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# Requirement and Techniques for Holding an Adversary Hearing Prior to Seizure of Obscene Material

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against a competitor's standing to challenge a rival's authority to engage in his business; one might observe that neither opinion reflects this policy and hence might be led to question its continuing vitality.

Justices Brennan and White would restrict the test for standing to examination of whether plaintiff was injured in fact by the administrative action challenged.<sup>121</sup> Statutory history and interpretation, the Justices argued, is a nonconstitutional requisite for standing and is more properly relevant to the issue of reviewability. Justice Brennan stated, "Reviewability has often been treated as if it involved a single issue: whether agency action is conclusive and beyond judicial challenge by anyone. In reality, however, reviewability is equally concerned with a second issue: whether the *particular* plaintiff then requesting review may have it."<sup>122</sup> While this structural analysis would aid determinations of standing, it would seem merely to defer the difficulties of the majority's approach to the issue of review—unless both standing and reviewability are to be "favorably presumed" away.

The opinion in *Data Processing Service* should serve to eliminate the circular reasoning resulting from the legal-right approach to standing, and the decision's emphasis on segregation of the issues of standing and reviewability may prove helpful. But it is doubtful that the obscure test proposed to guide the lower courts' determinations of those issues will prove effective. Clear standards have yet to be formulated.

DAVID G. CROCKETT

## The Requirement and Techniques for Holding an Adversary Hearing Prior to Seizure of Obscene Material

### INTRODUCTION

Since the United States Supreme Court's decision in *A Quantity of Books v. Kansas*<sup>1</sup> in 1964, the constitutionally sanctioned procedure by which material alleged to be obscene may be seized has become increasingly confused. That decision established a constitutional guideline to ensure an adequate "safeguard against the suppression of non obscene books"<sup>2</sup> by

<sup>121</sup> This view has long been urged by Professor Davis regarding standing under the "person-aggrieved" provisions of the APA. See K. DAVIS, ADMINISTRATIVE LAW § 22.02 (1958).

<sup>122</sup> *Association of Data Processing Service Organizations, Inc. v. Camp*, 38 U.S.L.W. 4198 n.2 (U.S. March 3, 1970) (concurring and dissenting opinion).

<sup>1</sup> 378 U.S. 205 (1964).

<sup>2</sup> *Id.* at 208.

criminal prosecution or injunction. It is now clear that publications—and, by extension, motion pictures<sup>3</sup>—may not be seized prior to a judicial adversary proceeding in which the materials are in fact found to be obscene.<sup>4</sup> This procedure is difficult to follow in North Carolina since there is no explicit statutory scheme providing a forum for such an adversary hearing.

Before examining the various constitutional problems emanating from attempts to seize allegedly obscene materials, it is necessary briefly to discuss some of the problems that have plagued inferior courts, local prosecutors, and law enforcement officials when they have tried to enforce statutes prohibiting the dissemination and showing of obscene material. The Supreme Court has set out a broadly-worded test to determine whether an item arguably protected by the first amendment is obscene and has further complicated the matter by reserving to appellate courts the final determination of the question of obscenity. According to the Court:

[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex, (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value.

. . . .

Evidence that the book was commercially exploited for sake of prurient appeal to the exclusion of all other values might justify the conclusion that the book was utterly without redeeming social importance . . . . [W]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications a court could accept his evaluations at face value.<sup>5</sup>

Since the Court established this standard for application when first-amendment rights are involved, books,<sup>6</sup> magazines,<sup>7</sup> and motion pictures<sup>8</sup>

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<sup>3</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir. 1969); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger v. Percy*, 393 F.2d 202 (7th Cir. 1968); *Cambist Films, Inc. v. Tribel*, 293 F. Supp. 407 (E.D. Ky. 1968); *Cambist Films, Inc. v. Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968).

<sup>4</sup> *See, e.g., Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969).

<sup>5</sup> *A Book Named "James Cleland's Memoirs of a Woman of Pleasure"* v. Attorney General of Massachusetts, 383 U.S. 413, 418, 420 (1966).

<sup>6</sup> *E.g., Childs v. Oregon*, 300 F. Supp. 649 (D. Ore. 1969).

<sup>7</sup> *E.g., People v. Stabile*, 58 Misc. 2d 905, 296 N.Y.S.2d 815 (N.Y. Cty. Crim. Ct. 1969).

<sup>8</sup> *E.g., Cambist Films, Inc. v. Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968).

are the most frequent examples of items measured according to it. Governmental attacks on obscenity, of course, have been extended to areas not necessarily protected by the first amendment. A bare breast displayed in public in Newark may be obscene<sup>9</sup> while one of presumably the same magnitude in San Francisco is not.<sup>10</sup> Lesbian gadgets, probably not protected by the first amendment, have also been declared obscene.<sup>11</sup> These examples illustrate the need for judicial flexibility in devising other appropriate tests for obscenity that fit the subject matter at issue.

