ORIGINAL

In the

Supreme Court of the United States

CAROL VANCE ET AL.,

APPELLANTS,

V.

UNIVERSAL AMUSEMENT CO., INC., ET AL.

No. 78-1588

Washington, D. C.
November 28, 1979

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CAROL VANCE ET AL., Appellants,	:	
v.	:	No. 78-1588
UNIVERSAL AMUSEMENT CO., INC., ET AL.	:	

Washington, D. C.

Wednesday, November 28, 1979

The above-entitled matter came on for argument at 11:37 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LONNY F. ZWIENER, ESQ., Assistant Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas, 78711; on behalf of the Appellants.

FRIERSON M. GRAVES, JR., ESQ., 2020 First Tennessee Building, Memphis, Tennessee, 38103; on behalf of the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Zwiener, you may proceed whenever you are ready.

ORAL ARGUMENT OF LONNY F. ZWIENER, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case, Vance v. Universal Amusement Company, has had a very long, tortuous history, starting off with a number of separate cases in the State of Texas and some 20 of those cases being consolidated before one three-judge court.

As a consequence, many issues got obscured. But I think that the issue that is presented today is clear and that is whether or not there can be any prior restraint imposed in the First Amendment area. Can there be any; if procedures that protect First Amendment rights are adopted, can there then be the type of thing we have here, an injunction against the future showing of, in this case obscene movies even though those particular movies have never been judicially determined.

QUESTION: Mr. Ziener --

MR. ZWIENER: Yes, sir.

QUESTION: May I say so, with all due respect, that it is a little difficult reading the briefs to discern what the

issues are in this case, at least it was for me.

But, in any event, may I ask you: Do you concede that Article 4666 is not involved in this case now before us and you do so because you concede the unconstitutionality of that article?

MR. ZWIENER: No, sir.

QUESTION: Well, I thought you did.

MR. ZWIENER: The brief says that we concede. We have said it has never been involved. Our briefs to the Fifth Circuit --

QUESTION: And the holding of the court that this article is unconstiutional, and I am quoting from your brief now, is not questioned by these appellants in this Court?

MR. ZWIENER: In this Court, that is true.

QUESTION: Now, isn't that the equivalent of conceding?

MR. ZWIENER: All right, Your Honor, --

QUESTION: Or if not, then correct me.

MR. ZWIENER: Well, all right, that interpretation, yes, sir, we are conceding it. But I hate to concede it, because because of the brief of the amicus in this case, Charles Keating, argues that it is constitutional and we will --

QUESTION: Another amicus argues that it is unconstitutional.

MR. ZWIENER: Yes, sir.

QUESTION: And yet you say it is not an issue.

MR. ZWIENER: Yes, sir. It wasn't an issue below.

QUESTION: That is one of the many reasons that cause me not a little confusion in reading this brief.

MR. ZWIENER: As a matter of fact, I think -- this case, as I say had gotten -- there were so many different cases, with so many different issues, that this issue never really got squarely presented I suppose until it did get to the Fifth Circuit.

QUESTION: But it is an issue now.

MR. ZWIENER: That is true, Your Honor.

QUESTION: Because, in effect, you do not question the holding that it is unconstitutional; is that it?

MR. ZWIENER: I don't --

QUESTION: In that sense.

MR. ZWIENER: All right, the brief says that this particular point may have been in error in making that statement because of --

QUESTION: I am more confused now.

MR. ZWIENER: Well, I think that the Court can correct me if I am wrong.

QUESTION: Well, you are presenting your case here, and I just wonder what case you have.

MR. ZWIENER: All right, we will tell the Court -- I think this case could have been settled early on if Moore

v. Simms had been decided, and we will suggest to the Court -- and I do suggest to the Court that if you apply Moore v. Simms, you can hold that the court below should not have taken this case at all.

QUESTION: You don't make that argument in your brief.

MR. ZWIENER: No, Your Honor, I don't. This brief was written of course before Moore v. Simms, at least before it came --it was brought to our consciousness. And it actually occurred to us when we passed a new obscenity statute which was contested in Texas.

QUESTION: What court decided Moore v. Simms?

MR. ZWIENER: This Court, Your Honor.

It is a --

QUESTION: What is the citation?

MR. ZWIENER: Oh, I don't know, Your Honor. It was decided in June.

QUESTION: I recall that case.

QUESTION: It was the one involving the juvenile statute.

MR. ZWIENER: That is true, Your Honor. And this Court decided it on the principles of abstention, and we would say that that discussion in Moore v. Simms probably would have required the court below in this case to have dismissed all the cases and that the State courts construe its own

statutes.

