People ex rel. Gow v. Mitchell Brothers: California Gropes for a Civil Obscenity Standard

Peter F. Frost

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol5/iss1/6
People ex rel. Gow v. Mitchell Brothers: California Gropes for a Civil Obscenity Standard

by Peter F. Frost*

I
Introduction

Recent years have seen an increase in the use of civil nuisance actions to combat obscenity. The use of a civil action to deal with conduct which was originally regulated solely by criminal statutes raises questions as to whether civil or criminal standards should apply at trial. The issues of appropriate remedies and trial procedures in obscenity nuisance abatement actions in California were first addressed in 1981 in People ex rel. Gow v. Mitchell Brothers [hereinafter Gow II].

The California Court of Appeal in Gow II rejected many of the remedies allowed by the trial court. The appellate court went on to uphold the use of a criminal standard of proof in the determination of obscenity vel non, but dealt only tangentially with another key procedural issue, the requirement of a jury. The United States Supreme Court granted certiorari solely to consider the appropriate standard of proof, holding that the federal Constitution does not require the use of a criminal standard. On remand the California appellate court settled on

---

* Member, Third Year Class; A.B., University of Southern California, 1976.


3. Vel non literally means “or not.” Black's Law Dictionary 1394 (5th ed. 1979). The determination of obscenity vel non is the threshold determination of whether a contested material is protected by the first amendment.

requiring proof of obscenity vel non by clear and convincing evidence.\(^5\)

This note considers the reasoning of both courts but, as the civil public nuisance abatement action is controlled by state law,\(^6\) the note concentrates on the decisions of the California Court of Appeal. After a brief discussion of the history of nuisance abatement actions as applied to obscenity, the note deals with \textit{Gow II} and the propriety of certain remedies sought by the plaintiff-city therein. Finally, it discusses the standard of proof and the jury trial requirement.

\section*{A. History of Public Nuisance Actions as Applied to Obscenity}

The foundation for the use of a civil action to enjoin the exhibition of obscene materials was laid as early as 1957, when the United States Supreme Court ruled that states are not limited to the criminal process to control pornography.\(^7\) The Court did require that any procedures used to determine whether materials are obscene must ensure "the necessary sensitivity to freedom of expression."\(^8\) To prevent the suppression of constitutionally protected expression two basic procedural rules were established in \textit{Freedman v. Maryland}.\(^9\) First, the burden of proving that the contested expression is unprotected must rest on the censor. Secondly, and more important to the focus of this note, a state may not bar future exhibitions of a contested expression without a prompt judicial determination that the expression is unprotected.\(^10\) "Any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"\(^11\)

To determine whether particular materials are protected expression or obscene, hence unprotected, courts have been directed to refer to the "contemporary community standard."\(^12\) Lower courts are free, however, to apply a state or a local stan-

---
\(^6\) \textit{See infra} note 24.
\(^8\) \textit{Freedman} v. Maryland, 380 U.S. 51, 58 (1965).
\(^9\) \textit{Freedman}, 380 U.S. at 58.
\(^10\) \textit{Id.}
\(^11\) \textit{Freedman}, 380 U.S. at 59.
\(^12\) Miller v. California, 413 U.S. 15 (1973); \textit{see also} Roth v. United States, 354 U.S. 476 (1957).
standard, as judicial delineation of a "precise geographic area" is not required by the federal Constitution.\textsuperscript{13}

With the maturation of the "community standards" principle came the maturation of the public nuisance action as an anti-obscenity tool. As a public nuisance is generally understood to be one which "affects at the same time an entire community or neighborhood . . .,"\textsuperscript{14} a more restrictive definition of the "community" affected by contested materials made the nuisance action more feasible for individual city complainants.

The California Supreme Court, in \textit{People ex rel. Busch v. Projection Room Theatre},\textsuperscript{15} sanctioned the use of a public nuisance abatement action to enjoin the exhibition of obscene materials. At that time, however, the court provided no guidance for California's trial courts either on remedies available in such actions or procedures to be used at trial.\textsuperscript{16} Although neither remedies nor the appropriate standard of proof had been ruled on prior to 1976,\textsuperscript{17} the United States Supreme Court had addressed the jury trial issue in 1973, in its per curiam decision, \textit{Alexander v. Virginia}.\textsuperscript{18} There the Court held that a jury trial was not constitutionally required in civil obscenity actions brought pursuant to the Virginia statute involved.

