to make duplicates, so that distribution of the "speech" will not be halted prior to trial on the merits. *Id.* at 492-93.

Although the *Heller* Court held that there is no absolute requirement of an adversary hearing before seizure of suspected obscenity as evidence, North Carolina's criminal obscenity statute requires a separate judicial proceeding to determine if material is obscene prior to its use in a criminal obscenity prosecution. N.C. GEN. STAT. § 14-190.2 (1981); *State ex rel Andrews v. Chateau X (Andrews I)*, 296 N.C. 251, 279-80, 250 S.E.2d 603, 620-21 (1979) (Exum, J., dissenting). This requirement seems to reflect legislative recognition of the difficulty of defining obscenity and a corresponding desire to provide maximum procedural safeguards for criminal defendants. *See* 296 N.C. at 277-79, 250 S.E.2d at 618-20 (Exum, J., dissenting).

In *Roaden v. Kentucky*, 413 U.S. 496 (1973), the companion case to *Heller*, the Court held that a warrant is required even when material is seized incidental to a lawful arrest, and even if the seizure is simply to preserve evidence. Before presumptively protected materials may be seized, a neutral magistrate must have a chance to "focus searchingly" on the question of the probable obscenity of the matter. *Id.* at 506.

In *Roaden*, a county sheriff viewed a film, then arrested the theatre owner and seized the film. The Court held that the seizure, conducted without a warrant, was unreasonable under the fourth and fourteenth amendments:

Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable . . .

413 U.S. at 504. The Court noted, however, that allegedly obscene materials may be seized without a warrant, if the seizure occurs under "exigent circumstances," such as when the evidence would disappear permanently if not seized immediately. *Id.* at 505. See the discussion of *Roaden* in Note, *Tennessee Nuisance Statute Declared Unconstitutional*, 4 MEM. S.U.L. REV. 619 (1974).

Lower court decisions discussing seizures of allegedly obscene materials include *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *United States v. Echols*, 577 F.2d 308 (5th Cir. 1978); *Eagle Books, Inc. v. Ritchie*, 455 F. Supp. 64 (N.D. Utah 1978); *Maguin v. Miller*, 433 F. Supp. 223 (D. Kan. 1977); *First Amendment Found. of Fla., Inc. v. State*, 364 So. 2d 450 (Fla. 1978); *People v. Hobbs*, 59 Ill. App. 3d 793, 375 N.E.2d 1367 (1978); *Hollington v. Ricco*, 40 Ohio App. 2d 57, 318 N.E.2d 442 (1973).

34. Although the Supreme Court recognizes the right of the state to license first amendment activities, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976), there are certain limits on that right. For instance, a license may not be revoked or withheld on the basis of past criminal convictions or other misconduct of the applicant or licensee. Such a denial of the right to disseminate material presumptively protected by the first amendment constitutes an illegal prior restraint if based solely on past conduct. *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980); *Natco Theatres, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979); *City of Springfield v. Hall*, 93 Ill. App. 3d 860, 417 N.E.2d 1059 (1981); *Hamar Theatres, Inc. v. City of Newark*, 150 N.J. Super. 14, 374 A.2d 502 (App. Div. 1977); *People v. J.W. Productions*, 98 Misc. 2d 69, 413 N.Y.S.2d 552 (Crim. Ct. 1979). A licensing system may also be an illegal prior restraint if it gives excessive discretion to an administrative licensing board: "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). An unduly time-consuming and cumbersome licensing system was stricken as a prior restraint in *State v. Huddleston*, 412 A.2d 1148 (Del. Super. 1980). *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981), held that licensing fees must be nominal or limited to the amount necessary to defray administrative expenses.

35. Harassment may take the form of police raids on adult theatres, as in *Maguin v. Miller*, 433 F. Supp. 223 (D. Kan. 1977). The *Maguin* court found a prior restraint based on evidence that police forced patrons of adult theatres to give their names and addresses to officers, seized tickets

have also held that a seller's contractual agreement to a prior restraint will not

from the theatre office, and arrested employees on several occasions. *Id.* at 230. In *Black Jack Distrib., Inc. v. Beame*, 433 F. Supp. 1297 (S.D.N.Y. 1977), a city building inspector repeatedly charged adult bookstore owners with building code violations, forcing businesses to close for brief periods. The court said that although the state

may vigorously enforce obscenity laws when the purpose is to punish the promotion or sale of *obscene* material, or deter such promotion or sale[,] . . . law enforcement will run afoul of the Constitution if the purpose is to force a sexually oriented enterprise to cease doing business or to refrain from dealing in presumably protected sexually oriented materials.

Id. at 1305 (emphasis in original).

A similar kind of prior restraint is created when officials circulate "blacklists" of disapproved material and, by threatening dealers, seek to discourage distribution of the material. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Threats made by a county sheriff against theatre owners who showed any films other than those rated for general audiences were held to constitute an illegal prior restraint in *Drive in Theatres, Inc. v. Huskey*, 435 F.2d 228 (4th Cir. 1970). In *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1354 (5th Cir. 1980), a series of arrests of employees of a sexually-oriented business was held to constitute constructive seizure of presumptively protected materials since the arrests were designed to force the business to remove adult magazines from distribution. *Id.* at 1360.

36. Many courts agree that a blanket closure provision—closing a building for *all* purposes for a set period—is an illegal prior restraint because it bars future speech based on past violations of obscenity or nuisance laws. See *General Corp. v. State ex rel. Sweeton*, 294 Ala. 657, 320 So. 2d 668 (1975); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *Gulf State Theatres of La., Inc. v. Richardson*, 287 So. 2d 480 (La. 1973); *Society to Oppose Pornography, Inc. v. Thevis*, 255 So. 2d 876 (La. App. 1971); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *New Rivieria Arts Theatre v. State ex rel. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967). *But see People ex rel. Hicks v. Sarong Gals*, 42 Cal. App. 3d 556, 117 Cal. Rptr. 24 (1974) (upholding blanket one-year closure); *State ex rel. Calahan v. Diversified Theatrical Corp.*, 59 Mich. App. 223, 229 N.W.2d 389 (1975) (one-year closure), *rev'd on other grounds*, 396 Mich. 244, 240 N.W.2d 460 (1976) (nuisance statute not applicable to films); *State ex rel. Ewing v. A Motion Picture Film Entitled "Without a Stitch"*, 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974) (one-year closure). The Supreme Court has never directly faced the question whether a total padlocking order constitutes an illegal prior restraint on speech. The Court agreed to hear the issue in 1981, but later dismissed the case on procedural grounds. *State ex rel. Kidwell v. United States Mktg., Inc.*, 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed sub nom. United States Mktg., Inc. v. Idaho*, 102 S. Ct. 1649 (1982).

There is less agreement over whether a "limited" closure order is legal. A partial padlocking order closes a business only to the extent necessary to prevent continuation of the nuisance, thus allowing use of the building for other purposes. Courts in many states have held that even a limited closure order creates an illegal prior restraint:

The theory expressed is that under the First Amendment all forms of expression are protected until an adversary hearing has been held and the material has been found obscene by a judicial official. Thus, under this theory, after nuisance-abatement proceedings it is lawful to confiscate obscene items and to enjoin further sale or exhibition of named items found to be obscene, but the injunction cannot close the establishment or generally prohibit future sales or exhibition of *similar* material.

Watts, Obscenity, in 1977 NORTH CAROLINA LEGISLATION 219 (1977). Compare *Society to Oppose Pornography, Inc. v. Thevis*, 255 So. 2d 876 (La. App. 1971) (partial closure permissible although total closure illegal) with *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied*, 429 U.S. 922 (1976) (partial closure invalid).

Although, in light of these decisions, North Carolina's abatement statute should not be read to allow a complete closure order, it is unclear whether the statute permits a partial padlocking. The abatement act provides that after the existence of the nuisance is established an order of abatement may be entered which requires "the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance." N.C. GEN. STAT. § 19-5 (1981). The North Carolina Supreme Court in *Andrews I* refused to interpret § 19-5, but noted its agreement with the State's concession that "any complete closing of a business for past sales of obscene material would constitute illegal prior restraint." 296 N.C. at 258, 250 S.E.2d at 608. The State argued that the statute authorized a limited closure order. Plaintiff Appellees' Supplemental Brief at 7-8, *Andrews I*. Justice Exum, dissenting in *Andrews I*, noted language in several sections of Chapter 19,

save the agreement from being stricken as unconstitutional.³⁷

Constitutional questions concerning prior restraints also arise when states attempt to abate obscenity as a nuisance. Nuisances fall into two rather vague categories—private nuisance, described as “a civil wrong, based on a disturbance of rights in land,”³⁸ and public nuisance, which is “a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.”³⁹ For example, a private nuisance could be created by a factory that produces large amounts of noise and smoke, but disturbs only the adjoining landowners’ use and enjoyment of their property. A public nuisance “may include anything from the obstruction of a highway to a public gaming-house or indecent exposure.”⁴⁰ While the private landowner is responsible for seeking a remedy for a private nuisance, the state may prosecute for a public nuisance.⁴¹ At common law, nuisances could be abated in a civil action, but early North Carolina courts usually controlled obscenity through criminal prosecution instead.⁴²

Recently, the civil abatement approach has become increasingly attractive to many states because the abatement procedure offers several advantages over a criminal obscenity prosecution. For instance, most abatement statutes permit preliminary injunctions against suspected obscene materials, thus providing a rapid, efficient means of halting distribution of the materials before trial on the merits. Moreover, because abatement is an action in equity, a jury trial is not required.⁴³ An additional advantage is the lower standard for burden of

§§ 19-2.1, -5, -6 and -7, that seems to authorize closures of some kind. See 296 N.C. at 269, 250 S.E.2d at 614.

At least one observer has argued that § 19-5 was originally drafted to allow blanket closures, but was amended by the General Assembly prior to passage of the final version to allow only limited closures. Watts, *supra*, at 214.

37. *Penthouse Int'l, Ltd. v. Putka*, 436 F. Supp. 1220 (N.D. Ohio 1977).