QUESTION: Well, it wasn't decided on --

MR. ZWIENER: That is why -- Your Honor, I don't want to concede 4666, even though I may have said so.

QUESTION: Well, it wasn't decided -- I wrote the opinion -- it wasn't decided in the Pullman extension at all. It was decided on the civil counterpart of Younger v. Harris dismissal abstention.

MR. ZWIENER: Well, Your Honor, if it was decided on that basis, I am sorry I misrepresented, Your Honor, to a couple of courts, because I said that there was no reason to discuss Pullman if it didn't have some meaning in the case, because obviously Younger is present as far as a pending case, a case is concerned.

As I say, I probably argued that case incorrectly, from what Your Honor has just said.

QUESTION: I share Mr. Justice Stewart's confusion about your position.

I want to be sure about one other thing.

MR. ZWIENER: All right.

QUESTION: I take it that the attorneys' fee issue is not before us.

MR. ZWIENER: Well, we did mention it in our jurisdictional statement. We have not argued it in our briefs. I would hope that the Court would consider that in deciding

this case, because -- again, because we have these multiplicity of cases we are going to have attorneys' fees possibly levied against a county attorney who never did really anything in this particular situation, this big mass of cases. We just suggest that maybe a lease should be canceled, or at least talk to the landlord which precipitated this case.

QUESTION: Isn't it listed in your questions presented?

MR. ZWIENER: All right, Your Honor, we will hope to resolve it, the issue below.

But I would like to clear up some of the things that we have here. 4667 is involved, and that statute says if the habitual use of -- or of premises for a certain purpose will be enjoined. It says the use, and not the property. That is why we were saying no prosecutor really tried to apply in the State of Texas 4666 and close the place for a year. The reason they didn't is because there was under the old obscenity statute, before it was amended some years ago, a section 13 which permitted enjoining premises for obscene -- the use of premises for obscene matters. And that did not permit closing. So when the obscenity statute was amended, and the injunction provisions removed, no one -- at least in the prosecution area, that I know of -- ever considered trying to padlock for a year, which is provided for in 4666. It just didn't occur to them.

Now, as far as the prior restraint, the other question

in this case is whether an injunction can be drawn that enjoins the use of premises for the future showing of pictures which have not been judicially determined to be obscene where the injunction is drawn in explicit terms as far as the sexual conduct enjoined and also cites the requirements of Miller.

QUESTION: According to your brief, if not to your oral argument today, that is the only issue presented to us in this case?

MR. ZWIENER: Yes, sir.

QUESTION: The one you have just stated.

MR. ZWIENER: Yes, sir.

QUESTION: Do you agree with that? That is what your brief seems to say, seems to say to me.

MR. ZWIENER: That is what my brief says, Your Honor.

QUESTION: And you say that today?

MR. ZWIENER: I say that today. I will ask the Court later to set aside the decision below on the basis of Moore v. Simms, so that I won't be caught by that position.

QUESTION: If the District Court shouldn't have dismissed this case entirely but was correct in considering the merits on the merits --

MR. ZWIENER: That is my single issue.

QUESTION: And the only issue.

MR. ZWIENER: Yes, sir.

QUESTION: Thank you.

QUESTION: General Zwiener, you say that later today though you are going to argue another issue.

MR. ZWIENER: Well, no, it is just that --

QUESTION: You are going to say that Moore v. Simms, which Mr. Justice Rehnquist pointed out, was a case involving a pending State proceeding, which under Younger barred the Federal Court from proceeding under the court's holding. And here the District Court, as I understand it, expressly held the Younger abstention did not apply because there is no pending State proceeding.

MR. ZWIENER: That is true.

QUESTION: Now, why are you going to ask us to do something different under Moore v. Simms?

MR. ZWIENER: Well, in most of the cases the consolidated cases, there were pending civil --

QUESTION: But not in this one.

MR. ZWIENER: But not in this one.

And I was also going to ask you, based on what I thought Moore v. Simms said about the Pullman abstention, and I thought that was a basis of the Moore v. Simms holding, that where you had a State statute that was capable of constitutional construction by the State courts, the Federal courts would give the State courts the opportunity to consider the statute and make those constitutional constructions. And I

would --

QUESTION: Well, that is -- as I understand it, that Pullman abstention, but it was not applied in Moore v. Simms. That is not argued in this case, I as understand it.

MR. ZWIENER: Well, until you had told me, Your Honor, what you have told me, Your Honor, you do discuss the Pullman doctrine.

