

# COMMENT

## *Arcara v. Cloud Books, Inc.*: Locking Out Prostitution

### Introduction

With increasing frequency, state and local governments are using civil penalties to control illegal sex-related businesses,<sup>1</sup> including prostitution and the sale of obscene literature.<sup>2</sup> Some commentators have argued that civil statutes or ordinances are more effective than criminal sanctions.<sup>3</sup> One significant approach has been to use nuisance abatement laws.<sup>4</sup> Generally, these laws apply one of two types of penalties: either the general business license of the offending establishment is revoked, or the business is closed (“padlocked”) pursuant to a temporary or permanent injunction.<sup>5</sup>

When prostitution alone is the nuisance abated by either a license or padlock law, free speech considerations logically do not arise because prostitution involves illegal conduct not connected in any way with the

---

1. Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478, 1478 (1983). See also O'Connor, *The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Businesses in the Mid-Town Area*, 46 FORDHAM L. REV. 57, 59 (1977).

2. See O'Connor, *supra* note 1, at 58 n.4. The guidelines for defining obscenity are set forth in *Miller v. California*, 413 U.S. 15 (1973). The basic *Miller* guidelines are as follows: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Id.* at 24 (citations omitted). See also *Pope v. Illinois*, 107 S. Ct. 1918 (1987). In that case, the Court clarified the *Miller* test, requiring application of the “reasonable person” standard rather than the “community” standard. *Id.* at 1921.

3. Note, *supra* note 1, at 1478. See also O'Connor, *supra* note 1, at 61-69. For example, even if the police and prosecutor are successful in arresting and prosecuting a particular prostitute who works in a house of prostitution, her house colleagues and the managers, owners, and agents would still be operating a viable prostitution business. *Id.* Under certain nuisance statutes, however, the premises could be closed down. See *infra* note 5 and accompanying text.

4. See generally Note, *supra* note 1.

5. *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 467 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986).

communication of ideas.<sup>6</sup> On the other hand, many licensing and "padlock" laws aimed at controlling the distribution of obscene materials have been attacked as unconstitutional prior restraints on protected speech.<sup>7</sup> Lower courts hearing these challenges have reached differing conclusions.<sup>8</sup> In 1986, the Sixth Circuit suggested that the Supreme Court's review of *People ex rel. Arcara v. Cloud Books, Inc.*<sup>9</sup> would finally resolve the first amendment issues surrounding licensing and padlock laws.<sup>10</sup> The Sixth Circuit was only partially correct.

The statute invoked against Cloud Books, an adult bookstore, was a padlock law.<sup>11</sup> However, bookselling operations were not the target of the action, and the question of whether the materials sold were obscene was not at issue. Rather, the District Attorney based his complaint upon illicit sexual activities that took place on Cloud Books' premises.<sup>12</sup> In *Arcara v. Cloud Books, Inc.*,<sup>13</sup> the issue before the Supreme Court was "whether the First Amendment bars enforcement of a statute authorizing closure of a premises found to be used as a place for prostitution and lewdness because the premises are also used as an adult bookstore."<sup>14</sup> A majority of the Court concluded that it does not. This decision, however, required the Court to consider and to characterize the relationship between the illicit sexual conduct and the lawful bookselling activities. This Comment examines the characterizations put forward by the majority and the dissent within the context of the First Amendment.

---

6. O'Connor, *supra* note 1, at 76-77 (citing F. SCHAUER, THE LAW OF OBSCENITY 240-41 (1976)).

7. See, e.g., *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983) (holding that local obscenity ordinances using the revocation of licenses and permits are unconstitutional prior restraints of protected speech); *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981) (same); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980) (same); see also *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978) (holding padlock obscenity laws invalid); *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied*, 429 U.S. 922 (1976) (same). But see *State ex rel. Kidwell v. U.S. Mktg., Inc.*, 102 Idaho 451, 631 P.2d 622 (1981) (holding that padlock laws directed at businesses involved in the sale or exhibition of obscene materials are not prior restraints), *cited in Paducah*, 791 F.2d at 468.

8. See *supra* note 7.

9. 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985), *rev'd*, 106 S. Ct. 3172 (1986).