38. W. PROSSER, *LAW OF TORTS* 572 (4th ed. 1971). See generally Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509, 523 (1977); *A Nuisance Abatement Statute*, *supra* note 1.

39. W. PROSSER, *supra* note 38, at 573. North Carolina law defines nuisances that may be abated under Chapter 19 as “[t]he erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs . . . , or illegal possession or sale of obscene or lewd matter, as defined in this Chapter” N.C. GEN. STAT. § 19-1 (1978).

40. W. PROSSER, *supra* note 38, at 573. In the early 20th century, “redlight” abatement statutes were enacted by many states to close down businesses used for gambling, prostitution, and other “lewd” activities. Rendleman, *supra* note 38, at 523. Today, some states are trying to construe these existing red light abatement statutes to permit abatement of obscenity, instead of formally amending the statutes as North Carolina’s General Assembly did. Some courts have been willing to “read” the red light statutes to include obscenity, while others have held the general language of the red light statutes too vague to be applied to material presumptively protected by the first amendment. *Id.* at 523-25.

41. W. PROSSER, *supra* note 38, at 572-73.

42. See Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances*, 14 WAKE FOREST L. REV. 1, 4 (1978).

43. *A Nuisance Abatement Statute*, *supra* note 1, at 1077 n.12. North Carolina’s nuisance abatement statute, N.C. GEN. STAT. § 19-2.4 (1978), however, gives the defendant the right to a jury trial on the issue of existence of the initial nuisance. There is no right to a jury trial in a later contempt hearing, however. See N.C. GEN. STAT. § 19-4 (1978).

proof. The state may prove existence of the nuisance by a preponderance of the evidence, rather than by the more stringent criminal standard of beyond a reasonable doubt.⁴⁴

The United States Supreme Court has "acknowledged the value of this approach to the solution of the vexing problem of reconciling state efforts to suppress sexually-oriented expression within the prohibitions of the First Amendment."⁴⁵ Yet at least one member of the Court has also warned that civil abatement procedures may provide insufficient procedural safeguards and thus pose a "danger that the dissemination of constitutionally protected material will be suppressed."⁴⁶

A typical nuisance abatement statute provides that a district attorney or other official may initiate a court action to enjoin dissemination of allegedly obscene materials. If the items are found obscene at trial, the court may declare both the materials and the business itself a nuisance. The court usually has the power to issue a permanent injunction against continuance of the nuisance;⁴⁷ the court may also order destruction of obscene materials,⁴⁸ seizure of proceeds from sales of obscene materials,⁴⁹ and, in some cases, closure of the premises.⁵⁰ Violations of the court injunction are punishable by a contempt prosecution.⁵¹

Prior to 1977, North Carolina's nuisance statute applied only to gambling, sale of drugs and liquor, and prostitution.⁵² The statute was amended, however, in 1977, when the General Assembly added to the list of abateable nuisances the category of pictorial obscenity.⁵³ With this addition, North

44. *A Nuisance Abatement Statute*, *supra* note 1, at 1077 n.12. The Fourth Circuit Court of Appeals in *Fehlhaber II* argued that the North Carolina Supreme Court requires the state to prove existence of a nuisance beyond a reasonable doubt. See *infra* note 57.

45. *McKinney v. Alabama*, 424 U.S. 669, 679 (1976) (Brennan, J., concurring in result).

46. *Id.* at 683 (Brennan, J., concurring in result).

47. The North Carolina abatement statute provides in pertinent part:

If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not sold.

N.C. GEN. STAT. § 19-5 (1978).

48. *Id.*

49. *Id.*

50. See *supra* note 36 (discussing padlocking). Despite language, *supra* note 47, in N.C. GEN. STAT. § 19-5 (1978) that seems to permit some kind of closure order, it is unclear whether courts will interpret the statute to allow padlocking of a nuisance.

51. N.C. GEN. STAT. § 19-4 (1978). The statute provides penalties for contempt including fines ranging from \$200 to \$1,000 and imprisonment for three to six months. For the text of the statute, see *infra* note 110.

52. See Act of June 23, 1971, ch. 655, 1971 N.C. Sess. Laws 622 (codified as amended at N.C. GEN. STAT. § 19-1 (1978)). See also Hogue, *supra* note 42, at 4.

53. Act of June 30, 1977, ch. 819, § 3, 1977 N.C. Sess. Laws, 1st Sess. 1107, 1107-09 (codified in pertinent part at N.C. GEN. STAT. §§ 19-1(a), -1.1 to -1.2 (1978)). For a discussion of the significance of the statute's distinction between "pictorial" and "written" obscenity, see *infra* note 145.

Under the amended abatement act, the district attorney or state attorney general may begin

Carolina joined the ranks of a growing number of states attempting to control obscenity through nuisance actions.

The first challenge to the statute came in *State ex rel Andrews v. Chateau X, Inc. (Andrews I)*, after officials attempted to have the Chateau X bookstore in Jacksonville, North Carolina declared a nuisance and permanently enjoined from operation.⁵⁴ The trial judge declared the store a nuisance and enjoined defendant operators from further distribution of items specifically found obscene at trial. He also permanently enjoined distribution of any other materials depicting certain specified sexual acts, even though the materials were not actually before the court.⁵⁵ The judge went on to rule that the store could not be closed, despite language in G.S. 19-5 that authorizes a final judicial order to "require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance." Although the trial judge read the statute as authorizing padlocking the building, he stated that such a closure order would constitute an illegal prior restraint on speech.⁵⁶

On appeal the chief contention of defendants was that the broad permanent injunctions permitted under section 19-5 of the abatement statute created illegal prior restraints on presumptively protected material by restricting distribution of items never judicially determined obscene.⁵⁷ The North Carolina

an abatement action by filing a complaint stating the facts constituting the nuisance. The complaint is filed in the superior court of the county in which the nuisance is located. N.C. GEN. STAT. § 19-2.1 (1978). The official may apply for an ex parte temporary restraining order to preserve evidence of the nuisance. *Id.* § 19-2.3 (1978). The defendant may counter with a motion to dissolve the temporary restraining order; his motion must be heard within 24 hours of service of the notice on the plaintiff, or on the next day the superior courts of the county are open, whichever is later. *Id.* State officials may also seek a preliminary injunction to restrain operation of the nuisance before trial. *Id.* § 19-2.2 (1978). A hearing on the preliminary injunction motion must be held within 10 days after the application is filed. *Id.* On the motion of the court or any party, trial on the merits may be consolidated with the hearing on the preliminary injunction. *Id.* § 19-2.4 (1978). If the two hearings are not consolidated, trial on the merits must be held no later than the next term of court, and the case receives precedence over most other civil cases. *Id.* § 19-3 (1978). If the existence of a nuisance is proven at trial, which may be before a jury, an order requiring destruction of obscene materials, closure of the premises, and forfeiture of the proceeds from sales of obscenity may be issued. *Id.* § 19-5, *quoted supra* note 47. The court may also permanently enjoin the continuance of any "such nuisance" in the future. *Id.* Hogue, *supra* note 42, and Watts, *supra* note 36, contain excellent, detailed discussions of the North Carolina abatement provisions.

54. 296 N.C. 251, 252-53, 250 S.E.2d 603, 604-05 (1979).

55. *Id.* at 255, 250 S.E.2d at 606.

56. *Id.* at 258, 250 S.E.2d at 607.

57. *Id.* at 262-63, 250 S.E.2d at 610. Defendants also argued that § 19-1.1(2) illegally places the burden of proof on defendants to show that the items are not obscene. The North Carolina Supreme Court disagreed, but did not specify whether the state must prove obscenity beyond a reasonable doubt or merely by a preponderance of the evidence in the initial nuisance proceeding. *Id.* at 260-61, 250 S.E.2d at 609. The *Andrews I* court did hold that the State must prove violation of an injunction beyond a reasonable doubt in any contempt proceedings under Chapter 19. *Id.* at 264, 250 S.E.2d at 611.

The Fourth Circuit Court of Appeals in *Fehlhaber II* apparently read the *Andrews I* opinion as requiring the State to prove the existence of the initial nuisance and violation of an injunction beyond a reasonable doubt. The court noted that Chapter 19 "leaves unclear several questions, including the nature of the burden of persuasion resting upon the state during the abatement proceeding and during any contempt proceeding." 675 F.2d at 1368. In a portion of the opinion discussing the nuisance proceeding the court noted that the *Andrews I* court had "construed the statute and placed upon the state the burden of proving beyond a reasonable doubt all elements of

Supreme Court rejected defendants' argument. The court said the term "prior restraint" is typically used to describe seizures of, or preliminary injunctions against, materials that have not been judicially declared obscene, or to describe licensing systems that interfere with presumptively protected speech.⁵⁸ The term is not ordinarily applied to permanent injunctions imposed after trial on the merits. Even if a permanent injunction could constitute a prior restraint, the court continued, prior restraints are not per se invalid.⁵⁹ Citing the United States Supreme Court decision in *Kingsley Books v. Brown*,⁶⁰ the majority observed that courts have allowed restraints on speech when the result-

the offense." 675 F.2d at 1369. The conclusion that the *Fehlhaber II* court was discussing the nuisance proceeding in the first part of its opinion is bolstered by the fact that a discussion of the State's burden of proof in the contempt proceeding appears later in the *Fehlhaber II* opinion. "[A]ny contempt citation upon an alleged violation of the injunction was not subject to North Carolina's summary contempt disposition procedures, but only to the state's plenary procedures, during which the state must shoulder the burden of proof of all elements of the offense beyond a reasonable doubt." 675 F.2d at 1369.

The defendants' second objection was that the final order enjoined protected matter because it failed to limit the scope of the injunction to matter that is "patently offensive." 296 N.C. at 261, 250 S.E.2d at 609. The North Carolina Supreme Court held that this deviation from the standard of N.C. GEN. STAT. § 19-1.1(2) (1978) and *Miller* was not fatal. *Id.* For a discussion of the *Miller* definition of obscenity, see *supra* note 16.