QUESTION: Well, it certainly is discussed in Moore v. Simms. I did not recall it as being the main focus of the thing, although I am sure it is cited in the case.

MR. ZWIENER: But let's talk about the procedures, which is criticized by the Appellee that in Texas to obtain an injunction, Mr. Frierson argues that a temporary restraining order can be obtained without notice. I would again refer the Court to Article 16 of the old obscenity statute 527, which required notice. And again, in most situations Mr. Frierson points to a situation in the case in Dallas where apparently there was not notice, I point to a case that came out of Austin and have the injunction issued in that case, which is a part of the consolidated cases where the courts expressly said there will be no temporary restraining orders issued. There will have to be no dissenting hearing before there will be an injunction in this type of case.

I would say, Your Honor, because that notice is required, and I think that in most instances the Texas courts

will provide it.

Now, there is a hearing,again my opposite number as far as counsel is concerned, disagree. I say at the hearing on the temporary injunction that the question of obscenity is considered and decided and a temporary injunction cannot issue without that decision. And we cite in our brief Roth v. State and Richards v. State, and it is apparent in those cases if the question of obscenity was considered at the injunction hearing and also on appeal, which is another point raised, and I differ.

QUESTION: Mr. Zwiener. what is the question of obscenity when you are talking about unknown films or books in the future; what can that be?

MR. ZWIENER: All right, what we do -- well, of course there has to be some use of the property and that is --

QUESTION: An identified --

MR. ZWIENER: All right.

QUESTION: -- pictures or books in the future. How can you determine the question of their obscenity?

MR. ZWIENER: Well, I would say that we are not entitled to even seek injunction unless --

QUESTION: My question was simply: What do you mean when you say the question of obscenity is considered?

MR. ZWIENER: All right. Well, then as far as the future use of the premises, again we -- the injunction does

recite the specific, or should recite the specific sexual acts that are prohibited and enjoined; and that those sexual acts --

QUESTION: I thought we are talking about books or movies.

MR. ZWIENER: We are.

QUESTION: And not conduct.

MR. ZWIENER: No, sir. And those sexual matters must be taken in the light of Miller.

Now, let us suppose an injunction issues under those circumstances. A temporary injunction is appealed in Texas and, by the way, in Texas as in the Federal courts the hearing on the temporary injunction is usually the trial. And very often, probably more often than not, attorneys agree that the temporary injunction and the permanent injunction hearing will be held at the same time. So the evidence is presented there and for all practical purposes that is the end of the case, because everybody has put on just about everything he has at that point.

A temporary injunction is appealable in Texas, it is an expedited appeal, the record must be filed in 20 days, and the court can consider it even without briefs in order to expedite consideration on appeal. So this kind of injunction does have that protection in expedited appeal.

But here is where we come to, I guess to me, the proposition that makes me wonder why we have come all this

way, except it is a matter of principle, and I shouldn't have said what I said. I think this is important.

But in Texas when there is a contempt hearing -- all right, we have an injunction against some premises enjoining the showing of obscene movies. A complaint is filed saying that injunction has been violated. The complainant, who ordinarily would be the county or district attorney, must come into court and prove that the injunction has been violated, which means for any move to be shown or any book to be displayed in a book store he has got to go through the same type of proof that he would if he defiled a criminal obscenity case.

QUESTION: Well, it is part of the burden of proof.

MR. ZWIENER: All right, the burden of proof probably in getting the injunction in Texas at this time would be preponderance of evidence.

QUESTION: No, I am not --

MR. ZWIENER: I would say --

QUESTION: As far as the burden of proof on the issue is whether the injunction has been broken.

MR. ZWIENER: All right, I think in that situation probably the test is a clear and convincing test.

QUESTION: Not beyond a reasonable doubt.

MR. ZWIENER: Not beyond a reasonable doubt.

QUESTION: So in that respect, if no other, it differs from a criminal trial; right?

MR. ZWIENER: That is true, sir.

QUESTION: You mean you are trying criminal intent?

MR. ZWIENER: Well, I mean if you issue this complaint -- say there has been an outstanding injunction and there is a claim it has been violated, then you issue a complaint. And is this for a civil or a criminal contempt?

QUESTION: Well, I would say it is civil. But I cannot tell precisely.

MR. ZWIENER: If it is civil of course there may not be --

QUESTION: Well, I postulate -- the reason I said what I did is because the burden of proof has changed in Texas in the commitment of the mentally persons and -- well, I don't think that is involved here, but

MR. ZWIENER: Well, we can send a person to jail so that I think --

QUESTION: You might send him to jail until he --

MR. ZWIENER: Purges himself.

