

Supreme Court of the United States

OCTOBER TERM, 1970

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In the Matter of:

Docket No. 41

----- X
FRANK DYSON, CHIEF OF POLICE
CITY OF DALLAS, et al.,

Appellants

vs.

BRENT STEIN

Appellee
----- X

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Place Washington, D. C.

Date November 16, 1970

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C O N T E N T S

ARGUMENT OF

PAGE

Lonny F. Zweiner, Esq.,
on behalf of Appellants

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David R. Richards, Esq.,
on behalf of Appellees

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 NOVEMBER TERM, 1970

3 -----
4 FRANK DYSON, CHIEF OF POLICE:
5 CITY OF DALLAS, ET. AL.,

6 Appellants

7 vs.

No. 41

8
9 BRENT STEIN

10 Appellee
11 -----

Washington, D.C.

12 Monday, November 16, 1970.

13 The above entitled matter came on for argument at 2:10
14 o'clock p.m.

15 BEFORE:

16 WARREN E. BURGER, Chief Justice
17 HUGO L. BLACK, Associate Justice
18 WILLIAM O. DOUGLAS, Associate Justice
19 JOHN M. HARLAN, Associate Justice
20 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

21 APPEARANCES:

22 LONNY F. ZWIENER
23 Assistant Attorney General of Texas
24 Austin, Texas
25 Counsel for Appellants

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APPEARANCES (Continued)

DAVID R. RICHARDS
Austin, Texas
Counsel for Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments
in No. 41, Dyson against Stein.

Mr. Zwiener?

ORAL REARGUMENT BY LONNY F. ZWIENER, ESQ.

ON BEHALF OF APPELLANTS

MR. ZWIENER: Mr. Chief Justice, may it please the Court, this case is up for reargument only the second time. We argued this matter last Spring.

The facts, as I told the Court then--and Mr. Chief Justice, I can confirm I think at least as far as Texas is concerned there has been a tremendous increase in three-judge Federal Courts. I think I handled all of them for the Attorney-General's office a couple of years ago and had 2 or 3 pending at the time, and now we have something like 30 and no longer can I do all the three-judge work.

So in all of the three-judge cases that I had, I think I would trade the facts in any one of the other cases for the facts in this one, which is before this Court.

This began in Dallas, Texas. It involved the seizure and the filing of a complaint involving an underground newspaper, The Dallas Notes. In this situation the complaint involved a violation of the Texas obscenity laws was filed and the police under search warrants, went out and seized the Dallas Notes and not only got printed newspapers, they picked

1 up any paper that was around that could have been used. They
2 got the furniture or whatever they considered might have been
3 the tools or the implements of the crime. As a saw, I would
4 trade these facts for almost any others, I think. I don't
5 particularly like the facts.

6 In any event, charges were filed--misdemeanor charges
7 were filed in the Dallas Courts. The defendants in those State
8 criminal cases then went into the Federal District Court, asked
9 that an injunction be issued against the pending prosecutions,
10 against future prosecutions, asked that the Texas obscenity
11 law be declared unconstitutional.

12 Now this was done prior to anything really happening
13 in the State Courts, I would say. But I don't really consider
14 that that is significant, at least in this particular situation.

15 Now the three-judge court was convened and that
16 three-judge court held the Texas obscenity statute to be un-
17 constitutional for two reasons. One, the statute in one of
18 its sections, purportedly punished private possession of
19 obscene material, violating an injunction laid down by this
20 Court in Stanley versus Georgia. The Court refused to separate
21 or sever that part of the statute out and said they were not
22 going to make that separation--that whole prohibition section
23 is unconstitutional.

24 They also found that the definition of obscenity
25 in this Texas statute was lacking. This statute was passed

1 shortly after this Court's decision in Roth and followed the
2 definition laid down by the Court in Roth. The three-judge
3 court below here found that this court had in memoirs in
4 Jacobellis, enlarged on or amplified or explained the Roth
5 decision and if the Texas statute was fatally defective be-
6 cause it failed to have the redeeming social value feature in it.
7 So, for those two reasons, the court below felt that the
8 statute was unconstitutional.

9 They did not enjoin the impending prosecution, but
10 they enjoined all future prosecutions effectively stopping any
11 prosecutions at least at that time in Dallas County.

12 I might say to the Court that the Dallas statute has
13 been amended since the--this decision, and we now have the
14 memoirs type definition, we have read out of the statute a
15 prohibition against private possession, and as best we could
16 tried to comport with the decisions of this Court.

17 But in any event we do--this was the old statute.
18 We did argue it was capable of constitutional interpretation,
19 that we didn't have to return indictments for mere private
20 possession, and that if no redeeming social value was a part
21 of the test of obscenity, that this could have been taken
22 care of by a court's charge to the jury and I think this Court
23 in a number of cases has permitted state amendments to bring a
24 state statute into constitutional interpretation. Several
25 statutes in the obscenity field have permitted that as a

1 matter of fact.

2 But, here we argued first off that the statute was
3 constitutional and we certainly say that no injunction should
4 have been issued against future prosecutions. And we say that
5 the injunctions should not have been issued because of this
6 option of abstention. That would mean that the doctrine of
7 equity would not interfere in a criminal case. And we also
8 say that 2283, the anti-injunction statutes, may very well
9 apply to future prosecutions, outstanding as well as to
10 pending prosecutions.