10. See *Paducah*, 791 F.2d at 471. In *Paducah*, the Sixth Circuit held that an ordinance revoking the business licenses of those who had distributed obscene materials was an unconstitutional prior restraint. *Id.* at 470.

11. See *infra* note 17 for the text of the statute.

12. *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d at 326; 480 N.E.2d at 1091, 491 N.Y.S.2d at 309.

13. 106 S. Ct. 3172 (1986).

14. *Id.* at 3173.

## I. Background

In *Cloud Books*, respondents owned and operated an adult bookstore in Kenmore, New York. Sexually explicit books and magazines were sold on the premises, and several booths showing movies of a sexually frank nature also were available for patron use.<sup>15</sup>

In response to reports of illicit sexual activities occurring on respondents' premises, an officer of the local sheriff's department, working undercover, "personally observed instances of masturbation, fondling, and fellatio by patrons on the premises of the store, all within the observation of the proprietor. He also observed instances of solicitation of prostitution, and was himself solicited . . . by men who offered to perform sexual acts in exchange for money."<sup>16</sup> As a result of these findings, the District Attorney filed a civil complaint against respondents seeking closure of the premises under section 2321 of the New York Public Health Law.<sup>17</sup>

In their answer to the complaint, the bookstore owners denied having any knowledge of sexual activities occurring on their premises. They further asserted that closure "would impermissibly interfere with their First Amendment right to sell books on the premises."<sup>18</sup> In New York Superior Court, the respondents moved for partial summary judgment on these first amendment grounds,<sup>19</sup> but the motion was denied and the first amendment argument rejected.<sup>20</sup> The New York Supreme Court affirmed.<sup>21</sup> Finally, however, respondents were successful. The New York Court of Appeals reversed on first amendment grounds.<sup>22</sup>

---

15. *Id.*

16. *Id.*

17. *Id.* at 3173-74. Section 2321 authorizes the District Attorney to institute a suit to enforce the provisions of § 2329, which provides for the closure of any building found to be a public health nuisance under § 2320. N.Y. PUB. HEALTH LAW § 2321 (McKinney 1985). Section 2320 of the New York Public Health Law defines places of prostitution, lewdness, and assignation as public health nuisances:

1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.

2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985).

18. *Cloud Books*, 106 S. Ct. at 3174.

19. *Id.* Respondents also argued that the "statute was not intended to reach establishments other than houses of prostitution in the traditional sense." *Id.*

20. *People ex rel. Arcara v. Cloud Books, Inc.*, 119 Misc. 2d 505, 465 N.Y.S.2d 633 (N.Y. Sup. Ct. 1983).

21. *People ex rel. Arcara v. Cloud Books, Inc.*, 101 A.D.2d 163, 475 N.Y.S.2d 173 (N.Y. App. Div. 1984).

22. *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985). The Court of Appeals did maintain, however, that the public health law

## A. The New York Court of Appeals Decision

Relying on the principle that bookselling activities are entitled to first amendment protection,<sup>23</sup> the Court of Appeals concluded that respondents' first amendment rights were implicated by the bookstore closure.<sup>24</sup> It reached this conclusion notwithstanding the fact that closure of the store was based on the prostitution and not on the content of the material sold there. Because it saw the prostitution on bookstore premises as a combination of expressive and nonexpressive conduct, the court evaluated the closure statute under the four-part test set forth in *United States v. O'Brien*.<sup>25</sup> In *O'Brien*, the Supreme Court held that when "speech" and "nonspeech" elements are combined "in the same course of conduct," incidental limitations on first amendment freedoms may be justified by a sufficiently important governmental interest in regulating the nonspeech element.<sup>26</sup> Under the *O'Brien* test,

[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction . . . is no greater than is essential to the furtherance of that interest.<sup>27</sup>

Applying the *O'Brien* test to the New York statute, the Court of Appeals found that the first three parts of the test were satisfied:

A statute aimed at the abatement of a public nuisance is certainly within the police power of the State. . . . [R]estriction of the conduct alleged . . . furthers an important governmental interest [since] [p]rostitution is criminal activity no matter where it occurs. . . . [Finally,] the interest in restricting this conduct is clearly unrelated to the suppression of free expression.<sup>28</sup>

However, the court reversed, holding that the statute failed part

---

in question applied to establishments other than traditional houses of prostitution. *Id.* at 329-30, 480 N.E.2d at 1093-94, 491 N.Y.S.2d at 311-12. *See supra* note 19.