#### THE PROBLEM OF CONSTITUTIONAL FACT

The Supreme Court's insistence on its determining the question of obscenity at the appellate level arises from fear of abridgment of first-amendment rights.<sup>12</sup> The issue of obscenity is typically a question of fact to be submitted to the jury.<sup>13</sup> Although findings of fact are normally binding in subsequent appeals,<sup>14</sup> when there are at issue "rights derived from the First Amendment guarantees of free expression, [the Court] cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."<sup>15</sup> Mr. Justice Harlan explained the Court's view when he stated in a concurring opinion in *Roth v. United States*<sup>16</sup> that if "obscenity is to

<sup>9</sup> *Adams Newark Theatre Co. v. City of Newark*, 22 N.J. 472, 126 A.2d 340 (1956).

<sup>10</sup> *See, e.g., In re Giannini*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).

<sup>11</sup> *People v. Clark*, 60 Misc. 2d 1073, 304 N.Y.S.2d 326 (N.Y. Cty. Crim. Ct. 1969).

<sup>12</sup> *See, e.g., Jacobellis v. Ohio*, 378 U.S. 184 (1964).

<sup>13</sup> *See, e.g., United States v. A Motion Picture Film*, 404 F.2d 196 (2d Cir. 1968).

The burden placed on the jury and the trial judge in determining the issue of obscenity is very great and may be seen clearly in a case in which the jury was called up to decide the obscenity of 289 separate publications. The judge, describing the problem, stated:

To lighten the burden of the reader, we will not attempt a weary description of the magazines here involved. A random selection of titles will suffice to present a kaleidoscope of the *genre* we have to deal with: Black Satin, The Body Shop, Busty, Cuddle Bug, Diamond Stud, Frenchy, Hip & Toe, Imp, Man's Favorite Pastime, Masher, Nymph, Pagan, Sultry, Slave, Undie World, and last but far from least, Wow! Multiply these titles by the proliferation of other titles, and it is not difficult to fathom the spectrum placed before the jury in this action.

*Olsen v. Doerfler*, 14 Mich. App. 428, —, 165 N.W.2d 648, 650 (1968).

<sup>14</sup> *United States v. A Motion Picture Film*, 404 F.2d 196 (2d Cir. 1968).

<sup>15</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).

<sup>16</sup> 354 U.S. 476 (1957) (concurring opinion).

be suppressed, the question whether a particular work is of that character involves not really an issue of fact, but a question of constitutional *judgment* of the most sensitive and delicate kind."<sup>17</sup> The doctrine of constitutional fact<sup>18</sup> permits judicial review of the issue of obscenity throughout all stages of the appellate process<sup>19</sup> and leads to greater confusion and uncertainty.

Two cases can be used to illustrate the application of the doctrine. In *United States v. A Motion Picture Film*,<sup>20</sup> a jury, applying the current test for obscenity,<sup>21</sup> had found the movie "I Am Curious (Yellow)" obscene. Nevertheless, the Court of Appeals for the Second Circuit ignored the jury's decision by ruling that ". . . obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the court."<sup>22</sup> In *State v. Childs*,<sup>23</sup> the Oregon Supreme Court dismissed the necessity for expert testimony to aid the jury in determining what the national contemporary standard is, and further stated that "[to] say that the average juror is not cognizant of the contemporary national community and what it will tolerate is to deny the present mass dissemination of information. Under proper instructions, the jury is qualified to weigh a particular book or movie."<sup>24</sup> But the federal district court, acting on a writ of habeas corpus, thought otherwise. Stating that the book did not appeal to prurient interests and did not go beyond contemporary community standards, the district court overturned the jury's verdict and held that the work was not obscene.<sup>25</sup>

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<sup>17</sup> *Id.* at 497-98 (original emphasis).

<sup>18</sup> For a discussion of the theory of constitutional fact, see Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C.L. REV. 311 (1969).

<sup>19</sup> It should also be noted that the redetermination of the issue of obscenity is not limited to the appellate process. One disgruntled federal district judge did not feel bound by a ruling on the issue of obscenity made by a neighboring federal district court. Some of the magazines on trial had been classified previously as nonobscene, but the judge ruled them obscene anyway. Venting his disgust about the earlier decision of the neighboring court, he said, "[O]ne of the magazines offered by claimant as previously approved . . . is entitled 'Pussy Cat.' It is the Court's belief that the title would be more accurate if the word 'Cat' were deleted." *United States v. 77 Cartons of Magazines*, 300 F. Supp. 851, 854 (N.D. Cal. 1969).

<sup>20</sup> 404 F.2d 196 (2d Cir. 1968).

<sup>21</sup> See text at note 5 *supra*.