The State claimed that the trial court erred by enjoining only the distribution of *enlarged* pictures of genitalia, arguing that § 19-5 requires the abatement order to prohibit dissemination of *all* such matter. 296 N.C. at 255-56, 250 S.E.2d at 606. The appellate court held that a trial judge must have the discretion to make permanent injunctions specific; he is not required to enjoin all material that may be obscene under § 19-1.1(2) of the abatement statute. While the *Andrews I* court upheld the trial judge's injunction against materials not actually before the court, it cautioned that its decision did not extend to whether a trial judge *must* always issue a broad injunction, or whether the permanent injunction may be limited to items specifically adjudicated obscene. *Id.* at 256, 250 S.E.2d at 606-07.

The State also objected that the trial court's permanent injunction was limited to material that constituted a substantial portion of the defendant's stock in trade. The State claimed that permanent injunctions must issue against sales of all obscene items, even if an item is the only obscene thing in the store. *Id.* at 257, 250 S.E.2d at 607. The North Carolina Supreme Court again disagreed. A publication constitutes an abateable nuisance only when the place in which the publication is found is a nuisance, the court said. A business is a nuisance only when a large percentage of the stock is obscene under N.C. GEN. STAT. § 19-1.2(5) (1978). Therefore, isolated sales of obscene matter do not constitute a nuisance unless the items are a substantial part of the defendant's stock in trade. *Id.*

Finally, the State agreed that the trial court erred in interpreting § 19-5 to allow *total* closure orders against a business. While the State conceded such an order would be an illegal prior restraint, it believed a "partial" closure order would be constitutionally permissible. Plaintiff Appellees' Supplemental Brief at 7-8, *Andrews I*. A partial closure order would shut down a business only for the purpose of preventing continuation of the nuisance; all other uses of the premises would be allowed. The North Carolina Supreme Court agreed that a blanket closure order would constitute an illegal prior restraint, but held that the padlocking issue was not properly before it, and thus refused to determine the exact meaning of the closure language of § 19-5. 296 N.C. at 258, 250 S.E.2d at 608. For a discussion of padlocking, see *supra* note 36.

58. 296 N.C. at 263, 250 S.E.2d at 610.

59. *Id.*

60. 354 U.S. 436 (1957). In *Kingsley* the United States Supreme Court upheld a New York statute that allows preliminary injunctions to issue against alleged obscenity, provided certain safeguards are followed. The Court upheld the statute based on its conclusion that it was less burdensome than New York's criminal procedures. 354 U.S. at 444. Although the *Kingsley* "injunctions vs. criminal prosecution" test was also used in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), discussed *infra* note 73 and accompanying text, it is not clear that this standard is the proper test to measure prior restraints created by nuisance abatement statutes. Also questionable is the North Carolina Supreme Court's failure to consider the *Freedman* standards, which were discussed in *Vance*.

ing "chill" is less than that created by the general *in terrorem* effect of a criminal obscenity statute.⁶¹

Based on the *Kingsley* comparison of the relative burdens imposed on defendants by criminal and abatement statutes, the North Carolina Supreme Court held that the state abatement statute chills speech no more than a criminal statute does. The court pointed out that the trial judge's order in *Andrews I* enjoined only material specifically within the statutory definition of obscenity,⁶² thus providing more notice to defendant than he would receive from a criminal obscenity statute. In addition, the same consequences—fine and imprisonment—face defendants who violate either a permanent injunction or the criminal obscenity law.⁶³ Further, in both criminal and nuisance proceedings, the burden of proof rests on the State,⁶⁴ and nonobscenity of the material is always a defense.⁶⁵ Although a defendant is not entitled to a jury trial in a contempt action based on charges he has violated a permanent injunction, there is no constitutional right to a jury trial in criminal contempt actions if the penalty does not exceed six months imprisonment.⁶⁶ Section 19-4 of North Carolina's abatement statute provides for a maximum fine of \$1,000 and up to six months imprisonment on conviction of contempt.⁶⁷

The North Carolina Supreme Court also held the *Near* rule against prior restraints inapplicable to nuisance abatement actions involving obscenity. The court characterized *Near* as dealing primarily with protection of political speech, and pointed to dictum indicating that restraints against obscene speech are permissible.⁶⁸ Moreover, the *Near* Court was concerned about the lack of specificity of the injunction, whereas the injunction against Chateau X was

61. 296 N.C. at 263-64, 250 S.E.2d at 611.

62. The trial court enjoined the defendants from:

d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals [sic] 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 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.

296 N.C. at 255, 250 S.E.2d at 606. Compare the statutory definition of obscenity under N.C. GEN. STAT. § 19-1.1 (1978), discussed *infra* note 136.

63. 296 N.C. at 264-65, 250 S.E.2d at 611.

64. *Id.* at 264, 250 S.E.2d at 611. It is unclear, however, whether the North Carolina Supreme Court would require the State to prove existence of the initial nuisance beyond a reasonable doubt or only by a preponderance of the evidence. See *supra* note 57.

65. 296 N.C. at 264, 250 S.E.2d at 611.

66. *Id.* at 264-65, 250 S.E.2d at 611 (citing *Taylor v. Hayes*, 418 U.S. 488 (1974)).

67. N.C. GEN. STAT. § 19-4 (1978).

68. 296 N.C. at 266, 250 S.E.2d at 612.

narrowly drawn "and the prohibited conduct [was] specifically defined."⁶⁹

On appeal to the United States Supreme Court,⁷⁰ *Andrews I* was vacated and remanded for further consideration in light of the Court's holding in *Vance v. Universal Amusement Co.*⁷¹ The appellee in *Vance* claimed that Texas' civil nuisance abatement statute authorized unconstitutional prior restraints by allowing injunctions against "the commercial manufacturing . . . distribution, or . . . exhibition of obscene material."⁷² The Supreme Court limited its review in *Vance* to whether an injunction under the Texas statute created a greater restraint on protected speech than that created "by any criminal statute."⁷³ In a brief per curiam opinion, the Court found the Texas abatement law to be more onerous than a criminal obscenity statute. The Court emphasized two aspects of the Texas law: nonobscenity was not always a defense to a charge of contempt,⁷⁴ and the statute lacked "any special safeguards governing the entry and review of orders restraining the exhibition of . . . motion pictures."⁷⁵

On remand, the North Carolina Supreme Court in *State ex rel. Andrews v. Chateau X, Inc. (Andrews II)* considered only whether the *Vance* holding applied to North Carolina's nuisance abatement statute.⁷⁶ The *Andrews II* majority believed the Texas statute was different from the North Carolina statute in one important respect: under the Texas statute a defendant could be found guilty of contempt if he sold materials in violation of the injunction, even if the materials were later proven to be nonobscene.⁷⁷ Since nonobscenity is always a defense to a contempt charge in North Carolina, the *Andrews II* court held that "the principles enunciated in *Vance* do not control . . ." ⁷⁸

The sole dissenter in *Andrews I* and *II*, Justice Exum, agreed that North Carolina's abatement statute should be upheld. Justice Exum disagreed, however, with the majority's interpretation of G.S. 19-5. Exum argued G.S. 19-5 permits permanent injunctions only against materials actually determined obscene by a court.⁷⁹ Allowing broader injunctions would be unconstitutional.⁸⁰ The majority's argument that a broad injunction is permissible because it cre-

69. *Id.* at 267, 250 S.E.2d at 613.

70. 445 U.S. 947 (1980).

71. 445 U.S. 308 (1980) (per curiam). For a discussion of the lower court rulings in *Vance*, see *infra* note 72 and *A Nuisance Abatement Statute*, *supra* note 1. The Supreme Court's ruling in *Vance* is discussed in Comment, *Prior Restraint of Obscenity As A Public Nuisance—Vance v. Universal Amusement Co., Inc.*, 26 N.Y.S. L.S. REV. 1122 (1981) and Note, *supra* note 5, at 145.

72. 445 U.S. at 310. The federal district court held the Texas statute created illegal prior restraints by allowing injunctions against showing films that had never been judicially determined obscene. A split panel of the Fifth Circuit Court of Appeals reversed the district court, but the panel's decision was reversed in an en banc rehearing by the Fifth Circuit Court of Appeals. 445 U.S. at 311-14.

73. *Id.* at 314-15.

74. *Id.* at 316.

75. *Id.* at 317.

76. See 302 N.C. 321, 323, 275 S.E.2d 443, 445 (1981).

77. *Id.* at 328-29, 275 S.E.2d at 447-48.

78. *Id.* at 330, 275 S.E.2d at 449.

79. 296 N.C. at 268-69, 250 S.E.2d at 614 (Exum, J., dissenting).

80. *Id.* at 271, 250 S.E.2d at 615 (Exum, J., dissenting).

ates no greater restraint on speech than does a criminal statute "is an old one" that was rejected by the Supreme Court in *Near*.⁸¹ The dissent also contended that construing G.S. 19-5 restrictively to allow injunctions only against materials judicially determined obscene would be more compatible with North Carolina's criminal obscenity statutes⁸² and the general trend of decisions in other jurisdictions.⁸³

The North Carolina nuisance abatement statute was under attack in the federal courts as well. Plaintiff operators of adult businesses in *Fehlhaber v. North Carolina (Fehlhaber I)* alleged that Chapter 19 of the North Carolina statutes created illegal prior restraints on speech.⁸⁴ The federal district court agreed with plaintiffs' main contention and held that G.S. 19-5 creates an illegal prior restraint by permitting permanent injunctions against materials not judicially determined to be obscene.⁸⁵ The court noted that such orders traditionally have been invalidated as unconstitutional.⁸⁶ The state's contrary argument was supported only by a split decision of the Fifth Circuit Court of Appeals in *Vance v. Universal Amusement Co.*⁸⁷ The *Fehlhaber I* court also

81. *Id.* at 278, 250 S.E.2d at 619-20 (Exum, J., dissenting).

82. *Id.* at 270, 250 S.E.2d at 615 (Exum, J., dissenting).

83. *Id.* at 271-72, 250 S.E.2d at 615 (citing *Mitchem v. Schaub*, 250 So. 2d 883 (Fla. 1971); *Parish of Jefferson v. Bayou Landing Ltd.*, 350 So. 2d 158, 165-68 (La. 1977); *New Rivieria Arts Theatre v. State*, 219 Tenn. 652, 412 S.W.2d 890 (1967)). See also *infra* notes 88, 149 and accompanying text.

