Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 1970

In the Matter of:

CHARLES BATCHELOR, CHIEF OF POLICE CITY OF DALLAS, et al.,	
Petitioners;	
vs.	
BRENT STEIN,	
Respondent.	

Docket No. 41 ~~565~~

Place Washington, D. C.

Date April 30, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES BATCHELOR, Chief of Police, CITY OF DALLAS, et al., Petitioners;	:	
vs.	:	No. 565
BRENT STEIN, Respondent.	:	

Washington, D. C.
April 30, 1970

The above-entitled matter came on for argument at 10:56 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Attorney for Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 565, Dyson against Stein.

Mr. Zwiener, you may proceed as soon as you are ready.

ARBUMENT OF LONNY F. ZWIENER

ON BEHALF OF PETITIONER

MR. ZWIENER: Mr. Chief Justice and may it please the Court:

This case is a direct appeal from a decision of a three-judge court holding the Texas obscenity statute unconstitutional. The case arose in Dallas, Texas when the police officers under search warrants made seizures under a search warrant or a publication entitled, Dallas Notes. It was a newspaper published every two weeks.

The officers had obtained an opinion of the Assistant District Attorney that it was obscene; they applied for a search warrant; they did make a seizure. Subsequently, they went back again and made a seizure of the Dallas Notes and other items.

I think we have about 15 three-judge courts in Texas, pending, dealing with the obscenity statute.

Q How many?

A About 15, I think, at last count. And I really would like the facts of any of those other cases. I would

trade them for the facts of this case. But my purpose here is not either to condemn the Dallas police or to really defend their conduct, because the order that is appealed here is not a civil rights type of order-- I mean a Title 42 situation where lawless conduct was alleged, proved and found to be present.

This appeal comes because the courts below found that the Texas obscenity statute was unconstitutional. I would like, just at the beginning, to comment on the im ropriety of issuing the injunction here and then move over into the obscenity ---

Q Was this a case of selling or was this a case of possession or what?

A It was a newspaper that was sold and distributed.

Q I know, but was the charge possession?

A The charge was possession at that time.

Q Not selling?

A That is true, sir. Stanley had not been handed down at that time. The Texas statute purported to cover both distribution and possession.

Q Well, was it naked possession or possession for purposes of sale?

A It was naked possession, I am afraid.

Q It was not with either the purpose or the intent, neither was alleged?

A No, Your Honor.

But again, as I say, we have a situation here where the statute was found to be unconstitutional, and an injunction was issued which is difficult, actually, in this case, too. The problems with this case are two-fold. I think in the area of the cases that have just been heard, the three-judge court area, their scope of activity, their permissible powers, is one of the most complicated and confusing areas of federal law. And in this case we add to it the complexities of the obscenity law, and we have a double dose, I think, of confusion.

In this case the final judgment granted the injunctive relief against future enforcements of sections 1 and 2 of the statute. Now I am not sure whether to interpret that as enjoining future prosecutions or continued enforcement of the then pending prosecution.

If it is pending prosecution, of course, the anti-injunction statute may not apply depending on how this Court rules in the cases it has just heard. I think if it does enjoin a pending prosecution, the anti-injunction applies in its proposition. If it goes to future prosecutions, I think the injunction was still not proper in this case.

Q At least in this case, there is no question about the jurisdiction of this Court, because there is an injunction, very clearly, on page 94 of the appendix.

A I think there is, yes, Your Honor.

There has been a good deal of discussion in the preceding cases about pending and future prosecutions, the propriety of enjoining the different types. There shouldn't, logically, be any distinction.

Q Was there a pending prosecution?

A Yes, sir, there were two pending prosecutions.

Q But they weren't enjoined?

A I am not sure, Your Honor, because the words in the judgment that future enforcement of the obscenity statute is enjoined.

Q As against plaintiff?

A Yes, sir. But now this to me would connote that any other steps to implement the cases that were filed ---

Q The pending prosecution against the plaintiff----

A Yes, sir.