In 1980 the Court again approved the use of public nuisance abatement actions to enjoin the exhibition of specified obscene films,\textsuperscript{19} but repeated the \textit{Freedman} rule that future exhibitions could be enjoined only after a judicial determination of the obscenity of the particular film in question.\textsuperscript{20}

\textsuperscript{13} Hamling v. United States, 418 U.S. 87, 105 (1974).
\textsuperscript{14} See infra note 24.
\textsuperscript{16} Busch dealt only with a trial court's judgment sustaining a demurrer without leave to amend. People ex rel. Gow v. Mitchell Brothers, 114 Cal. App. 3d 923, 929 (1980).
\textsuperscript{17} Prior to Busch, the action had not been widely used in California. Although the Busch court cites several cases which used the process in other jurisdictions to control obscenity, see 17 Cal. 3d at 57-60, the court relies chiefly on one California case, Weis v. Superior Court, 30 Cal. App. 730, 159 P. 464 (1916). In Weis the California Court of Appeals held that nude dancing at an International Exposition attraction known as the "Sultan's Harem" constituted a public nuisance subject to abatement.
\textsuperscript{18} This was not a thoroughly reasoned decision. Even though there was argument before the Court, the Court issued only a two sentence per curiam opinion. 413 U.S. 836 (1973).
\textsuperscript{19} Vance v. Universal Amusement Co., 445 U.S. 308 (1980).
\textsuperscript{20} Id. at 317. For a thorough history of obscenity law see F. Schauer, supra note 1, at 1-48.
California's municipal governments did not widely utilize the public nuisance action against obscenity until after the *Busch* decision, and *Busch* left several procedural questions unanswered. The California appellate court attempted to answer those questions with its decision in *Gow II*.

B. *People ex rel. Gow v. Mitchell Brothers*

1. **Trial Court**

*People ex rel. Gow v. Mitchell Brothers (Gow II)* was an action brought by Santa Ana city attorney Keith Gow to abate a public nuisance as defined by California Civil Code sections 3479 and 3480. The complaint alleged that defendant owners and operators of a movie theatre were perpetuating a public nuisance by their continuing exhibition of allegedly obscene films. Among the remedies sought by the plaintiff-city were a request for damages and a $100,000 bond from the defendants. A jury decided the issues of obscenity, public nuisance and

---

21. See supra note 17 and accompanying text.

22. See supra text accompanying note 16.


24. CAL. CIV. CODE § 3479 (West 1970):

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner, of any navigable lake, or river, bay, stream or canal, or basin, or any public park, square, street or highway, is a nuisance.

CAL. CIV. CODE § 3480 (West 1970): "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

25. Although initiated by the city attorney, the action was tried by a private attorney, Mr. James J. Clancy. Clancy is a Naval Academy graduate and a one time submarine officer described by many as a zealot. He has dedicated his legal career to purging society of pornography and, as an active voice in the Citizens for Decency Through Law, has carried his crusade nationwide. His purpose, he said, is to preserve order in society. "[Pornography] always has been used throughout the ages as a means of destroying order—order within the family, order within the community, order within the system. It's a tool of revolution," he said. Given the choice between good and evil, Clancy said, man will choose the evil road and must be prodded toward the good.


26. *Gow*, 114 Cal. App. 3d at 927. The city also sought as relief, 1) revocation of defendants' operating license and permits; 2) a permanent injunction banning the showing of the named films; 3) forfeiture of the defendants' box office receipts; 5) removal of defendants' theatre fixtures and movable property for sale by police and; 6) punitive damages and attorney's fees.
TOWARD A CIVIL OBSCENITY STANDARD

No. 1]

TOWARD A CIVIL OBSCENITY STANDARD

damages prior to the court’s decision on the equitable issues.\textsuperscript{27} The jury was read over fifty separate instructions, including one which required that the obscenity of the challenged film be proven beyond a reasonable doubt.\textsuperscript{28}

Of seventeen films viewed by the jury, eleven were found obscene and two not obscene. No verdict was reached on the remaining four.\textsuperscript{29} The jury awarded the city $76,400 in damages, and the court ordered defendants to deposit $100,000 in trust as “insurance” against the future costs of such actions.\textsuperscript{30}