QUESTION: But you don't suggest that Texas is convicting people of criminal contempt for a certain term in jail on proof less than beyond reasonable doubt?

QUESTION: He just did.

QUESTION: Well, he didn't; he said he didn't know whether it was civil or criminal.

MR. ZWIENER: I take that from the law of Texas.

My guess is a Texas court would hold in this kind of situation, since a jail term is involved, again looking to the cases where persons have been committed to mental institutions, that probably a Texas court in all fairness will use the clear and convincing test.

QUESTION: Would the defendant have a right if he wanted one to a jury trial?

MR. ZWIENER: I doubt it; I doubt it. I can tell you what the law of Texas is in this. I have had law clerks --

QUESTION: Yes.

MR. ZWIENER: -- the courts of Texas have never told me what criminal and civil contempt is, I don't know what the burden of proof is, and I have to confess it to the Court. If I could have,it would have been in a brief.

QUESTION: Yes, sir.

QUESTION: Mr. Zwiener, in any event, whatever the proceeding is, civil or ciminal, he would get a jail term?

MR. ZWIENER: He could be confined to jail until he purges himself.

QUESTION: How much of a jail sentence?

MR. ZWIENER: Until he purges himself. That is permissible.

There is also a statute that sets a fine.

QUESTION: If he has violated, how does he purge himself?

MR. ZWIENER: He purges himself by not showing this particular movie or taking that particular magazine off the shelf.

QUESTION: Well, that is not like civil contempt. I think --

QUESTION: you, in effect, hold the key to the jail-house door in your pocket.

MR. ZWIENER: Right.

QUESTION: Yes, but he already has by definition according to the State violated the injunction. How can he un-ring a bell; how can he purge himself?

MR. ZWIENER: He hasn't violated an injunction until it is proved that he has shown an obscene movie, that is true, and that --

QUESTION: So that the trial, the issue on whether he has committed contempt would be determined by deciding whether he has shown an obscene movie.

MR. ZWIENER: That is true.

QUESTION: But in the meaning of Miller.

MR. ZWIENER: And you are --

QUESTION: And now if it is decided that he has, what is he punished to?

MR. ZWIENER: I would say that he quit showing the movie. I would analyze this in terms of what happens in child cases where the husband does not pay for child care. He has

already violated the statute. And yet when he pays, he gets out of jail. I am not sure there is any difference. That is the best I could do.

QUESTION: Well, what if someone is convicted for second degree murder in Texas and let's assume the statute permits the imposition by the jury of 20 years. Now, does the standard of proof for conviction of a clearly defined crime in Texas require that it be beyond a reasonable doubt?

MR. ZWIENER: Yes, sir.

QUESTION: General Zwiener, I know there are a lot of unanswered questions, how this statute will be construed. But am I correct in assuming this much: that in determining whether there is a nuisance under this statute, the sole inquiry of the Court would be as to the content of the motion pictures or books alleged to be obscene and there would be no consideration of the character of the neighborhood or the location of the theater, or anything like that?

MR. ZWIENER: That is correct, sir. That is correct.

What we are saying, that 4667 imposes no more burden, threat to free speech than does a penal statute. I think that is the bottom line.

I do invite the Court to the brief filed by amicus Charles Keating in which he argues that under general common-wealth principles 4666 is -- would be constitutional and he

cites Art Theaters Guild v. Ewing -- I believe it is an Ohio case -- cited in his brief as authority for this Court's approval of a closure statute. And as I would have closed, Mr. Justice Rehnquist, with Moore v. Simms but --

QUESTION: I would say I have sent for Moore v. Simms, and I was too critical of your analysis of it. There was a good deal of reference in it to the Pullman abstention doctrine. And I think I owe my apology to you for that.

MR. ZWIENER: Well, thank you, Your Honor.

But I do think that if Moore v. Simms does not extend Pullman to this type of situation, that this Court should give consideration where there is a State statute that is capable of constitutional construction by the State courts, that an extention of Pullman would seem dictated, or at least desirable. It would save the time of the Federal courts, it would give the State courts a chance to construe their own statutes, and the Texas courts have accepted the invitation of this Court in Miller to construe the statutes in conformity with this Court's opinion.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Graves.

ORAL ARGUMENT OF FRIERSON M. GRAVES, JR., ESQ.,

ON BEHALF OF THE APPELLEE

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

Mr. Zwiener mentions prior restraint. I would like to state to the Court some reasons why I believe this statute shows that it is an impermissible prior restraint.