Q --- would be within the reach of that?

A I would say that it is, but I am not positive. But I have never heard discussed this notion that equity will not interfere in a criminal cases. We have talked about the anti-injunction statute; we have talked about abstention, but we haven't talked, as far as I have heard, about the classic notion, the idea or the doctrine, that equity will not interfere in a criminal case.

I think that this would be the reason for either a federal or state court to not interfere in a criminal case,

murder, rape, robbery, that type of case. The court would not talk about abstention. It would talk about equity will not intrude into a criminal prosecution.

Q Well, what if you talk about a prosecution that is pending, would you still say that it is interference with a criminal prosecution if you enjoin the enforcement of a criminal statute?

A I don't really know the answer to that. I find myself coming back and meeting myself in this area, but I think I would answer that, yes, it will not interfere in criminal prosecutions.

Q Even though none of it is contemplated or pending?

A Well, I see no reason for equity to act if none is contemplated or none pending.

Q What is interference? You don't limit this only to injunction, or do you?

A I think mainly it has been injunction because this is what they have asked equity for.

Q What about declaratory relief? Is that interference?

A I am sorry the Court asked that. I have never really understood why this Court has held that declaratory relief is proper where no injunction is proper. Because that is purely an advisory opinion. You say, "Ah ha, the state

statute is unconstitutional, but we are not going to issue an injunction." Now the state, as I understood it, could just go ahead and just prosecute all it wanted to.

Q Can you have a three-judge court for a declaratory judgment without injunctive relief?

A I don't think so, sir.

Q Were you addressing yourself to our reaction to three-judge courts which declare only but do not enjoin?

A I am really referring to the three-judge court to do it.

Q Well, when a three-judge court does that, it dissolves itself, doesn't it, whether it acknowledges it or not?

A I have no trouble -- and I will get to it in a minute -- with deciding that the injunction is proper in this case, future or pending, if I just read Dombrowski and Cameron v. Johnson. But Zwicker v. Koota gives me some concern, because it seemed that this Court was saying to the three-judge court, "Even though you have found that an injunction is not proper, you should consider the declaratory judgment aspect." This I cannot fit into my thinking on the three-judge court scheme.

Q Do you think the declaratory judgment is as much an equitable remedy as injunction and whether the court should issue one should be governed by the same standards as an injunction?

A Well, no, sir, if we are talking about a suit for declaratory judgment in the federal court construing a federal statute.

Q But what about a state statute?

A Well, as I say, unless it is a proper case for an injunction, the fact that the court decides that the statute is unconstitutional is advisory, as witness the case we just argued.

Q Then you would think the declaratory judgment statute is just unconstitutional as applied to state proceedings?

A No, sir, I think ---

Q Unless you want to issue an injunction.

A No, sir, I wouldn't say it is unconstitutional; it is meaningless in my view.

Q Well, according to you, it would be just an advisory opinion.

A Yes, sir, I don't see that it does anything else.

Q Which federal courts don't issue.

Q Constiutionally can't issue.

A Well, as I say, this is my trouble with ---

Q Zicker and Koota.

A Yes, sir.

Q And with the declaratory judgment statute, then

I guess.

A Yes, sir. I would never, if I were a plaintiff in this case, I don't think I would plead the Declaratory Judgment Act. I don't think it is necessary. I think 2281 and 2284 are all that is necessary, with other jurisdictional statutes, perhaps.

But if I just take Dombrowski. Now, as I say, the classic notion that equity and abstention will not interfere in a criminal prosecution -- you have these. I think abstention is a different doctrine, and there are probably 3 or 4 different abstention doctrines.

But in the free speech area we do have a different rule, and Dombrowski announced it. Then I think, as I read Cameron as it interprets Dombrowski, I have no trouble at all with finding the injunction in this case was improper. Because Dombrowski, now, was a non-pending prosecution type case. Prosecution was not pending.