2. Appellate Courts

The California court of appeal affirmed in part and reversed in part, holding that the action was properly brought but that, under the applicable public nuisance statutes,\textsuperscript{31} injunctive relief was the only remedy available to the plaintiff city. The Busch decision specifies that it is the exhibition of films which is the nuisance, and not the theatre itself. Enjoining the exhibition abates the nuisance. Therefore, where the suit is brought to abate the nuisance, injunction of the exhibition of particular obscene films is the only remedy available.\textsuperscript{32}

The city also appealed the granting of a jury trial as a matter of right, but as the city was not harmed by that decision, the court rejected its contention. The court did address the jury issue in a footnote, saying that although it appeared that a jury was not required in civil obscenity cases, there was contrary authority.\textsuperscript{33} Finally, the court upheld the requirement of proof

\textsuperscript{27} Gow, 114 Cal. App. 3d at 927.
\textsuperscript{28} Gow, 114 Cal. App. 3d at 928.
\textsuperscript{29} Id.
\textsuperscript{30} On equitable issues the trial court held that the defendants' box office receipts did not have to be placed in a constructive trust and that their theatre could remain open under their current license. The trial court held for the plaintiff-city by permanently enjoining the exhibition of the eleven films which had been found obscene. The prints of those eleven films were ordered destroyed, and the city was awarded $5,869.31 in costs. Gow, 114 Cal. App. 3d at 928.
\textsuperscript{31} Gow, 114 Cal. App. 3d at 931; CAL. CIV. PROC. CODE § 731 (West 1970):
An action may be brought by any person whose enjoyment is lessened by a nuisance \ldots and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefore. A civil action may be brought in the name of the people of the State of California to abate a public nuisance \ldots by the city attorney of any town or city in which such nuisance exists \ldots
\textsuperscript{32} Gow, 114 Cal. App. 3d at 932.
\textsuperscript{33} Gow, 114 Cal. App. 3d at 994 n.12. There the court noted that Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973), approved civil actions to regulate obscenity as long as the state law "meets the First Amendment standards set forth in Miller v. California
of obscenity *vel non* beyond a reasonable doubt.\textsuperscript{34}

*Gow II* was appealed to the United States Supreme Court under the name *Cooper v. Mitchell Brothers*.\textsuperscript{35} The Court there held, per curiam, that the criminal standard of proof was not constitutionally required in such actions, but that states could independently require such a standard.\textsuperscript{36} Three justices dissented from the grant of certiorari. Two of the three, Justices Marshall and Brennan, argued for requiring the use of a criminal standard.\textsuperscript{37} On remand the California appellate court settled on requiring proof of obscenity *vel non* by clear and convincing evidence in a public nuisance action.\textsuperscript{38}

(413 U.S. at p. 69).” In *Miller* the Court called for a continued reliance on the jury system. See infra text accompanying note 97.

34. *Gow*, 114 Cal. App. 3d at 932.

35. 454 U.S. 90 (1981). The California Supreme Court denied petitions for hearing and plaintiffs appealed to the U.S. Supreme Court.


37. Certiorari was granted and a per curiam opinion issued without the benefit of a brief from defendants. The case was decided solely on the plaintiff’s brief. See *Cooper*, 454 U.S. at 94. Justices Marshall and Brennan dissented from the granting of certiorari, questioning the Court’s jurisdiction on a case which they felt was not clearly decided on federal grounds. In the alternative, they dissented from the court’s holding on the burden of proof. 454 U.S. at 94 (Brennan, J., dissenting). Justice Stevens dissented separately from the granting of certiorari and ruling on the merits without the benefit of briefs and argument. 454 U.S. at 94 (Stevens, J., dissenting).