23. *Cloud Books*, 65 N.Y.2d at 332, 480 N.E.2d at 1095, 491 N.Y.S.2d at 313 (citing *Smith v. California*, 361 U.S. 147, 150 (1959)). In *Smith*, the Court found unconstitutional a city ordinance which held a bookstore owner criminally liable for the mere possession in his store of materials later adjudged to be obscene, regardless of whether he had knowledge of their contents. *Smith*, 361 U.S. at 155.

24. *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d at 334-35, 480 N.E.2d at 1096-97, 491 N.Y.S.2d at 313.

25. 391 U.S. 367 (1968). In *O'Brien*, the Court considered the first amendment implications of applying a statute imposing criminal sanctions for the knowing destruction of a draft card to the petitioner who had destroyed his card to express opposition to the draft.

26. *Id.* at 376-77.

27. *Id.* at 377.

28. *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d at 336, 480 N.E.2d at 1098-99, 491 N.Y.S.2d at 316-17 (citations omitted).

four of the *O'Brien* test.<sup>29</sup> The District Attorney had failed to demonstrate that less restrictive relief “would be insufficient to abate the nuisance.”<sup>30</sup> The District Attorney then sought, and the United States Supreme Court granted, certiorari.<sup>31</sup>

## II. The Majority's Analysis

The United States Supreme Court, in an opinion written by Chief Justice Burger, rejected the Court of Appeals' reasoning.<sup>32</sup> The Court declared that civil penalties are not automatically subject to first amendment “least restrictive means” scrutiny simply because they will have some effect on the first amendment activities of those subjected to the penalties.<sup>33</sup> Rather, one of two alternate requirements must be met: either the conduct must have an expressive element, or the burden imposed by the statute must fall disproportionately on persons engaged in protected first amendment activities.<sup>34</sup>

### A. The Conduct Must Have an Expressive Element

In *Cloud Books*, the Supreme Court did not review the New York court's “least restrictive means” analysis because the majority concluded that *O'Brien* was inapposite to the facts in *Cloud Books*. The Court asserted that *O'Brien* has no relevance to a statute directed at imposing sanctions on activities that are completely nonexpressive.<sup>35</sup> “The petitioners in *O'Brien* had, *as respondents here do not*, at least the semblance of expressive activity in their claim that the otherwise unlawful burning of a draft card was to ‘carry a message’ of the actor's opposition to the draft.”<sup>36</sup> Because the illegal conduct in *O'Brien*—the draft card burning—legitimately could be construed as the protected expression of a political opinion, first amendment scrutiny was appropriate.<sup>37</sup> The Court

---

29. *Id.* at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317. *See supra* note 27 and accompanying text.

30. *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317.

31. 474 U.S. 978 (1985) (grant of certiorari).

32. *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172 (1986).

33. *Id.* at 3177. Apparently, the Court would apply this view to criminal as well as civil sanctions. *Id.*

34. *Id.* at 3177-78.

35. *Id.*

36. *Id.* at 3175 (emphasis added).

37. After setting forth and then applying the four-part test, the *O'Brien* Court determined that the statute prohibiting the destruction or mutilation of draft cards was valid. 391 U.S. 367, 382 (1968).

The Court in *Cloud Books* also cited two other cases in which it had applied the *O'Brien* test to governmental regulation of conduct that had an expressive element. *Cloud Books*, 106 S. Ct. at 3176. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court upheld a ban on sleeping and camping in Washington, D.C. parks as applied to demon-

distinguished the illegal conduct in *O'Brien* from the illicit sexual activities involved in *Cloud Books*. These activities, the Court maintained, exhibited absolutely no element of protected expression.<sup>38</sup> Declaring that "[F]irst [A]mendment values may not be invoked by merely linking the words 'sex' and 'books',"<sup>39</sup> the Court concluded that any burden on respondents' bookselling activities was irrelevant to the statute's validity. Hence, first amendment scrutiny was not required.<sup>40</sup>