84. 445 F. Supp. 130, 136 (E.D.N.C. 1978), *rev'd in part*, 675 F.2d 1365 (4th Cir. 1982). Plaintiffs unsuccessfully attacked N.C. GEN. STAT. § 19-2.3 (1978), which permits a court to issue an ex parte temporary restraining order on an application from the complainant showing good cause. The order may restrain the defendant and other persons from removing or altering evidence in the nuisance action, but may not restrict distribution of suspected obscene matter prior to trial on the merits. *Id.*, cited in *Fehlhaber II*, 675 F.2d at 1367. The court held that the TRO provision did not create an illegal prior restraint on protected speech because the orders are designed only to preserve the status quo and may extend only until the preliminary injunction hearing. In the interim a defendant may move for dismissal of the TRO, and a hearing must be held within 24 hours. 445 F. Supp. at 135 (citing N.C. GEN. STAT. § 19-2.3 (1978)).

Plaintiffs were also unsuccessful in their attack on another aspect of N.C. GEN. STAT. § 19-2.3 (1978), which permits a court to order a business subject to a temporary restraining order to keep an inventory of materials sold after the TRO becomes effective. Defendant argued that this provision creates an illegal restraint by requiring the business to record the names of customers. The court held the statute does not require defendant-storeowners to record customers' names, however, and upheld the statute. 445 F. Supp. at 136.

The plaintiffs also challenged N.C. GEN. STAT. § 19-6 (1978), which provides that the owner of a building housing a business that has been declared a nuisance by a court has the option of voiding the defendant-lessee's lease. The *Fehlhaber I* court refused to consider whether the statute created a prior restraint, however, as the issue was not properly before the court. 445 F. Supp. at 140.

The fourth statutory provision challenged, N.C. GEN. STAT. § 19-8.2 (1978), provides that certain health officials may enter and inspect a building where a suspected nuisance is maintained. The court noted in dictum that the provision did not appear to create an illegal restraint, although it refused to decide the issue. 445 F. Supp. at 140.

Plaintiffs' final objection to Chapter 19 was their claim that N.C. GEN. STAT. § 19-2.3 (1978) constitutes an illegal search. Section 19-2.3 provides that after a temporary restraining order is entered against a defendant-storeowner, police may make an inventory of the items sold at the store. The court held the provision does not authorize a bona fide search, but rather allows police to take note of items in plain view. 445 F. Supp. at 136.

85. 445 F. Supp. at 137-40.

86. *Id.* at 138-40.

87. *Id.* at 139. See discussion of *Vance*, *supra* notes 71-77 and accompanying text.

pointed out that seven state supreme courts have invalidated similar injunctions as invalid prior restraints on speech.⁸⁸

In *Fehlhaber v. North Carolina (Fehlhaber II)*⁸⁹ the Fourth Circuit Court of Appeals reversed the district court, holding that the permanent injunction against sales of similar material did not create an illegal prior restraint.⁹⁰ The court believed that the injunction gave sufficient notice of the kinds of material that were forbidden:

If [defendant] . . . reopens an "adult bookstore" and fills it with explicit displays of sexual activity altogether comparable with the materials for the sale of which he has already been found to be in violation of the law, the fact that different couples were performing does not detract from the adequacy of his forewarning.⁹¹

The Fourth Circuit also noted that the North Carolina Supreme Court decisions in *Andrews I* and *II*⁹² had removed several potential constitutional flaws from the statute.⁹³

The court added that the North Carolina abatement statute does not suffer from the same vices as the Texas law invalidated in *Vance*.⁹⁴ According to the Fourth Circuit, the Texas act was void because it permitted restraints of indefinite duration against presumptively protected material.⁹⁵ A second ground for invalidation was the possibility that a defendant could be found guilty of selling certain items in violation of an injunction even if the items were later held to be nonobscene.⁹⁶ In contrast, North Carolina's abatement statutes do not permit indefinite restraints. A defendant may move for trial on the merits as soon as a preliminary injunction is issued, and the case receives scheduling priority over almost all other civil actions.⁹⁷ The court also pointed out that in North Carolina nonobscenity is a defense to a contempt charge.⁹⁸

88. *Id.* at 138 (citing *General Corp. v. State*, 294 Ala. 657, 320 So. 2d 688 (1975); *Busch v. Projection Room Theatre*, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328 (1976); *Mitchem v. State ex rel. Schaub*, 250 So. 2d 883 (Fla. 1971); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *State v. "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *Parish of Jefferson v. Bayou Landing Ltd.*, 350 So. 2d 158 (La. 1977); *New Rivieria Arts Theatre v. State*, 219 Tenn. 652, 412 S.W.2d 890 (1967)). See also *supra* note 83 and *infra* note 148.

89. 675 F.2d 1365 (4th Cir. 1982). See discussion of *Fehlhaber II supra* note 36.

90. *Id.* at 1371.

91. *Id.* at 1370.

92. See *supra* notes 54-83 and accompanying text.

93. 675 F.2d at 1368-70. The Fourth Circuit noted that the North Carolina Supreme Court in *Andrews I* and *II* construed Chapter 19 as requiring that the state carry the burden of proof beyond a reasonable doubt, and as allowing nonobscenity as a defense to charges of sale of materials in defiance of a permanent injunction entered under § 19-5. *Id.* at 1369.

94. *Id.* at 1370. For a discussion of *Vance*, see *supra* notes 71-75 and accompanying text.

95. See 675 F.2d at 1370. The North Carolina Supreme Court apparently attached little significance to the Fifth Circuit's claim in *Vance* that the Texas statute authorized restraints of indefinite duration. See 302 N.C. at 328, 275 S.E.2d 447-48. The North Carolina Supreme Court said the United States Supreme Court struck down the Texas statute because it failed to ensure that nonobscenity would be a defense in all contempt proceedings. *Id.*

96. 675 F.2d at 1370.

97. *Id.*

98. *Id.*

Further, the *Fehlhaber II* majority held that the North Carolina abatement action is no more onerous than a criminal obscenity procedure because a defendant in the initial nuisance action has the right to a jury trial and the state has the burden of proof, just as in a criminal hearing.⁹⁹ Furthermore, the nuisance abatement statute "imposes no penal sanction upon [the defendant]. It contents itself with telling him 'you have violated the law; go and sin no more.'"¹⁰⁰ Thus, the defendant gets "two chances" before he is punished, unlike a criminal defendant.¹⁰¹ Finally, the *Fehlhaber II* majority stated that even if a broad permanent injunction chills some presumptively protected speech, the restraint is acceptable because the state's interest in controlling obscenity outweighs the low value of sexually-oriented materials.¹⁰²

The sole dissenter in *Fehlhaber II*, Judge Phillips, argued that adult speech not yet judicially determined obscene must be included within first amendment protection. Drawing the boundaries of protected speech more narrowly might imperil the "core" values of political speech.¹⁰³ In addition, the Court in *Vance* held that the presumption against the constitutionality of injunctions prohibiting future exhibitions of protected materials is even stronger than that applied against criminal sanctions for past communications.¹⁰⁴ Traditionally, such injunctions have been allowed only when limited to materials already determined by a court to be obscene or, alternatively, when the injunction conforms to the *Freedman* standards.¹⁰⁵ Judge Phillips concluded that the North Carolina abatement statute has neither of these saving features.¹⁰⁶

The majority opinion in *Fehlhaber II* is appealing because it condemns the "purveyors of hard core pornography seeking the protection of the precious values of the First Amendment" and upholds a state's right to protect "morality and decorous communities."¹⁰⁷ Nevertheless, the North Carolina abatement statute creates an unconstitutional prior restraint by failing to comply with the three conditions of constitutionality set out by the Supreme Court in *Freedman*: the censor must carry the burden of proof, pretrial restraints must be limited, and the defendant must be ensured a prompt, final judicial determination on the merits of the case.¹⁰⁸

The major flaws in Chapter 19 appear in G.S. 19-4, which provides that a defendant who violates a permanent injunction may be punished in a contempt proceeding that lacks the protection of the *Freedman* safeguards.¹⁰⁹ For

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.* at 1371.

103. *Id.* (Phillips, J., dissenting).

104. *Id.* at 1371-72 (Phillips, J., dissenting).

105. *Id.* at 1372 (Phillips, J., dissenting).

106. *Id.* (Phillips, J., dissenting).

107. *Id.* at 1366.

108. *See Freedman*, 380 U.S. at 58-59. For a discussion of the *Freedman* test, see *supra* text accompanying notes 29-30.

109. North Carolina's abatement statutes provide for two distinct kinds of hearings—the nui-

instance, although the first prong of *Freedman* requires the state to bear the burden of proving that materials are obscene, this requirement is not found on the face of G.S. 19-4.¹¹⁰ That section states only the penalties available on conviction of contempt; it fails to specify any procedural requirements for the contempt hearing. While G.S. 19-4 appears to fail the first prong of the *Freedman* test, however, it may have been saved by the judicial gloss administered in *Andrews I*, in which the North Carolina Supreme Court apparently construed G.S. 19-4 to require the state to carry the burden of proof in the contempt proceeding.¹¹¹ If the North Carolina court's construction means, as it seems to, that the state has the burden of proof, then the statute meets the first prong of *Freedman*.

The abatement statutes fail to comply with the second prong of *Freedman*, which requires that pretrial restraints be limited as much as possible.

sance trial and a contempt proceeding. Initially, a defendant charged with distributing obscenity is entitled to a trial under the provisions of §§ 19-2.4 and 19-3, to determine if a nuisance exists. A defendant found guilty of maintaining a nuisance by distributing obscenity may be permanently enjoined from further activity constituting a nuisance. N.C. GEN. STAT. § 19-5 (1978). For text of § 19-5, see *supra* note 47. If the defendant is accused of violating the permanent injunction, he may be tried for contempt of court. The contempt proceeding is governed by § 19-4 and is a separate proceeding from the initial nuisance hearing. The contempt statute, by failing to guarantee safeguards against infringement upon protected speech, appears to fall short of the *Freedman* standards. See discussion at notes 110-11 and accompanying text.