11 Q May I ask what has happened to the pending
12 prosecutions in the Texas State courts?

13 A They are still pending so far as I know. They--
14 I called the City Attorney's office before coming up here, and
15 he says he thought they were pending. Is that correct?

16 One is pending, Mr. Richards.

17 Q One, I gathered from the Briefs, has been dis-
18 missed.

19 A Yes, sir.

20 Q One by the time the briefs were written when
21 I left. When I left last night one was still pending and I
22 wondered what happened to it.

23 A Yes, sir, it is still--

24 Q Fine.

25 A I would hate to go this far and be caught by

1 meekness. But it--of course, I don't think that even if
2 that prosecution were dismissed it would make it loose; as long
3 as we have possible prosecutions under the old statute within
4 its prior limitations, I think that the case would still be
5 timely enough. But--

6 Q This 2283, you have suggested, is that normal
7 for a prosecution imbalance to take that long to be tried?

8 A Your Honor, insofar as I know in the field of
9 obscenity, there have been only one of two convictions in
10 Texas since the massive attack has been levelled on obscenity.
11 In other words here in the last couple of years. The prosecu-
12 tors are not that sure what to do. They don't know really,
13 when they are getting ready to try a case, what kind of proof
14 they will need. Do they just submit the material to the jury
15 and let the jury and the instructions decide if the material
16 is offensive and obscene, as the Federal Government, I under-
17 stand, is doing in some of their cases, or do they need expert
18 witnesses to testify as to the
19 interest, no anti-social value repugnant to the community,
20 if those matters are concerned. So this--

21 Q When do you think you are going to get the
22 answers to any of those questions in the case here?

23 A Your Honor, I--

24 Q What is causing the delay in filing that case
25 in Dallas, Texas?

1 A Well, again, I think that they don't know what
2 to do. They kind of hate to prosecute as long as the Federal
3 District Court has said the statute is unconstitutional.

4 Q But they are still making arrests?

5 A Well, now, they have made arrests recently in
6 Dallas under--

7 Q Wasn't one place in Texas a few days ago they
8 arrested everybody including the man selling popcorn?

9 A They made some arrests in Houston, Texas. A
10 number of arrests involving--

11 Q Everybody out of the theater including the man
12 selling popcorn.

13 A I don't know about the man selling popcorn,
14 Your Honor, but they did make a number of arrests. They were
15 booking theaters and in those cases they tried to comply with
16 what may be the law, we are not sure yet on evidentiary seizure
17 as opposed to mass seizure. They did not seize the movies.
18 I don't know about the popcorn man. I think that is--

19 Q It has been in all--

20 A --bad public relations--

21 Q --all the people were in all the papers.

22 A --as far as the constitution is concerned.

23 I don't believe that is correct, sir. There may
24 have been some talk in the newspapers about that. I think that
25 at one or two of the theaters they did hold them up. I was

1 down in Houston at a three-judge court hearing in that par-
2 ticular situation. We did not arrest the patrons. But there
3 is a Houston ordinance that says that if you remain on the
4 premises while lewd or obscene devices going on you are also
5 violating the law and may be picked up. I am not--if something
6 has to be found unconstitutional that seems to me a good
7 place to start. I think that is a bit problematical as far
8 as this ordinance, and I think also better relations for
9 the police, but I don't think the spectators were picked up.

10 Q With respect to this particular case we have
11 here before us, the Texas courts have had just about two years
12 now to try this case and this constitution in Dallas and to
13 give what construction they may want to to the state law, and
14 I wonder why that hasn't moved forward, it hasn't been enjoined.

15 A Well, I--

16 Q --And when you argue that a District Court
17 should abstain or should not intervene you argue on the basis
18 that that should be left up to the State courts, and the State
19 courts in this very case have had two years and they have done
20 nothing. I just wondered what the reason was.

21 A Well, I don't know the answer to that, although--
22 except as I was suggesting, this decision was on the books and
23 still is on the books as far as the old statute is concerned.
24 So, as I say, I am sure they hesitate to prosecute.

25 Now, I would say there is another factor, too--they

1 are worried now that they have gotten into the field of obscen-
2 ity, about the case. They are probably up against Dallas Notes.
3 So many things have gotten worse in this area since this arrest
4 was made almost two years ago, that they probably would be
5 perfectly frank, they don't like the looks of this case. They
6 have got Stag News to go after now, and this--the Dallas Notes
7 was very tame compared to what is being purveyed today.

8 Probably part of the answer. But in any event, I
9 do say and would like to add to what was said this morning
10 as to 2283 prohibiting pending prosecutions. I think this is
11 a possibility and I don't think this Court has ever completely
12 settled that. In Dombrowski, of course, they suggested there
13 was a difference between pending and future prosecutions.

14 But only for the purposes of that case, and I, like
15 several others before me,--and it becomes kind of hard to try
16 something that has not been said before in this cluster of
17 pages--I do think that it is just as harmful to state-Federal
18 relations to enjoin future prosecutions as it is pending pro-
19 secutions.