#### B. The Statute Must Impose a Disproportionate Burden on Parties Engaged in Protected Expression

Citing *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,<sup>41</sup> the Court noted that it had applied first amendment scrutiny to some statutes "which, although directed at activity with no expressive component, imposed a disproportionate burden upon those engaged in protected First Amendment activities."<sup>42</sup> In *Minneapolis Star*, the Court struck down a tax imposed on the sale of large quantities of ink and newsprint. Although the tax was imposed on a nonexpressive activity, "the burden of the tax inevitably fell . . . almost exclusively . . . upon the shoulders of newspapers exercising the constitutionally protected freedom of the press."<sup>43</sup>

The Court then factually distinguished *Cloud Books* from *Minneapolis Star*. The New York statute did not have the effect of singling out bookstores to shoulder its burden as the tax in *Minneapolis Star* had singled out newspapers.<sup>44</sup> If the prohibited conduct occurred, closure would result regardless of the nature of the premises.

In the *Cloud Books* majority's view, the relationship between the illicit sexual activities and the lawful bookselling activities would be better described as a non-relationship. Civil penalties are subject to scrutiny only when the legal sanction affects conduct that also has a significant expressive element, or when a statute based on a nonexpressive activity has the effect of singling out those engaged in expressive activity.<sup>45</sup> Since

---

strators who were there to protest the plight of the nation's homeless. In *United States v. Albertini*, 472 U.S. 675 (1985), the Court upheld the conviction of a protester who had reentered a military base after being barred for previous improper conduct. In both cases, "[the Court] considered the expressive element of the conduct regulated and upheld the regulations as constitutionally permissible." *Cloud Books*, 106 S. Ct. at 3176. These two cases are relevant to the majority's discussion in *Cloud Books*, not because of their results, but because in both cases the illegal conduct was considered to have an "expressive" element.

38. *Cloud Books*, 106 S. Ct. at 3176-77.

39. *Id.* at 3177.

40. *See id.* at 3178.

41. 460 U.S. 575 (1983).

42. *Cloud Books*, 106 S. Ct. at 3176.

43. *Id.*

44. *Id.* at 3177.

45. *Id.* at 3177-78.

*Cloud Books* involved neither situation, the Court concluded that the First Amendment was not implicated by the closure of premises in which respondents happened to sell books.<sup>46</sup>

### III. The Dissent's Analysis

Justices Blackmun, Brennan and Marshall dissented in *Cloud Books*. These Justices rejected the basic premise of the majority opinion—that first amendment scrutiny is required only when the challenged law regulates conduct with an expressive element or nonexpressive conduct that has the effect of disproportionately burdening a particular first amendment protected activity.<sup>47</sup> Writing for the dissent, Justice Blackmun maintained that historically the Court's "concern clearly has been to avoid *any* exercise of governmental power that 'unduly suppress[es]' First Amendment interests."<sup>48</sup>

Arguing that commercial bookstores play an "obvious role . . . in facilitating free expression,"<sup>49</sup> the dissent stressed that while the purported intent of the closure statute was to stop illicit sexual activities, the statute was still subject to first amendment scrutiny because enforcement of the statute halted lawful, protected book sales as well. "[T]he Court has said repeatedly that a statute challenged under the First Amendment 'must be tested by its operation and effect.'"<sup>50</sup>

The dissent cited several cases in which the Court repeatedly had struck down statutes that purported to regulate nonspeech, if the statutes unduly penalized either political or nonpolitical speech.<sup>51</sup> For example, in *Schneider v. Irvington*,<sup>52</sup> the Court held invalid several ordinances which banned the distribution of handbills. These ordinances were intended to curtail littering.<sup>53</sup> The Court in *Cantwell v. Connecticut*<sup>54</sup> invalidated a statute that prohibited the solicitation of funds for religious causes unless the cause was approved by the secretary of the public welfare council who would then issue a license.<sup>55</sup> The purpose of the statute was to prevent fraudulent solicitations; however, the Court concluded

---

46. *Id.* at 3178.

47. *Id.* at 3179 n.\* (Blackmun, J., dissenting) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

48. *Id.* (emphasis in original).

49. *Id.* at 3178 (Blackmun, J., dissenting) (citing *Smith v. California*, 361 U.S. 147, 150 (1959)). *See supra* note 23.