The provisions for trial of the *initial* nuisance charges also fall short of the *Freedman* guidelines in one respect: the statutes fail to ensure prompt judicial decision of the question of obscenity. N.C. GEN. STAT. § 19-2.2 (1978) provides that a hearing on a preliminary injunction must be held within 10 days after application for the injunction is filed, and § 19-2.4 provides that the hearing on the preliminary injunction and trial on the merits may be merged at the request of the defendant. See *supra* note 53. Thus, although a speedy trial is assured, there is no provision requiring the judge to make a *decision* shortly after trial. A prompt hearing is of little benefit to a defendant who must wait weeks for a judicial decision on the issues.

The initial nuisance abatement procedure seems to satisfy the first prong of *Freedman* by requiring the State to carry the burden of proof in the initial nuisance hearing. Although Chapter 19 does not explicitly state that the State has the burden of proof, this requirement was "read into" the law by the North Carolina Supreme Court in *Andrews I*. See *supra* note 57. The initial abatement provisions meet the second prong of *Freedman* by limiting the duration of the pretrial restraints. N.C. GEN. STAT. § 19-2.3 (1978), for instance, provides that a defendant may move to dissolve a temporary restraining order at any time, and the hearing on his motion must be held within 24 hours, or on the next day that a superior court is in session in the county, whichever is later. Hearings on preliminary injunctions must be held within 10 days after the injunction application is filed. *Id.* § 19-2.2. Compare the requirements of the nuisance abatement statute with those of the statute governing harmful material to minors, discussed *infra* at notes 168 & 170 and accompanying text.

110. Section 19-4, which governs the contempt proceedings, contains almost no procedural guidelines:

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.

N.C. GEN. STAT. § 19-4 (1978).

111. "There is no significant difference procedurally in a criminal action for selling obscenity and in a contempt action for violation of an injunction. In both proceedings the defendant can always defend on the ground that the material is not legally obscene . . . The burden is on the State to prove obscenity beyond a reasonable doubt." 296 N.C. at 264, 250 S.E.2d at 611. The nature of the burden upon the State in the initial nuisance provision is unclear, however. See *supra* note 57.

The statutory provisions in Chapter 19 governing the *initial* nuisance proceeding clearly comply with the *Freedman* standard: the statute requires a hearing on preliminary injunctions within ten days of the filing of the motion and allows consolidation of the preliminary injunction hearing and the trial on the merits.¹¹² But there is no similar limitation on restraints imposed before the *contempt* proceeding.¹¹³ In the initial nuisance proceeding, a defendant subject to pretrial restraints may at any time request a prompt trial on the merits.¹¹⁴ If the defendant is found guilty at the initial proceeding of distributing obscenity, he may be subjected to a permanent injunction barring further distribution of any other "such" material.¹¹⁵ Any further proceedings against the defendant, then, will be cast in the form of a contempt proceeding for violation of the permanent injunction. Yet G.S. 19-4 contains no provision for restricting the duration of the restraints imposed before the contempt hearing. Not only will the permanent injunction continue to bind the defendant, but G.S. 19-4 contains no provision limiting imposition of any new restrictions.

The statute violates the third *Freedman* requirement because it fails to guarantee prompt, final judicial determination of the obscenity issue. G.S. 19-4 contains no time limit for a judicial decision on the question of obscenity following the contempt trial. Even if the trial were held promptly, there is no guarantee that a *decision* would be rendered without delay.

The third prong of *Freedman* is violated in another way. The very nature of a contempt proceeding, coupled with the impossibility of clearly defining obscenity, creates a serious risk that the obscenity issue will never reach a court. A defendant faced with a broad permanent injunction forbidding sales of both materials determined obscene at trial and other "such items" must determine what items on his shelves are likely to be determined obscene in a contempt proceeding. If the defendant guesses wrong and sells an item later determined obscene, he faces a fine or jail sentence for contempt. Thus, the safest course for the businessman is to remove all adult materials from his shelves, including those that might be nonobscene. Therefore, while judicial review remains available in theory, as a practical matter the issue of obscenity of the "similar" items may never reach court at all, violating the *Freedman* requirement of guaranteed judicial review on the issue of obscenity.¹¹⁶

Although the United States Supreme Court has never ruled on the question, it seems likely that the cautious rule adopted in *Freedman* never was

112. N.C. GEN. STAT. §§ 19-2.2, -2.4 (1978).

113. *See id.* § 19-4.

114. *Id.* § 19-2.4.

115. *Id.* § 19-5.

116. In *Freedman* the United States Supreme Court recognized the danger that many disputes involving prior restraints would simply never reach a court. "Without these safeguards [the three-pronged test], it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation." 380 U.S. 51, 59 (1964). For a discussion of the *Freedman* test, see *supra* text accompanying notes 29-30.

intended to authorize broad permanent injunctions.¹¹⁷ The *Freedman* Court agreed to allow prior restraints against *specifically named* materials only if certain safeguards were provided. When the *Freedman* safeguards are followed, there is no uncertainty about the materials that are subject to restraint, and the restrictions are limited in scope and duration. A broad permanent injunction, on the other hand, creates a much greater burden on speech. First, it will usually be impossible for a defendant to identify all materials subject to the injunction. In addition, a permanent injunction by its very nature is not limited in duration. *Freedman* permits prior restraints on speech in very limited circumstances and should not be read to allow broad permanent injunctions, which impose the very kinds of far-reaching restrictions on speech that the *Freedman* safeguards were designed to prevent.

In addition to failing the *Freedman* test, the North Carolina abatement statutes present other constitutional difficulties. One test of constitutionality provides that restrictions on speech are constitutional so long as the resulting "chill" is no greater than that created by a criminal obscenity statute.¹¹⁸ Initially, it should be noted that it is not clear whether the "abatement vs. criminal burdens" test is the proper standard for judging all abatement statutes.¹¹⁹ Assuming, however, that the test is proper, comparison of North Carolina's Chapter 19 and criminal obscenity law¹²⁰ reveals that the abatement statutes create a greater restraint on speech.

The *Fehlhaber II* majority based its decision on its finding that the abatement statute is less burdensome than the criminal laws. That court pointed out that North Carolina's abatement statute, as interpreted by the North Carolina Supreme Court, requires the state to carry the burden of proof,¹²¹ gives the defendant the right to a jury trial,¹²² and provides that nonobscenity is a defense to a contempt proceeding.¹²³ An additional argument not relied on by the *Fehlhaber II* majority is that permanent injunctions issued under Chapter 19 create no greater uncertainty than is created by the state's criminal statute, since the statutes define obscenity in similar ways.¹²⁴ The Fourth Circuit in

117. 296 N.C. at 272-73, 250 S.E.2d at 616 (Exum, J., dissenting).

118. See, e.g., *Vance*, 445 U.S. at 315-16; *Fehlhaber II*, 675 F.2d at 1370; *Andrews II*, 302 N.C. at 328, 275 S.E.2d at 448.

119. The test seems to have originated in *Kingsley Books v. Brown*, 354 U.S. 436 (1957), discussed *supra* note 60. While the test appears to have been used in *Vance*, 445 U.S. at 315-16, there is no indication in the brief *Vance* opinion that the Court intended that the abatement versus criminal burdens test be used in future cases. See Note, *supra* note 5, at 160. Furthermore, the Court did not identify factors a court may consider in determining whether an abatement statute chills speech more than does a criminal obscenity law. *Id.* at 161. Moreover, the *Vance* opinion did not clearly indicate the role the *Freedman* test would play in cases using the *Kingsley* burdens test. Despite these problems with the *Vance* opinion and the burdens test, the author of the Note, *Control of Obscenity*, suggests the test is at least an acceptable approach to the problem of prior restraints created by nuisance abatement statutes. *Id.*

120. N.C. GEN. STAT. § 14-190.2 (1981). See discussion of the criminal obscenity law in *Andrews I*, 296 N.C. at 279-80, 250 S.E.2d at 615 (Exum, J., dissenting).

121. See *supra* note 57, and accompanying text.

122. N.C. GEN. STAT. § 19-2.4 (1978). See discussion of the abatement statutes, *supra* note 53.

123. See 675 F.2d at 370.

124. Compare N.C. GEN. STAT. § 19-1.1(2) (1978) with *id.* § 14-190.1(b), -190.1(c) (1981). See

Fehlhaber II also noted that although there is no right to a jury trial in a contempt action under North Carolina's abatement statute, a jury is not required in a criminal contempt proceeding either.¹²⁵

Despite these observations, however, the *Fehlhaber II* characterization of the abatement and criminal obscenity statutes is not entirely accurate. A defendant clearly has been given the right to have a jury determine the merits of his case if an injunction is issued against specific items found obscene at the initial nuisance trial.¹²⁶ But when a broadly-worded permanent injunction is issued, no jury has determined the issue of obscenity of the similar items enjoined by the order.¹²⁷ The issue of obscenity of the unnamed items will be decided for the first time in the later contempt proceeding when the defendant is prosecuted for selling materials in violation of the injunction. The North Carolina abatement statute does not provide for a jury trial in these contempt proceedings.¹²⁸ Contrary to the position of the majority in *Fehlhaber II*, however, the civil contempt proceeding should not be compared to a criminal contempt action, in which a jury trial is similarly denied. As one commentator has noted, "The parallel proceeding under a criminal obscenity law is not a criminal contempt proceeding, but, rather, an initial criminal trial on the merits."¹²⁹ In both the nuisance contempt action for violation of a broad injunction and a criminal trial on the merits, the issue of obscenity is being determined for the first time. Yet the criminal defendant is guaranteed the right to a jury trial, and the civil defendant is not.¹³⁰

Further, the North Carolina criminal statutes are less burdensome than the abatement statutes because the criminal laws require a separate judicial finding of obscenity before presumptively protected materials may be seized or used as the basis of a criminal prosecution.¹³¹ When a defendant is charged with violating a broadly-worded injunction, however, the abatement statutes guarantee no such determination before the material is seized.¹³²

The abatement statute is more burdensome than the criminal obscenity laws in other ways. For instance, a criminal defendant must be shown to have scienter or intent to distribute or possess obscenity.¹³³ Intent is not required

296 N.C. at 261, 250 S.E.2d at 609 (comparing N.C. GEN. STAT. § 19-1.1(2)(1978) with criteria of *Miller v. California*, 413 U.S. 15, 24 (1973)). *But see infra* notes 136-41.