<sup>22</sup> 404 F.2d at 199.

<sup>23</sup> — Ore. —, 447 P.2d 304 (1969).

<sup>24</sup> *Id.* at —, 447 P.2d at 310.

<sup>25</sup> *Childs v. Oregon*, 300 F. Supp. 649 (D. Ore. 1969).

## PROBLEMS SURROUNDING THE ADVERSARY HEARING

The requirement of an adversary hearing prior to the seizure of allegedly obscene books, enunciated in *A Quantity of Books v. Kansas*,<sup>26</sup> was extended to attempts to seize motion pictures by the Court's subsequent per curiam decision in *Lee Art Theaters, Inc. v. Virginia*.<sup>27</sup> In that case, the Court ruled that a warrant issued by a magistrate upon the affidavit of a police officer who had viewed the entire film was insufficient to support its seizure. *Lee Art Theaters* had been interpreted by three federal courts of appeals<sup>28</sup> to hold that even if the magistrate himself views the film before issuing the warrant, it is invalid since the defendant has not been afforded an opportunity for an adversary hearing.

In *Tyrone, Inc. v. Wilkinson*<sup>29</sup> the commonwealth's attorney and the Richmond chief of police had secured an apparently valid search warrant for the film "Angelique in Black Leather." The warrant was issued upon the affidavits of four police officers and two lawyers who had seen the film by a magistrate who had also viewed it. Upon the basis of this warrant, the film was seized, and the theater was charged with possessing and exhibiting an obscene motion picture. The theater responded with an action under title 42, section 1983, of the United States Code.<sup>30</sup> It claimed that an adversary hearing to determine obscenity was required before the film could be seized and that the seizure, and threats of its repetition would result in the suppression of nonobscene material. The defendants requested the return of the film and an injunction against further criminal prosecutions by the state. The Court of Appeals for the Fourth Circuit ordered the state to return the motion picture and prohibited the seizure of any other film until the question of obscenity had been determined. However, the court refused to enjoin criminal prosecu-

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<sup>26</sup> 378 U.S. 205 (1964).

<sup>27</sup> 392 U.S. 636 (1968).

<sup>28</sup> *Bethview Amusement Park v. Cahn*, 416 F.2d 410 (2d Cir. 1969); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger v. Percy*, 393 F.2d 202 (7th Cir. 1968).

<sup>29</sup> 410 F.2d 639 (4th Cir. 1969).

<sup>30</sup> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1964).

tions<sup>31</sup> and further ordered that the theater deliver to the commonwealth's attorney, upon request, a copy of the movie for reasonable use in the preparation and trial of the charges then pending in the state courts.<sup>32</sup>

The requirement of an adversary hearing before material can be seized prior to the actual criminal trial in effect presents a defendant with two opportunities below the appellate level to be found not guilty of a charge based on obscenity. If the material is found to be nonobscene at the prior hearing, then the charges must be dropped, and no further action can be taken against the defendant. Even if the material is determined obscene at the prior hearing, this decision is not binding at the subsequent criminal trial because the hearing would not have been a fully matured action at law.<sup>33</sup> At trial the defendant will receive a second opportunity to defend on the ground that the material is protected by the first amendment, and the issue of obscenity will have to be submitted to a jury.<sup>34</sup> If the material is found to be obscene at the trial, the defendant still can make use of all other defenses that may exist. Finally, if the defendant is convicted, an appellate court may still re-examine the issue of obscenity. This procedure, as outlined by the federal courts, is designed to give the defendant every possible opportunity to defend the item in order to "safeguard against governmental suppression of non obscene [material]."<sup>35</sup>

The problem of the unavailability of the adversary hearing due to

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<sup>31</sup> The question whether suits under section 1983 constitute an exception to 28 U.S.C. § 2283 (1964), so that a federal court may enjoin a state prosecution, has been expressly left open by the Supreme Court. *Cameron v. Johnson*, 390 U.S. 611, 613 n.3 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965). The Fourth, Sixth, and Seventh Circuits have held that section 1983 does not create an exception. *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Sexton v. Barry*, 233 F.2d 220 (6th Cir. 1956); *Gross v. Illinois*, 312 F.2d 257 (7th Cir. 1963). On the other hand, the Third Circuit has held that section 1983 is an exception. *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950).

<sup>32</sup> *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 640-41 (4th Cir. 1969).

<sup>33</sup> Application of collateral estoppel to the determination of the issue of obscenity has been rejected. One judge noted that some of the same magazines on which he was ruling had been determined nonobscene in two unreported federal district court cases, but he ruled them all obscene anyway. *United States v. 77 Cartons of Magazines*, 300 F. Supp. 851 (N.D. Cal. 1969). This same rationale should be followed in determining the effect of an adversary hearing on a later criminal trial; *i.e.*, the prior judicial determination of obscenity should have no effect at the trial on instructions to the jury or on its verdict. As an added precaution against prejudice, the judicial official who determines the question of obscenity at the prior hearing should not be the judge in the subsequent trial.

