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Subsequent Use of Civil Adjudications of Obscenity

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SUBSEQUENT USE OF CIVIL ADJUDICATIONS OF OBSCENITY

INTRODUCTION

In recent years, states have added a new weapon to their existing arsenal for use in their fight against obscenity. This weapon is legislation which establishes procedures for the civil adjudication of allegedly obscene material prior to, or apart from, a criminal prosecution.[1] Generally, the statutes provide that a prosecutor,[2] at his own option,[3] may institute an action against material that he has reasonable cause

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1. *See, e.g.*, ALA. CODE tit. 14, § 374(5)-(13) (Supp. 1973); LA. REV. STAT. ANN. § 14:106F (West 1974); MASS. GEN. LAWS ANN. ch. 272, §§ 28C-28I, 30 (West Supp. 1977-1978); N.Y. CIV. PRAC. LAW § 6330 (McKinney Supp. 1976-1977); N.C. GEN. STAT. § 14-190.2 (Supp. 1975); OKLA. STAT. tit. 21, §§ 1040.14-.22 (1971); 18 PA. CONS. STAT. ANN. § 5903(h)-(i) (Purdon 1973); VT. STAT. ANN. tit. 13, §§ 2809-2813 (Supp. 1977).

Massachusetts is a jurisdiction with a bifurcated injunction procedure. MASS. GEN. LAWS ANN. Ch. 272, §§ 28C-28I, 30 (West Supp. 1977-1978). It authorizes procedures for equitable actions to determine the question of obscenity as it relates only to books. Section 28I makes the procedure a condition precedent, as to books only, to the institution of any criminal proceeding for the dissemination or possession of obscene matter. Section 30 injunctive procedures apply to all other types of obscene material. *See,* District Attorney v. Three Way Theatres Corp., 357 N.E.2d 747 (Mass. 1976).

2. A prosecutor may be the attorney general, MASS. GEN. LAWS ANN. ch. 272, § 28C (West Supp. 1977-1978); OKLA. STAT. tit. 21, § 1040.14 (1971); a district attorney, ALA. CODE tit. 14, § 374(5) (Supp. 1973); N.Y. CIV. PRAC. LAW § 6330 (McKinney Supp. 1976-1977); any law enforcement officer, *Id.*; any prosecuting officer, N.C. GEN. STAT. § 14-190.2 (Supp. 1975); VT. STAT. ANN. tit. 13, § 2810 (Supp. 1977).

3. A prosecutor may institute an equitable action to enjoin the sale of allegedly obscene matter at his discretion prior to, or in lieu of, a criminal prosecution. *See, e.g.*, ALA. CODE tit. 14, § 374(5) (Supp. 1973) (all material, except mailable matter); MASS. GEN. LAWS ANN. ch. 272, § 30 (West Supp. 1977-78) (all matter, except books); N.Y. CIV. PRAC. LAW § 6330.1 (McKinney Supp. 1976-1977) (only material that is allegedly obscene to persons under the age of seventeen); OKLA. STAT. tit. 21, § 1040.14 (1971); 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973).

Some jurisdictions however, have made a prior civil determination of obscenity mandatory before a criminal prosecution may be initiated: *See, e.g.*, ALA. CODE tit. 14, § 374(16K)(C) (Supp. 1973) (mailable matter); LA. REV. STAT. ANN. § 14:106F (1) (West 1974) (compulsory for all material except "hard core" pornography); MASS. GEN. LAWS ANN. ch. 272, § 28C (West Supp. 1977-1978) (required for all obscene books); N.C. GEN. STAT. § 14-190.2(a) (Supp. 1975); VT. STAT. ANN. tit. 13, § 2809 (Supp. 1977) (mandatory for written matter in a book under the juvenile statutes; the state has repealed its adult obscenity legislation).

to believe is obscene.[4] Under the typical statutory scheme, the prosecutor files a petition: (1) naming the publication; (2) naming certain parties as defendants such as the author, the publisher, and the wholesale and retail distributors; (3) seeking an adjudication that the material is obscene; and (4) seeking a permanent injunction against the further sale or dissemination of the material, if it is found to be obscene. The court then summarily examines the material to determine if there is probable cause to find the material obscene. If there is not, the court will dismiss the petition. If there is however, the court will issue an order to the named parties to show cause why the material should not be adjudged obscene. Contemporaneous with the issuance of this order, the court may order an injunction pendente lite[5] against the further sale and distribution of the material, if the statute so provides.[6] The named respondents, or any interested parties, may appear and file an answer. A trial on the issue of obscenity is conducted in accordance with the rules of civil procedure applicable to the trial of cases by a court with or without a jury.[7] If the material is adjudged obscene, the court orders the surrender and the destruction of the material and issues a permanent injunction against any person who sells or distributes the material. Other statutory provisions make it a crime, punishable by fine, imprisonment, or both, to sell or distribute material that has been judicially determined obscene.

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4. *See, e.g.*, ALA. CODE tit. 14, § 374(3) (Supp. 1973) and OKLA. STAT. tit. 21, §1040.12 (1971) (statutory definitions of matter or material). The Alabama definition includes, "[A]ny book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious, scientific, or educational institution." MASS. GEN. LAWS ANN. ch. 272, § 28C (West Supp. 1977-1978) and VT. STAT. ANN. tit. 13, § 2809 (Supp. 1977) (equitable actions for written material in a book only); LA. REV. STAT. ANN. § 14:106A(3) (West 1974) (any tangible material); N.Y. CIV. PRAC. LAW § 6330.1 (McKinney Supp. 1976-1977); N.C. GEN. STAT. § 14-190.2(a) (Supp. 1975); 18 PA. STAT. ANN. § 5903(h) (Purdon 1973) (allow injunctions against any allegedly obscene book, magazine, motion picture, or other material).

5. An injunction pendente lite is a temporary injunction granted, pending trial upon the merits, for the purpose of preventing any acts which may harm the rights of parties to the controversy, or for the purpose of preserving the subject matter of the controversy. Ford v. Taylor, 140 F. 356, 358 (C.C.D. Nev. 1905).

6. *See, e.g.*, ALA. CODE tit. 14, § 374(7) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 272, § 30 (West Supp. 1977-1978); N.Y. CIV. PRAC. LAW § 6330.6 (McKinney Supp. 1976-1977); N.C. GEN. STAT. § 14-190.2(d)(3) (Supp. 1975); 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973).

7. Some states provide for trial by the court. *See, e.g.*, ALA. CODE tit. 14, § 374(9) (Supp. 1973), LA. REV. STAT. ANN. § 14: 106F(2) (West 1974); N.C. GEN. STAT. § 14-190.2(d) (Supp. 1975); OKLA. STAT. tit. 21, § 1040.18 (1971). Other states require trial by jury. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 28D (West Supp. 1977-1978); 18 PA. CONS. STAT. ANN. § 5903(i) (Purdon 1973); VT. STAT. ANN. tit. 13, § 2811 (Supp. 1977) (which requires a unanimous verdict).

Although the use of civil sanctions to control the dissemination of obscene material is not a new phenomenon,[8] the recent enactment of legislation which provides for equitable proceedings to control obscenity evidences a growing trend whereby prosecutors may resort to civil forums to litigate the issue of obscenity prior to, or in lieu of, criminal prosecutions. The purpose of this comment is to explore some of the substantial constitutional problems that may arise in the course of such a civil proceeding and in a subsequent action where the question of obscenity is sought to be precluded by a prior determination.

Section I examines the advantages and disadvantages of an equitable action and summarizes the existing framework of constitutional standards and procedures which must be present when there is an adjudication of the obscenity issue. Section II considers whether the due process clause of the fourteenth amendment requires that a defendant have a right to a jury finding that the material is obscene beyond a reasonable doubt, in a state civil proceeding. Section III focuses on the doctrine of collateral estoppel to determine what effect, if any, a prior civil judgment on the issue of obscenity will have in a subsequent action. Section III also considers several equal protection and due process problems which are raised by allowing an issue decided in a civil action to be conclusive as to an element of the crime charged.

Primarily, this comment analyzes under what circumstances the doctrine of collateral estoppel is applicable to multiple actions involving the same allegedly obscene material and/or parties, and the implications of such a rule.

I. CONSTITUTIONAL STANDARDS IN THE ADJUDICATION OF OBSCENITY

The United States Supreme Court has consistently recognized that obscenity is not protected by the first amendment.[9] In light of this proposition, the Supreme Court in *Paris Adult Theatre I v. Slaton*[10] ac-

8. *See, e.g.*, Times Film Corporation v. City of Chicago, 365 U.S. 43 (1961). In that 1961 case, the Supreme Court concluded that a Chicago ordinance, requiring the submission of films for examination or censorship prior to their public exhibition, was valid on its face.