In that case, as Cameron interprets it, it says that there will not be federal interference unless the statute is excessively broad and vague and where you have the circumstances as you had in Dombrowski, where the state courts had been knocking down the search warrants, returning evidence, stopping the state prosecution, and the officers would continue to harass and prosecute under the statute.

If that is what Dombrowski means and that is the only

reason that a federal court can issue an injunction, a federal three-judge court, then I am not at all concerned. If you have to have Dombrowski circumstances, where you have an excessively broad and vague statute on its face and where you have the special harassment circumstances, then I see no problem.

In this case I don't like the facts. The decision below does not rest on harassment. It rests on the constitutionality of the statute. So I say that the injunction below, regardless of whether the statute was constitutional or not, was improper.

As far as the statute is concerned, the court below found at this time the Texas statute defined obscenity in the terms of law. They had not the added elements that were announced in Memoirs and also suggested in Jacobellis and so forth. It also purported to forbid mere possession. The statute said, "possess, possess for sale, sell, distribute and so forth."

The court said that it would not try to separate these elements; that because it had possession in there, it was unconstitutionally broad and vague. We think that this is wrong. Other three-judge courts have found the Roth definition to be acceptable, assuming that a state trial judge will draft the necessary constitutional safeguards in any choice to a jury. And this is what our argument was below and is here.

The court also -- and, of course, the court was

resting on Stanley to find that possession was improper, the proscription against it, and that the statute was impermissibly vague because it contained this element.

Q Was there any barrier to the plaintiffs raising their constitutional argument in the pending state prosecution?

A We say not. Now the searches occurred in late 1968. This petition was filed in the federal district court in January, I believe, of 1969. In February, in one of the state charges, they filed a motion to suppress and a motion for acquittal -- I have forgotten. And this was finally granted long after ---

Q When were the prosecutions? How were they initiated? On information or indictment or how?

A On information.

Q On information. And they were filed when in relation to the time that this suit was brought?

A They were filed in December, I believe, of 1968.

Q I see, and then it is a month later that this suit was brought, is that it?

A Yes, sir.

Q What I was trying to get at, I want to be sure that there is no question that the criminal prosecutions have actually been initiated before this action was brought.

A I don't think there is any question there.

Q And if the plaintiffs had any objections to the constitutionality of the obscenity statute, they could have raised those objections in the pending criminal prosecutions?

A Yes, sir. As I said, they did in one case. There are several ways they could do it. Under the search warrant procedures effected, you can raise the question ---

Q Couldn't they just file a motion to dismiss the prosecution based on the unconstitutionality of the statute?

A They did this, and this is a practice that has no statutory framework or foundation in Texas. However, the courts are beginning to do it to avoid situations like this. They are beginning to consider. As a matter of fact, we have had a state court very recently declare the Texas obscenity statute unconstituional. I hate to make the admission that I think that court is wrong too.

Q Held what unconstitutional?

A Our obscenity statute. The state court held it unconstituional.

Q Since this case?

Q This same statute? It is not this statute?

A No, sir, it is not.

Q This statute is not on the books at all?

A It is on the books for this purpose -- I wouldn't want to suggest mootness because I think one of the Dallas criminal cases is still pending, and I think there are some

cases pending in San Antonio and elsewhere around Texas. And presumably, somebody has done something very bad in the field of obscenity, before our new statute was passed, somebody might want to prosecute for during the period of limitation.

Q Which of your state courts held the amended statute unconstitutional?

A The district court in Wichita Falls, Texas.

Q That was Judge Teffeldriver (?).

A Yes, sir. The case is now in appeal to the Texas Supreme Court.

Q --- at 3:52 p.m. on February 9, 1970, according to this.

A Another problem that the court found below, or an assumption, was the fact -- I am sorry -- that they assume that there will be a national standard for the judging of obscenity. In this case I think this obscenity case presents most of the problems in the obscenity field. The only one it neglects and doesn't have in it is this prior adversary hearing, the problem which has given the Court so much trouble.