50. 106 S. Ct. at 3179 (Blackmun, J., dissenting) (quoting *Near v. Minnesota*, 238 U.S. 697, 708 (1931)).

51. *Id.*

52. 308 U.S. 147 (1939).

53. *See id.* at 162. The ordinances under review were from three different cities—Los Angeles, Milwaukee, and Worcester.

54. 310 U.S. 296 (1940).

55. *Id.* at 301-02.

that the statute violated the petitioner's freedom of speech and religion.<sup>56</sup>

In essence, the *Cloud Books* dissent argued that first amendment scrutiny is required when any statute directly or indirectly affects any activity protected by the First Amendment. In *Cloud Books*, that activity was bookselling.

Proceeding from this premise, the dissent then considered the "least restrictive means" issue as it related to the New York ordinance. The Justices conceded that "[a] State has a legitimate interest in forbidding sexual acts committed in public, including in a bookstore."<sup>57</sup> They nevertheless asserted that when a state impairs first amendment activities, such as bookselling, the state must show that it has chosen the least restrictive means of pursuing its legitimate objectives.<sup>58</sup> The dissent suggested that the state logically and directly could stop the illegal sexual activities taking place on the premises of Cloud Books by arresting individual offenders.<sup>59</sup> Since the New York statute did not allow for this approach,<sup>60</sup> the dissent maintained that the state had failed to show that less restrictive measures would not abate the nuisance.<sup>61</sup> Accordingly, the dissent considered the statute unconstitutional as applied to respondents.<sup>62</sup>

This argument essentially paralleled the reasoning of the New York Court of Appeals.<sup>63</sup> However, unlike the New York court, the dissent moved beyond this "least restrictive means" analysis to what they apparently considered to be the "hidden agenda" of the *Cloud Books* majority's holding:

The Court's decision creates a loophole through which counties like Erie, can suppress 'undesirable,' protected speech without confronting the protections of the First Amendment. Until today, the Court has required States to confine any book banning to materials that are determined, through constitutionally approved procedures, to be obscene. . . . [However, a] State now can achieve a sweeping result without any special protection for the First Amendment interests so long as the predicate conduct—which could be as innocent as repeated meetings between a man and a woman—occurs on the premises.<sup>64</sup>

---

56. *Id.* at 303-07. See also *Marsh v. Alabama*, 326 U.S. 501 (1946), which struck down a statute invoked against a Jehovah's Witness who trespassed on the street of a company-owned town in order to distribute religious literature.

57. *Cloud Books*, 106 S. Ct. at 3180 (Blackmun, J., dissenting).

58. *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See *supra* notes 23-30 and accompanying text.

64. 106 S. Ct. at 3180 (Blackmun, J., dissenting) (citations omitted).

In short, the dissent saw censorship and book banning as the real danger of the *Cloud Books* decision.

#### IV. Putting *Cloud Books* in Perspective

##### A. Precedent and First Amendment Principles

The dissenters in *Cloud Books* maintained that the majority decision departed from precedent and from first amendment principles. However, the dissent's arguments did not sufficiently respond to the crux of the majority's position—that because the illicit sexual activities were in no way connected with the protected bookselling activities, no first amendment concerns were implicated.

The cases cited by the dissent<sup>65</sup> did indeed involve first amendment scrutiny of statutes that regulated nonspeech or unprotected conduct but imposed a burden on protected speech. However, none of those cases contradicts the standard explained and illustrated by the majority.<sup>66</sup> Rather, in each of those cases, the “nonspeech” conduct was intimately connected to the “speech” activity<sup>67</sup> and thus could be said to contain an expressive element.<sup>68</sup> The balancing test<sup>69</sup> that the Court applied in *Schneider*, *Cantwell*, and *Marsh* was appropriate because first amendment scrutiny was triggered by nonspeech conduct containing an expressive element. In *O'Brien*,<sup>70</sup> first amendment scrutiny was appropriate because the protected political expression (opposition to the draft) was not only intimately connected to the unprotected conduct (destroying a draft card), it was in fact part of the “same course of conduct.”<sup>71</sup>

The dissent also found authority in *Smith v. California*<sup>72</sup> for the theory that any statute that results in the closure of a bookstore requires “least restrictive means” analysis.<sup>73</sup> This theory, however, resulted from an overbroad reading of the *Smith* decision. Unlike the New York statute in *Cloud Books*, the statute in *Smith* was concerned with the content of the materials sold in the store.