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

10. 413 U.S. 49 (1973). The Respondent had brought an action in a lower state court to enjoin the petitioner from showing allegedly obscene motion pictures. The state supreme court reversed the trial court's refusal to issue an injunction and the petitioners appealed to the United States Supreme Court. Chief Justice Burger concluded that nothing precluded a state from regulating allegedly obscene material, although it

knowledged that: "States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation . . . ."[11]

Because it is within a state's inherent police power to protect society's interest in morality,[12] states have been allowed considerable latitude in choosing among constitutionally permissible means to control obscenity. In *Kingsley Books v. Brown*,[13] it was recognized that it was not within the Court's prerogative to prescribe limits on the legislature's selection of remedies. If the means are legitimate, the states can exercise their own discretion in deciding whether prohibited conduct should be punished by a criminal prosecution or a civil sanction.[14]

Not only has the Supreme Court upheld the validity of civil sanctions, but some members of the Court have expressed a preference for them as an alternative to complete reliance on criminal prosecutions for the regulation of obscenity. Justice Frankfurter, in *Kingsley*, argued that states should use equitable proceedings as "a brake on the temptation to exploit a filthy business offered by the limited hazards of piecemeal prosecutions, sale by sale, of a publication."[15] From another perspective, Justice Douglas proposed that there should be a civil determination on the issue of the obscenity of a given publication; then a subsequent violation of the law prohibiting the sale of obscene material would be required before any criminal prosecution could be instituted against the individual. By utilizing such civil procedures, he asserted, a state could make its vague obscenity laws more specific and

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was viewed only by "consenting adults", as long as the applicable state law complied with the first amendment standards enunciated in Miller v. California, 413 U.S. 15, 23-25 (1973).

11. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).

12. *Id.* at 61.

13. 354 U.S. 436 (1957). The majority opinion upheld a state procedure which authorized an injunction against further dissemination of obscene material and an order for its seizure and destruction upon a court finding of obscenity. Under the statute, an *ex parte*, temporary injunction could be issued prior to trial on the merits, but trial had to be within one day of joinder of issue and had to be decided within two days of its end. The appellant challenged the temporary restraining order as a prior restraint on speech not yet determined to be unprotected. The Court rejected this contention and held that the injunction was not an impermissible prior restraint because of the safeguards it provided for first amendment values.

14. *Id.* at 441.

15. *Id.* at 440. Justice Frankfurter, speaking for the majority, went on to state that instead of requiring the bookseller to risk criminal prosecution for sale of a book without prior warning as to the book's obscenity, the civil procedure assures that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. *Id.* at 442.

thereby give a person fair warning as to what actions might be criminal.[16]

Furthermore, the Commission on Obscenity and Pornography advocates the enactment of legislation which would permit prosecutors to acquire a declaratory judgment on the issue of the obscenity of certain material, and encourage them to prosecute criminally only conduct which occurred after the civil determination.[17] Some states have accepted this recommendation and have made equitable actions, prior to criminal prosecutions, discretionary with the prosecutor.[18] Other states however, require a civil adjudication of the question of obscenity and a violation of that civil judgment before an individual may be prosecuted criminally for selling or distributing obscene matter.[19]

The Advantages and Disadvantages Of A Civil Determination Of Obscenity

Civil proceedings to judicially determine obscenity *vel non* have advantages and disadvantages for both parties to the litigation. Civil sanctions may provide a prosecutor with a more effective means of controlling the dissemination of certain types of material.[20] They may also allow him to join all affected parties within a given jurisdiction into a single equitable proceeding, in lieu of piecemeal criminal prosecutions.[21] The use of civil proceedings however, may prove to be unsuc-

16. Miller v. California, 413 U.S. 15, 41-43 (1973) (Douglas, J., dissenting).

17. THE UNITED STATES COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT 63 (1970).

18. *See, e.g.*, ALA. CODE tit. 14, § 374(5) (Supp. 1973) (all material, except mailable matter); MASS. GEN. LAWS ANN. ch. 272, § 30 (West Supp. 1977-1978) (all matter, except books); N.Y. CIV. PRAC. LAW § 6330.1 (McKinney Supp. 1976-1977) (only material that is allegedly obscene to persons under the age of seventeen); OKLA. STAT. tit. 21, § 1040.14 (1971); 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973).

19. *See, e.g.*, ALA. CODE tit. 14, § 374(16k)(c) (Supp. 1973) (mailable matter); LA. REV. STAT. ANN. § 14:106F(1) (West 1974) (compulsory for all material except "hard core" pornography); MASS. GEN. LAWS ANN. ch. 272, § 28C (West Supp. 1977-1978) (required for obscene books); N.C. GEN. STAT. § 14-190.2(a) (Supp. 1975); VT. STAT. ANN. tit. 13, § 2809 (Supp. 1977) (mandatory for written matter in a book under its juvenile statutes; the state has repealed its adult obscenity legislation). *See also*, Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 569-87 (1975) [hereinafter cited as Lockhart] for a discussion of how legislatures might effectively draft statutory procedures for dealing with obscenity in a civil context.

20. For example, those types of materials which have a sufficient time period between production and distribution, such as books and motion pictures. *Cf.* Freedman v. Maryland, 380 U.S. 51, 60-61 (1965) (upholding a Maryland scheme for the preview of films).

21. *See, e.g.*, ALA. CODE tit. 14, § 374(6) (Supp. 1973); LA. REV. STAT. ANN. § 14:106F(1) (West 1974); MASS. GEN. LAWS ANN. ch. 272, § 28C (West Supp. 1977-

cessful in regulating "those outlets dealing with relatively fast-moving, hard-core materials,"[22] because of the time lag between discovering the material, instituting an action, and receiving a judicial determination on the merits.

For the defendant, civil procedures may be a judicial avenue for receiving "fair notice" of what materials are constitutionally unprotected and, therefore, subject to criminal laws, before the party engages in prohibited conduct. In this way, such actions reduce the chilling effect of uncertainty on the distribution of marginal materials.[23] On the other hand, civil sanctions may infringe on speech which would otherwise be protected in a criminal action, because of the lower procedural requirements. Moreover, under the threat and inconvenience of participating in a civil litigation, a bookstore may choose not to carry certain materials. If a seller is subjected only to criminal prosecution, he may decide to carry the material believing that the state can not meet the higher standard of proof (beyond a reasonable doubt) that the material is obscene. The state's initiation of an equitable action may also serve as an impermissible prior restraint on speech which has not been determined to be obscene.[24] These policy considerations are important in evaluating and resolving the constitutional problems that are raised by using civil proceedings to regulate obscene speech.

Constitutional Standards And Procedures

There exists a dim line between protected speech and obscenity.[25] Because there is a high value, embedded in our constitutional and political history, placed on the preservation of first amendment rights, the Court has mandated that states incorporate into their legislation certain standards and procedures for adjudicating the issue of obscenity.

In *Miller v. California*,[26] Chief Justice Burger enunciated two

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1978); N.Y. CIV. PRAC. LAW § 6330.1 (McKinney Supp. 1976-1977); N.C. GEN. STAT. § 14-190.2(c) (Supp. 1975); OKLA. STAT. tit. 21, § 1040.15 (Supp. 1976); 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973); VT. STAT. ANN. tit. 13, § 2810(b) (Supp. 1977).

22. Lockhart, *supra* note 19, at 570.

23. *Id.* at 569.

24. *See* Freedman v. Maryland, 380 U.S. 51 (1965). *See also* note 35 *infra.*

25. Protected speech is simply that speech which comes within the protection of the first and fourteenth amendments. *See* Konisberg v. State Bar, 366 U.S. 36, 49-50 (1961).

26. 413 U.S. 15 (1973). The appellant was convicted of mailing unsolicited sexually explicit material in violation of a state statute. The Supreme Court held that material may be subject to state regulation provided that, taken as a whole, it appeals to the prurient interest in sex, portrays sexual conduct in a patently offensive way, and,

limitations on the permissible scope of state statutes regulating obscene material. First, the legislation must be restricted to works which depict and describe sexual conduct. Second, the prohibited conduct must be specifically defined by applicable state law, as written or authoritatively construed.[27] In order that a state might determine what constitutes obscene speech, he promulgated a three-part test to be used in all obscenity cases, regardless of the nature of the forum, be it criminal or civil.[28] The test was stated as follows:

> The basic guidelines 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.[29]

In addition to these guidelines for determining the question of obscenity, certain procedural safeguards are necessary to insure that protected speech is not unduly suppressed. In *McKinney v. Alabama*,[30] the state instituted an equitable proceeding (in rem and in personam) to have certain material declared obscene and to enjoin certain parties from further sales. The petitioner received notice of the judgment although he was not a party to the action. Subsequently, he was charged and convicted of selling what had been judicially determined to be obscene material. During the course of the criminal trial, the judge ruled that petitioner was precluded from relitigating the issue of the obscenity of the material. The Supreme Court, in reversing the decision of the state courts, did not condemn civil sanctions in general, but did declare that this procedure violated the first and the fourteenth amendments.[31] It concluded that because the petitioner did not have an opportunity to litigate the question of obscenity in the prior civil action, he was not bound by the court's judgment. It found he must have an "opportunity

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again taken as a whole, lacks serious literary, artistic, political, or scientific value. The Court vacated the conviction of the appellant and remanded.

27. *Id.* at 24.

28. Chief Justice Burger made no distinction between criminal and civil obscenity actions, and referred to all state statutes designed to regulate obscene materials. *See id.* at 23-24.