First of all, I would like -- I think the injunction below is improper, whether our statute is constitutional or not. I also say that the statute is constitutional and could be constitutionally interpreted ---

Q That is on the ground that there was a pending, or there were, pending prosecutions.

A No, sir, it is on the ground that the Dombrowski circumstances were not present for the issuance of an injunction either against pending or future prosecutions. There were no circumstances present. Now there may have been circumstances that could have been proved, that the court may have relied on, but the court did not. In absence of these circumstances which must form a part of the judgment, no injunction is proper, again as I say, constitutionality of the statute or not.

I say that the statute is constitutional. In a way I am asking this Court to, hopefully, really not dispose of the case on the injunction aspect. I would be very hopeful that the Court will address itself to obscenity so that there will be a definition of obscenity that will be approved of by a majority of the Court.

Q But if the district court was quite wrong in interjecting itself, it would be quite wrong of us to continue that interjection in the state court proceedings, wouldn't it?

A Well, sir, you have ---

Q If you really mean it in your argument that the district court, the three-judge district court, shouldn't have intervened, then, certainly, we shouldn't approve it.

Q You would be asking us for an advisory opinion.

A Your Honor, I am getting awfully close to it, which everybody else has asked the Court not to do. But I will

say that this Court, as the final arbiter of law -- in the obscenity field as in the treee-judge field there is hopeless confusion. And I think this case presents the necessary points to permit this Court to write in the obscenity area without violating the purely advisory opinion -- I am getting awful close to it but ---

Q It depends on whose ox is gorged.

A That is true. In this case we do need a definition; we need to know what community we need to prove obscenity by. We need many other points decided, or we will be in federal court forever.

Now as a supervisor of the federal system -- we have some 15 of these cases in Texas. A decision by this Court on the obscenity problem would solve, at least, part of the congestion there.

Q Well, if you would take the view of Justice Black and myself, you would have no problem.

A This is one view that I don't want to urge on the Court, but I would say this to Your Honor, that if a majority of the Court did hold that way, it would solve a lot of problems too.

Q What you want is a "final" advisory opinion.

A Your Honor, Mr. Chief Justice, if I have ---

Q If it is made a crime, the trouble is the definition of the crime. That would seem to be the duty of

the legislative body and not us.

A Well, I think it is the duty of the legislative body, Your Honor, Mr. Justice Black, and we ---

Q But if they can't do it, then they can't do it.

A This Court in Roth handed down a definition and told us what you thought it should be. Our legislature ---

Q How many pages was that definition in?

A In a lot of pages, Your Honor. But we did the best we could with Roth. We amended the statute. Now we have come along and adopted the Memoirs. And if the Court does not adopt the view of you and Justice Douglas, then we certainly need the majority definition. If they do adopt your position, well then, I guess we don't need one.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Richards:

ARGUMENT OF DAVID R. RICHARDS

ON BEHALF OF RESPONDENT

MR. RICHARDS: Mr. Chief Justice and may it please the Court:

Let me clarify, if I may, at the outset one matter. Very clearly there is no injunction here against a pending prosecution. Ironically enough, I sought only declaratory relief below. The issue was raised whether that required a three-judge panel. And in accordance with the present practice of the Fifth Circuit, a three-judge panel was designated to

decide that threshold question of the necessity of the panel. At that point I amended my pleadings -- they appear on page 77 -- and reinserted a prayer for injunctive relief, with the exception of presently pending causes. Our assumption at that point being since we had three judges coming we might as well clarify their jurisdiction.

The court's opinion at page 81 characterizes our prayer as one for injunction with the exception of presently pending causes. I would assume in this background then the clear interpretation of the order is that the injunctive order runs only against future enforcement of the statute as to the plaintiff and does not inhibit the processing of the presently pending causes.

Q Your point is that there is not a 2283 problem here at all; that you and your complaint sedulously avoided it, and that the three-judge court in its decree did likewise.