QUESTION: Well, why is this a prior restraint? Is it your contention that the issuance of the injunction or the passage of the statute is a prior restraint?

MR. GRAVES: The issuance of the injunction against unnamed future films which subject the motion picture operator or otherwise to the various types of either somebody looking over his shoulders, the judge acting as the censor, the unlimited discretion of the trial judge in issuing that injunction, the broad language that is permissible in the injunction, it is doing for the future what Near v. Minnesota applied to a newspaper say shouldn't be done. And now they are attempting to expand that to say because there has been shown an obscene motion picture and we come in and get a single judge on a preponderance of the proof to issue an injunction and the judge therefore sets out the broad language of what he might consider to be obscene in the future, that it becomes a prior restraint because we have that facing --

QUESTION: What you are saying is the nuisance route --

MR. GRAVES: Yes, sir.

QUESTION: -- that was applied to many different kinds of establishments, including illegal liquor establish-

ments cannot be used in the First Amendment field.

MR. GRAVES: Yes, sir, and the First Amendment field, because --

QUESTION: Even though from time to time opinions of various courts have suggested that is the way -- that was the best way to deal with obscenity.

MR. GRAVES: Your Honor, the -- the only limited exception that I believe this Court has really looked at is the model statute in Kingsley Books v. Brown in which there was a movie brought before -- or a book brought before the Court. That particular book was enjoined and then if there was any violation in the future, then the person could be punished. And even in that decision the Court said, well, it is possible that even while we are waiting to try the obscenity finally on the merits, New York might not even punish for contempt if they continued the sale of the book during that period of time.

But to extend this doctrine -- and I know the Court has said maybe the best possible notice of whether or not a motion picture is obscene would be to have a civil injunction against it and then if there was a further exhibition of the motion picture you would know --

QUESTION: That would be a particular motion picture.

MR. GRAVES: That is the particular motion picture,

just like --

QUESTION: Not just motion pictures like the bad one --

MR. GRAVES: That is right

QUESTION: -- that had previously been identified.

MR. GRAVIES: That is right, sir, because in this case you have the judge says in his unlimited discretion. And in the case that the State cites of Richards v. State, the court there says it was unwilling to assume that the State must bring suit each time the defendants change the obscene menu in their passion pits. And that they didn't want to tie the hands of the chancellor.

Well, in this particular case the broad language, the case that the State of Texas cites as the good example of what the specific conduct should be, they mentioned they shouldn't have. What is defined in the code is sexual intercourse, deviate sexual intercourse or bestiality, and then the injunction says or you are permanently enjoined from showing any motion pictures or magazines or selling those or other materials which contain representations or descriptions of ultimate sex acts, normal or perverted,actual or simulated. So you have an injunction that the court says that you have a description in the book of a simulated sex act or if you have a description or depiction in a movie, then if it violates the term of the obscenity law you can be punished for contempt

of court.

QUESTION: But why isn't the obscenity law then of prior restraint rather than the injunction?

MR. GRAVES: Well, the obscenity law faces everyone who may or may not want to distribute. But when you have an injunction --

QUESTION: The criminal laws.

MR. GRAVES: The criminal law. But when you have an injunction that says not only will we determine whether you have violated the injunction but we will also subject you to six months in jail, which is the penalty in Texas for criminal contempt, that is it. But you don't have what you are entitled to in a criminal trial. It hasn't gone through the hands of a criminal complaint, a grand jury proceeding. All your protection that you have, and what you have in this statute which is beyond the criminal, is that this statute allows a private individual without injury to bring the suit for injunction.

QUESTION: Well, you say the nuisance route that has been occasionally referred to in opinions of this Court is then actually a worse one from the point of view of the defendant than an outright criminal prosecution under an obscenity statute, since the defendant in the nuisance route doesn't have the safeguards of the criminal procedure.

MR. GRAVES: No, sir, I am not saying that for a

civil injunction against the showing of a particular movie in existence which is brought before the court and there is no dissent or hearing on that movie and if there is an injunction on it, then only in the future if you disobey that injunction by showing that particular movie. But when you have here an injunction that says just as the criminal statute, if you happen to show any particular material that has a simulated setback in it, you can be brought back before the court for a contempt action, then that is going beyond what is the limited exception that you have looked at for civil injunctions in Kingsley Books v. Brown or the other model.

QUESTION: And type filmed involved.

MR. GRAVES: Yes, sir.

QUESTION: A specific, identified name.

MR. GRAVES: That is right. This is against unidentified, unnamed films that -- or magazines or books that are not even in existence.