29. 413 U.S. at 24.

30. 424 U.S. 669 (1976).

31. *Id.* at 670.

to litigate in some forum the issue of the obscenity of [the material] before he may be convicted of selling obscene material."[32]

In conjunction with the requirements of notice and an opportunity to be heard, due process and freedom of speech mandate certain additional procedures in the conduct of an obscenity trial. In *Freedman v. Maryland*,[33] the petitioner challenged a Maryland motion picture censorship statute as a prior restraint on free speech. Justice Brennan, in striking down the Maryland scheme, held that the statute failed to provide the necessary safeguards against undue inhibition of protected expression. The Court's opinion stated that censorship procedures can avoid constitutional infirmity only if they are carried out under certain procedural safeguards. First, the burden of proving that the speech is unprotected expression must be borne by the state. Second, "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."[34] Finally, there must be a prompt and final judicial decision, to minimize the chilling effect of an erroneous administrative decision: "Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."[35]

These procedural requirements, which are necessary in an obscenity trial, evidence a philosophy that due process requires more safeguards than normal in a civil action when the sensitive area of free speech is involved. For example, by placing the burden on the state to prove that the speech is obscene, the Court has relieved the defendant from having to prove that the speech is entitled to constitutional

32. *Id.* at 677.
33. 380 U.S. 51 (1965).
34. *Id.* at 58.
35. *Id.* at 59. In light of *Freedman*, those statutes which authorize injunctions pendente lite and which do not expressly or impliedly specify a time period within which a trial and a final determination on the merits must be made, may be found to be impermissible prior restraints on speech which has not been found to be unprotected. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973) (no time limit prescribed). On the other hand, those statutes which are worded similarly to the New York statute, sustained in Kingsley Books v. Brown, 354 U.S. 436 (1957), should meet the procedural requirements of *Freedman* and avoid the potentially chilling effect of prior restraints on protected speech. *See, e.g.*, ALA. CODE tit. 14, § 374(9) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 272, § 30 (West Supp. 1977-1978); N.Y. CIV. PRAC. LAW § 6330.2 (McKinney Supp. 1976-1977); N.C. GEN. STAT. § 14-190.2(d)(1) (Supp. 1975).

protection.[36] Compatible with this philosophy is the possibility that freedom of speech and due process mandate that a state civil proceeding include the requirement that a jury find beyond a reasonable doubt that the material is obscene.

II. THE APPLICABLE STANDARD OF PROOF

The Right to a Jury Trial

Although *Alexander v. Virginia*,[37] held that a jury trial was not constitutionally required in a state civil action, brought to enjoin the sale and distribution of allegedly obscene material, the language of the Supreme Court in prior and subsequent cases is inconsistent with that holding. The majority opinion in *Miller* supports the proposition that the right to a jury trial is a necessary element of an obscenity case, whether it be a civil or criminal one. *Miller* emphasized that, in resolving the "inevitably sensitive" question of whether certain material is obscene, states should continue to rely on the jury system, accompanied by other judicial protections.[38]

Likewise, in the companion cases of *Hamling v. United States*[39] and *Jenkins v. Georgia*,[40] Justice Rehnquist, speaking for the Court, explained the constitutional parameters of jury discretion in an obscenity trial. He held that when applying the "contemporary community standard" of the *Miller* test, "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination."[41]

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36. Which party has the burden of proof may be important. Where there is equal evidence on both sides, the party with the burden of proof will fail. In an obscenity case, the Court has placed the burden on the censor. Freedman v. Maryland, 380 U.S. 51, 58 (1965).

37. 413 U.S. 836 (1973) (per curiam).

38. 413 U.S. at 26.

39. 418 U.S. 87 (1974). The Court affirmed the conviction of the petitioners for mailing obscene materials in violation of federal law. Justice Rehnquist held that the relevant "contemporary community" standard of the *Miller* test in a federal obscenity case was the federal judicial district from which the jury is drawn.

40. 418 U.S. 153 (1974). In this companion case to *Hamling*, Justice Rehnquist refused to require states to apply a statewide "contemporary community" standard, under the *Miller* test, in state obscenity prosecutions. Rather, he found that it was permissible for states to use either a statewide or a local judicial district standard. He went on to find, however, that the trial court had improperly applied the *Miller* test and that the appellant's conviction must be reversed, as the material he distributed was not obscene as a matter of law.

41. 418 U.S. at 104.

There are also strong policy considerations for requiring a jury trial. The importance of a jury in an obscenity case has been analyzed in the following way:

> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene.[42]

Additionally, Chief Justice Warren's dissent in *Times Film Corporation v. City of Chicago*,[43] asserted that "[t]he inexistence of a jury to determine contemporary community standards is a vital flaw."[44] Warren also asserted the proposition that a jury, although it may be ill equipped to decide on the nature of unprotected speech, does "represent the general views and the common sense of the community and often appreciate[s] the motives of the speaker or writer whose punishment is sought."[45]

In addition to being a representative cross section of the community, a jury of peers may be more cognizant of and more sensitive to free speech values. They may attempt to exercise greater precision in delineating between the area of protected speech and obscenity than would the judiciary. In *Duncan v. Louisiana*,[46] ruling that a right to a jury trial in criminal cases was guaranteed by the due process clause of the fourteenth amendment,[47] the court acknowledged that, "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge."[48]

The same logic and justifications for requiring a jury trial in a

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42. Kingsley Books v. Brown, 354 U.S. 436, 448 (1957) (Brennan, J., dissenting).
43. 365 U.S. 43, 50 (1961) (Warren, C.J., dissenting).
44. *Id.* at 68-69.
45. 365 U.S. at 69 n.9 (citing from Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 314 (1961)).
46. 391 U.S. 145 (1968).
47. *Id.* at 149.
48. *Id.* at 156.

criminal action,[49] to insure that an individual is not deprived of life or liberty without due process, seem applicable to a civil trial involving a question of protected speech or obscenity. The citizenry and the Court should be reluctant to entrust the job of censorship of speech to a select judiciary. Rather, a jury should decide for itself what the average person, applying contemporary community standards, would find appealing to the prurient interest or patently offensive. Such a conclusion is consistent with the profound commitment to the preservation of free speech. States should not be allowed the discretion of deciding whether or not to provide jury trials.[50]

The Standard of Proof: Beyond A Reasonable Doubt

Typically, statutes which authorize a civil adjudication of obscenity provide that the trial is to be conducted in accordance with the established rules of civil procedure. These rules usually designate that the standard of proof shall be a preponderance of the evidence.[51] When this standard of proof is applied to the question of obscenity, the trier of fact, in applying the *Miller* test, is required to find that it is more probable than not that this material is obscene.[52]

The use of a preponderance standard of proof, which is quantitatively lower than a finding of beyond a reasonable doubt, may subject material to censorship which would otherwise be entitled to constitutional safekeeping. There is a margin of error that is inherently present in the factfinding process. When one party to the litigation has

49. The Court in Duncan v. Louisiana, 391 U.S. 145 (1968), found that a jury trial was essential to prevent miscarriages of justice, to insure that all defendants receive a fair trial, and to guard against abuses of official power by a judge or group of judges. *See id.* at 156-58.

50. Some states, by statute, require a jury trial in the civil proceeding. *See* note 7 *supra.*

51. *See, e.g.*, OKLA. STAT. tit. 21, § 1040.18 (a) (1971) (civil obscenity trials to be conducted in accordance with the rules of civil procedure). The standard of proof in Oklahoma civil trials is the preponderance of the evidence. *See,* Gilbaugh v. Rose, 205 Okla. 508, 239 P.2d 406, 407-08 (1951); 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973) (rules of civil procedure applicable). The Pennsylvania rule is the preponderance standard. *See,* Rasner v. Prudential Ins. Co. of America, 140 Pa. Super. 1124, 13 A.2d 118 (1940); VT. STAT. ANN. tit. 13, § 2810(c) (Supp. 1977) (rules of civil procedure apply to civil adjudications of obscenity). Vermont standard of proof in civil adjudications is a preponderance of the evidence. *See,* Gentes v. St. Peter, 105 Vt. 103, 163 A. 569 (1933).

52. The preponderance of the evidence standard requires that the trier of fact find that the fact asserted by the party with the burden of proof is more probably true than false. Burch v. Reading Co., 240 F.2d 574, 579 (3d Cir. 1957), *cert. denied,* 353 U.S. 965 (1957).

at stake an "interest of transcending value," such as free speech, this possibility of error is reduced by placing on the opposing party the burden of convincing the factfinder beyond a reasonable doubt that his assertion is correct.[53]

Accepting this proposition, Justice Harlan, concurring in *In re Winship*,[54] recognized that a factual error can affect the outcome of the litigation in one of two ways. First, a judgment may be rendered in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in an obscenity case would be the suppression of protected speech.[55] Conversely, an erroneous factual determination can result in a decision for the defendant when the truth would justify a decision for the plaintiff. The obscenity case analogue would be the protection of obscene speech.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. In an obscenity trial, if the standard of proof is a preponderance of the evidence rather than beyond a reasonable doubt, there is a smaller risk of erroneously protecting obscene speech, but a greater risk of mistakenly suppressing free speech. Therefore, the social disutility of each type of factual error should be assessed prior to a decision as to the standard of proof to be utilized in a particular type of litigation.[56] In *Winship*, Justice Harlan evaluated the social disutility of a factual error in the context of a civil action and concluded that a preponderance of the evidence standard seemed appropriate; an erroneous verdict in favor of the plaintiff was no more serious than an erroneous verdict in the defendant's favor. However, this reasoning does not apply if the social disutility of restricting free speech is viewed as greater than the disutility of protecting obscene speech.[57]

Because the danger and the resulting harm to society may be great if protected expression is continually subjected to erroneous suppression,[58] the Court should insure that the opportunity for error in the fac-

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

54. 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring).