A I sedulously attempted to avoid it, and I hope I successfully avoided the 2283 problem. Frankly, we do not think we even have to turn to Dombrowski for our authority, but we can go back to 1923 and Justice Butler's opinion in Terrace vs. Thompson, which I think quite clearly speaks to the right of a litigant to go to the federal court and obtain injunctive relief against the enforcement of a state statute which impinges upon not only upon his property rights ---

Q What is that case again?

A Pardon me.

Q What is that case of Justice Butler?

A Terrace vs. Thompson 263 U. S. 197. "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order to effectually protect property rights or rights of person against injuries otherwise irremediable."

We think the facts here show just that kind of irremediable injury or potential injury. The plaintiff, the young man publishing an underground newspaper in the city of Dallas, Texas ran afoul of the Dallas police. As the head of the vice-squad admitted on his deposition, the police became concerned about the newspaper in general, decided to go to the District Attorney and show him a copy of it.

We were unable to reprint the copy in the appendix; it is part of the record. And we submit that it is not obscene under any standard extant.

The District Attorney claimed that it looked obscene to him. So the Dallas police didn't get their search warrant then in the afternoon. They waited until night and went out to the hockey match and got the Justice of the Peace to issue a warrant to seize obscene matter. They didn't show the Justice of the Peace the newspaper upon which they relied to obtain their warrant.

They arrived at Mr. Stein's residence at about ten at night with 2 trucks, a dozen police officers and trustees, and seized, by their own admission, 2 tons of newspapers, periodicals, typewriters, cameras, money, a brown sweater even, effectively putting Mr. Stein out of business they felt.

Q What was the brown sweater?

A This was one of the items they seized with no explanation.

Q For showing obscenity?

A They treated everything they found as an instrumentality of the crime was their explanation for the seizures of the tables ---

Q That was the instrumentality for creating a crime of obscenity?

A This was apparently their theory.

Q A brown sweater? It was a brown one?

A The police officer, when asked on deposition why he had seized a poster of Mao Tse-tung on the wall ---

Q A what?

A I can't pronounce the name probably, Mao Tse-tung, the Premier of Communist China --- they took that poster off the wall, and I asked why it was that they had seized that particular item, and they said, "We did not know what to take and what not to take, so we simply took everything."

That was on October 30.

Q As an advocate, very naturally, you would give us that background, but none of that has anything to do with the case before us, does it?

A It seems to me it is the factual context within which the injunction was issued.

Q Yes, but you are enjoining the enforcement of these particular statutes. The search-and-seizure is not before us, in any sense of the word, is it? Or am I mistaken?

A It is before you, it seems to me, to the extent that this statute was relied upon by the Dallas police who felt the statute gave them authority to make on-the-spot determination as to the obscenity of any given material and confiscate that material. Now that is how they view the statute.

Q But as I understand the three-judge court, it wasn't dealing with the application of the statute to your client; it was dealing with the statute on its face, and it declared the statute constitutionally invalid on its face. Isn't that the issue here? Nothing to do with search-and-seizure, although, naturally, the colorful facts of that are something that you, as an advocate, want to tell us about.

A Understandably, I do, but let me at least say -- at least in colloquy with prior counsel and in earlier cases argued both yesterday and today -- I sense a certain feeling of the Court that injunction should not be issued except in circumstances which demonstrated a continuity, perhaps, a

a threat of continuing violation, a concern that First Amendment rights may be overburdened by a pattern of conduct. I think the two searches-and-seizures here do reflect the kind of pattern, the kind of context, in which injunctive relief is -- certainly addresses itself to the lower court's discretion as to whether ---

Q It is these very prosecutions which are the only prosecutions that you did not seek to enjoin.

A I did not seek to enjoin ---

Q You are in a rather odd position to say that the facts of these prosecutions are what entitles you to an injunction when these are the very prosecutions you did not ask an injunction against.