20 I think as far as declaratory judgment act is concerned
21 which I have heard all you, I made this suggestion to the
22 Court, I don't understand Zwickler versus Koota. The last
23 time I was here I asked the Court to decide this case, not on
24 the basis of the injunction and the impropriety of issuance
25 but I think on the basis of the obscenity statute. At that

1 time you told me I was asking for an advisory opinion, and I
2 had to kind of nod my head and smile sheepishly and concede
3 perhaps that was true, because if I won on the authority of
4 the injunction you might not have to decide obscenity. But
5 I suggest to this Court that any time a Federal Court considers
6 a State statute, the constitutionality of it, and does not hear
7 or issue an injunction but merely decides that the statute is
8 unconstitutional, it has only an advisory opinion.

9 It decides the statute is unconstitutional and does
10 not issue an injunction.

11 I say the only reason the Federal Court should be
12 deciding the constitutionality of a State statute is to deter-
13 mine whether or not an injunction should be issued. If they
14 say--

15 Q I am not clear--I am not quite clear, counsel,
16 just--your point is--you mean we should say "It is unconstitu-
17 tional and we mean it."

18 A Your Honors, if you do not issue--if the Federal
19 Court does not issue an injunction, the federal--the State
20 Court would be, some might say, would be free to go ahead and
21 prosecute. Now, you see, in this case they did not enjoin the
22 pending case, but they did say the statute was unconstitutional.
23 Of course, this is not an invalid (?) opinion because they
24 enjoined future prosecutions. But if they say the statute is
25 unconstitutional and no injunction, then the State would be

1 free to go ahead and prosecute. Now, perhaps a State defendant
2 would then go back into Federal Court and say, "Look, now look
3 what they are doing to me." And the thing that worries me,
4 the second step, the lady from New York pointed out, this might
5 make it a one-judge court case, harassment, but I know what
6 else it might make it the second time around, it might make
7 it a Dombrowski type of situation, because here the Court,
8 a distinguished court of three judges said the statute is un-
9 constitutional, no injunction. The State proceeds to prosecute,
10 so the argument can be made coming into Federal Court here, is
11 "Look what the State is doing, lawless behavior, harassment,
12 and yet you, the Federal Court, has said the statute is un-
13 constitutional, Dombrowski type of case."

14 By the way, as far as Dombrowski is concerned, I
15 differ a little as far as the gentlemen from New York, the
16 State's counsel from New York says, I think Dombrowski seems
17 to indicate that you must have a statute that is vague on its
18 face, and, the special lawless type circumstances before an
19 injunction should issue in the future prosecution type case.

20 Yet our case, I say they are not Dombrowski circum-
21 stances, and so no opinion, no--the pending prosecution should
22 not have been enjoined.

23 Q Should you not have said future--

24 A I beg your pardon, future prosecutions.

25 Q And don't you think there is some significance

1 to the fact that the pending prosecutions were not enjoined?

2 Isn't there a negative implication there that--

3 A I think--

4 Q --all the future prosecutions were enjoined?

5 A --I think that the Court felt that the anti-
6 injunction statute may have barred the information from enjoining
7 the pending prosecution.

8 It also suggests that the Court felt that they were
9 not perhaps Dombrowski circumstances except that I don't really
10 suggest that very clearly.

11 Now the circumstances here were bad, I think. I am
12 not real pleased with them. I would liked to have had some
13 other facts, but I would say that there are no Dombrowski
14 circumstances here because the statute is not vague and un-
15 clear on its face and too broad.

16 Q How is Purient Interest defined?

17 A Let me see, you mean in the old statute, let's
18 see now--Obscene is defined as whether to the average person
19 applying contemporary community standards, the dominant theme
20 of the material taken as a whole appeals to the purient inter-
21 ests."

22 Q I got that. I was wondering what the defini-
23 tion of "purient" is.

24 A There is none in the statute.

25 Q You think that is clear, then?

1 A Your Honor, I don't think that--

2 Q I have heard people say that they could tell
3 it when they saw it but they couldn't describe it.

4 A I believe that some of Your Honors mention that
5 in opinions. I think it is a problem. I think all obscenity
6 statutes are a problem. I think any statute that seems to
7 try to circumscribe speech is a problem, although we have
8 argued an issue in this case--I believe it was Justice Harlan
9 suggested in one of the cases that it is not really going to
10 hurt these United States if there are differences in the
11 enforcement of obscenity laws. If the people in Texas can't
12 read "The Tropic of Capricorn" it is really not going to make
13 much difference in the glory and the beauty of the Federal
14 system since you have 50 laboratories to apply these situa-
15 tions and I would suggest that really, that the State of Texas
16 or the State of Oklahoma or New York wants to pass a statute
17 that says you cannot use the word "Damn" in any written
18 material, I really don't find that particularly offensive
19 because there are enough other words to convey the meaning,
20 if you just want to take out one word like that.

21 Now I realize where are we going to draw the line?
22 Maybe "darn" would be the next word and we would give it the
23 next one. But nevertheless, we do make the suggestion that
24 this is a matter where the States should--

25 Q My question really went to your observation

1 that this statute was clear of ambiguity.

2 A I understand--I think that where we have words
3 we do have differences of opinion, but I do think that in
4 most statutes you have problems, perhaps more in this field.
5 I think you are correct, sir.