55. Although *In re Winship*, 397 U.S. 358 (1970), involved a juvenile delinquency proceeding, Justice Harlan's reasoning seems applicable to a trial involving the issue of obscenity.

56. *In re Winship, id.* at 371 (Harlan, J., concurring).

57. This analogy is drawn from Harlan's discussion regarding the disparate disutility of convicting an innocent man as opposed to freeing a guilty man in a criminal trial. *Id.* at 372.

58. McKinney v. Alabama, 424 U.S. 669, 685-86 (Brennan, J., concurring).

tual determination of the obscenity of any material is minimized. This bias in favor of free speech is the basic justification for requiring that the higher standard of proof (beyond a reasonable doubt) be an essential element of any obscenity trial, criminal or civil.

It may be contended that if the Constitution does require such a standard of proof, then there would be little or no incentive to utilize civil sanctions when criminal prosecutions, with equal procedural burdens, are a greater deterrent to those who disseminate obscene material. This logic, however, overlooks some important counterpoints. First, it is only in those instances where the question of obscenity is a relatively close one that the higher standard of proof may affect the outcome of the litigation. Frequently, the trier of fact will be able to conclude that it is more probable than not that the material is obscene, but not that it is obscene beyond a reasonable doubt.

Second, a civil proceeding need not frustrate a prosecutor's enforcement efforts. On the contrary, it may prove more beneficial to the state by increasing the number of persons who will be deterred from dealing in obscene material. Given the prosecutor's limited resources of both time and money, an equitable action is efficient, as it allows the joinder of multiple parties regardless of their alleged criminal activity. On the other hand, if the prosecutor were to pursue a similar course of action through criminal prosecutions, he would be required initially to establish to the satisfaction of the court the probable cause to believe that a particular party engaged in prohibited conduct, before he could proceed with an action to restrain the activities.

Finally, it is important to consider the basic distinctions between civil and criminal litigation. Civil proceedings generally have been characterized as remedial,[59] whereas criminal prosecutions are of course punitive.[60] Whenever the effects of a civil action begin to resemble criminal punishment, due process should mandate greater procedural protection.[61] Because the first amendment necessitates greater awareness and protection for an individual's right to speak and

59. A civil action is remedial, because its primary purpose is the prevention of future harm or compensation for an injured party. Its function is to protect a private right. Pearson v. State, 159 Tex. 66, 315 S.W.2d 935, 937 (1958).

60. In the area of obscenity, they penalize the speaker for his ideas and also penalize that segment of society who wishes to receive expression that the injunction prohibits the speaker from disseminating.

61. *Cf.* Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968) (Involuntary civil commitment to mental institution without legal counsel).

to hear, the Court should conclude that a jury trial and the higher standard of proof on the question of obscenity are required in all cases.

III. Subsequent Use of a Civil Adjudication of Obscenity

Once there has been a judicial determination that certain material is obscene, it is important to consider the possible effects this will have in subsequent proceedings. The Court in *McKinney*, held that a prior judgment would not have preclusive effect against the defendant in a subsequent criminal prosecution when the party did not have notice and an opportunity to participate in the earlier civil action. The plurality opinion however, did not resolve the issue of when or how the doctrine of collateral estoppel was applicable to either a later proceeding involving a party present in the original action, or a subsequent action involving the same material, brought against an individual not included in the prior civil adjudication. The question can arise in the three types of actions which may follow a civil determination of obscenity: (1) a contempt proceeding involving a party not joined in the prior civil litigation; (2) a criminal prosecution of a defendant in the first action; and (3) another civil adjudication or criminal prosecution including the same material, but brought against an individual who did not participate in the earlier trial. In this third category, the defendant may seek to use the prior civil determination as collateral estoppel against the prosecuting party.

A. A Contempt Proceeding Involving a Party Not Joined in the Firct Action

Legislation which authorizes civil proceedings usually provides that in the event a judgment is entered declaring the matter to be obscene, the court shall issue an order requiring the surrender and destruction of the material and issue a permanent injunction against any person selling or distributing the obscene matter.[62] Conduct in violation of the court ordered injunction may constitute grounds for holding one in civil or criminal contempt[63] because an order issued by a court

62. *See, e.g.*, Ala. Code tit. 14, § 374(10) (Supp. 1973); Mass. Gen. Laws Ann. ch. 272, § 30 (West Supp. 1977-1978); N.Y. Civ. Prac. Law § 6330.6 (McKinney Supp. 1976-1977); N.C. Gen. Stat. § 14-190.2 (3) (Supp. 1975); Okla. Stat. tit. 21, § 1040.20 (Supp. 1976); 18 Pa. Cons. Stat. Ann. § 5903(h) (Purdon 1973); Vt. Stat. Ann. tit. 13, § 2812(a) (Supp. 1977).

63. United States v. United Mine Workers, 330 U.S. 258, 298-99 (1947).

with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed after proper review.[64]

Contempt is characterized as criminal or civil depending on whether the dominant purpose of the contempt proceeding is to punish the alleged contemnor or coerce him to do something.[65] Criminal contempt has as its primary purpose the preservation and maintainance of the authority and dignity of the court, and the punishment of those parties who disobey its orders.[66] On the other hand, the essential function of civil contempt is remedial; it is a sanction to compensate an injured party for losses or damages suffered because of noncompliance, or to coerce obedience to a court order.[67]

In order to hold a person in contempt for violating a court ordered injunction, two elements must be present.[68] First, the alleged contemnor must have violated the court order with actual knowledge of its existence and the terms it contained.[69] This requirement of actual knowledge does not necessitate any finding that the party was formally served with the order of the court.[70] Second, the order which is said to have been disobeyed must be specific and definite so as to give the individual fair warning of the prohibited conduct or the duties imposed upon him.[71] The court will test the sufficiency of the order on the basis of several criteria, which include: the circumstances surrounding the entry of the court order, the remedy sought by the aggrieved party, the evidence presented at the injunction proceeding, and the harm which the injunction seeks to prevent.[72] Additionally, if the alleged contemnor is prosecuted for criminal contempt, the court must conclude that he intended to violate the order or that he willfully disobeyed its command.[73] This intent to do the act may also be present in a civil contempt, but it is not a prerequisite.[74]

Once the requisite elements are established, it becomes necessary

64. *Id.* at 293; Walker v. City of Birmingham, 388 U.S. 307, 320 (1967).
65. State v. Greenwood, 63 N.M. 156, 315 P.2d 223, 225 (1957).
66. *In re* Nevitt, 117 F. 448, 458 (8th Cir. 1902).
67. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).
68. *In re* Rubin, 378 F.2d 104, 108 (3d Cir. 1967).
69. *Id.*; *see also*, Thompson v. Johnson, 410 F. Supp. 633, 640 (E.D. Pa. 1976); Spence v. The Woodman Co., 213 Ga. 573, 100 S.E.2d 435, 439 (1957).
70. Thompson v. Johnson, 410 F. Supp. 633, 640 (E.D. Pa. 1976).
71. *In re* Rubin, 378 F.2d 104, 108 (3d Cir. 1967).
72. United States v. Christie Indus., Inc., 465 F.2d 1002, 1007 (3d Cir. 1972).
73. Duemling v. Fort Wayne Community Concerts, Inc., 243 Ind. 521, 188 N.E.2d 274, 276 (1963).
74. *In re* Rubin, 378 F.2d 104 (3d Cir. 1967); Thompson v. Johnson, 410 F. Supp. 633 (E.D. Pa. 1976); Farber v. Rizzo, 363 F. Supp. 386, 395 (E.D. Pa. 1973).

to determine if the alleged contemnor is bound by the court order. A party who participated in the proceeding in which the injunction was issued would clearly be bound, but there is the problem of whether a party who was not joined in the original litigation is also required to comply with the terms of the order. Some states have statutorily defined which parties were bound by a court ordered injunction against the further dissemination of obscene material. Some of these statutes provide that any person who receives written notice of the filing of the complaint or judgment must obey the order.[75] Other legislation binds the respondent to the action and those persons who are in active concert with the respondent, provided these persons have actual notice of the injunction.[76]

Absent statutory provisions, courts have taken either an expansive or restrictive position on the effect of an order on a person not joined or given the opportunity to participate in the equity action. One jurisdiction has declared that although an individual was not a party to the injunction proceeding, he may be punished for contempt if it is shown that he had actual knowledge of the order and its provisions and nevertheless disobeyed it.[77] On the other hand, it has been held that only those nonparties who had actual knowledge of the order and its terms and who are abetting a party to the action, or were legally identified with him, could be held in contempt.[78]

If an individual is found in contempt, the court will decide his punishment depending on whether the purpose of the penalty is to punish for past acts or to secure future compliance with the order.[79] A finding of criminal contempt may necessitate a fine or imprisonment for the contemnor.[80] A verdict of civil contempt may result in a fine for damages to the aggrieved party or incarceration for the purpose of coercing obedience to the order.[81] With respect to the granting or withholding of sanctions, a finding of contempt does not always result in a fine or

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75. *See, e.g.*, N.C. GEN. STAT. § 14-190.2(i)(Cum. Supp. 1975) (both elements must be present); OKLA. STAT. tit. 21, § 1040.22 (1971) (either element is a sufficient prerequisite).