125. 675 F.2d at 1369. *See* *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

126. In other words, a defendant could have requested a jury trial in the initial nuisance proceeding. N.C. GEN. STAT. § 19-2.4 (1978). When the injunction bars only the material specifically found obscene at trial, every item has thus been considered by a jury.

127. For a more detailed discussion, see Note, *supra* note 5, at 163.

128. Compare N.C. GEN. STAT. § 19-2.4 (1978) (allowing a jury trial during the initial nuisance action) with *id.* § 19-4 (allowing no jury for contempt hearings).

129. Note, *supra* note 5, at 163.

130. *Id.* at 164.

131. N.C. GEN. STAT. § 14-190.2 (1981). On the validity of seizures of materials presumptively protected under the first amendment, see *Edelstein & Mott, supra* note 32.

132. *See* N.C. GEN. STAT. § 19-4 (1978).

133. *Smith v. California*, 361 U.S. 147 (1959); N.C. GEN. STAT. § 14-190.1(a), -190.1(e) (1981). *See generally* Comment, *Proof of Scienter in Criminal Obscenity Prosecutions*, 9 AKRON L. REV. 131 (1975).

under the Chapter 19 provisions.¹³⁴ Further, North Carolina's criminal obscenity provisions define obscenity more precisely than do the abatement statutes, giving criminal defendants more notice than is received by defendants in abatement cases.¹³⁵ The definition of obscenity in G.S. 19-1.1,¹³⁶ the abatement statute, may be more vague than the standard used in North Carolina's criminal statute,¹³⁷ which is the constitutional minimum set forth by the Supreme Court in *Miller v. California*.¹³⁸ The abatement statute defines obscenity in terms of "the context in which it is used,"¹³⁹ language that appears neither in *Miller* nor in the criminal statute. This alteration makes the abatement standard more subjective than *Miller's*, rendering items nonobscene

134. *Andrews II*, 302 N.C. at 331, 275 S.E.2d at 449 (Exum, J., dissenting).

135. Compare N.C. GEN. STAT. § 14-190.1(b), -190.1(c) (1981) with *id.* § 19-1.1(2) (1978).

136. North Carolina's abatement statute defines obscenity as any matter:

- (a) Which the average person, applying contemporary community standards would find, when considered as a whole, appeals to the prurient interests; 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 for which it is used, possesses serious literary, artistic, political, educational or scientific value.

N.C. GEN. STAT. § 19-1.1(2)(a)-(b) (1978).

137. North Carolina's criminal obscenity statute tracks the language of *Miller v. California*, 413 U.S. 15 (1973), and provides in relevant part:

- (b) For purposes of this Article any material is obscene if:
 - (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
 - (2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
 - (3) The material lacks serious literary, artistic, political, educational or scientific value; and
 - (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.
- (c) Sexual conduct shall be defined as:
 - (1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral;
 - (2) Patently offensive representations or descriptions of excretion in the context of sexual activity or a lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity.

N.C. GEN. STAT. 14-190.1 (1981). Compare the wording of the criminal obscenity statute above with North Carolina's "adult" zoning ordinance, *infra* note 141.

138. 413 U.S. 15 (1973). The *Miller* standard defines obscenity in terms of:

- (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.

Id. at 24.

139. N.C. GEN. STAT. § 19-1.1(2) (1978).

under *Miller* abateable under Chapter 19.¹⁴⁰ If the abatement standard is in fact broader than *Miller*'s, it is probably unconstitutional; at best the standard is vaguer than *Miller*, creating a greater burden on nuisance abatement defendants.¹⁴¹

The *Fehlhaber II* majority also asserted that sexually-oriented material is less valuable than other kinds of speech and therefore deserves less first amendment protection.¹⁴² The court concluded that any chill created by the nuisance abatement statute is outweighed by the state's interest in controlling obscenity.¹⁴³ The idea of affording different levels of protection to speech is not new. Support for this "tier" approach to the first amendment, however, appears unstable among members of the Supreme Court.¹⁴⁴

140. For example, it might be possible to construe the abatement statute to impose liability on the seller of a copy of GRAY'S ANATOMY, a standard medical reference text, if the book is used to create sexual arousal. Hogue, *supra* note 42, at 40 n.197. Under the *Miller* standard, on the other hand, "material retains its scientific value apart from any other use or misuse to which it may be put." *Id.* The abatement statute's definition of obscenity is constitutionally defective to the extent it leaves unprotected material that would be nonobscene, and thus protected, by the first amendment under the *Miller* standard. *Id.* at 13 n.56. For a discussion of other possible drafting flaws in the abatement statute, see Watts, *supra* note 36, at 215-20.

141. The abatement procedure appears even more burdensome when compared to the specificity with which prohibited matter is defined in North Carolina's criminal statute, which allows zoning to regulate adult establishments. The statute provides that only one adult business may be located in one building. N.C. GEN. STAT. § 14-202.11 (1981). Violation of the rule is a misdemeanor. *Id.* § 14-202.12. Adult establishments include adult bookstores, defined as bookstores with a preponderance of materials "characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas." *Id.* § 14-202.10(1). Specified anatomical areas are defined as:

- (a) less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock or (iii) female breast below a point immediately above the top of the areola; or
- (b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Id. § 14-202.10(8). Specified sexual activities are defined as:

- (a) human genitals in a state of sexual stimulation or arousal;
- (b) acts of human masturbation, sexual intercourse or sodomy; or
- (c) fondling or other erotic touchings of human genitals, pubic regions, buttocks, or female breasts.

Id. § 14-202.10(9).

142. 675 F.2d at 1371.

143. *See id.*

144. Several Supreme Court justices have advocated lowering the level of first amendment protection given to certain kinds of speech. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), Justice Stevens argued for a plurality that the state's interest in protecting erotic materials is less than its interest in ensuring free political debate:

Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice.

Id. at 70.

Five members of the Court apparently subscribed to the theory that indecent (not obscene) speech holds a lower place in the scale of first amendment protection in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Interestingly, in *Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n*, 447 U.S. 557, 562-63 (1980), Justice Powell applied a similar multitiered approach to commercial speech. Yet Powell dissented in *Pacifica* and *American Mini Theatres*. The Court, however, has not applied the multitiered theory in all obscenity-related cases. *See Paris Adult*

A related notion, also relied upon by the *Fehlhaber II* majority, is that pictorial matter, the only kind of "speech" affected by North Carolina's abatement statute, constitutes a kind of "second class" speech.¹⁴⁵ This conclusion is inconsistent with the United States Supreme Court decision in *Joseph Burstyn, Inc. v. Wilson*,¹⁴⁶ which extended first amendment protection to visual material, and subsequent Supreme Court decisions that have continued to protect pictorial matter.¹⁴⁷ A rule affording less protection to visual communication flies in the face of settled Supreme Court holdings and creates definitional problems in an area already mired in confusion. For instance, the *Fehlhaber II* majority ignored the problem of rating the "value" of materials that contain both pictures and words as well as that of identifying the standard by which such materials should be measured to determine the level of protection they "deserve."¹⁴⁸

In approving North Carolina's abatement statute, the Fourth Circuit Court of Appeals ignored a clear trend against allowing permanent injunctions to issue against materials never judicially determined obscene. Courts in twelve states and two federal circuits have struck down injunctions similar to the one upheld in *Fehlhaber II*.¹⁴⁹

Theatre I v. Slaton, 413 U.S. 49 (1973) (films) and *Miller v. California*, 413 U.S. 15 (1973) (illustrated books). See also Hogue, *supra* note 42, at 39.

145. "Explicit photographic portrayals of natural and deviant sexual activity stand upon a plain far below . . ." 675 F.2d at 371. At least one commentator has noted that courts seem to allow greater infringement on modern electronic media rights, such as television and radio, than on more traditional forms of communication, such as books. L. TRIBE, *supra* note 15, at 700. The explanation may be an historical judicial preference for print media, combined with the need for special regulation of electronic media:

Broadcast regulation has proceeded upon the premise that, since government must somehow carve up the electromagnetic spectrum so as to prevent interference among broadcast frequencies, those who are permitted to use the public airwaves may be selected on criteria and subject to controls that would be unacceptable in the case of the print media.

Id. at 698. Compare this view that the form of the media determines the level of protection to the idea expressed *supra* note 144, that perceived social value may determine the level of protection.

146. 343 U.S. 495 (1952). "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. . . . The importance of motion pictures as an organ of public opinion is not lessened by the fact they are designed to entertain as well as to inform." *Id.* at 501.

147. "Neither logic nor case law compels the conclusion that the first amendment does not apply or applies with less vigor to graphics rather than written material." Hogue, *supra* note 42, at 39. Recent Supreme Court cases extending protection to pictorial matter include *Freedman v. Maryland*, 380 U.S. 51 (1964) (movies); *Marcus v. Search Warrant*, 367 U.S. 717 (1961) (magazines).

148. There are numerous variations on this problem. A book may have many pictures and no written material other than captions, or it may have thousands of pages of text and one obscene picture.