38. People ex rel. *Cooper v. Mitchell Brothers Santa Ana Theatre*, 128 Cal. App. 3d 937, 180 Cal. Rptr. 728 (1982). On remand the California Court of Appeal specifically invoked state constitutional provisions in their decision, insulating it from further federal intervention. 128 Cal. App. 3d at 940. Their original decision, however, could just as well have been supported by independent state grounds. The majority of the U.S. Supreme court in *Cooper* evidently believed that the California Appellate court understood that the standard of proof beyond a reasonable doubt was required by federal law. It is by no means clear that such was the California court’s position. While at one point the California court said, “We agree with the trial court that the issue of obscenity *vel non* in a public nuisance abatement action must be proved beyond a reasonable doubt,” other passages indicate that the court was making an independent determination based on its examination of the authorities. E.g., “Although we agree with the entire ‘burden of proof’ portion in the Brennan [dissenting] opinion, one passage is particularly persuasive.” 114 Cal. App. 3d at 936 (emphasis added). Although the California court’s rationale in originally approving the use of a standard of proof beyond a reasonable doubt is ambiguous, they “surely [knew] the difference between opinions that merely contain persuasive reasoning and opinions that are authoritative because they explain a ruling that is binding on lower courts.” *Cooper*, 454 U.S. at 96 (Stevens, J., dissenting). The California court’s repeated references to Justice Brennan’s dissenting opinion in *McKinney v. Alabama* seem to indicate that it was fashioning a rule of law independent of federal pronouncements and imposing a stricter procedural rule on state courts subject to its jurisdiction.
II
Analysis

A. Remedies

The California Court of Appeal dealt primarily with the city's standing to recover damages and the possible "chilling effect" of the trial court's requiring a $100,000 deposit to insure against the costs of future abatement actions.

The court's disallowance of damages finds support both in legislation and in policy. The city's complaint in Gow II was brought pursuant to California Civil Code section 731. Section 731 includes provisions for abatement of the nuisance and the award of damages when the action is brought by a "person." The statute has a separate provision allowing injunction alone in actions brought by a municipality. It appears that the city's attempt to recover damages in this case did indeed "border on the frivolous." A cursory reading of the statute reveals that the legislature intended there be two separate paths towards nuisance abatement, one for individual persons and one for corporate municipalities. While a private person may sue for damages, the municipality's only remedy is abatement of the nuisance—in this case, stopping the exhibition of obscene films. A municipality is not operated for profit and cannot claim to suffer monetary loss from the showing of obscene films within its borders. It would therefore have difficulty establishing a basis for the award of compensatory damages.

The trial court's requirement that defendants deposit $100,000 in trust as insurance against the future costs of such actions raises more serious questions. Such a requirement would cast a pall over the defendants' business, threatening heavy financial losses if the defendants' appraisal of a film as not obscene were overturned in an abatement action. In such

40. See supra note 31.
41. Gow, 114 Cal. App. 3d at 931.
42. Whether a private corporation may sue for damages is not addressed by either the California statute or the court in Gow II. See supra note 24 and accompanying text.
43. Although the named plaintiff in a public nuisance action is a public official, the people affected are the citizens. While a fine may be appropriate punishment for a criminal act, it seems that damages awarded in a public nuisance action could not be fairly allocated among the affected parties.
an atmosphere of fear, borderline films are as likely to be suppressed as obscene films.

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. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country. . . .

The net effect is prior restraint. While that result was surely the city's goal, the first amendment's free speech provisions abhor such results.

Any system of prior restraint must overcome a heavy presumption against its constitutional validity. The presumption may be overcome by a showing that the expression sought to be suppressed is not protected by the first amendment. A valid showing that expression is unprotected, however, may only be made in an adversary hearing at which specific procedural safeguards are applied. In addition, where speech is concerned courts must be careful to tailor the sanctions imposed to the degree of the problem presented. Any injunctions issued must be restricted to specific books or films, and not applied "against the premises in which the material is sold, exhibited or displayed."

44. Freedman, 380 U.S. at 59.
45. The first amendment of the United States Constitution prohibits the imposition of a restraint on a publication before it is published. Near v. Minnesota, 283 U.S. 697 (1931). Obscene publications are not protected by this policy, but "an invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the first amendment without there first being a judicial determination that the material does not qualify for First Amendment protection." State v. I, A Woman—Part II, 53 Wis. 2d 102, 191 N.W.2d 897, 902-03 (1971).
49. Dennis v. United States, 341 U.S. 494, 508-511 (1951). Dennis involved the conviction of communist party members for advocating the overthrow of the government. The Court held that such activity could be punishable if there was a "sufficient danger of a substantive evil that Congress has a right to prevent to justify application of the statute under the First Amendment." Id. at 494. "In each case [courts] must ask whether the gravity of the evil, discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." Id. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
50. Busch, 17 Cal. 3d at 59.
Here the trial court's threat of severe financial penalties for defendants' future exhibition of contested materials worked to bypass the necessary judicial determination of obscenity vel non. It also acted as an informal restraint against defendants' whole business, rather than an injunction against the exhibition of specific materials. The potential for such substantial liability for the exhibition of contested materials could completely preclude the defendants from operating their legitimate business. Such "backdoor" prior restraints have been overturned more than once and were properly overturned in this case.