QUESTION: Isn't it true thought before you can be held in contempt that a move that it is claimed violates the injunction would have to be found to be obscene?

MR. GRAVES: Not necessarily so, sir. And I say this because --

QUESTION: Let's assume -- your colleague disagrees with you on that -- let's assume that you are wrong on that and that before you could be held in contempt you have to have the

same kind of finding you would have to have under the statute, the same kind of determination of obscenity that you would have to have under the statute. Would you still --

MR. GRAVES: You would have if they were trying the movie but you could also be convicted of contempt if you failed to produce the movie -- if the court said, I issue a show cause order, you are arrested, under the procedures admissible in Texas you are arrested, and not just a citation for show cause, you are put in jail, you are brought into court and you fail to produce the motion picture. And the court says, bring in the motion picture in the court because I want to see it and rule whether or not you are in contempt. And you say, I am not going to bring the motion picture. You have violated the injunction. You may have been served with the injunction and you don't take the film off of the screen right then and there. You might be --

QUESTION: Let us assume he does have regular film and there is no issue like that in the contempt proceeding. Before he can be held in contempt, there will have to be a determination of obscenity of the film that he has shown.

MR. GRAVES: You would have to be, but you are not entitled to all the procedures you would be if you were a criminal trial. Yes, sir.

QUESTION: If there is a criminal trial.

MR. GRAVES: That is right.

QUESTION: That is right.

MR. GRAVES: But the real problem with that is you ignore that an injunction action could be brought before a single judge, that the district attorney, the city attorney, the county attorney picks out, that judge says, and he writes a very broad injunction and so a 7-11 store or a department store, the people that the Book Sellers Association here, they say, we are not going to take that book --

QUESTION: Well, Mr. Graves --

MR. GRAVES: -- and display it any more.

QUESTION: -- as you read that injunction, and I gather what you were reading to us was from an injunction --

MR. GRAVES: That is from the injunction in the State v. Stambaugh.

QUESTION: As you read that, that appears as if a violation of a future exhibition of a film could be based upon and a finding of guilt could be based upon, as you read it to us, an isolated excerpt from the film without judging the obscenity of the film as a whole, which is the test of obscenity.

MR. GRAVES: Your Honor, in the Richards case and in the Locke case --

QUESTION: Am I right?

MR. GRAVES: You are right, sir, because the State of Texas, while they did, the injunction says though, taken as a whole, but the Locke v. State and the Richards case says

to state that sexual intercourse and offend, that is obviously obscene.

QUESTION: Even though it is just an isolated incident.

MR. GRAVES: Even though it is an isolated incident. And, Your Honor, that is the problem,that it can go beyond to do this, the fact of what is done. There is an appeal now in the Fifth Circuit of a civil injunction against an issue of Penthouse Magazine. You will find that when a private citizen can bring an injunction suit to get to say that this particular magazine is obscene, find a judge that can do it, there is a broad general injunction for every unnamed future publication. And petition after petition can be brought and it will get the courts into what this Court didn't want to be, as a nation-wide censor, in that the judge becomes just like the administrative censor.

In fact, in the Locke v. State case, where there was another problem, which was an agreed order of procedure and the agreed order of procedure was that if a motel operator had a film that he wanted to show and thought it was a borderline, he would take it down to the court and ask for a ruling, or risk contempt. And when you have got that, then the Judge could be faced with magazines, motion picture films, books, anything like that. And we are not talking about just explicit sexual movies, we are -- you might even be re-litigating Lady

Chatterly's Lover, because that has descriptions of it, as opposed to that, while that might have serious value, you would say, well, something that goes along with The Happy Hooker, then that has the description of it and some book-store says, I don't want to do that because I may be facing an original injunction. And then I have the duty to look into each and every book that I want.

Now, we always know that there are some people that are going to take the chance that they are not going to be caught, they are not going to be prosecuted, they are not otherwise do it, and they are going to take that chance under the criminal law. And when we have always thought that in the First Amendment that it is either that -- in crimes that you look at both either punishment or education to determine whether or not you would do this. And that the First Amendment you are entitled to a broad protection on prior restraint. And that was the purpose of it, to stop it. Let the man have the subsequent punishment.

Now, this contempt action is not just subsequent punishment. Not only don't you have all of the things of criminal procedures, but you can say a petition is brought that a man showed the motion picture a month ago and now he is charged with contempt. It is ridiculous to say that every action will always be civil contempt, and I have the keys to the jail because I stopped showing the motion picture. It has

been shown a month ago.