149. Decisions in the supreme courts of California, Georgia, Alabama, Kansas, Tennessee, Louisiana, and Florida were cited by the federal district court in *Fehlhaber I*. See *supra* note 83. Cases striking down broad injunctions as creating impermissible prior restraints include *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980) (Washington); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 167-69 (5th Cir. 1978) (en banc) (Texas), *aff'd*, 445 U.S. 308 (1980) (per curiam); *Bayside Enterprises, Inc. v. Carson*, 470 F. Supp. 1140 (M.D. Fla. 1979); *Gulf State Theatres of La., Inc. v. Richardson*, 287 So. 2d 480 (La. 1973); *State ex rel. Cahalan v. Diversified Theatrical Corp.*, 59 Mich. App. 223, 229 N.W.2d 389 (1975), *rev'd on other grounds*, 396 Mich. 244, 240 N.W.2d 460 (1976); *State ex rel. Wampler v. Bird*, 499 S.W.2d 780 (Mo. 1973); *State ex rel. Leis v. Barton*, 45 Ohio App. 2d 249, 344 N.E.2d 343 (1975); *State ex rel. Ewing v. A Motion Picture Entitled "Without A Stitch"*, 37 Ohio St. 2d 95, 207 N.E.2d 911 (1974), *appeal dismissed*

For example, in *New Riviera Arts Theatre v. State*¹⁵⁰ the Tennessee Supreme Court held that permanent injunctions may issue only against specifically named films. A Tennessee statute provided that when a person was found to be distributing obscene material, the State could institute an action to "prevent such sales, distribution, exhibition or display or further sales, distribution, exhibition or display or the further acquisition of any such material."¹⁵¹ Defendant in *New Riviera* was found guilty of displaying an obscene film and several obscene previews or "trailers."¹⁵² The trial judge permanently enjoined defendant from showing the particular film found to be obscene and "[o]ther films . . . or 'trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of [the Tennessee statute]."¹⁵³ The Tennessee appellate court interpreted the statute to permit permanent injunctions to issue only against material judicially determined obscene.¹⁵⁴ A construction of the statute authorizing injunctions against display of unidentified films "would vest in the courts an unlimited power of prior restraint on the freedom of speech and press."¹⁵⁵

The provisions of the Tennessee statute in *New Riviera* and North Carolina's abatement statute appear very similar, but have been given very different interpretations by the courts. Arguably, both statutes on their faces permit injunctions against material never judicially declared obscene.¹⁵⁶ Tennessee, however, chose to salvage its statute by a judicial construction that limits permanent injunctions to material specifically found by a court to be obscene. The North Carolina Supreme Court and the Fourth Circuit Court of Appeals, on the other hand, chose a more literal interpretation of the North Carolina statute, and permitted broad, permanent injunctions. The North Carolina courts could have placed a limiting construction on the abatement statutes, but if a literal interpretation of the language were deemed essential, the courts should have declared the provision unconstitutional.

The Court of Appeals for the Fourth Circuit and the North Carolina courts may have been willing to overlook the constitutional difficulties in Chapter 19 because they feared limitation on the scope of the statutes would

sub nom. Art Theatre Guild v. Ewing, 421 U.S. 923 (1975); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Brightbill v. Rigo*, 274 Pa. 315, 418 A.2d 424 (1980).

150. 219 Tenn. 652, 412 S.W.2d 890 (1967).

151. *Id.* at 658, 412 S.W.2d at 893 (quoting Act of Mar. 3, 1965, ch. 93, § 1(a), 1965 Tenn. Pub. Acts 327, 327 (repealed 1974) (formerly codified at TENN. CODE ANN. § 39-3005(a))). For the full text of the statute, see *infra* note 156.

152. 219 Tenn. at 656, 412 S.W.2d at 892.

153. *Id.* at 657, 412 S.W.2d at 892.

154. *Id.* at 659, 412 S.W.2d at 894.

155. *Id.* at 663, 412 S.W.2d at 895.

156. The Tennessee statute, since repealed, provided in relevant part:

(a) The District Attorney General, in any district where a person, firm or corporation sells, distributes, exhibits or displays, or is about to sell, distribute, exhibit or display . . . any material which is obscene as hereinafter defined, may maintain an action for an injunction . . . to prevent such sales, distribution, exhibition or display or further sales, distribution, exhibition or display, or the further acquisition of any such materials.

219 Tenn. at 658, 412 S.W.2d at 893 (quoting Act of Mar. 3, 1965, ch. 93, § 1(a), 1965 Tenn. Pub. Acts 327, 327 (repealed 1974) (formerly codified at TENN. CODE ANN. § 39-3005(a))).

dilute a powerful weapon in the state's arsenal against obscenity.¹⁵⁷ But the state would not be stripped of power to regulate obscenity by abatement actions even if permanent injunctions could issue only against materials judicially declared obscene. With proper planning, large numbers of allegedly obscene items could be considered in a single trial. Copies of alleged obscenity may be seized as evidence prior to trial under a warrant issued by a neutral magistrate who has independently determined that probable cause exists to believe the items are obscene.¹⁵⁸ Once in evidence, the merits of all the samples may be adjudicated in a single hearing by the trial judge, eliminating the need for a separate trial for each item.

In addition to nuisance abatement proceedings, the state has other methods of regulating sexually-oriented speech. Some of the alternatives include restricting adult businesses to certain areas through zoning laws,¹⁵⁹ requiring dealers to obtain licenses,¹⁶⁰ pursuing criminal prosecutions for violation of

157. Justice Exum, dissenting in *Andrews I*, spoke to this concern when he argued that his proposed construction of the abatement statute "does not render the state powerless to deal with the problem of obscenity." 296 N.C. 251, 280, 250 S.E.2d 603, 620 (1979).

Justice Dupree, who wrote the opinion in *Fehlhaber I*, discussed *supra* notes 84-88 and accompanying text, voiced similar concerns. "The court is also aware that the regulation of such materials [obscenity] would perhaps be more easily accomplished through the broad injunctive relief authorized by section 19-5 than through any other means." 445 F. Supp. at 140.

158. *Heller v. New York*, 413 U.S. 483 (1973). Of course, seizures of items for preservation of evidence must not be so massive that they amount to a prior restraint. For a discussion of seizures of first amendment materials, see *supra* note 33.

159. The leading case in the area of zoning and first amendment activities is *Young v. American Mini Theatres*, 427 U.S. 50 (1976). In *Young*, the United States Supreme Court upheld a Detroit zoning ordinance that provided no adult theatre could be established within 1,000 feet of any other business defined by the law as a "regulated use." The Court held that society's interest in preserving the character and property value of neighborhoods outweighed the marginal value of sexually-oriented speech disseminated by adult theatres. The Court emphasized the Detroit zoning ordinance was not designed to censor the content of speech, but rather to preserve property values; the purpose of the ordinance was demonstrated by a study completed by the City of Detroit prior to adoption of the zoning ordinance. The Court also pointed out that the ordinance did not limit consumer access to sexually-oriented speech in the overall market. *Id.* at 62. For a discussion of the licensing aspects of *American Mini Theatres*, see *supra* note 34 and *infra* note 160.

Since *American Mini Theatres*, zoning regulations have become an increasingly popular means of controlling adult businesses, but courts have disagreed about the validity of such laws. Annot., 1 A.L.R. 4th 1297, 1298 (1980). North Carolina's adult business zoning law prohibits location of more than one adult business in a single building. N.C. GEN. STAT. § 14-202.10 to .12 (1981). See *supra* note 141. The North Carolina Supreme Court has not ruled on the constitutionality of the statute. A city ordinance similar to the state provision was discussed by the state court of appeals, however, in *Harts Book Stores, Inc. v. City of Raleigh*, 53 N.C. App. 753, 281 S.E.2d 761 (1981). The court refused to discuss whether the ordinance was constitutional, however, and decided the case on other grounds.

See also *Wiggins Inc. v. Fruchtmann*, 482 F. Supp. 681 (S.D.N.Y. 1979) (upholding a New York City zoning law for massage parlors); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981) (upholding city zoning ordinance similar to the one discussed in *American Mini Theatres*).

But see *The Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981) (zoning ordinance invalidated because plan left no alternative locations for adult businesses inside city limits); *E & B Enter. v. City of University Park*, 449 F. Supp. 695 (N.D. Tex. 1977) (invalidating an ordinance as a prior restraint when the zoning law left no alternative sites for the adult business and the city presented no reasons for regulating sexually-oriented businesses). For a general discussion of zoning and the first amendment, see *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1562-63 & n.81 (1978); Annot., 1 A.L.R. 4th 1297 (1980).

160. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), upheld a licensing provision as a

obscenity laws,¹⁶¹ enforcing statutes through *qui tam* actions,¹⁶² and imposing reasonable time, place, and manner restrictions on sexually-oriented speech.¹⁶³ Local governments also have statutory power to enact their own, albeit limited, regulations on obscenity,¹⁶⁴ and state and local governments also may retain their common-law powers to control obscenity.¹⁶⁵

North Carolina's civil remedy for sale of harmful materials to minors is a

mechanism to enforce a city zoning provision when the combined effect of the zoning and licensing ordinances did not substantially restrict access to "adult speech" and when the ordinances promoted a substantial city interest in preserving neighborhood property values. *See also* Annot., 8 A.L.R. 4th 130 (1980). *But see supra* note 34 (examples of licensing systems that have been invalidated as creating illegal prior restraints on presumptively protected speech).

161. N.C. GEN. STAT. § 14-190.1 to .11 (1981) are North Carolina's chief criminal obscene literature statutes. *See supra* note 137. The provisions of N.C. GEN. STAT. § 14-202.10 to .12 (1981) limit the number of adult establishments that may be located in a single building and provide criminal penalties for violators. *See supra* note 141.

162. A *qui tam* action is a suit brought under a statute that establishes a civil penalty for omission or commission of some act. To encourage enforcement of the act, the individual who brings the suit receives part of the penalty the defendant pays. The remainder of the penalty goes to the state. *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (N.D. Ala. 1971). A *qui tam* action may not be brought, however, unless there is a specific statute authorizing the action; apparently no state has passed legislation allowing *qui tam* actions to enforce obscenity rules. *See Williams v. Wells Fargo & Co. Express*, 177 F. 352 (8th Cir. 1910) (postal laws); *Lanni v. City of Bayonne*, 7 N.J. Super. 169, 72 A.2d 397 (1950) (zoning laws); *Salonen v. Farley*, 82 F. Supp. 25 (E.D. Ky. 1949) (gambling laws). *See also* Note, *supra* note 5, at 139.

163. *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941). *See also* L. TRIBE, *supra* note 15, at 662.