<sup>34</sup> *See, e.g.*, *United States v. A Motion Picture Film*, 404 F.2d 196 (2d Cir. 1968).

<sup>35</sup> *A Quantity of Books v. Kansas*, 378 U.S. 205, 208 (1964).

delays and postponements requested by the defendant has been presented in two recent cases with contrary results. In *Fontaine v. Dial*<sup>36</sup> the court found that the hearing was continually postponed on motions by the defense. Nevertheless, the court ruled that an adversary hearing had to be held before a valid seizure could take place, and it was inconsequential that the hearing was not held because of delays requested by the defendant. On the other hand, in *Grove Press v. Kansas*,<sup>37</sup> the court interpreted *A Quantity of Books* to require only that the defendants be afforded an opportunity for a prior adversary hearing and held that since the defendants themselves delayed and postponed the hearing, the court was not bound to give them one.<sup>38</sup>

The rationale behind the defense tactic of delaying a prior hearing is illustrated by the attempt to seize the motion picture "I Am Curious (Yellow)" in Greensboro, North Carolina.<sup>39</sup> Because of the unwillingness of a judge to grant an adversary hearing the film could not be seized; therefore, it was shown until the final determination in a full-scale criminal trial.<sup>40</sup> Because of all the publicity attending the numerous attempts to suppress this particular motion picture, the delay surely proved to be profitable.<sup>41</sup>

Occasionally courts have permitted the seizure of allegedly obscene material for evidentiary purposes<sup>42</sup> although they clearly forbid seizure for the purpose of suppression.<sup>43</sup> The constitutionality of seizure for evidentiary reasons requires close analysis because there are basic differences between the two media primarily used to disseminate obscenity—motion pictures on the one hand and literature, including books and magazines, on the other. There may be no difference in effect between a seizure for evidence and a seizure for suppression in an obscenity proceeding involving

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<sup>36</sup> 303 F. Supp. 436 (W.D. Tex. 1969).

<sup>37</sup> 304 F. Supp. 383 (D. Kan. 1969).

<sup>38</sup> *Id.* at 385.

<sup>39</sup> See Greensboro Daily News, Feb. 19, 1970, § B, at 18, col. 1.

<sup>40</sup> *Id.*

<sup>41</sup> "[I Am Curious (Yellow)] opened at the theatres Feb. 11, and has since played to capacity audiences." Greensboro Daily News, Feb. 19, 1970, § B, at 18, col. 1. The film was declared nonobscene at the trial, and the manager of the theater was found not guilty. Greensboro Record, Feb. 28, 1970, § A, at 9, col. 6.

<sup>42</sup> See, e.g., *Rage Books, Inc. v. Leary*, 301 F. Supp. 546 (S.D.N.Y. 1969).

<sup>43</sup> A seizure for the suppression of the material results when a large number of books are taken from circulation without any judicial determination of the obscenity of the material. See *Gregory v. DiFlorio*, 298 F. Supp. 1360 (W.D.N.Y. 1969), in which the court ordered the return of the books and magazines that were confiscated in a wholesale seizure incident to a lawful arrest.



a motion-picture film, but one copy of a book or a magazine that is printed in volume may be seized as evidence in a later prosecution without amounting to an actual suppression of the material.<sup>44</sup>

In *City of Youngstown v. DeLoreto*<sup>45</sup> a state court ruled that the taking of one copy of each magazine without a prior judicial determination of obscenity did not violate any provisions of the Constitution. In *Rage Books, Inc. v. Leary*,<sup>46</sup> Judge Pollack, citing *Tyrone, Inc. v. Wilkinson*<sup>47</sup> in several instances, ruled that an adversary hearing was not required when the "normal police function of effecting an arrest and the seizure of sample evidence of a suspected crime being committed"<sup>48</sup> was involved. He explained, "[S]uch an arrest and a limited supporting seizure are not tantamount to a prior restraint since the jeopardy faced is essentially the restraint [on the sale of obscenity by] the obscenity law itself . . . ."<sup>49</sup>

A method safer and easier than an outright seizure of obscene books or magazines for evidentiary purposes is instigation of the prosecution simply by the purchase of sample copies.<sup>50</sup> Such a tactic accomplishes two things necessary for a successful prosecution: (1) it effects a sale of the material, an essential element of an obscenity offense in many states,<sup>51</sup> and (2) it enables the prosecution to obtain evidence without risking a violation of the Constitution since no seizure is involved. However, the purchase of a book or magazine, rather than an outright seizure of one copy, has been declared by one judge to be an unnecessary precaution:

That a policeman is free to buy a copy of the offensive matter makes no material or rational difference. The only deprivation from a seizure is of a profit to the suspected lawbreaker. The police are not consti-

<sup>44</sup> See, e.g., *Rage Books, Inc. v. Leary*, 301 F. Supp. 516 (S.D.N.Y. 1969).