QUESTION: Well, what if following the Heller approach that this Court decided along with the Miller case, a law enforcement officer goes, views a film, files an affidavit, presents it to a magistrate and the magistrate issues a search warrant for the seizure of the -- of one copy of the film. The law enforcement officer goes on and tries to seize one copy of the film and the owner of the film says: I am simply not going to turn it over to you, I am protected by the First Amendment.

Do you think he can't be tried for contempt?

MR. GRAVES: I think he would be in violation of the Court of failing to: "The first thing I think the officer would just go in and physically take the film because he had been authorized to."

QUESTION: Well, supposing he stood in the door and said, you are not coming in here.

MR. GRAVES: Well, I think he would be arrested and physically taken away and they would go take the film on the basis of the search warrant.

But in this case, if you approach it under the civil injunction statute, that I have an injunction against me and you if you go out to show me a show cause order, under Heller, I continue even with the criminal charge to show the motion picture because I believe ghe jury will find me not

guilty. Under this case, if I continue to show the motion picture the Judge can say, I told you, you are under an injunction and you are both civil and criminal because it is past actions of showing it and in the future you can't show this unnamed picture now identified any more. So you have gone even beyond Heller by saying not only you seize the film but you have that particular injunction. I just believe that when we are talking about the First Amendment and the idea that the First Amendment's chief purpose is to not have a prior restraint and that you would try to say that you wouldn't, that the least tolerated and the most serious type of provision under the First Amendment is to try to identify this in the past. The contempt, the injunction, becomes just the same thing as a criminal statute. It is sitting there but you have that official sanction of someone looking over your particular shoulder every time, with that particular judge being a censor, for something that is so loose in identification, because we still have in Smith v. U.S., we still said it was a real fact question as to whether or not the material appealed to the purient interest or was faintly offensive according to contemporary standards of the community.

QUESTION: You have something looking over your shoulder under a perfectly valid statute, under Paris Adult Theater in Miller, depending upon whether a jury were to define whether or not it met the test laid down by that statute, don't

you?

MR. GRAVES: Yes, sir, but you have the normal checks and balance of a government as to whether or not there will be a criminal indictment or a possible grand jury hearing on it, because there are other criminal procedures to you, as opposed to the fact that just like in McKinney v. Alabama some people won't want to challenge the fact when they have an injunction, whereas if they are distributing a magazine or a book or a motion picture which has some isolated incident of sex act in it, are they going to say that this freezes, it doesn't just chill, it freezes the provisions and becomes what I believe is an impermissible prior restraint in that action, sir.

The contempt action, this also is really self-censorship, because the person must look at each and everything when he is under an injunction. In a criminal prosecution if a bookstore operator receives a book, a written book, and he doesn't read it completely and he is not in the adult business where he screens these -- he is in a zoned area like American Mini-Theater v. Young, but he is having it there, he has had an injunction issued against him. Does he review each and every book and then make that determination himself as to what must be done when he is not, ihe is on the borderline.

QUESTION: What about the proprietor of an adult film theater which shows sexually explicit film?

MR. GRAVES: This particular case, Your Honor, involved the original case, Universal Theater Amusements v. Vance-involved Deep Throat. It was tried twice in Houston, Texas, there mis-trials both times. When we were having the hearing in this case the prosecution dismissed the indictment against Deep Throat, and that case was settled and leaving these other pending 20 cases.

So we --

QUESTION: So we really don't know that as to a kind of any particular case, except to say that when you have a criminal obscenity statute the proprietor in an adult film theater does have to use some judgment in interpteting that law, at least consult his lawyer.

MR. GRAVES: But he also has the very uneven application of the law, become some juries determine that it is not obscene and some juries decide that particular films with explicit sex acts are obscene. And that has to be that particular person's judgment as to whether he goes over the borderline with a determinate as opposed to the time when you have an injunction here that goes back before a single judge that says, in my mind, any act, any motion picture which shows a sex act, actual, or simulated, I also believe appeals to the prurient interests and you are convicted of contempt, or you are guilty of civil contempt for this unknown motion picture that you have now presented.

And it is the main reason, it is the unnamed future publication in which there is that restraint upon the individual.

QUESTION: Have there been any contempt proceedings for violations of injunctions of this kind?

MR. GRAVES: Yes,sir, in the State of Tennessee there was.

QUESTION: I mean in Texas.

MR. GRAVES: In Texas, I don't believe in Texas -- of course this statute was passed in '74 and there were some proceedings pending at that time, so that this became involved in the declaratory relief at that time in there.

QUESTION: This lawsuit has held everything up?