76. ALA. CODE tit. 14, § 374(11) (Supp. 1973).

77. Spence v. The Woodman Co., 213 Ga. 573, —, 100 S.E.2d 435, 439 (1957).

78. Thompson v. Johnson, 410 F. Supp. 633, 640 (E.D. Pa. 1976).

79. United States v. United Mine Workes of America, 330 U.S. 258, 302 (1947).

80. *Id.* at 303.

81. *Id.* at 303-04 (1947); Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa. 1976); Duemling v. Fort Wayne Comm. Concerts, Inc., 243 Ind. 521, —, 188 N.E.2d 274, 276 (1963).

imprisonment,[82] because the imposition of punishment is within the discretion of the judge.[83] A trial judge, when exercising his discretion on the question of what penalty is to be assessed, may consider several factors: the extent of the contemnor's willful disobedience of the court's order and the seriousness of the consequences which have followed from noncompliance; the importance of preventing future contumacious conduct by the defendant; and the necessity of protecting the public's interest by putting an end to the contemnor's conduct.[84]

If the previous analysis were applied to the factual setting of *McKinney*, it is conceivable that the petitioner, as a nonparty, could have been found in contempt of court for violating an order prohibiting the further sale of certain materials although he could not have been convicted criminally without first being afforded notice and an opportunity to litigate the issue of obscenity *vel non*. If the court had found him in civil and/or criminal contempt, they could have imprisoned him for past acts or incarcerated him until he complied with the court order to surrender the obscene material for destruction, or fined him as punishment or as damages for the aggrieved party, here, the state.[85]

Justice Douglas, in a fiery dissent in *Kingsley Books*, warned of the potential abuses that may result from the use of injunctions and contempt citations in the free speech area.[86] He argued that an injunction "substitutes punishment by contempt for punishment by jury trial. . . . [and in that respect] it transgresses constitutional guarantees."[87] In light of this assertion, a court should exercise its power to hold an individual in contempt with the "utmost sense of responsibility and cir-

82. Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa. 1976).

83. *Id.*

84. United States v. United Mine Workers, 330 U.S. 258, 303 (1947).

85. *Id.* at 303-04. *See, e.g.*, OKLA. STAT. tit. 21, § 1040.22 (1971). This section provides that if one violates a court ordered injunction against the further sale of material judicially determined to be obscene, he is, "guilty of contempt of court and upon conviction after notice and hearing shall be imprisoned in the county jail for not more than one (1) year or fined not more than One Thousand Dollars ($1,000.00), or be so imprisoned or [*sic*] fined."

An injured party must prove his actual damages by reason of the contemnor's violation of the injunction. United States v. United Mine Workers, 330 U.S. 258, 304 (1947); Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa. 1976). In the context of a contempt proceeding involving a violation of an injunction against the further dissemination of certain obscene material, a court may have difficulty imposing a civil sanction in the form of a fine, because the state may not be able to demonstrate that there have been tangible losses caused by the defendant's noncompliance.

86. 354 U.S. 436, 446-47 (1957) (Douglas, J., dissenting).

87. *Id.* at 447.

cumspection,"[88] when there has been a violation of a court ordered injunction. Along with the previously mentioned considerations, a court might want to make several additional inquiries before finding a party in contempt. First, it should determine the nature of the subject matter that is enjoined. The court should exercise greater leniency with an inadvertent or inconsequential violation of its order when society places high values on the preservation of the subject matter.[89] Second, the court should consider if the alleged contemnor was a party, or privy, to the action in which the injunction was issued. A defendant who was not joined and did not have an opportunity to participate in the prior action, even though he had actual knowledge of the court order, may have assessed the importance of his first amendment rights differently from those who did participate in the proceeding. Therefore, they might have conducted a more vigorous defense of their constitutional rights.

It is arguable that such an approach may either lead to a total frustration of the purpose of the injunction or encourage parties not joined in the action to disregard court orders. This result will not occur if courts continue to exercise their sound judgment. There may be instances where a court is compelled to find a non-party in contempt, but this action does not have to become a common practice. Courts are instinctively aware of the due process requirement of fair play and should not allow states to circumvent the constitutionally mandated procedures of notice and an opportunity to be heard through ancillary means, such as injunctions and contempt proceedings.

B. A Criminal Prosecution Involving A Defendant in the First Action

Many statutes provide that once a given publication has been judicially found to be obscene in a civil action, it is a crime, punishable by a fine, imprisonment, or both, to disseminate such material.[90] This section considers the effect of a prior civil adjudication of obscenity in the subsequent criminal prosecution of an individual who had notice

88. Thompson v. Johnson, 410 F. Supp. 633, 640 (E.D. Pa. 1976) (quoting Glenwal Development Corp. v. Schmidt, 356 F. Supp. 67, 69 (D.P.R. 1972)).

89. For example, if the subject matter of the injunction was speech, the court may choose not to punish a contemnor if it feels that the original proceeding may be erroneously suppressed protected speech.

90. *See, e.g.*, Ala. Code tit. 14, § 374(4) (Supp. 1973) (a misdemeanor); La. Rev. Stat. Ann. § 14:106G (West 1974) (a felony, if distributed to an unmarried person under the age of seventeen); Mass. Gen. Laws Ann. ch. 272, § 284, § 29 (West Supp.

and an opportunity to litigate the question of obscenity in the prior civil action.

In *McKinney,* the defendant was served with notice of the judgment of a prior civil proceeding to which he was not a party. In the civil litigation, the court had found certain named publications to be obscene. Subsequent to serving the defendant with notice, the state found one of those publications in the petitioner's bookstore. The state indicted and convicted him for possession with the intent to distribute judicially determined obscene material. The petitioner was not given an opportunity to litigate the question of obscenity in his criminal trial. The trial court ruled that the issue had been concluded in the earlier equitable action and the defendant could not relitigate the issue.[91] The Supreme Court reversed the conviction and remanded the case to allow the petitioner the opportunity to litigate, in some forum, the question of obscenity.[92] By neglecting to specify the nature of the forum where the issue was to be litigated, the Court left unanswered the question of what effect a civil determination of obscenity would have in a subsequent action. In particular, they did not resolve the issue of whether collateral estoppel could be used to estop a party from relitigating an issue in a subsequent criminal prosecution[93] and whether its use might raise equal protection and due process problems.

Collateral Estoppel

In deciding whether the doctrine of collateral estoppel may be invoked, this comment makes a two-step analysis: First, it examines the prerequisites to applying the rule, and second, it considers the limitations, if any, on allowing its use. In this analysis, this section explores those aspects of collateral estoppel which may have a bearing on an obscenity trial.

The doctrine of collateral estoppel requires that where a question

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1977-1978) (a felony); N.Y. CIV. PRAC. LAW § 6330.5 (McKinney Supp. 1976-1977) and N.Y. PENAL LAW § 235.21 (McKinney Supp. 1976-1977) (a felony); N.C. GEN. STAT. § 14-190.2(h) (Supp. 1975) (a misdemeanor); OKLA. STAT. tit. 21, § 1040.13 (1971) (a misdemeanor); VT. STAT. ANN. tit. 13, § 2802(a) (1974) (a misdemeanor).

91. McKinney v. Alabama, 292 Ala. 484, 296 So.2d 228 (1974), *rev'd,* 424 U.S. 669 (1976).

92. *Id. See generally* Hirsch & Ryan, *I Know It When I Seize It: Selected Problems in Obscenity,* 4 LOY. L.A.L. REV. 9, 70-81 (1971) [hereinafter cited as Hirsch & Ryan] for a discussion of how and when the concept of collateral estoppel may be applicable to multiple criminal prosecutions concerning allegedly obscene material.