<sup>45</sup> 19 Ohio App. 2d 267, 251 N.E.2d 491 (1969).

<sup>46</sup> 301 F. Supp. 546 (S.D.N.Y. 1969).

<sup>47</sup> 410 F.2d 639 (4th Cir. 1969).

<sup>48</sup> *Rage Books, Inc. v. Leary*, 301 F. Supp. 546, 549 (S.D.N.Y. 1969).

<sup>49</sup> *Id.*

<sup>50</sup> See *City of Youngstown v. De Loreto*, 19 Ohio App. 2d 267, 275, 251 N.E.2d 491, 498 (Ct. App. 1969).

<sup>51</sup> (a) It shall be unlawful for any person, firm or corporation, to purposely, knowingly or recklessly disseminate obscenity. . . . A person disseminates obscenity if he

(1) Sells, . . . or offers or agrees to sell . . . any obscene writing, picture, record or other representation or embodiment of the obscene . . . .

N.C. GEN. STAT. § 14-189.1(a) (1) (1969).

tutionally required to fill the coffers of suspects rather than to seize undeniable specimens as evidence.<sup>52</sup>

Of course, seizure of the only copy of a motion picture that a theater possesses, even for evidentiary purposes, has the effect of suppressing the film since it cannot be shown while in the state's possession. Seizing one print of a motion picture has been analogized to confiscation of a large number of books:

We are told that [the theater] has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4,000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in light of first amendment rights, from preventing a similarly large number of books from being circulated.<sup>53</sup>

Irrespective of federal precedents, several recent state cases sanction the seizure of one copy of a film without any adversary hearing if authorities rely on a search warrant. In *People v. De Renzy*<sup>54</sup> the court ruled that state law-enforcement officers acting under authority of a search warrant could seize at least one copy of an allegedly obscene film for evidence in a later criminal prosecution without violating the first or fourth amendments. In obvious contrast to *Tyrone, Inc. v. Wilkinson*,<sup>55</sup> a search warrant and a seizure under it of a motion picture were held by a New York inferior court to be valid in *People v. Steinberg*,<sup>56</sup> in which the judge who issued the warrant had viewed the film himself.

Some courts have not even required a search warrant before a seizure of a film on the ground that a seizure incident to a lawful arrest is valid. A Michigan court ruled in *People v. Bloss*<sup>57</sup> that officers who had paid admission to the theater were obligated to make the arrest when a crime—*i.e.*, the showing of an allegedly obscene film, "A Woman's Urge"—was committed in their presence. The court held that both the arrest and the seizure incident to it were lawful. Similarly, in *People v. Lake Ronkonkoma Theater Corp.*<sup>58</sup> officers had observed the motion picture as customers, decided that it was obscene, arrested the manager of the theater,

<sup>52</sup> *Rage Books, Inc. v. Leary*, 301 F. Supp. 546, 549 (S.D.N.Y. 1969).

<sup>53</sup> *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410, 412 (2d Cir. 1969).

<sup>54</sup> — Cal. App. 2d —, 79 Cal. Rptr. 777 (Ct. App. 1969).

<sup>55</sup> 410 F.2d 639 (4th Cir. 1969).

<sup>56</sup> 60 Misc. 2d 1041, 304 N.Y.S.2d 858 (Westchester Cty. Ct. 1969).

<sup>57</sup> 18 Mich. App. 410, 171 N.W.2d 455 (Ct. App. 1969).

<sup>58</sup> 59 Misc. 2d 438, 299 N.Y.S.2d 545 (Suffolk Cty. Dist. Ct. 1969).

and seized the film. This seizure was permitted by the court as incident to a lawful arrest. In *People v. Hall*,<sup>59</sup> the confiscation of two allegedly obscene motion pictures without a prior judicial inquiry was held permissible because the seizure was incident to a lawful arrest and was for the purpose of obtaining and preserving evidence. A federal district judge in *Cambist Films, Inc. v. Duggan*<sup>60</sup> permitted the seizure of a motion picture incident to a lawful arrest after the arresting officer had viewed the entire film. However, all other copies of the film, which had been seized from other theaters in an area-wide raid, were ordered returned because the officers who seized them had not viewed each one in its entirety. The court acted on the basis of whether the entire film had been seen rather than whether there had been an adversary proceeding.<sup>61</sup> Despite these numerous rulings, permitting seizures of films incident to a lawful arrest or subsequent to a valid search warrant is constitutionally dubious because motion pictures cannot be treated as normal instrumentalities of crime<sup>62</sup> in light of the potential infringement of first-amendment rights that confiscation engenders.