6 Q Well, when they amended the statute they under-
7 took to supply the deficiency which Justice Douglas was ad-
8 dressing--

9 A Sawyer?

10 Q Yes, sir.

11 A But again, you have problems when you define
12 something and the words that you use to define it are also
13 subject to problems there again. But we did put no redeeming
14 social values. That is now in our statute.

15 I do suggest that the injunction here was--

16 Q Did you forget to--

17 A I am sorry, sir.

18 Q Did you forget to read all of your material?

19 A What is that, sir?

20 Q On that statute, no redeeming social values.

21 A Oh, I don't think it is at all. In fact, I
22 could make a very good argument why stag movies should be
23 permitted. Because entertainment, sailing on the lake, going
24 to baseball games are purely entertainment, it doesn't really
25 profit anybody anything, but I guess you would say they have

1 social value. Those who enjoy stag movies I suppose are being
2 entertained, and in that respect they have redeeming social
3 value. I suppose taking it to the larger degrees, your views
4 and those of Justice Douglas might prevail as far as obscenity
5 is concerned.

6 But I do hope that your views as far as injunction,
7 Justice Black, do prevail in this case because I do suggest
8 injunction was improperly issued and that this case the judge-
9 ment below should be vacated.

10 MR. CHIEF JUSTICE BURGER: Mr. Richards?

11 MR. RICHARDS: Yes, Your Honor.

12 REARGUMENT BY DAVID R. RICHARDS, ESQ., ON

13 BEHALF OF THE APPELLEE

14 MR. RICHARDS: I have my supplemental brief on the
15 argument, Your Honor. It is a small, thin blue brief in which
16 I have taken to address myself to the issue of declaratory
17 judgment in a fashion slightly more--I hope slightly better
18 than we did the first round.

19 The opening fact that I would like to convey about
20 our case here is that this was not a case in which the State
21 sought to abort a State Court criminal prosecution. Quite
22 the contrary. We are prepared to try to litigate the pending
23 criminal cases in the State Court but were frightened about
24 future prosecutions which threaten the existence of this under-
25 ground paper. This was not a resort--this was not a race to

1 reform, but rather a resort to the federal courts to seek pro-
2 tection for substantial federal rights that were threatened
3 with extinction by the Dallas police. Trace, if I may, the
4 evolution of our pleadings and it is partly in response to
5 Mr. Zwiener's argument.

6 I know when our initial complaint was filed it did
7 seek injunction against the pending prosecutions. This was
8 stricken from our complaint and we restricted our complaint
9 --our First Amendment amended complaint--he sent me a prayer
10 for relief against police harassment. This appears at page 30
11 of the record.

12 And a declaration of the statute's unconstitutionality.

13 We were content to litigate the matter in a single
14 judge's court at that stage. The State then filed its response
15 on March 20, ten days later, and urged, at page 43 of the re-
16 cord, that this matter had to be resolved by a three-judge
17 court. That is, urged that, as I understand their pleading,
18 that even though we sought wholly declaratory relief, that
19 nevertheless required convening a three-judge court.

20 So as it appears in the record at page 75, a three-
21 judge court was convened in order to determine whether or not
22 three-judge questions were presented. And at that stage, in
23 order to take the jurisdictional issue out of the case, we
24 reinstituted a demand for injunctive relief not against pending
25 prosecutions but only against future prosecutions. Thereby,

1 hoping to obviate some of the difficulties in the case. But
2 on hindsight I think we would have been better advised, I
3 suspect, to leave our pleadings just for declaratory relief.

4 Q Where did you file your complaint for injunc-
5 tion?

6 A The complaint is filed in January, Your Honor,
7 of 1969.

8 Q Where?

9 A I am sorry, the Northern District of Texas,
10 Dallas Division.

11 Q What court?

12 A United States District Court, the Northern
13 District of Texas, and before Sarah T. Hughes at the time it
14 was filed.

15 Q Did you file any in the State court?

16 A Did not file any proceeding in the State court.
17 We, in the State court, did seek to resist Federal prosecutions.
18 We filed motions to suppress the evidence and motions to dis-
19 miss.

20 Q What has been done with their views?

21 A Well, in this court--the lower court opinion
22 in this case came in June of 1969. In October of 1969, four
23 months later, a motion--one of our motions to dismiss--was
24 granted by the trial court. As to one of the criminal pro-
25 secutions.

1 Q In the State court?

2 A By a State court trial judge, yes, Your Honor.

3 The second criminal prosecution remains pending on
4 our motion to dismiss, and I surmise along with counsel that
5 the State may not take it to convict my client, but they
6 haven't seen fit to dismiss the prosecution or proceed with it.
7 So it now has been pending for some two years, in the State
8 Court for Criminal Prosecution.

9 Q In the meantime, you long ago got all the
10 material back that was seized, didn't you?

11 A Yes. In that connection when we filed our
12 suit in the Federal Court, one of our principal concerns, of
13 course, was to seek to return the material the police had con-
14 fiscated. They had in two raids on a period of two weeks'
15 time, confiscated six typewriters, two desks, cameras, personal
16 possessions, clothes, anything--the kind of sweep that even
17 by the admission of the police officer on deposition was that
18 they said they had cleaned house again.