Most importantly, the dissent seemed to view the *Cloud Books* decision as a thinly veiled attack, not on the illicit sexual activities, but on the protected bookselling activities, because of the “adult” and perhaps ob-

---

65. See *supra* notes 52-56 and accompanying text.

66. See *supra* notes 35-40 and accompanying text.

67. In *Schneider v. Irvington*, 308 U.S. 147 (1939), for example, passing out handbills was the method petitioner chose to express his political views. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the expression of religious views was directly limited by the licensing statute.

68. See *Cloud Books*, 106 S. Ct. at 3177 n.3.

69. See *id.* at 3179 (Blackmun, J., dissenting).

70. See *supra* notes 25, 35-38 and accompanying text.

71. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968); see also *supra* notes 25-27 and accompanying text.

72. 361 U.S. 147 (1959). See *supra* note 49 and accompanying text.

73. See *Cloud Books*, 106 S. Ct. at 3178, 3180 (Blackmun, J., dissenting).

jectionable nature of the materials being sold.<sup>74</sup> However, Justice O'Connor spoke directly to this point in her concurrence:

If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review.<sup>75</sup>

There is nothing in the majority opinion or in the dissent to support the contention that *Cloud Books* set the stage for book banning at will.

## B. Other State Decisions

To support its grant of certiorari in *Cloud Books*, the Supreme Court noted that the decision of the New York Court of Appeals conflicted with decisions of the Virginia Supreme Court and the Pennsylvania Superior Court.<sup>76</sup> Those two cases and a third case from California provide insight into the *Cloud Books* decision.

In *Commonwealth ex rel. Lewis v. Allowill*,<sup>77</sup> the Pennsylvania Superior Court affirmed the trial court's injunction padlocking two adult bookstores for one year because of illicit sexual activities occurring on the premises. The trial court found that despite arrests in both stores, the illicit activities had continued.<sup>78</sup> The *Allowill* court rejected appellants' constitutional challenge to the nuisance statute authorizing the closure, noting that the illicit sexual activities, not the obscenity of the materials sold, were the basis for the closures.<sup>79</sup> The court also noted that appellants were allowed to remove their merchandise from the stores and therefore conceivably could continue to sell their books and magazines elsewhere.<sup>80</sup>

A Virginia trial court held in *Commonwealth v. Croatan Books, Inc.*<sup>81</sup> that defendant's business constituted a public nuisance because of criminal sexual activities occurring on its premises. But the trial court also declared that the nuisance statute, which mandated closure, was unconstitutional as applied because it exceeded the remedy necessary to abate the nuisance.<sup>82</sup> The trial court fashioned its own remedy, ordering dismantling of the booths where the illicit activities had occurred and

---

74. See *supra* text accompanying note 64.

75. *Cloud Books*, 106 S. Ct. at 3178 (O'Connor, J., concurring).

76. *Id.* at 3175 n.1.

77. 330 Pa. Super. 32, 478 A.2d 1334 (1984).

78. See *id.* at 37, 478 A.2d at 1337. Note also that arrest was the solution suggested by the *Cloud Books* dissent. See *supra* note 59 and accompanying text.

79. *Allowill*, 330 Pa. Super. at 40, 478 A.2d at 1338.

80. *Id.* at 40, 478 A.2d at 1339.

81. 228 Va. 383, 323 S.E.2d 86 (1984).