MR. GRAVES: Well, there have been other injunctions, such as in Dallas in Austin, Texas; but I don't know if there have been any contempt proceedings involved in this. But I --

QUESTION: What do you think is the form of the contempt proceeding contemplated by this statute, civil or criminal?

MR. GRAVES: I think it is both, sir. I think it is both, because if you -- in the first place if you have the magazine or if you have the motion picture at the time, then the court is going to say, stop showing it or you are in civil contempt, stay in jail until you do stop showing it.

QUESTION: The fact of what you have said is that the court doesn't say just stop showing this picture, but stop

showing any picture like this.

MR. GRAVES: That is the general injunction, but if you are cited for contempt because you show a picture like it in the future, and you still had the picture, it would be civil contempt and you are going to stay in jail until you stop showing it. Or --

QUESTION: But only after a determination that you have violated the injunction.

MR. GRAVES: Only after a determination that you have violated the injunction except, Your Honor, you are not going to come -- you are not going to be filed with a show cause order and immediately come into court. You are going to have a few days to prepare. And if you continue to show at that time, then you then --

QUESTION: What if the order --

MR. GRAVES: The temporary injunction --

QUESTION: Let us assume that in some other context as a perfectly valid injunction and the injunction that you would concede was validly issued and substantively acceptable and then there is an order to show cause why the fellow subject to the injunction shouldn't be held in criminal contempt. Is he given notice given notice and there is going to be a hearing --

MR. GRAVES: Is there a Texas rule about what the standard of proof is before you can find somebody guilty of criminal contempt and put him in jail for a term certain?

MR. GRAVES: The case as I read in Texas, Your Honor, and the ones I cited in our brief, I would think it would have to be beyond a reasonable doubt on the criminal part, but in the civil part --

QUESTION: Yes, sure -- of course --

MR. GRAVES: Like any other civil contempt, yes, sir.

Now, they do have divorce hearings wherein they say we are giving you criminal contempt and put you in jail, but I would think that if you had somebody obnoxiou odors or running a house of prostitution or liquor, then --

QUESTION: Well, criminal intent, is there or is there not in Texas, prattice?

MR. GRAVES: No, sir, the punishment is six months. And so you do not have to have a jury trial.

QUESTION: That is under this statute?

MR. GRAVES: That is right, sir.

QUESTION: But if there were --

MR. GRAVES: Yes, sir.

QUESTION: -- beyond that, then there would be a jury trial?

MR. GRAVES: Yes, sir.

QUESTION: And what is it: 12-man or 6-man; what is it?

MR. GRAVES: I am not -- I don't generally practice

in Texas, so I can't answer.

QUESTION: You agree, Mr. Graves, before you sit down, that Article 4666 is not involved here?

MR. GRAVES: I agree that the court down there said that it wasn't involved but, if it was, it was unconstitutional. And since it was conceded in the brief, I did not raise that issue. I know it was brought up by the amicus but I think it so clearly unconstitutional --

QUESTION: But your view is not it is now an issue here,

MR. GRAVES: It is not an issue in this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further?

REBUTTAL ARGUMENT OF LONNY F. ZWIENER, ESQ.,

ON BEHALF OF APPELLANTS

MR. ZWIENER: Just a minute, Your Honor, I would still repeat that this Texas injunction statute has no more chilling effect on First Amendment rights than does the Texas or any other criminal or any other obscenity statute.

QUESTION: Well, what does it -- why, then, do you need it, if it is the equivalent of the Texas criminal law?

MR. ZWIENER: I am not sure that we do, to be frank, but --

QUESTION: What does it add to the criminal law. It changes the burden of proof, it deprives a person of a jury trial.

MR. ZWIENER: I don't think it adds anything. As a matter of fact, I think it is a cumbersome process and I don't know that the prosecutor after more than two rounds will ever use it again. However, I would say that the cause that Mr. Graves has imagined with respect to some situations that could happen in these kinds of injunction proceedings, and what the consequences might be against Moore v. Simms, he has got a far-ranging, broad-based attack. Most of these problems would have probably been settled by the Texas courts if they had had the opportunity four years ago to worry about some of the things that we are worrying here. And I do suggest that Moore v. Simms might be a solution, if not I suggest that this statute should be held to be constitutional.

Q: The Texas statute, even disregarding 4666, with a finding of habitual abuse and the declaration of public nuisance under 4667, in your view would the trial court have the authority as a matter of discretion to say the proper remedy here is to close the theater?

MR. ZWIENER: I don't think so, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

Whereupon, at 11:37 o'clock a.m., the case in the above-entitled matter was submitted.