19 The return from the police search--the second search--
20 appears at pages 16 and 17 in the record, in which they list
21 the items confiscated. In this instance they got three cameras,
22 a desk, five cardboard boxes containing personal records. This
23 was the police characterization of what they took, not what we
24 characterize it. And two black, Bell System telephones. There
25 was never an adequate explanation of why they saw to seize the

1 telephones. Presumably they likened the telephones inasmuch as
2 they were an adjunct to the publication of newspapers as simply
3 part of the contraband they were taking when they made their
4 raid.

5 The raid, by the way,--the two raids--were made upon
6 a two-story house which served as a residence of the Plaintiff
7 Stein. He lived upstairs and part of the lower floor they
8 put out their underground newspaper. On the first--they not
9 only arrested and charged the Plaintiff Stein, but they arrested
10 and charged on both occasions everyone they found on the pre-
11 mises.

12 During the first raid they arrested two people, a
13 husband wife named Delaney, Mr. and Mrs. Delaney. Both raids
14 were conducted at night--ten o'clock or so at night--and during
15 the first raid they came on and they found Mr.--Mr. and Mrs.
16 Delaney had retired on the bed, in a part of the house which
17 they occupied as their own residence.

18 When I asked the police officer why they were arrested,
19 the Delaneys, his response was: "They were arrested because
20 they were there, and the obscene material was found there, ob-
21 viously they lived there."

22 Q Now all of these things that you say are inter-
23 esting facts,--and I may say outrageous facts--but are not in
24 this lawsuit; they were not considered by these three judges--

25 A Those are whole--

1 Q --All your allegations as to harassment were
2 reserved for determination by a single-judge court, as I under-
3 stand Judge Hughes' opinion. Am I mistaken?

4 A Well, I was not--

5 Q She, she--she, in her opinion, says that what
6 is declaratory is the constitutionality of the statute. And
7 at the end, in her order, she has found that Section 1 and part of
8 Section 3 of the statute are unconstitutional, and the defen-
9 dants are permanently enjoined from any future prosecutions.

10 And all of the Evi--anything else having to do with
11 the harassment and this would include these searches and so on,
12 I reserve for the determination by a single judge. And assumed,
13 as I prepared for this case, that the argument that those mat-
14 ters were not really before us at all in this case.

15 A And I--

16 Q Now, the second--

17 A --Well, I would certainly hope that I can bring
18 before you our motion, the case moved off on summary judgement.
19 Our motion for summary judgement, which falls on page 57 of
20 the record, states that Plaintiff in making this motion for
21 summary judgement relies upon the depositions that Defendant
22 Police Officers Snyder, Montique(?) and Rogers(?), and it was
23 from those depositions from which I just read.

24 Now, I haven't, and we briefed and argued in the
25 --before the three-judge panel, and I did quite extensively quote

1 from the depositions in my Brief to the three-judge panel.

2 Q Hadn't the three judges quite decided not to
3 pass on that part of your case, as a three-judge court, and
4 instead to direct that for consideration by a single-judge
5 court and as far as it appears in this record, the single
6 judge is never yet active on your claim of harassment.

7 A Well, if I may say, Your Honor, we were invoking
8 the equity panels of our court, below, and I think necessarily
9 saying to the Court that the facts that have gone before--which
10 are the facts that I have recited here--suggest quite strongly
11 the threat of future prosecutions and future harassment over
12 this statute, and it was in this fact context we would say
13 that the Court looked to the future with their preparatory
14 judgement, saying, having reviewed what has gone before, there
15 is a reasonable--very reasonable, in my mind--apprehension on
16 the part of this Plaintiff that he will be subjected to future
17 prosecutions if he tri--and searches and seizures--if he con-
18 tinues to publish his newspaper. And in light of what the
19 Dallas police have done in the past, there is a fair reason
20 to think that they have not abandoned their efforts with re-
21 spect to the Plaintiff and his newspaper.

22 So the--

23 Q Sir--harassment by the police is not the same
24 thing as prosecution by the prosecutors.

25 A It is not the same thing, you are quite right.

1 Q Insofar as your lawsuit, a complaint of har-
2 assment by law-enforcement officers, it was reserved for deter-
3 mination by a single judge District Court. And the injunction
4 of future prosecution by the prosecutor, even in all good faith,
5 by such prosecutor, was---that was based upon the unconstitu-
6 tionality of the statute. Am I wrong about that?

7 A Ah,--

8 Q And--and the probability that there might be
9 future prosecutions, I would certainly review that.

10 A Well, if I might say, I know it is--

11 Q You might also--

12 A --it goes behind the court's opinion below some-
13 what, but I know that Judge Hughes who sat on the State District
14 Bench in Dallas for a number of years, served in the legislature
15 from Dallas County before coming on the Federal Bench--was
16 deeply troubled by what to do. That is, was it more disruptive
17 for her to issue an injunction that sought to compare or to
18 prohibit police conduct, sit in judgement on the day-to-day
19 activities of the police. Was that more disruptive or was it
20 more to the point to declare that statute, which was on its
21 face overbroad, unconstitutional and in that fashion cure the
22 underlying evil, because it was this statute, the obscenity
23 statute, that was, we say facially overbroad, by which the
24 Dallas police were allowed in victimizing and vandalizing
25 the Plaintiff's residence.