164. *Hogue, supra* note 42, at 35. The North Carolina General Assembly has delegated the authority to define and abate nuisances to cities and counties. N.C. GEN. STAT. § 153A-121 (1978) (counties); *id.* § 160A-174. The North Carolina Supreme Court interpreted the power delegated to cities and counties to allow local governments to set a higher standard of behavior than the State statute requires, but not to pass ordinances that merely duplicate existing state statutes. *State v. Tenore*, 280 N.C. 238, 247, 185 S.E.2d 644, 650 (1972).

The power of local governments to regulate obscene behavior more strictly than does state law does not permit cities and counties to *redefine* obscenity. The Supreme Court set a constitutional minimum standard of obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973), and statutes using a broader definition are presumably unconstitutional. *See Hogue, supra* note 42, at 40. The power of local governments extends simply to setting fines and punishments not provided by the state statute. Local governments may treat obscenity "as a nuisance subject to abatement or define it as a misdemeanor and provide for a fine or imprisonment upon conviction or for a civil penalty." *Hogue, supra* note 42, at 36-37.

Local communities also exercise "control" over obscenity in the sense that the *Miller* standard defines obscenity in terms of what local communities deem patently offensive. Thus, a film that is not "obscene" in Los Angeles might be banned in a small North Carolina town as patently offensive to local tastes.

165. *Hogue, supra* note 42, at 37. At common law, obscenity was actionable both civilly and criminally. *Id.* at 3. Early North Carolina cases show officials relied almost exclusively on criminal actions to control obscenity. Further, there is no common-law authority for a private citizen to abate a public nuisance in North Carolina. *Id.* at 34. "Absent special legislative provision by statute authorizing private persons to sue for public nuisance, individuals may not redress public nuisances unless their own property is interfered with." *Id.* But "[b]ecause obscenity is a common law crime, both abatement by public officers and indictment would be available remedies unless these are restricted or foreclosed by the provision of exclusive state remedies, or . . . unless the common law of obscenity has been . . . repealed by state law." *Id.* at 35. Arguably, then, the common-law power to control obscenity still exists. *Id.* at 37.

Attempts to use common-law powers to abate obscenity in a civil action in other states have met with little success, however. Many courts have held the common-law nuisance concept too vague to be applied to materials presumptively protected by the first amendment. *See Grove Press v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), *City of Chicago v. Festival Theatre Corp.*, 88 Ill. App. 3d 216, 410 N.E.2d 341 (1980); *Ranck v. Bonal Enters.*, 467 Pa. 569, 359 A.2d

final method of obscenity control available to courts and government bodies.¹⁶⁶ Although the Act apparently has been used little in the past, it may gain increasing importance in light of a recent United States Supreme Court decision granting states expanded power to regulate dissemination of lewd material to minors.¹⁶⁷ North Carolina's Act provides a speedy procedure for determining whether speech is harmful to those under eighteen and allows regulation of such speech, even though the materials might not be obscene for adults. Permanent injunctions may issue barring distribution of the harmful materials or other "such" items.¹⁶⁸ Although it is well-established that courts may use a lower standard in regulating access of minors to sexually-oriented speech,¹⁶⁹ the North Carolina statute suffers from several of the flaws that plague the nuisance abatement regulations.¹⁷⁰ Because there are no reported cases concerning the Act, it is not yet clear whether the statute may be judicially interpreted to conform to the *Freedman* guidelines and other constitutional requirements.

While the state has ample means to control obscenity, a better solution

748 (1976); *Commonwealth v. MacDonald*, 464 Pa. 435, 347 A.2d 290 (1975), *cert. denied*, 429 U.S. 816 (1976).

166. N.C. GEN. STAT. §§ 19-9 to -20 (1978).

167. In *New York v. Ferber*, 102 S. Ct. 3348 (1982), the United States Supreme Court upheld a New York statute barring knowing dissemination of material depicting sexual performances by children under sixteen, regardless of whether the material is obscene. The Court held that a different standard may be used by states in regulating "child pornography" than the standard required under the *Miller v. California* obscenity test, set out *supra* note 16. For child pornography cases, the *Ferber* Court eliminated the *Miller* requirements that material be found to appeal to the prurient interest of the average person, be portrayed in a patently offensive manner and be considered as a whole before it may be banned. 102 S. Ct. at 3358.

The state's freedom to ban nonobscene material depicting sexual acts by minors rests on its strong interest in protecting the physical and emotional well-being of its children, the *Ferber* Court held. *Id.* at 3354. Further, said the Court, the first amendment value of child pornography is "exceedingly modest, if not de minimis." *Id.* at 3357.

The Supreme Court's decision in *Ferber* gives states broader power to regulate material depicting sexual acts by minors. The decision may encourage more vigorous enforcement of statutes like North Carolina's restrictions on child pornography. See *infra* note 170. For additional discussion of *Ferber*, see 68 A.B.A. J. 1153 (1982).

168. N.C. GEN. STAT. § 19-14 (1978) provides that the complaint "shall: . . . (5) seek a permanent injunction against any respondent prohibiting him from selling, commercially distributing, or disseminating in any manner such material to minors or from permitting minors to inspect such material." *Id.* (emphasis added).

169. *New York v. Ferber*, 102 S. Ct. 3348 (1982) (discussed *supra* note 167). *Ginsberg v. New York*, 390 U.S. 629 (1968) (dictum), *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (dictum).

170. See *supra* notes 109-17 and accompanying text (discussing North Carolina's nuisance abatement statute).

The "harmful materials" statute seems to permit illegal prior restraints on dissemination of presumptively protected material by authorizing broadly-worded permanent injunctions against items which have never been judicially determined harmful to minors. N.C. GEN. STAT. § 19-18(b) (1978). The statute provides that after a court finds material harmful to minors, it may enter a permanent injunction against future distribution of any "such material" by the defendant. Presumably "such material" means items similar to those actually found harmful by the court. The injunction is thus not limited to exact material specifically ruled on by the court.

Further, the statute fails the first prong of the *Freedman* test because it does not specify that the state has the burden of proving the material harmful to minors. The statute meets the second prong of *Freedman* by limiting the scope and duration of pretrial restrictions on presumptively protected material. *Id.* § 19-19. The third prong of *Freedman*, which requires prompt judicial review and decision on the merits, is provided for in *Id.* § 19-17.

would be to extend first amendment protection to all sexually-oriented speech. This outcome is mandated by the clear language of the first amendment,¹⁷¹ and would eliminate confusion about the proper method of defining and detecting obscenity.¹⁷² The tangle of conflicting decisions in the obscenity area strongly suggests that courts are not equipped to make uniform judgments about obscenity, a term whose definition is subject to constantly changing societal standards.¹⁷³ Recognition of all forms of communication as speech that deserves first amendment protection would remove the courts from their role as censors of the public mind, leaving dockets clear for cases within the realm of judicial competence.

Even if courts could agree on a workable standard of obscenity that would be acceptable to a majority of the public, there would remain a dissenting minority, whose access to ideas and information would be suppressed by the majority. Yet the first amendment was specifically designed to protect unpopular ideas and preserve robust public debate.¹⁷⁴ Clearly, messages accepted by the majority do not need the championship of the courts. But ideas viewed as repulsive or alien must be protected or they will be trampled. And without the voice of dissent, society will lose a source of growth and creativity.¹⁷⁵

It seems unlikely that first amendment protection will soon be extended to obscene material, although some observers note growing support for such a move.¹⁷⁶ At the very least, however, North Carolina's nuisance abatement statutes should be changed to conform to the minimum constitutional standard. First, and most importantly, G.S. 19-5 should be amended to permit permanent injunctions only against material actually determined obscene in an adversarial judicial hearing.¹⁷⁷ Restricting the statute in this way would prevent creation of illegal prior restraints on presumptively protected material and would conform to the overwhelming trend of court decisions in other

171. See *supra* note 12.

172. This approach was suggested in *Miller v. California*, 413 U.S. 15, 37 (1973) (Douglas, J., dissenting), and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting). Both are cited in *Andrews I*, 296 N.C. at 277 n.3, 250 S.E.2d at 618 n.3 (Exum, J., dissenting).

173. The list of great writers who have been banned as objectionable at one time or another, according to the tastes of the moment, constitutes a literary "Who's Who." "The list is endless. It includes the works of Dante, Boccaccio, Erasmus, Michelangelo, Cervantes, Galileo, Shakespeare, Sir Francis Bacon, Descartes, Milton, LaFontaine, Moliere, Locke, Swift, Swedenborg, Voltaire, Fielding, Rousseau, Kant, Jefferson . . ." Hart, *Introduction*, in *CENSORSHIP: FOR & AGAINST* 6 (H. HART ed. 1971).

174. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

175. Extension of first amendment protection to these unpopular ideas would not deprive the states of the power to regulate obscenity. States would remain free to place reasonable time, place, and manner restrictions in order to protect children and unwilling adults. L. TRIBE, *supra* note 15, at 661-62.

176. See Rendleman, *supra* note 38. Rendleman recognizes that complete first amendment protection for all forms of sexually-oriented speech is not soon likely. As a "way station in the process of cultural transformation," he suggests that states abandon "criminal penalties in favor of an exclusive civil remedy providing for injunctive relief" against pornography. *Id.* at 510.

177. The court should also eliminate the closure or padlocking provisions that appear to be contained in Chapter 19. This change would eliminate the current uncertainty over the closure provisions and prevent restraints on future speech based on past violations of obscenity laws by a business. See discussion of padlocking, *supra* note 36.

states. Limiting restrictions to speech determined obscene would also parallel the requirements of North Carolina's criminal obscenity statutes.

Second, the currently vague definition of obscenity under the abatement statute should be amended to reflect the *Miller* standard, avoiding the possibility that the nuisance act permits abatement of items not obscene under *Miller*.

It may be a long time before the state legislature is willing to accept such a "compromise" and revise North Carolina's abatement statute to conform to constitutional standards. It will be longer still before courts are willing to extend first amendment protection to obscenity. The framers of the first amendment understood the human desire to silence unpopular views because they had suffered the tyranny of censorship. The courts of today must re-learn the lesson of the first amendment: the courts cannot stop obscenity. Sellers of pornography will exist as long as there is a demand for their message. Although censorship cannot destroy ideas, it can destroy the freedom to form them.

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