82. *Id.* at 386-87, 323 S.E.2d at 87-88.

enjoining the bookstore from constructing any similar structures.<sup>83</sup> The trial court apparently was unpersuaded by evidence introduced by the State showing that a prior temporary order<sup>84</sup> had been unsuccessful in eliminating loitering and solicitation of sexual activities.<sup>85</sup> When *Croatan Books* reached the Virginia Supreme Court, the justices applied the *O'Brien* four-part test.<sup>86</sup> The high court accepted the State's argument; because the less restrictive remedy had failed, closure was a proper exercise of the Commonwealth's police power and satisfied the *O'Brien* requirement of incidental, permissible infringement on first amendment freedoms.<sup>87</sup>

*People ex rel. Sorenson v. Randolph*,<sup>88</sup> a California case, reached a similar decision. In *Randolph*, a club that featured various illicit sexual activities had ignored previous warnings and had continued to allow lewd conduct on the premises despite a temporary injunction.<sup>89</sup> Consequently, the court held that closure was not unreasonable.<sup>90</sup>

The similar pattern of relationships and behavior in the facts of *Allowwill*, *Croatan* and *Randolph*—as well as in *Cloud Books*—probably influenced the majority's analysis in *Cloud Books*. Arguably, when illicit sexual activities occur outside of traditional houses of prostitution, they often take place on the premises of adult bookstores.<sup>91</sup> And, as the cases discussed above indicate, arrests and temporary injunctions appear to be unsuccessful in stopping these activities. Had the Supreme Court agreed that first amendment scrutiny of the New York nuisance statute was required because of the statute's effect on respondents' bookselling activities, similar statutes in other states would be subject to the same scrutiny. Then, if the pattern of illegal sexual activity suggested by existing case law were to continue, the states would expend considerable time and resources instituting temporary measures which experience has shown are often ineffective. By rejecting the proposition that a closure statute aimed at illicit sexual activities has first amendment implications simply

---

83. *Id.* at 387, 323 S.E.2d at 88.

84. This order was issued at an initial hearing to determine whether a temporary injunction should be imposed. The court required that access to two of the four movie booths be roped off, that any openings between the booths be repaired and that uniformed guards be hired to prevent loitering and use of the booths by more than one patron at a time. *Id.* at 387, 323 S.E.2d at 87.

85. *Id.* at 391, 323 S.E.2d at 90.

86. *Id.* at 388-89, 323 S.E.2d at 88.

87. *Id.* at 391, 323 S.E.2d at 90.

88. 99 Cal. App. 3d 183, 160 Cal. Rptr. 69 (1979). The *Croatan Books* court cited *Randolph* in its analysis. See *Croatan Books*, 228 Va. at 390, 323 S.E.2d at 90.

89. *Randolph*, 99 Cal. App. 3d at 190, 160 Cal. Rptr. at 72.

90. *Id.*

91. The *Allowwill* court stated that it was generally known in Harrisburg that adult bookstores were places where people could go to have impersonal sexual encounters. *Allowwill*, 330 Pa. Super. at 41, 478 A.2d at 1339.

because the activities take place on the premises of a bookstore, the Supreme Court has relieved the states of this task.

### Conclusion

In *City of Paducah v. Investment Entertainment, Inc.*,<sup>92</sup> the Sixth Circuit predicted that *Cloud Books* would settle the issue of padlock laws and prior restraint.<sup>93</sup> However, the *Cloud Books* decision really only split the issue. *Cloud Books* involved a nuisance statute aimed solely at controlling illicit sexual activities; such a statute implicitly was distinguished from one aimed at controlling obscenity.<sup>94</sup> When state or local governments invoke a statute intended to combat illegal sexual conduct, even against the owner of a bookstore, they are now freed from first amendment standards of review—as long as the contents of the materials sold are not at issue, and the statute in question is not a pretext for censorship.

Of course, censorship is precisely what the dissenters feared would result from *Cloud Books*, but the dissent offered little more than general speculation on this point. The dissent also overlooked the fact that if a statute prohibits conduct that has an expressive element or is somehow connected to the materials sold, *Cloud Books* will not apply. Most likely, *Cloud Books* has simply provided state and local governments with one small, but nevertheless effective, weapon in their ongoing battle against prostitution and other illicit sexual conduct.

*By Ina L. Potter\**

---

92. 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986).

93. *Id.* at 467.

94. The Court still has not addressed the constitutionality of nuisance laws aimed specifically at obscenity. In fact, the Court denied certiorari in the *Paducah* case subsequent to the *Cloud Books* decision. *City of Paducah v. Investment Entertainment, Inc.*, 107 S. Ct. 316 (1986) (denial of certiorari). *See supra* note 10 and accompanying text.

\* B.A., University of California, Berkeley, 1970; Member, third year class.