1 I have gone behind the opinion, the three-judge
2 court opinion, but I think that why she was troubled by how
3 I deal with this problem which does present Federal questions
4 an intrusion upon Federal rights.

5 Q What do you say she reserved?

6 A In the opinion, the court's opinion, the
7 summary judgement addressed itself solely to the constitutional-
8 ity of the statute and remanded to the single judge my prayer
9 for injunction, my injunctive prayer, set instructions to the
10 Dallas police that they should not seize material. It said--
11 the typical kinds of relief that one would seek, I think, in a
12 case of civil harassment even under a lawful statute. So I
13 think what they did--well, I am sure what they did--they re-
14 manded that matter for further hearings, disposed, however, of
15 the constitutional question on summary judgment of which the
16 facts I have recited to you were undisputed, that is,--

17 Q I suppose that if the statute--you start off
18 the subject that the statute is unconstitutional--the case is
19 no different than what it would be if the New York Times was
20 being taken over by investigators and the police in pressmen's
21 clothes and what-not--it would be a form of censorship, I sup-
22 pose, like Mirror (?) versus Minnesota, wouldn't it?

23 A It was as clear as one can imagine, of course,
24 but that is what the Dallas police were engaged in during--

25 Q But I was told if the statute is constitutional,

1 then you have a different question.

2 Q Quite different.

3 But as I say I think the lower court can always
4 can always--that conceivably by declaring the statute uncon-
5 stitutional might stay the hand of the police in the sense
6 that they were relying upon its overbreadth and swarming around
7 my Plaintiff's place of business.

8 Parenthetically the injunction at issue, the court's
9 opinion here issued on June 9th, 1969, the lower court opinion,
10 declaring the statute unconstitutional; on June 10, 1969, the
11 Texas Legislature enacted its amended statute which Mr. Zwiener
12 has alluded to, so for all prac--and also the injunction ran
13 only to the Plaintiff, it didn't run to a broad class of
14 Plaintiffs, it did not run to the world at large. So the
15 injunction that was issued is a very narrow injunction, pro-
16 tecting this Plaintiff against prosecution under the old
17 statute and declared that statute unconstitutional.

18 Q And the statute has already been repealed?

19 A No, the court's opinion issued on June 9, 1969--
20 June ninth--and on June 10th, the next day, the legislature
21 amended the statute.

22 Q What has been done with it since that time by
23 the courts?

24 A The--

25 Q What did the parties do when the legislature

1 amended the old law?

2 A Well, the State of Texas appealed this case
3 to this Court, and we have--

4 Q Neither one of them asked the three-judge court
5 to take any other action?

6 A No, Your Honor. No, Your Honor.

7 As I say we have continued to try to defend the
8 criminal prosecutions in the State trial courts where they
9 have successfully obtained a dismissal of one of them since
10 that time.

11 Q The other one hasn't been tried, that is still--

12 A The other one has not been tried.

13 Q --in possession?

14 A Correct, Your Honor.

15 Your Honor anticipated some of what I intended to
16 say, but when this case came, as it did, to the mobile chapter
17 of the American Civil Liberties Union, the problems that con-
18 fronted the lawyers assigned the case was not how to abort the
19 state criminal prosecutions, but how, somehow, to protect this
20 underground newspaper which seemed to be entitled to publish
21 under the First Amendment, and how to get the man's material
22 back to him.

23 There it is again, the great list of typewriters,
24 desks, and camera--we made written demand upon the Dallas police
25 for return of the material, that they had been improperly seized.

1 The demands were ignored and it was only at that
2 time, only after demand, that suit was filed in the Federal
3 Court seeking return of the material, seeking relief against
4 future harassment, and, finally, seeking declaratory judgement
5 as to the constitutionality of the statute.

6 But in our initial argument, Justice White asked me,
7 at least on one occasion and perhaps two, what was it that
8 we couldn't accomplish in the Federal--State criminal prosecution
9 that necessitated the filing of the Federal Court action?

10 I would say they were these things: they may have
11 not been available to some recovery of property that had been
12 seized; there was no possibility of relief against future
13 harassment from an outgrowth of the State criminal prosecution;
14 there was little likelihood that the constitutionality
15 of the statute would be spoken to in the state criminal prosecution
16 inasmuch as it had been previously upheld on both
17 counts by the Texas Court of Criminal Appeals which is our
18 highest appellate court in the criminal division.

19 So all of these things could never have been answered
20 in the State court prosecution. Defense of the State criminal
21 prosecution was not adequate in any way to secure our First
22 Amendment rights.

23 Q Did your legislative Act contain any provision
24 for making it operative--

25 A The total--

1 Q Were these provisions already in there?

2 A No, Your Honor.

3 There was an emergency clause that made it effective
4 immediately, but it did not--it was not an ex post facto law.
5 No, Your Honor. It did not operate to any--

6 Q There were no provisions to keep the pending
7 cases on the docket?

8 A As far as I am aware, Your Honor, it did not
9 speak to that specifically at all, as to what the effect it
10 has upon pending criminal prosecutions. It was simply an
11 amendment of the statute.