The reluctance of many courts to enforce strictly the requirement of an adversary hearing may stem from the fear that the inherent delay would give the defendant an opportunity to splice the film and eliminate the objectionable parts, send it out of the jurisdiction, or impair the evidence in some other manner. However, if there is a real threat of such actions, it can be controlled by a temporary restraining order.<sup>63</sup> In the face of judicial hesitancy, one judge expressed the necessity for an adversary hearing:

The seizure of film after no more than an *ex-parte* determination of probable cause is essentially a prior restraint of expression—especially inimicable to the First Amendment—and clearly lacks the sensitivity required by the Constitution. In fact, any procedure less sensitive than an adversary hearing on the issue of obscenity prior to seizure of the film, fails to meet the Constitutional requirements implicit in the First, Fourth, and Fourteenth Amendments.<sup>64</sup>

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<sup>59</sup> 60 Misc. 2d 850, 304 N.Y.S.2d 379 (Nassau Cty. Dist. Ct. 1969).

<sup>60</sup> 298 F. Supp. 1148 (W.D. Pa. 1969).

<sup>61</sup> *But see* *McGrew v. City of Jackson*, 307 F. Supp. 754 (S.D. Miss. 1969); *Bazzell v. Gibbens*, 306 F. Supp. 1057 (E.D. La. 1969), in which the courts refused to recognize the right to an adversary hearing before the seizure of motion pictures.

<sup>62</sup> *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961).

<sup>63</sup> *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410, 412 (2d Cir. 1969).

<sup>64</sup> *Fontaine v. Dial*, 303 F. Supp. 436, 439 (W.D. Tex. 1969).

POSSIBLE TECHNIQUES FOR THE ADVERSARY HEARING  
IN NORTH CAROLINA

The administration and procedure of the constitutionally required adversary hearing present special problems in North Carolina since the state's General Statutes provide no mechanism by which to determine the obscenity of any material prior to the actual trial of an alleged offense. "The accepted rule is that the statutory scheme must make provision for a prompt, adversary judicial proceeding to determine whether [the material] is or is not obscene."<sup>65</sup>

The statutory deficiency in North Carolina was exposed during the previously discussed attempt in Greensboro to prosecute the Janus Theatres for the showing of the motion picture "I Am Curious (Yellow)." The judge refused the prosecutor's request for an adversary hearing in order that the movie could be confiscated for evidence before the scheduled criminal trial.<sup>66</sup> He stated that he had found "no North Carolina statute which sets up the machinery for an adversary hearing,"<sup>67</sup> and that a statute outlining such a hearing was "a matter the legislature would have to consider."<sup>68</sup>

Even without a specific statutory scheme for an adversary hearing prior to seizure, it may still be possible to hold one in North Carolina. *Tyrone, Inc. v. Wilkinson*,<sup>69</sup> the controlling case in the Fourth Circuit, contains language implying that there may be procedures other than those specifically defined by a statute that will satisfy the requirement of an adversary proceeding. The court suggested as techniques an application for preliminary injunction or for an order to show cause why the film should not be seized as obscene.<sup>70</sup> If the hearing on the petition is "designed to focus searchingly on the question of obscenity,"<sup>71</sup> it should meet the constitutional requirements.

*Application for a Preliminary Injunction*

There may be some difficulty in using the technique of an application for a preliminary injunction<sup>72</sup> against the showing of a certain film or

<sup>65</sup> *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

<sup>66</sup> Greensboro Daily News, Feb. 19, 1970, § B, at 1, col. 4.

<sup>67</sup> *Id.* § B, at 18, col. 1.

<sup>68</sup> *Id.*

<sup>69</sup> 410 F.2d 639 (4th Cir. 1969).

<sup>70</sup> *Id.* at 641.

<sup>71</sup> *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961)

<sup>72</sup> N.C. GEN. STAT. §§ 1-485 to -500 (1969).

the selling of particular books or magazines. At common law, the equitable remedy of an injunction could not be issued to bar the commission of a criminal offense since it was deemed that the remedy at law would be sufficient.<sup>73</sup> This objection can be eliminated by the enactment of a statute specifically authorizing injunctions against the dissemination of obscenity. The constitutional requirements for a valid statute creating injunctive remedies to suppress allegedly obscene material have been set out by a federal district court:

[There must be some] rule or procedure or statute of the Commonwealth [that] restricts the state court's discretion in the granting, continuance, or dissolution of such injunction once a preliminary hearing is held . . . . [There must also be] an expedited appeal or an unconditional right to supersedeas or a fixed time within which either trial or appellate courts must render their judgment.<sup>74</sup>

In any case, the need for the actual issuance of an injunction after a hearing is questionable: once it is determined that the material is in fact obscene, the violator can be arrested, and his goods seized. If the hearing of the request for an injunction went so far as to provide a forum for determining the issue of obscenity, the requirement for a prior adversary proceeding might well be constitutionally satisfied although no injunction could actually issue because of historical precedent.