A I considered that the injunctive relief I sought and the injunctive relief that I obtained ran to all defendants, and that includes the Dallas police. Frankly, it was not the pending prosecutions that represented the threat. It was the repeated searches-and-seizures, pursuant to the obscenity statute, which we felt were going to assure the demise of the newspaper if they persisted.

Q Why couldn't you get what relief you wanted in the pending prosecution?

A Well, if I may say, at that time the Texas Court of Criminal Appeals, which is the highest appellate court of Texas with respect to criminal matters, had addressed itself

to the two fundamental issues upon which I had attacked the statute and upheld -- one they had in Sullivan vs. State which is cited in my brief -- upheld the statute insofar as it made criminal simple possession of obscene matter. So I assume that the lower courts of Texas would consider themselves bound by that determination.

The second attack I made on the statute was, I guess, the protection attack, that the exemption the statute gave to daily and weekly newspapers was really unconstitutional.

Q But you did have a way of attacking the statute in the pending prosecution?

A The question occurs whether that -- yes, I had a way of attacking it. We could go to trial and ---

Q I take it you argue that even if you must wait to attack it in the state trial court, that once it rose against you, you could go to federal court? Or would you have to appeal?

A I take it that at that stage the remedy, I would assume, would be one of appeal from the lower court ---

Q What is your excuse for not going that route rather than going to the federal court?

A My excuse, if I am required to have one, is that I am dealing here with a publisher of a newspaper who is being subjected to repeated harassment by the Dallas police, pursuant to this statute.

Q That will end if you win on your declaratory judgment. I mean that will end if you win on your objection in the state court.

A If I might say -- we do allude in our brief since it is not of record -- we filed and presented and argued at some length a motion to suppress in the state court in one case in February of 1969 -- it was filed in October of 1969. But the state court did grant that motion almost ten months later. In the second pending criminal case our motion to dismiss has been pending at least that long and has never been acted upon.

I would submit that during the period of gestation that the newspaper might well not have existed. One more raid of this nature, in which typewriters and all implements of the crime are seized, might well have brought it to a halt. We felt that it was the kind of circumstance that did require, did warrant, injunctive relief.

Now independent of the injunctive relief, we think that what we did, the relief we sought here, was clearly in a contemplation of the declaratory judgment statute. At least the legislative history of the statute suggests that this is part of its purpose; that is to permit persons to go to federal court to obtain declaratory judgments as to the unconstitutionality of a statute without risking future prosecutions, without risking further harassment, under a state statute, which

is on its face overbroad and unconstitutional.

Quoting from the Senate report: "Much of the hostility to the extensive use of the injunction power by the federal courts will be obviated by enabling the courts to render declaratory judgments."

And again, if I may say, it was my thought initially that the declaratory relief would have been ample relief for us, but that once we had a three-judge court convened, it seemed a reasonable use of the time to reinstate a prayer for injunctive relief.

We suggest that ---

Q As a matter of fact, you can't get a three-judge court without it. Isn't that the truth?

A We have this practice in Texas -- or a decision of the Fifth Circuit rather. Jackson vs. Chilton says that whenever the issue or the necessity of a three-judge court is raised, that a three-judge court will be appointed to determine whether it is required. In this particular instance I had narrowed my pleadings to declaratory relief. A three-judge court was appointed to determine whether this required its action, and then I amended my pleadings thereafter.

Q Well, I am not too interested in what the Fifth Circuit says. The statute says you ask for an injunction or you don't get a three-judge court.

A That is correct, and I read the cases to say

that a three-judge court is not required for declaratory relief.

Q Are you suggesting that the Fifth Circuit's practice is to convene a three-judge court just for a declaratory judgment?

A No, Your Honor, I am suggesting that the practice is that when the issue is raised as to whether a three-judge court is required, that the practice now obtaining is to designate a three-judge panel to decide, in the first instance, whether or not their action is required.

Q But if the pleading is filed with a single district judge and it doesn't ask for injunctive relief, is there any need to have two other judges help him decide that it doesn't comply with the statute?

A Not in my view, no, Your Honor.