B. Trial Procedures

When potentially constitutionally protected acts may draw both criminal and civil suits it is not always evident which procedural rules should govern the civil remedy. In the usual case, the biggest factor in determining which rules govern is the penalty to which the defendant may be subjected.

In criminal cases, the liberty of the accused is at stake; courts zealously protect the freedom of the accused by incarcerating him only if a jury finds his conduct reprehensible. No similar right can necessarily be inferred in a civil case between party and part when only property is at stake.

Though it is a civil action, the obscenity nuisance abatement proceeding concerns more than just party against party, and considerably more than mere property is at stake. In any obscenity case first amendment considerations dominate the proceedings. To many the first amendment is of paramount value to our society, for it protects and fosters that free flow of information so vital to our participative government. The first amendment's central importance to our society is the reason

---

51. See Mayor of Savannah v. TWA, Inc., 233 Ga. 885, 214 S.E.2d 370 (1975) (attempt at prior restraint by denial of license and padlocking store); Sanders v. State of Georgia, 231 Ga. 608, 203 S.E.2d 153 (1974) (attempt to totally enjoin bookstore's operation, charging that store was nuisance); Penthouse International v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) (attempt to prevent sale of certain magazines by select arrests of dealers of magazines which were found objectionable by individual police officers); Drive In Theatres, Inc. v. Huskey, 435 F.2d 228 (4th Cir. 1970) (County sheriff announced that, in his judgment, all "X" and "R" rated films were obscene and published his plan to confiscate all such films if any attempt was made to exhibit them within his jurisdiction. Court held sheriff's actions were improper prior restraint.) For further discussion of informal censorship see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards 45 Minn. L. Rev. 5, 6-9 (1960).

courts "remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections."

The need for procedural safeguards at trials determining whether contested expression is protected has long been recognized. For example, the procedure under which a warrant is issued to seize allegedly obscene materials must be designed to focus "searchingly" on the question of obscenity. Although a jury's determination of obscenity has been held not essential in civil actions, courts have been adjured to rely on the jury system in obscenity cases to safeguard significant constitutional interests.

To require only a civil standard in obscenity cases has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts.

The sensitivity of the issue, free speech, compels the adoption of more powerful protections than those afforded by the civil standards.

1. Standard of Proof

The purpose of a standard of proof is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." These standards of proof are generally recognized in the law. In a civil case, typically involving a money or property dispute between the parties, a mere preponderance of the evidence suffices. Society has little

54. "[A] state is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 731 (1961); See supra notes 9-11 and accompanying text.
58. People v. Lim, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941) (citations omitted).
TOWARD A CIVIL OBSCENITY STANDARD

stake in such disputes and therefore attempts to place the litigants on a somewhat equal footing. At the other end of the spectrum is the original standard of "proof beyond a reasonable doubt." In criminal cases the defendant's interest in avoiding the more severe criminal penalties justifies the use of this most stringent of standards. The standard of proof beyond a reasonable doubt is regarded as a critical part of the "moral force of the criminal law," and courts have been hesitant to apply it "too broadly or casually in noncriminal cases."

Between these two standards is the standard of "proof by clear and convincing evidences." The "clear and convincing" standard is a test of the belief engendered in the trier of fact, as opposed to the mere presentation of a quantum of evidence. It requires evidence "which is so clear, explicit, and unequivocal as to leave no substantial doubt and which [is] sufficiently strong to command the unhesitating assent of every reasonable mind." To meet the standard of "clear and convincing" evidence "the witnesses to a fact must be found to be credible and . . . the facts to which they have testified . . . distinctly remembered and the details thereof narrated exactly and in due order. . . . [T]he testimony [must] be clear, direct, and weighty and convincing, so as to enable [one] to come to a clear conviction without hesitancy of the truth of the precise facts in issue." The clear and convincing standard or one of its variants has been used often in civil cases, particularly in those involving allegations of quasi-criminal conduct.