#### *Order to Show Cause*

A second possible method for holding an adversary proceeding in North Carolina is by means of a hearing of an order to show cause<sup>75</sup> why film, books, or magazines should not be seized as obscene. The defendant would be served with a copy of the order and required to produce in court a copy of the allegedly obscene material. If the material was found to be obscene, then it could be seized prior to the criminal trial. At the time of the issuance of the show-cause order, a warrant for the arrest of the suspected violator should also be issued and served so that a sounder foundation of jurisdiction over the individual could be established. A similar procedure was approved by the United States

<sup>73</sup> *In re Sawyer*, 124 U.S. 200, 210-11 (1888).

<sup>74</sup> *Grove Press, Inc. v. Philadelphia*, 300 F. Supp. 281, 288 (E.D. Pa. 1969).

<sup>75</sup> Every clerk has power—

(4) To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties. N.C. GEN. STAT. § 2-16(4) (1969).

Supreme Court in *Kingsley Books, Inc. v. Brown*;<sup>76</sup> however, in that case there were specific statutory guarantees of a speedy hearing and appropriate appellate protection.

### *Arrest*

Another possible nonstatutory method that may be constitutionally adequate involves the arrest of a person for violation of an obscenity statute.<sup>77</sup> Once the arrest is accomplished, there are two options open to the prosecutor. He may seize the material as incident to a lawful arrest (and perhaps he may not have to concern himself with the problem of an adversary hearing),<sup>78</sup> or he may seek an adversary proceeding. Once the accused is under the jurisdiction of the court pursuant to his arrest, he could be ordered to bring the allegedly obscene material before the judge for a determination of the question of obscenity prior to the actual criminal trial. If the material was found not to be obscene, then the charges could be dropped; all the material found to be obscene could be confiscated and used for evidence at later criminal proceedings.

### *The Subpoena Duces Tecum*

Still another possible means for bringing about a pre-seizure adversary hearing is through obtaining issuance of a subpoena duces tecum.<sup>79</sup> In *Sokolich v. Ryan*,<sup>80</sup> a criminal prosecution, the judge outlined such a procedure. He suggested that the prosecutor institute adversary proceedings before a judicial officer through notice to the suspected offender and a subpoena duces tecum, directed to the defendant, containing the name of each challenged publication or film.<sup>81</sup> After the hearing on obscenity, criminal proceedings could be undertaken if appropriate. It

<sup>76</sup> 354 U.S. 436 (1957).

<sup>77</sup> A peace officer may without warrant arrest a person:

(1) When the person to be arrested has committed . . . a misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a . . . misdemeanor in his presence. . . .

N.C. GEN. STAT. § 15-41(1) (1965).

<sup>78</sup> See notes 44-62 *supra* and accompanying text.

<sup>79</sup> Subpoenas for the production of records, books, papers, documents or tangible things may be issued in criminal actions in the same manner as provided for civil actions in Rule 45 of the Rules of Civil Procedure.

N.C. GEN. STAT. § 8-61 (1969).

Rule 45 gives the judge broad discretion in the issuance of subpoenas. N.C. R. Crv. P. 45.

<sup>80</sup> 304 F. Supp. 213 (S.D. Ga. 1969).

<sup>81</sup> *Id.* at 218-19.

is questionable, however, whether the subpoena itself would confer jurisdiction over the person without his arrest.

A variation of the above procedure was used with apparent success in North Carolina's Seventh Judicial District.<sup>82</sup> An arrest warrant was issued by the magistrate and at the same time an order was served on the defendants by the district court judge requiring them to appear at a specified time and to bring with them copies of the allegedly obscene film. The order further enjoined the defendants from removing or permitting to be removed from the jurisdiction any copies of the film. After the preliminary hearing, the motion picture was found to be obscene. After the judge viewed the film in the presence of the defendants, he issued an order to seize all copies of it.<sup>83</sup>

#### *Hearings for Issuance of Warrants*

The two existing statutory provisions that are perhaps best suited to provide an adversary hearing in North Carolina are those for the issuance of arrest warrants<sup>84</sup> and search warrants.<sup>85</sup> Before an arrest warrant is issued under section 15-20 of the North Carolina General Statutes, the issuing judicial officer is required to examine the complaint and any witness who may be produced by the complainant. If it appears from such an examination that any criminal offense has been committed, he may issue a warrant for the arrest of the suspect or, in the alternative, a misdemeanor summons.<sup>86</sup> There is nothing in the statute to preclude turning this application for a warrant into an adversary hearing on the question of obscenity. The suspected offender could be notified of the hearing and could defend against the issuance of the warrant by raising the question of the obscenity of the materials involved. If they are found to be obscene, then there would be just cause to issue the warrant; if not, the warrant would not be issued, and the case would be closed.