Q Who raised the issue?

A I was just trying to ferret it out of the record. My recollection is -- but I don't want to be dishonest with the record -- is that the state raise it, perhaps not the Attorney General, but we had the District Attorney and we had the City Attorney in. And one of them raised the question of whether I could obtain declaratory relief from simply a single judge. When that was raised, under the prevailing practice that threshold questions were to be addressed to a three-judge panel, a three-judge panel was appointed.

We think that the only argument that would address itself to the Court's actions is whether they should have abstained from acting. We think it quite clear that under Baggett and under Harman vs. Forssenius there was no possibility of a state court interpretation that would have narrowed the statute and rendered it constitutional.

The statute clearly punished mere possession of obscene matter. The charges that were filed against my client, Stein, were simple possession -- as counsel concedes -- of what was alleged to be obscene matter. There was no possiblity of a narrowing construction that would have saved the statute, and under those circumstances certainly no reason ---

Q Do you see any difference between the printing of one newspaper and a couple of hundred?

A You mean insofar as it supports the inference that you possessed them for the purpose of distribution? I would think the possession of 200 would suggest an inference that you possessed the newspapers for purposes of distribution.

Q So you don't just have mere possession; you have possession for a purpose.

A Let me say, Your Honor, that this case has a peculiar factual angle in that the alleged obscene matter -- The residence that was searched was a residence and an office. Upstairs was the residence; the lower part was the office. Part of the obscene matter, upon which the prosecution was founded,

were photographs seized in the bedroom of the plaintiff Stein, wholly apart and separate and unrelated to the publication of the newspaper. So we had, factually, a very close Stanley kind of case. That is, we had both newspapers downstairs and photographs upstairs that were unrelated to the publication of the newspaper.

Q Stanley was a one-man home, a bachelor living by himself. The three reels were in the drawer of his desk in his bedroom, period.

A These particular films were in a cardboard box under Stein's bed, and it seemed to us that put it in the Stanley context.

We find ourselves then, as we view the case, that we have no 2283 problems since we did not seek to enjoin pending prosecutions. As I understand this Court's opinion in Dombrowski and Judge Haynsworth and Baines, restraints upon future prosecutions are beyond the reach of section 2283, and that our case really falls within that narrow area of comity or abstention, which this Court has spoken to in a number of opinions.

I guess most recently it seemed in Zwickler vs. Koota, in which the Court said that the trial court in a case such as this had the duty to look to the necessity of declaratory relief independent of the determination as to injunctive relief -- and we think that in this instance the declaratory

relief was clearly proper under the governing decisions of this Court.

We submit that this Court, when it said that wherever the federal courts sit human rights under the Federal Constitution are always a proper subject for adjudication, that this was simply the kind of case we had. The human rights we had were searches-and-seizures that were clearly reminiscent of Stanford vs. Texas. If anything, they were worse: not one search, but two searches; no indication by the Dallas police that they intended to abandon this course of conduct; relying upon a Texas statute that on its face was overbroad.

We would suggest that this case is actually sort of a proof of the pudding in the sense of the necessity of a principle akin to Dombrowski, or akin to other decisions of the Court, and that is, facts that cry out for some relief, cry out for some protection under the Federal Constitution, require the immediate attention and cannot be allowed to languish while state criminal prosecutions -- and there has been no inhibition against the state from prosecuting Mr. Stein. And we are now almost two years from the filing of the original prosecution, and they haven't moved.

This, we think -- in keeping with my experience, at least, while I practiced in Dallas -- there were ofttimes long delays between the filing of a prosecution and its ultimate disposition. We found ourselves when we had to find action, and

we think the lower court order is quite proper.

The court's opinion addresses itself to obscenity, not only on the ground that the statute punished mere possession, but that it failed to contain the standard that appeared expressly in Memoirs, again in Redrup; that is, the material be utterly without redeeming social value. The Texas statute did not contain that narrowing definition, and, hence, in our view permitted the police officers, such as in the instant case, to use their own discretion, seize whatever they felt inclined to seize. Hence, the statute on this ground was over-broad.