12 Q And have you argued that point in your Brief?

13 A To the law court?

14 Q To us or anybody else?

15 A Not to you, no, Your Honor.

16 Q What is the effect of that Act? What did it
17 do to your case?

18 A I have not argued that, and I have assumed
19 that it did nothing to my case--

20 Q Why--why did you assume that? It is a repeal
21 of the law,--

22 A Well, well, I--I--

23 Q --pending prosecution.

24 A --I misspoke myself. I think I did not mean
25 to say it repealed the law; it amended the statute. I do not

1 think that it constituted a repeal of the statute in the sense
2 that it would have voided it--voided criminal cases. This has
3 not been my view that it would have.

4 Q They simply amended it--

5 A Yes, Your Honor.

6 Q --

7 A Yes.

8 We had a--I might say, I think the substance of
9 the relief that we obtained below was declaratory relief. So
10 this is what we were seeking. We were seeking it, as I say, on
11 behalf of a continuing enterprise, as continuing as best it
12 could under the circumstances of a paper that was published
13 every two weeks. At the point where he came into court,
14 the Plaintiff lost all his help, they were afraid to come
15 around to his address for fear they would get hassled by the
16 police and at the police station. He was putting out the
17 paper by himself at that stage, borrowing typewriters or
18 whatever else property was required.

19 Q It wasn't you who asked for a three-judge
20 court, was it?

21 A The State's response to us after we deleted
22 the declaratory relief in lieu of the injunctive prayer (?),
23 said this was a matter for a three-judge court.

24 Q But you originally had asked injunctive relief
25 against harassment and for a declaratory judgement that the

1 statute was unconstitutional at least as applied to your client,
2 is that right?

3 A Well, to be fair, Your Honor, I had originally
4 asked for an injunction against prosecutions. I had deleted
5 that from my pleadings and restricted my pleadings to the
6 declaratory and harassment.

7 The State still took the position that the three-
8 judge court was required and at that point Chief Judge Brown
9 convened the three-judge court and we then amended our pleadings
10 and only at that time did we institute our prayer for injunction
11 against--

12 Q --future prosecution?

13 A That is right.

14 We have cited in our Reply Brief, the Senate Report
15 on declaratory judgements which seems to--at the time that
16 declaratory judgements statute was enacted--it seems to, also
17 in all fairness, that this is precisely the kind of case which
18 declaratory judgement is envisioned--that is the Senate Report
19 in its concluding paragraph, with respect to preparatory judge-
20 ment procedures, stated, "Finally, it may be said declaratory-
21 judgement procedure has been molded and settled by thousands
22 of precedents, so that the administration of the law has been
23 definitely clarified. The Supreme Court mentioned one of its
24 principal purposes in Terrace v. Thompson . . . when it said:
25 "They are not obligated to take the risk of prosecution, fines,

1 and imprisonment and loss of property in order to secure an
2 adjudication of their rights."

3 We think here we are not talking about a single
4 shot opposition. That is, is it a crime, is it not; we are
5 talking about a continuing publishing enterprise, a newspaper
6 being put out every two weeks in which, on the basis of past
7 conduct, the Dallas police and the Dallas district attorney's
8 office, there was every reason to fear that with each succeed-
9 ing issue we would be subjected to a new prosecution. In this
10 context, declaratory relief as to the constitutionality of the
11 statute was indeed, it seems, the only swift and appropriate
12 remedy would not assure us but as to the future we could or
13 could not proceed. It was, in our view at least, then a tradi-
14 tional form of declaratory judgement proceedings.

15 The only cases, of course, that did come out of
16 business enterprise kinds of cases, or the--Terrace versus
17 Thompson, if memory serves me, was whether an alien could
18 farm land in some state in the Pacific Northwest.

19 But other State court cases had dealt with the
20 problem, that is, businesses that were declared unlawful by
21 certain State enactments and the owners of those businesses
22 going into the Federal--going into court to seek declaratory
23 relief. Indeed, the Senate Report again, cites as a prime
24 example of the kind of relief they envisioned at least, at the
25 time they enacted the statute was a Tennessee case in which

1 the--it is cited in our Brief--that there were pool hall
2 operators who thought they were having their rights infringed
3 by a State enactment and went into the State courts for
4 declaratory relief. We find ourselves at least, we think,
5 as well off, as pool hall operators who thought that their
6 rights were being concluded by the existence of a state
7 criminal enactment.

8 Q Well, do you have a declaratory judgement law
9 in Texas?

10 A We do, Your Honor.

11 Q Why did you not proceed there?

12 A As a prac--my judgement as the attorney at
13 the time was that I was more likely to obtain swifter response
14 to my prayer in the Federal court. My second judgement was
15 that I was pursuing Federal rights, First Amendment rights,
16 rights to be secured against unlawful search and seizure,
17 and rights to be secured against harassment and traditional
18 Hague versus CIO (?) sort of context, and that the Federal
19 forum was an appropriate forum. And--

20 Q You were going on the theory that the State-
21 Federal Court couldn't stay Federal criminal proceedings in
22 the State Court?

23 A I did not seek to stay and did not think I could
24 obtain a stay--

25 Q You did later?

1 A No, I have never obtained a stay against pending
2 criminal prosecution--

3 Q Didn't you later amend your complaint and ask
4 for an injunction?

5 A Only against future prosecutions; not against
6 the pending prosecutions. There was never--and that is quite
7 clear in the Court's opinion and in my--

8 Q Of course, if you had gotten a preparatory
9 judgement, I assume you then would have gone into any court
10 all courts, in order to enjoin that proceeding that held it
11 unconstitutional.