93. *See* McKinney v. Alabama, 424 U.S. 669 (1976).

of fact or law essential to the judgment is actually litigated and necessarily decided in the first proceeding, the issue is conclusively settled and may not be relitigated in a subsequent action between the same parties or their privies.[94] The primary justifications for the doctrine are to prevent repetitious litigation, to discourage a party from shopping for a receptive forum, and to decide conclusively the rights of adverse parties and any disputed issues.[95] If a party desires to take advantage of collateral estoppel, he must show that all the elements required for its application are present.[96] Conversely, a party seeking to avoid estoppel must prove that either the doctrine is not applicable as the prerequisites have not been met or that there is a limitation on its use.[97]

In deciding how the rule of collateral estoppel may be applicable in this context, it is important to understand the basic nature of an obscenity trial. An obscenity trial is a procedural hybrid in that it contains elements of in rem, in personam, and quasi in rem jurisdiction. It is an action in rem because the proceeding is directed against specific material and seeks a determination that such material is obscene. The litigation has in personam aspects, because it is directed against certain named individuals. Finally, because the action will determine the rights of the parties with respect to the res, the allegedly obscene matter, it has the characteristics of a quasi in rem proceeding. It must be noted, however, that the principal issue for estoppel purposes is the question of whether the material is obscene.[98]

Before a court precludes a party from relitigating an issue, it must determine if the prerequisites to utilizing collateral estoppel are present.[99] This determination is based upon the answers to four questions: (1) was the issue being sought to be precluded raised and considered in the first action and necessarily decided? (2) was the nature of the issue decided one of fact or law? (3) what are the natures of the past and present adjudicating bodies, and was the first judgment final and valid? (4) who were the parties and their privies to the first

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94. *See* Green v. Chafee Ditch Co., 150 Colo. 91, 371 P.2d 775, 779-80 (1962).

95. *See generally* A. VESTAL, RES JUDICATA/PRECLUSION 7-12 (1969) [hereinafter cited as VESTAL].

96. *See* Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 509-11 (E. D. Mich. 1974).

97. *Id.*

98. *See* Hirsch & Ryan, *supra* note 92, at 76-77.

99. Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 510-12 (E.D. Mich. 1974).

suit and to the present one?[100] Each of these questions shall be considered in the context of obscenity proceedings.

The most basic postulate of collateral estoppel is that the issue must have been actually litigated and necessarily determined in a prior suit.[101] This connotes that the litigation involved adversary parties who advanced their positions with both argument and evidence and which resulted in the decision of an issue. Difficulty may arise where an issue that was necessary to the resolution of the original suit was not actually litigated by the parties, but resolved by other means. For example, some courts have determined that if a party to the litigation had an opportunity to appear and protect his interests, a default judgment, like any other judgment, is conclusive on any issue necessary to support the judgment.[102] Conversely, it has been held that a default judgment is not conclusive, because the issue was not actually litigated.[103] The rule in a given jurisdiction as to whether the concept of collateral estoppel is applicable following a default judgment may be important when there is a subsequent criminal prosecution against a party who defaulted in the first action and who now wishes to contest the issue of obscenity.

An approach has been suggested that would allow the court to evaluate a party's failure to litigate before reaching a decision on the question. The court may consider such factors as: the importance of the matter to the conceding party; the cost of litigation; and the ease with which a defense could have been made on the point. These factiors bear on the root question of whether a party had both the oppor-

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100. Much of the discussion and examination of collateral estoppel in this section is patterned after the format proffered by VESTAL, *supra* note 95.

There are three additional elements of collateral estoppel: (1) "the issue to be concluded must be the same as that involved in the prior action;" (2)"the issue must have been material and relevant to the disposition of the prior action;" and (3)"the resolution of that issue must have been essential to the judgment rendered." Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 512 (E.D. Mich. 1974). Because the issue of obscenity is essential to the court's determination in any trial involving allegedly obscene material, these additional elements will not be further considered.

101. Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 512 (E.D. Mich. 1974).

102. Harvey v. Griffiths, 133 Cal. App. 17, 23 P.2d 532, 534 (1933); Lawhorn v. Wellford, 179 Tenn. 625, 168 S.W.2d 790, 792 (1943).

103. Tutt v. Doby, 459 F.2d 1195, 1199-1200 (D.C. Cir. 1972) (estoppel dependent upon whether parties could reasonably foresee the conclusive effect of their actions); Crowder v. Red Mountain Min. Co., 127 Ala. 254, 29 So. 847 (1900); *See also* 1B MOORE'S FEDERAL PRACTICE ¶ 0.44[2] (2d ed. 1974).

tunity *and the incentive* to litigate the matter fully and whether it is reasonable to hold the defaulting party estopped.[104]

The second question which the court must evaluate is the nature of the issue sought to be precluded. For preclusion to take place, the issue must be the same as that decided in the prior action.[105] Because the original decision was based upon facts and conditions existing at the time, collateral estoppel will not bar relitigation of an issue when, after the prior judgment, events and conditions arise which create a new legal setting or alter the rights of the parties.[106] Likewise, estoppel is not applicable if there has been a change in the applicable law between the time of the first judgment and the present action.[107]

In an obscenity trial, the contention that there has been an intervening change of fact or law since the original proceeding may be a successful defense to the use of collateral estoppel. The Supreme Court in *Miller*, ruled that one of the basic guidelines for the trier of fact must be what the "average person, applying contemporary community standards" would find.[108] The issue of obscenity then is one of fact.[109] Because contemporary "[c]ommunity standards are inherently in a state of flux"[110] there is a substantial danger that material which is judicially determined to be obscene may never be available to the community, although it would no longer consider the material to be patently offensive or appealing to the prurient interest. If a person is charged with the crime of distributing material judicially determined to be obscene, that individual should be permitted to claim that "contemporary community standards" have changed from the time of the prior proceeding to the time when he committed the acts for which he is charged. If this defendant can establish any basis for this claim, he should not be barred from relitigating the issue of obscenity.[111] One difficulty apparent with this proposal is how one shows that there has been a significant change in community standards since the first litigation. Possible solutions include the showing of a significant pas-

104. *See* VESTAL, *supra* note 95, at 200 n.27.
105. Commissioner v. Sunnen, 333 U.S. 591, 601-02 (1948).
106. *See* Township of Washington v. Gould, 39 N.J. 527, 189 A.2d 697, 700-02 (1963).
107. State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 162 (1945).
108. 413 U.S. at 24.
109. *See id.* at 24-26.
110. McKinney v. Alabama, 424 U.S. at 689-90 (Brennan, J., concurring).
111. *Id.* at 690.

sage of time or that recent trials involving similar material have resulted in either acquittals or hung juries.[112]

In deciding whether it is reasonable to allow collateral estoppel, some jurisdictions have examined the subject matter of the litigation in light of the importance that society places on the issue. In particular, the court may be reluctant to permit collateral estoppel on constitutional issues involving political and civil rights.[113] When the issue upon which preclusion is sought is one which merely affects the property rights of the individual parties to the lawsuit, its importance is limited to those parties. However, when that issue deals with basic constitutional rights, or affects the availability of material to the public, the interests of the private litigants are outweighed by the interests of the individual and society and mandate a trial de novo on the issue.[114]

Because, "[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth,"[115] a court should exercise restraint in precluding a party when the question involved in both suits is one of free speech or obscenity. In this context, the court may choose to avoid the rule of collateral estoppel when a free speech issue has been resolved adversely to the speaker. On the other hand, the court may allow a prior determination of free speech to be conclusive against a prosecutor in a subsequent action regarding the same matter. The reason for treating these respective interests differently is that society needs to provide greater support for the individual's right to speak than it does for the censor's right to suppress.

The third facet of collateral estoppel involves a judicial inquiry into the nature of the adjudicating bodies. In order for an issue to be precluded, it must be established that the courts in both actions had jurisdiction over the subject matter and the persons.[116] If the court in the first suit did not have jurisdiction, then its judgment would not be conclusive in a later proceeding, although the same issue and parties are involved.[117]

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112. *See* Lockhart, *supra* note 19, at 577 n.165.

113. Sweeny v. City of Louisville, 102 F. Supp. 525, 530-31 (W.D. Ky. 1951), *aff'd per curiam sub nom.* Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir., 1953) *vacated per curiam on other grounds,* 347 U.S. 971 (1954).

114. *See* VESTAL, *supra* note 95, at 271.

115. Roth v. United States, 354 U.S. 476, 488 (1957).

116. *See* Overseas Motors, Inc. v. Import Motors Ltd., Inc., 375 F. Supp. 499 (E.D. Mich. 1974).

117. *See generally* VESTAL, *supra* note 95, at 257-68.

A jurisdictional problem may be important in the context of a civil adjudication of obscenity.[118] If the courts in both actions are courts of general jurisdiction within the same state, there generally will not be a jurisdictional problem in barring a party from relitigation of the issue.[119] However, a question of jurisdiction may arise where the court in which the material was found to be obscene is of limited jurisdiction and the court hearing the second proceeding is of general jurisdiction.[120] A party to the civil action may successfully urge that because the first court exercised limited jurisdiction, its judgment should not be binding on the present tribunal and, therefore, it should not estop a relitigation of the issue.[121]

In addition to an examination of the characteristics of the adjudicating bodies, a court must decide if the order or ruling of the prior court was final. The concept of collateral estoppel is not applicable to a subsequent proceeding unless there has been a final judgment in the original action.[122] A decision may be final and preclusive, if an appeal has been attempted but not perfected, if the ruling if unappealable, or if an appeal has been heard and decided by the higher court.[123] A split exists among jurisdictions on the question of finality when an appeal has been timely filed, but not yet heard and decided by the appellate court. It has been held that an appeal from a judgment does not cause that judgment to be inoperative as collateral estoppel detween the same parties, although the initial decision may be subse-

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118. There may be a problem in applying collateral estoppel where a court has statewide jurisdiction, but the state has selected the local jurisdiction as the "contemporary community" for purposes of determining community standards in obscenity trials. *See* notes 39-41 *supra* and accompanying text. In essence, the collateral estoppel effect of the judgment may be limited to the local judicial district.