In this connection, we do submit that none of the material seized -- at least as appears of record here -- the newspaper clearly was not obscene. It was offensive. It may have been in bad taste, according to one's views. But it clearly was pure and simple speech of a highly political character. It is a dialogue, a rhetoric, that is new, but, at least, it is political, and it is the kind that is clearly protected by the First Amendment.

Finally, in closing we would say that the Texas statute -- although the lower court failed to pass upon it -- there was an entirely alternative ground on which the statute could have been stricken in our view; that is, the statute's wholly arbitrary exemption of daily and weekly newspapers.

My man, who could not have the money to get himself

out once a week, hence, fell under the statute because he published twice a month, but yet, the statute wrote a broad exemption for daily and weekly newspapers.

We think that inasmuch as we are in the area of what are essentially fundamental rights of speech and press, that the standard by which this statute is to be judged is not one of whether it is arbitrary but rather whether this serves any compelling state interest, that is, the exemption of daily and weekly newspapers. We suggest that there is no compelling state interest to be served by that exemption.

That would provide an entirely alternative ground to affirm the court's action below, without addressing yourselves to Mr. Zwiener's request to write a final disposition on the question of obscenity.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Richards.

Mr. Zwiener, you have about 8 minutes left.

REBUTTAL ARGUMENT OF LONNY F. ZWIENER

ON BEHALF OF PETITIONER

MR. ZWIENER: Thank you, Your Honor.

I would like to address myself for just a moment to this exemption of newspapers. As I said in the beginning, whether the statute is unconstitutional or not, the injunction was improper. But this exemption is, I think is, perhaps, unwarranted and unjustified, but it was the best experience of the legislature at the time they passed this obscenity statute.

Their experience was that newspapers did not publish pictures of nude women and so forth, and they said, "Well, we'll exempt newspapers, both daily and weekly." I don't know that anybody ever thought of a newspaper published any other time.

As a matter of fact, in the briefs below I briefed the question fairly extensively, and a newspaper was something that, apparently, is published either daily or weekly according to the common parlance.

This, I think, was what the legislature knew of obscenity at the time. This was a legislative judgment that in the newspapers matters obscene did not appear.

The facts were discussed, and I might just expound on that for a moment, on my thought that if these Dallas police officers did engage in lawless conduct, ignoring the statute and ignoring proper constitutional procedures, you do not, in my opinion, have a three-judge court case. You have a civil rights case, which might be handled by one judge. It would not be a situation where you declared the statute unconstitutional.

There is some question in my mind whether an injunction could be issued in those cases. But certainly, the remedy would be as a civil rights complaint and "I am being harassed, tormented by the police officers who are deliberately setting out to suppress my civil rights." We don't have that situation here.

In conclusion I again think that the facts of this case merit an opinion by this Court on obscenity. I think my preference would be if the Court wrote Judge Harlan's view taken in Roth where he expressed the point of view that the states should be permitted to legislate in this area without regard to a national standard, saying that one of the geniuses of the federal system is that we have some 48, at that time, little laboratories where this type of experimentation can go on, and that he sees nothing that will be detrimental to the country in permitting the states to experiment.

Q You don't think that your urge to get some clarification in this confused area might confuse the situation even more? Have you thought of that?

A It might, Your Honor, but I don't know how it could, really.

Q Well, that is possible.

Q What you would really like to have us do is leave it to the states?

A This would be my preference. If not, I would like a definition of obscenity from this Court, and if you want to include "with no redeeming social value", I think this is properly a defensive issue that a defendant could be expected to prove. If it is patently offensive and it appeals to the prurient interest, this should be enough to initiate prosecution and let the defendant then show that there is

some redeeming social value.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Zwiener. Thank you, Mr. Richards. The case is submitted.

(Whereupon, the argument in the above-entitled matter was concluded at 11:44 a.m.)