12 A I don't think so at all. I don't think a
13 declaratory judgement is the final judgement until--look, if
14 the State did not appeal my--did not appeal, and the judgement
15 became final, I think that is quite right, I would have relied
16 upon an injunctive relief. But not at least until it became
17 final and it is not final till this day, in terms of declaratory
18 relief. I do not consider declarator relief to be simply
19 the other side of the coin from injunctive relief. I think
20 it does speak to the future, it does clarify rights, and this
21 was precisely the problem my client faced. He needed to know:
22 can I continue to publish this newspaper in Dallas, Texas
23 and/or am I going to be victimized by this statute each time
24 an issue comes out?

25 And it was to this, looking to the future, that we

c 1 spoke in our declaratory injunctive proceeding.

2 And the tendency of the proto-prosecutions (?) to
3 me at least, was simply evidentiary of the threat. They--we
4 were prepared to leave them alone but tendency, the fact that
5 the police had carried out the searches that they had, seemed
6 to us were clear evidence and I think to the court below, that
7 unless some declaration of rights was issued, that unless the
8 court used its equity powers, that Stein, and the Dallas
9 Notes and the underground, was going to be effectively suppressed
10 by simply the technique of taking an overbroad statute, using
11 it, or misusing it as the case may be, to put him out of
12 business.

13 So again, we did not speak to the pending cases.
14 We were prepared to litigate it and still are prepared to liti-
15 gate it. I think at this stage the State has indicated a re-
16 luctance to go to trial in the pending criminal case, not us
17 at all.

18 Q Do you have any preference, that one case with
19 a preference to go on after you?

20 A Well, we--

21 Q --and knew it was unconstitutional?

22 A Oh, excuse me. You mean, I am not sure I--I
23 am not sure I understand. There were two arrests, two searches
24 and seizures, two pending criminal prosecutions by the time
25 we went to the Federal Courts. We did not move on the first

1 case. We did not go to the Federal Courts until there had been
2 a repetition, the clearest kind of repetition that they were
3 willing to engage any kind necessary that we thought to suppress
4 our paper.

5 It was only then that we went to the Federal Court,
6 and after going to the Federal Court, and after getting a
7 return of the material that had been seized, there were no fur-
8 ther arrests under the statute. No, but they were not restrained.

9 Q Do you think that brought you within the Ex
10 Parte Young doctrine?

11 A In what respect, Your Honor?

12 Q Ex Parte Young doctrine, about how you can
13 enjoin a State court in the Federal court, by harassment?

14 A We felt we were entitled to seek a plain
15 injunction against harassment. The case happened to go off
16 on summary judgement and of course, you know, the disputed
17 factor issues with respect to harassment they were never
18 resolved by the trial court. I assumed there was a denial
19 of harassment, a denial of an evil intent on the part of the
20 police, and these were factors that were never resolved.

21 ORAL REARGUMENT BY LONNY F. ZWIENER, ESQ.,

22 ON BEHALF OF APPELLANTS -- REBUTTAL

23 MR. ZWIENER: May I take the last few minutes here
24 of this Court's session.

25 There are only two things I would like to say.

1 First, as far as police activity in this particular
2 case, I would like to say something about that. I am not proud
3 of the facts in this case, as I told the Court several times.
4 But the minute this situation came to the attention of the
5 City Attorney's office in Dallas they no longer--police can't
6 get search warrants for First Amendment printed material without
7 conferring with the City Attorney's office. This also precipi-
8 tated the amendment of the obscenity statutes and this was
9 done not after the Court decision, but it--it--wheels began
10 to turn months before this court below held the statute un-
11 constitutional but it does sometimes the police do not act
12 properly, but I do think when it gets to the District Attorney,
13 the County Attorney, the City Attorney, our office, breaks
14 can be put on and really I think they can do it pretty well
15 without the Federal Court intervention.

16 I would say something about this declaratory judge-
17 ment. Apparently the plaintiffs here or a number of people
18 here are asking declaratory judgement doctrine be extended to
19 encompass just everything--that one judge in a declaratory
20 judgement can pass on any State statute that somebody is
21 worried about, and the ridiculousness of this thing is that
22 we have had an attack on our sodomy statute. A couple came in
23 and said, "We would like to practice sodomy in our bedroom
24 but this statute is bothering us, the existence of it." And
25 that day that was a case of controversy; there were several

1 other parties to this but this can, I think, show the extent
2 that this thing can lead to.

3 Again, I suggest really, and I don't--I apologize
4 to the Court in a sense for saying this, but Zwickler versus
5 Koota which tells the lower federal courts that they should
6 consider the constitutionality of State statutes even where
7 no injunction is proper, I think is authorizing advisory
8 opinions.

9 Thank you, if there are no other questions, sir.

10 MR. CHIEF JUSTICE BURGER: Thank you. Thank you
11 gentlemen. The case is submitted.

12 (Whereupon, at 3:00 o'clock p. m. the consolidated
13 reargument in the above-entitled matter, was concluded.)

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