119. A problem may arise if the court in the first instance is one of limited jurisdiction and the state designates its "contemporary community" as the entire state. *See* notes 39-41 *supra* and accompanying text. If a court of general jurisdiction allows the decision of the inferior court to be collateral estoppel as to the issue of obscenity of certain material, then the adjudication of the inferior court may establish the statewide "contemporary community" standard. *See generally* Hirsch & Ryan *supra* note 92, at 76-81.

120. For example, an inferior court may be a municipal court, a probate court, or justices' court. *See* VESTAL, *supra* note 95, at 215-17.

121. A litigant in the second action may avoid preclusion on a given issue, because courts are not required to follow the decisions of inferior courts. People v. Scofield, 249 Cal. App. 727, 57 Cal. Rptr. 818, 822 (1957); *accord*, Sherbill v. Miller Mfg. Co., 89 So.2d 28, 30 (Fla. 1956). Nonetheless, a court may choose to give estoppel effect to the adjudication of an inferior court. *See* VESTAL, *supra* note 95, at 257 n.30.

122. Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89 (1954).

123. *See generally* VESTAL, *supra* note 95, at 233-38.

quently reversed.[124] Other courts hold to the contrary, and give no estoppel effect to the prior ruling if the issue may be reversed on appeal.[125] The subsequent forum should carefully consider this factor, before deciding that the issue is concluded by the first judgment.[126]

Finally, the court must ascertain whether the parties in the second action were parties or their privies in the first litigation, because the doctrine of collateral estoppel binds only those parties to the first judgment and their privies.[127] Additionally, an individual, who is not considered a party or privy to the initial proceeding, may be bound by that judgment where his interests are of the same class as the interests of those who were joined in the proceeding.[128]

In *Hansberry v. Lee*,[129] the Supreme Court recognized that it was constitutionally permissible for states, in appropriate cases, to entertain "class action" lawsuits which would be binding upon members of the class who were not formal parties to the action. Such actions were permitted, where the interests of the absent parties were adequately represented by those present, where the interests of the parties joined and those not present were identical, or where the parties present were legally entitled to assert the interests of the absent individuals.[130] The Court however, stated that a decision to bind non-parties to a judgment would be scrutinized by the Court in light of the due process requirements of notice and an opportunity to be heard.[131]

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124. *See* Reed v. Allen, 286 U.S. 191 (1932); Denham v. Shellman Grain Elevator, Inc., 444 F.2d 1376 (5th Cir. 1971); Overseas Motors Inc. v. Import Motors Ltd., 375 F. Supp. 499, 517 (E.D. Mich. 1974).

125. *See* Chapman v. John St. John Drilling Co., 73 N.M. 261, 387 P.2d 462, 465 (1963); Sabine Pilots Ass'n v. Lykes Bros. Steamship Inc., 346 S.W.2d 166, 169 (Civ. App. Tex. 1961).

126. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41, Reporter's Notes, comment f (Tent. Draft No. 1, 1973).

127. Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 807, 122 P.2d 892 (1942); Coca Cola Co. v. Pepsi Cola Co., 172 A. 260, 262 (Super. Ct. Del. 1934). A party has been defined as: "one who is directly interested in the subject matter, and had a right to make a defense, or to control the proceeding, and to appeal from the judgment." Bernard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. —, 122 P.2d 892, 894 (1942). A party is in privity if he is: "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritence, succession, or purchase." *Id.*

128. *See* notes 129 & 130 *infra* and accompanying text.

129. 311 U.S. 32 (1940).

130. *Id.* at 42.

131. *Id.* at 40. One of the prerequisites to maintaining a class action is that the persons constituting the class must be so numerous as to make it impractical to join all of them in the litigation. *See* C. WRIGHT, LAW OF FEDERAL COURTS 346 (3d ed. 1976). *See generally Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

In applying the Court's ruling in *Hansberry* in the context of an obscenity trial, the question arises as to whether the state can consider all dealers of certain materials to be within a class and seek to bind them all by a civil judgment in an action involving several members of the class. The Court's opinion in *McKinney* appears to resolve this issue in the negative. There, the Court rejected the contention that the existence of certain named parties provided sufficient adversity in the civil proceedings to permit the state to use the adjudication as collateral estoppel against a party not joined. Rather, Justice Rehnquist concluded that the interests of the named parties were not "sufficiently identical to those of the petitioner that they would adequately protect his First Amendment rights."[132] Furthermore, he found no evidence that the petitioner was in privity with the named parties.

Once a court is satisfied that the prerequisites for allowing collateral estoppel exist, it must still decide if there are any limitations on its application. Some states, by statute, have limited the effects of collateral estoppel to a judicial district.[133] There may also be state constitutional limitations on the use of the doctrine.[134] Due process may be violated when a prior judgment, which was grossly incorrect, is conclusive as to an issue in a subsequent action between the same parties.[135] Furthermore, the very use of a civil determination to bar relitigation of an element of a criminal prosecution may raise due process problems.

In *In re Winship,* the Court held that, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[136] Subsequently, in *Mullaney v. Wilbur*,[137] the Court, in an unanimous opinion, extended the ruling of *Winship* and found that due process requires proof beyond a reasonable doubt of *every element* which constitutes the crime charged against the defendant.[138] In

132. 424 U.S. at 675.

133. *See, e.g.,* LA. STAT. ANN. § 14: 106F(4) (West 1974); N.C. GEN. STAT. § 14-190.2(f) (Supp. 1975).

134. This comment deals with federal constitutional problems and does not consider whether there may be limitations imposed on the use of collateral estoppel by state constitutions or statutes.

135. *See* Wayside Transp. Co. v. Marcell's Motor Express, Inc., 284 F.2d 868, 871 (1st Cir. 1960). *See also* VESTAL, *supra* note 95, at 446-54, for an examination of other due process problems arising in the collateral estoppel context.

136. 397 U.S. at 364.

137. 421 U.S. 684 (1975).

138. *Id.* at 704.

light of due process requirements, a judgment in a civil case is not conclusive as to an issue in a criminal case, because there is a higher standard of proof in a criminal case.[139] If a civil judgment were allowed to bar relitigation of an issue in a subsequent criminal proceeding, the practical effect would be to nullify the rule of *Mullaney*.[140]

Because due process requires proof beyond a reasonable doubt of each and every element of a crime, how an element is defined is of critical importance. Typically, statutes provide that every person who: (1) with knowledge of its contents; (2) sells, distributes, or possesses with the intent to sell or distribute; (3) any matter known by such person to have been judicially found to be obscene (in a civil action) shall be guilty of a crime.[141] Thus, an essential element of the crime is that the material has been judicially determined to be obscene. One possible interpretation of this element is that the prosecution need only prove, beyond a reasonable doubt, *that there has been a judicial proceeding* wherein the court found the material to be obscene. The state would *not* be required to relitigate the actual question of obscenity, unless the criminal defendant had not had an opportunity to contest the issue of obscenity in the prior action.[142]

The danger of such a result is illustrated by the fact that the Supreme Court has not established a standard of proof for civil obscenity cases. Therefore, it may be permissible for a trial court to admit evidence of a civil action and its determination that the material is obscene, because such evidence bears not on the issue of whether the material is obscene, but rather on the question of whether there was a judicial determination of obscenity. In essence, the defendant is precluded from relitigating the issue of obscenity because it is not a requisite element of the crime with which the defendant is charged, which must be proved beyond a reasonable doubt.

The inequities of allowing a civil judgment, under a preponderance of the evidence standard, to be conclusive on the issue of obscenity in a criminal action are clear. The Court in *Mullaney* recognized that if the courts looked only at the formal wording of a criminal stat-

139. *See* Roden & Son v. State, 30 Ala. App. 229, 3 So. 2d 420, 421 (Ct. App. 1941); State v. Weil, 83 S.C. 478, 65 S.E. 634, 635 (1909).

140. *See* State v. Weil, 83 S.C. 478, 65 S.E. 634 (1909).

141. *See, e.g.*, ALA. CODE tit. 14, § 374(4) (Supp. 1973); N.C. GEN. STAT. § 14-190.2(h) (Supp. 1975); OKLA. STAT. tit. 21, § 1040.13 (1971).

142. *See* McKinney v. Alabama, 424 U.S. 669 (1976). *See generally* Hirsch & Ryan, *supra* note 92 and accompanying text.

ute, rather than the operation and effect of the law as applied and enforced by the state, a state could undermine many of the interests that due process sought to protect, by merely redefining the elements that constitute different crimes.[143] It has also been stated that, "[t]he requirement that obscenity be proved beyond a reasonable doubt may not be diluted by transporting the determination to a prior civil proceeding, for the essence of the crime in reality remains the sale of obscene literature rather than disobedience of a court injunction."[144] However, it would still appear to be consistent with due process to allow a decision from a prior civil action to be conclusive on an element of a criminal prosecution when the standards of proof are identical.