Although the United States Supreme Court did not require the use of a criminal standard in proving the obscenity of contested materials, a state may independently require a standard stricter than a mere preponderance. There are cogent arguments for requiring a stricter standard. The defendant in a civil obscenity action loses some basic protections enjoyed by

61. Id.
63. Addington, 441 U.S. at 428.
65. Aetna Insurance Co. v. Paddock, 301 F.2d 807, 811 (5th Cir. 1962).
a criminal defendant.\textsuperscript{69} When the action involves potentially constitutionally protected expression, a strict standard of proof should not be lost. The question is whether use of the strictest standard of proof is either necessary or appropriate.

It would seem that the California Court of Appeal saw the need for a strict standard as they originally approved the use of a criminal standard in \textit{Gow II}. The court there was persuaded by Justice Brennan's dissent in \textit{McKinney v. Alabama}, where he stated

In the civil adjudication of obscenity \textit{vel non}, the bookseller has at stake . . . an "interest of transcending value"—protection of his right to disseminate and the public's right to receive material protected by the First Amendment. Protection of those rights demands that the factfinder be almost certain—convinced beyond a reasonable doubt—that the materials are not constitutionally immune from suppression.\textsuperscript{70}

Justice Brennan felt that only by requiring such a degree of confidence in the correctness of the factfinder's conclusion could society ensure that protected materials would not be erroneously suppressed.\textsuperscript{71} In addition, the possibility of self-censorship due to fear of civil judgment (causing sellers to become over-cautious about the materials with which they deal) would become more remote. The possibility of such self-censorship as an informal prior restraint prompted the California appellate court to invalidate the trial court's requirement of a $100,000 bond from the defendants in \textit{Gow II}.\textsuperscript{72} Justice Brennan, joined by Justice Marshall, dissented on the merits in \textit{Cooper},\textsuperscript{73} reiterating the views he expressed in \textit{McKinney v. Alabama}.\textsuperscript{74}

A final argument for use of the criminal standard is that obscenity has long been solely within the province of the criminal law in California. If this action were brought under the applicable penal code,\textsuperscript{75} both scienter and the commission of the necessary overt acts would have to be established beyond a reasonable doubt.

\textsuperscript{69} For example, in a civil case, the defendant could be ordered to submit to a deposition. In a criminal case the same defendant could refuse to testify.

\textsuperscript{70} \textit{McKinney}, 424 U.S. at 684 (Brennan, J., dissenting).

\textsuperscript{71} See supra note 58 and accompanying text.

\textsuperscript{72} See supra text accompanying notes 44-52.

\textsuperscript{73} \textit{Cooper}, 454 U.S. at 94; see supra note 37.

\textsuperscript{74} See supra note 70 and accompanying text.

\textsuperscript{75} \textit{Cal. Penal Code} § 311 (West 1970).
There are more persuasive reasons, however, for not adopting the criminal standard. This is a civil action and would normally require only a preponderance of the evidence. More importantly, the defendant in a civil action does not face the more serious sanctions faced by the criminal defendant. The less demanding standards of the civil action are more appropriate for its less threatening judgments. If prosecutors are required to meet a criminal standard in a civil case they may tend to forego the civil in favor of a more final and perhaps more damaging criminal judgment.

For the standard of proof there is a middle ground. California courts can adopt, and one Court of Appeal has approved, the standard of clear and convincing evidence for the proof of obscenity vel non in a public nuisance abatement action.

As noted above, the standard of proof by clear and convincing evidence is extremely demanding yet is free of criminal connotations. Its use gives the defendant significantly greater protection than the “mere preponderance” test, but sets the action apart from criminal prosecutions. It has frequently been applied in quasi-criminal actions and so is particularly appropriate here. While neither the federal nor the California Constitution mandates any specific standard of proof for the obscenity determination in a nuisance abatement action, the “clear and convincing” standard seems best suited to its peculiarities.