The general principle that a determination in a civil case is not binding in a criminal prosecution may not be an absolute. In *Yates v. United States*[145] the Supreme Court, in dicta, suggested that there may be an exception to this rule. In that criminal case, the defendant contended that the rule of collateral estoppel should be applied against the government. The government, in a prior civil action, had been unsuccessful in establishing the fact under a preponderance standard, and the defendant argued that they should not be allowed another opportunity to prove the same fact, particularly in light of the higher standard of proof required in the criminal case. The Court rejected the defendant's claim because the issue in the current criminal prosecution was different from the issue involved in the prior civil proceeding. But, before reaching its decision, the opinion noted that the judgment of a civil proceeding was not made inapplicable by the fact that the subsequent action was a criminal one. Thus, a litigant who was unsuccessful in establishing a fact in the original action may be barred from attempting to prove the same fact in a second proceeding.[146]

If this reasoning is employed in an obscenity case, a court might conclude that where a prosecutor has been unsuccessful in proving the obscenity of certain material in a prior civil litigation, under the preponderance of the evidence standard, he is precluded under the doctrine of collateral estoppel from having another opportunity to prove it in the subsequent criminal proceeding. On the other hand, it does not follow that a defendant is estopped because he did not have the

143. 421 U.S. at 698-99.
144. 424 U.S. at 687 (Brennan, J., concurring).
145. 354 U.S. 298 (1957).
146. *Id.* at 335-36.

burden of proving that the material is obscene in the first instance.[147]

In conclusion, if the court determines that an issue was actually litigated and necessarily decided by a court of competent jurisdiction in a prior action involving the same parties, it may consider permitting the use of collateral estoppel to bar relitigation of that issue, subject to any limitations heretofore discussed. Still, a court should exercise discretion in using the doctrine when there is a constitutional issue involved or when there may be other constitutional problems.[148] In that instance, the court should balance the policy of collateral estoppel against the constitutional interests at stake.

Equal Protection and Due Process

The use of collateral estoppel in a criminal prosecution also raises equal protection and due process issues.[149] Equal protection mandates that those who are similarly situated be treated equally under the law.[150] In order to facilitate an analysis of these equal protection and due process problems, assume this hypothetical: Two defendants are being criminally prosecuted for the sale of certain obscene material. Defendant *A* was involved in an earlier civil proceeding wherein the issue of obscenity was, under a preponderance standard, decided in favor of the state. He is being precluded from having the issue relitigated in the subsequent criminal action. Defendant *B* was not a party to the civil determination and he is being initially prosecuted in his criminal action. It must be fairly assumed that these parties are similarly situated, as in both cases the substantive evil which the state wishes to control is the sale of obscene material. Defendant *A* is convicted of selling obscene material in the criminal action. Defendant B, on the other hand, is acquitted in his criminal prosecution because the state did not prove beyond a reasonable doubt that the same material was obscene. In essence, defendant *A* is denied equal protection and due process because the state did not comply with the requirements of *Mullaney*.

Alternatively, suppose that defendant *A* has the question of obscenity determined by a judge in the first action and is convicted by

147. *See* notes 33 & 34 *supra* and accompanying text.

148. For example, if the subject matter of the prior litigation involved a dispute about whether certain speech was entitled to constitutional protections.

149. *See generally* McKinney v. Alabama, 292 Ala. 484, 296 So. 2d 228, 231-35 (1974) (Heflin, C.J., dissenting), *rev'd* 424 U.S. 669 (1976).

150. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

a jury in the criminal proceeding. Furthermore, suppose that defendant *B* is acquitted by the jury in his criminal trial. In this instance, defendant *A* is denied equal protection and the due process right to a trial by jury on each element of the crime with which he is charged.[151]

Finally, assume that a state requires a unanimous jury verdict in all criminal prosecutions, but allows nonunanimous jury determinations in civil proceedings. If, in the prior civil action, the determination of obscenity was based upon a nonunanimous verdict, and the issue of obscenity is not relitigated in the criminal suit, *A* may still be convicted. However, with defendant *B*, indicted for distributing the same material, the jury can not reach a unanimous decision that the material is obscene and the result is a mistrial. If a state mandates that there shall be a unanimous jury verdict in all criminal cases,[152] equal protection and due process require that the jury consider all of the elements of the crime with which defendant *A* is charged, including the issue of obscenity, before rendering their verdict.

C. A Civil or Criminal Proceeding Involving a Party Who Did Not Participate in the Prior Litigation

In *McKinney*, the Supreme Court held that a state may not use a prior judgment to estop a defendant, not a party to the earlier action, from relitigating the issue of obscenity.[153] The Court, however, did not speculate as to what its holding would be if the factual situation was reversed. Hypothetically, if the state is unable to prove that certain material is obscene in a prior equitable action, can a defendant, who was a stranger to the first proceeding, avail himself of the judgment in a later action and claim that the state is collaterally estopped from relitigating the issue? The answer to this question initially involves a study of which parties may use a prior judgment as collateral estoppel.

In later litigation, the benefit of collateral estoppel is generally available to both parties and their privies of the original action under

151. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

152. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Supreme Court held that the sixth amendment guarantee of a jury trial, made applicable to the states through the due process clause of the fourteenth amendment, does not require that the jury verdict be unanimous to convict the defendant of the crime charged.

153. 424 U.S. at 670-77.

the mutuality rule.[154] This rule states that the party taking advantage of the earlier adjudication must have been bound by it, had the decision gone against him.[155] Traditionally, a stranger to the prior proceeding, not being bound by its judgment, can not benefit from a prior determination by contending that it was binding as to a party who participated in the earlier action.[156]

The mutuality rule, however, has been the subject of increasing controversy in recent years among the jurisdictions.[157] Some courts have abandoned the requirement of "mutuality" and have allowed a stranger to invoke the rule of collateral estoppel defensively against a party to the original action.[158] It has been held consistent with public policy to bind a plaintiff to a prior adverse judgment when he selects the forum and there fails to establish his contentions.[159] Likewise, the use of a prior adjudication by a stranger has been declared not violative of due process, as long as the party against whom the prior determination is used had a full and fair opportunity to be heard on the issue in the earlier litigation.[160]

Applying the reasoning of *Yates*,[161] if a prosecutor has failed to persuade the trier of fact that certain material is obscene in a prior action, the court may permit a defendant, even though not a party to the original litigation, to claim that the state is precluded from relitigating the issue of obscenity.[162] Such a result may be harsh in some instances, but the policy interests in resolving conflicts may outweigh the interests of the prosecutor who after all, has directed the sequence of litigation.

Allowing a prior judgment to be conclusive on the issue of obscenity in a subsequent proceeding may have positive and negative implications for both sides. For the prosecutor as well as the defendant, collateral estoppel may be a vehicle for conclusively deciding the issue

154. *See* Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 807, 122 P.2d 892 (1942).

155. *See id.*; Coca Cola Co. v. Pepsi Cola Co., 172 A. 260, 261-62 (Super. Ct. Del. 1934).

156. *Id.*

157. *See* Hirsch & Ryan, *supra* note 92, at 72 n.347.

158. Coca Cola Co. v. Pepsi Cola Co., 172 A. 260, 262-63 (Super. Ct. Del. 1934); Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 807, 122 P.2d 892, 894-95 (1942); Richmond v. Davis, 135 Va. 319, 116 S.E. 492, 493-94 (1923).

159. *See* Coca Cola Co. v. Pepsi Cola Co., 172 A. 260, 263 (Super. Ct. Del. 1934).

160. *See* Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967).

161. Yates v. United States, 354 U.S. 298, 335-36 (1957).

162. *See* Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967).

of obscenity as to certain materials for purposes of any future confrontations.[163] However, if the state is unsuccessful in establishing that the material is obscene, the adjudication may be used defensively against it by a stranger to the original proceeding.[164] The threat of estoppel in a subsequent criminal prosecution may also coerce a defendant, who would not do so otherwise, to litigate the issue of obscenity in the original action.[165] Sound judicial discretion would dictate that the courts balance the policy in favor of collateral estoppel against the interests of individual litigants and the interests of free speech and due process.

IV. CONCLUSION

A profound commitment to the preservation of free speech and due process need not conflict with, or lead to a total frustration of, state efforts to control the spread of obscenity. Rather, what is called for are greater procedural safeguards,[166] in civil adjudications of obscenity, to insure that, collectively, the interests of all parties are satisfied to the optimum. The judgment of a prior civil trial directed under these procedural standards would be entitled to estoppel effect in a subsequent action, be it in a civil or criminal forum, while avoiding any denial of equal protection or due process.

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163. This proposition assumes that the civil adjudication involves a jury trial and the beyond a reasonable doubt standard of proof.

164. *See* Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967).

165. If he defaulted in his appearance or pleading, the court in the second action may allow the state to claim a bar to the relitigation of the obscenity of the material. *See* VESTAL, *supra* note 95 and accompanying text.

166. Particularly a jury finding, beyond a reasonable doubt, that the material is obscene.