While the “clear and convincing” standard has been adopted by one appellate court, trial courts outside that district are not bound by that decision. While other appellate courts in

---

77. Further, in obscenity causes the usefulness of a final civil judgment as a starting point for subsequent criminal prosecutions is questionable. A California court has disallowed the defense of collateral estoppel in an obscenity case. The defendant’s contention that the film at issue had been declared not obscene in a prior proceeding was held inapplicable, as the defendant had not been party or privy to the prior action. People v. Seltzer, 25 Cal. App. 3d Supp. 52, 101 Cal. Rptr. 260 (1972). The use of res judicata as a basis for obscenity actions against the same corporate party defendants in a different community is an unsettled issue. It is doubtful whether res judicata and collateral estoppel concepts can be validly applied, using the “contemporary community standards” theory, if the limits of the community are not clearly defined. For example, at best it can be said that sales of allegedly obscene materials at international airports affect a very amorphous community. As res judicata and collateral estoppel are complex and difficult doctrines and have been the sole subjects of other notes, they will not be dealt with further in this note.
78. See supra notes 64-65 and accompanying text.
79. People v. Yeats, 66 Cal. App. 3d 874, 879, 136 Cal. Rptr. 243 (1971); but see
California may use the decision in Gow II as precedent, they are also free to disagree. The repeated agreement of other courts may eventually establish the standard throughout the state but, in lieu of such a trend, the state supreme court must settle the issue or the legislature must act.

2. Jury Trial

The California Constitution guarantees the right to trial by jury in civil actions.80 Trial by jury has been held to be a matter of right in actions at law but not in actions in equity.81 Although the traditional distinction between actions at law and actions in equity has been the remedy sought,82 California courts have varied from that approach. In People v. One 1941 Chevrolet Coupe83 the California Supreme Court recognized that the right to jury trial at common law was constantly evolving and concluded that "in determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action."84

Although both penal obscenity codes and public nuisance codes were in force in 1872,85 their combined use did not gain prominence in California until the Busch86 case in 1976. This is a new action, and new rules must be developed to deal with it. The "gist of the action" theory has given California courts room to develop new procedural standards for those actions which do not fit the traditional molds. It can apply analogously to this civil action to abate obscenity as a public nuisance.

As an action to abate a nuisance sounds in equity,87 any proposal for requiring a jury’s determination of obscenity in such an action deserves the most careful scrutiny. A suit seeking

---

80. CAL. CONST. art. 1, § 16. The state supreme court has interpreted this as a guarantee of the right as it existed when the state constitution was adopted in 1850. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 286-287, 231 P.2d 832, 835 (1951).
83. 37 Cal. 2d 283, 231 P.2d 832 (1951).
84. Id. at 299, 231 P.2d at 843-844 (emphasis added).
85. See CAL. PENAL CODE § 311, CAL. CIV. CODE § 3479 (West 1970). The original version of § 311 was enacted in 1858, the original version of § 3479 in 1872.
86. See supra note 17.
only to enjoin a nuisance is an action in equity, an action which does not require a jury trial. Neither does the federal Constitution require a jury trial in civil proceedings to determine the obscenity of contested materials. While an adversary hearing is a required procedural safeguard in all obscenity actions, a jury need not be a part of that hearing. Indeed, some jurisdictions are satisfied with a magisterial determination of obscenity.

The United States Supreme Court's requirements, however, are only the lowest limit, the quantum of protection that will satisfy the applicable provision of the federal Constitution. Individual states may require stronger, more comprehensive protections under their state statutes or state constitutions. California courts are free to find that their state constitution does require the use of a jury in civil obscenity proceedings.

Finally, obscenity has traditionally been a criminal matter. The same arguments which support the requirement of a strict standard of proof support the requirement of a jury trial. Were the city to bring a criminal action for exactly the same objectionable conduct the defendants would be entitled to a jury trial with a unanimous verdict. But the criminal action's more difficult requirements, involving jury trial, are appropriate for its graver punishments. The civil action's less demanding standards are appropriate for its less threatening judgments. If criminal procedures were required for both criminal and civil determinations of obscenity, prosecutors could as easily bring criminal cases as civil. They might therefore be disposed to forego civil complaints in favor of gaining a more final criminal conviction. The availability of both ac-

91. See Trans-lux v. State of Alabama, 366 So. 2d 710 (1979); People v. Potwora, 95 Misc. 2d 350 (1977) (magistrate decides issue of obscenity prior to seizure; cf Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963) (words of statute fix only the standard to be applied, not the entity which will apply it)).
92. Cooper, 454 U.S. at 93.
93. See generally Lockhart, supra note 39.
95. Although most criminal prosecutions result in fines, some statutes provide for a maximum of five years imprisonment. F. Schauer, supra note 1, at 197.
tions, with their differing standards, may discourage criminal prosecutions.

There are compelling arguments, however, for requiring a jury's determination of obscenity. First, the value of a jury in obscenity decisions was recognized by the United States Supreme Court in *Miller v. California*, which pronounced the revised "contemporary community standards" test for obscenity. There the Court stated that, in applying the test, to resolve the "inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide. . . ." Secondly, the importance of first amendment freedoms mandates the use of the most effective means of implementing that most difficult test. Trial by jury is the most effective means.

Justice Brennan, dissenting in *McKinney v. Alabama*, stated:

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.

Jurors can use their knowledge of their community to determine what would be patently offensive to a member of that community. However educated, fair and insightful a judge might be, one who is no part of a community cannot claim to have the same viewpoint as its members. The "outsider" is by definition not part of the group and should not be tasked with determining what the group will accept or reject. The standard of judgment being that of the whole community, even a single individual from that community should not be the factfinder. Personal prejudices seem bound to surface. In our pluralistic society the ideal method of implementing the "community standards" test would be a referendum on the community's view of specific contested materials. As the ideal is impractical, the best solution left is trial by jury. A jury is only a cross

97. Id. at 26 (emphasis added).
section of the community, but as members drawn from the community’s ranks, the jurymembers as a group are best able to draw their community’s line over which speech crosses into obscenity.\(^{100}\)

Finally, one of the most important protections provided by the jury system is the assurance that jury findings will not be easily overturned in a higher court.\(^{101}\) The need for such assurance was exemplified by the results of *Penthouse International, Ltd. v. McAuliffe*,\(^ {102}\) where the Fifth Circuit Court of Appeals reviewed a lower court’s magisterial determination of obscenity. The appellate court reversed the lower court’s decision on several issues, in two instances finding material obscene which the lower court has declared not obscene. As obscenity is to be determined according to local standards, it seems that the findings of the courts closest to the community in question should be given great weight. The Fifth Circuit’s action in *Penthouse International* instead rendered ineffective the lower court’s determination of what was objectionable in its community.\(^ {103}\)

To summarize, in *Miller v. California* the Court appears to have favored the use of a jury trial as the best method of implementing the community standard theory. Members of the community composing the jury are most familiar with the community’s standards. In addition, a jury’s finding of fact would be more difficult to overturn than a magisterial finding, and so would better insulate a community’s decision from arbitrary intervention by higher courts. Use of a jury would therefore protect defendants, contested materials and community standards to the greatest degree possible.

### III

**Conclusion**

The California appellate court in *Gow II* necessarily considered issues common to all civil obscenity actions—remedies short of prior restraint, the appropriate standard of proof and the requirement of a jury trial. Deciding the issue of appropri-
ate remedies required a fair interpretation of the applicable statutes and a sensitivity to the effect of severe financial sanctions on free expression. The California court provided these and went on to require proof of obscenity vel non by clear and convincing evidence in civil actions. However, the standard of proof and jury trial issues will not be finally settled until either the state supreme court or state legislature acts. Either can adopt standards stricter than those required by the United States Supreme Court and should do so.

For the questions of standard of proof and jury trial requirements, traditional procedural formalities must yield to the overpowering first amendment considerations inherent in this new action. When interests of such "transcending value" are at stake, the use of a quasi-criminal standard of proof in a trial by jury will guard against the risk of arbitrary decisions. As noted by the California appellate court in Gow II, the United States Supreme Court statements regarding jury trial in civil obscenity cases are inconsistent, and no standard of proof has been dictated. The California judiciary, however, has the legal machinery to remedy these ills. Analogizing to the "gist of the action" test, California courts can adjust their procedures to require these stricter protections as part of this new action. Until California establishes these safeguards statewide, as an integral part of its civil obscenity actions, its proceedings will be deficient because there will be room for intrusive reversals of community obscenity determinations, and the "chill of uncertainty" now inherent in obscenity law will maintain its sway.

105. See supra note 101.
106. Gow, 114 Cal. App. 3d at 934 n.12.
108. Lockhart, supra note 39.