Section 15-25 of the North Carolina General Statutes provides that certain judicial officials may "issue a warrant to search for any contraband, evidence, or instrumentality of crime upon finding probable cause

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<sup>82</sup> On November 12, 1969, criminal prosecutions were instigated by Charles Winberry, prosecutor for the Seventh Judicial District, against the owners and operators of the Drake Theater in Wilson for showing the film "Ladie Godiva Rides."

<sup>83</sup> Conversation with Charles Winberry, December 12, 1969.

<sup>84</sup> N.C. GEN. STAT. §§ 15-18 to -22 (1965), as amended (Supp. 1969).

<sup>85</sup> N.C. GEN. STAT. § 15-25 (Supp. 1969).

<sup>86</sup> If the judge has reasonable grounds to believe that the defendant will appear, he may issue a summons instead of an arrest warrant. N.C. GEN. STAT. § 15-20 (1969).

for the search."<sup>87</sup> The hearing on probable cause could easily be turned into an adversary proceeding. The defendant could be notified of the hearing and could be ordered to appear and bring with him the material in question pursuant to a subpoena duces tecum.<sup>88</sup> If at the hearing the material was found to be obscene, the magistrate would have probable cause to issue the search warrant, and any of the material adequately described in the warrant could be seized.

### *Recommended Combination of Techniques*

A combination of the procedures discussed above is recommended as the surest method of achieving suppression of obscene materials prior to a criminal trial in North Carolina since the state does not yet have a specific statutory provision for an adversary hearing.<sup>89</sup> First, the prosecutor should file with the appropriate magistrate a complaint alleging that a violation of the obscenity laws has occurred, and he should request a misdemeanor summons<sup>90</sup> for the defendant. The summons should then be served on the defendant to bring him within the jurisdiction of the court. A subpoena duces tecum,<sup>91</sup> ordering the defendant to come before the court and to bring samples of the material in question, should accompany the summons so that an adversary hearing can be held on the question of whether the judge should issue a search warrant.<sup>92</sup> An order should also be issued enjoining the party from removing, causing, or permitting to be removed the material that is the subject of the investigation.

Obscenity *vel non* should be decided in the hearing on whether there is probable cause to issue a search warrant. If the material is determined to be obscene, the search warrant may be issued and the material

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<sup>87</sup> N.C. GEN. STAT. § 15-25 (Supp. 1969).

<sup>88</sup> N.C. GEN. STAT. § 8-61 (1969). See note 79 and p. 842 *supra*.

<sup>89</sup> Another technique that might be used to combat the dissemination of obscenity is declaring the establishment in which the undesired material was sold or exhibited a public nuisance. N.C. GEN. STAT. §§ 19-1 to -6 (1965). It is doubtful, though, that North Carolina's nuisance statutes constitutionally provide a technique to suppress obscenity because:

[T]here is no rule or procedure or statute that restricts the state court's discretion in the granting, continuance, or dissolution of such injunction once a preliminary injunction is held. . . . Nor is there an expedited appeal or an unconditional right to supersedeas or a fixed time within which either trial or appellate courts must render their judgment.

Grove Press, Inc. v. Philadelphia, 300 F. Supp. 281, 288 (E.D. Pa. 1969).

<sup>90</sup> N.C. GEN. STAT. § 15-20 (Supp. 1969).

<sup>91</sup> N.C. GEN. STAT. § 8-61 (1969).

<sup>92</sup> N.C. GEN. STAT. § 15-25 (Supp. 1969).



that is described in the warrant seized. This procedure should be sufficient in most cases since the prior adversary hearing does not have to be "a fully matured action at law."<sup>93</sup>

### *Obscenity That Is a Danger to Children*

A different, less tolerant standard of constitutional protection prevails when there is a danger that children may be exposed to obscenity.<sup>94</sup> North Carolina has a procedure<sup>95</sup> for obtaining a permanent injunction against anyone who is "engaged in selling, distributing, or disseminating in any manner harmful material to minors."<sup>96</sup> Either a solicitor or a prosecutor may commence the action by filing a complaint with a true copy of the allegedly harmful material. The court then conducts a hearing to determine if there is probable cause to believe that such material is harmful to minors. If the material is found to be harmful, a summons may be issued to the respondent. At this point, the respondent has an opportunity to appear and defend at trial. These proceedings may result in a permanent injunction against the respondent, thereby eliminating the dissemination of the material.

### EXTENSION OF THE ADVERSARY-HEARING REQUIREMENT

The broadest extension of the requirement for a pre-seizure adversary hearing has recently been effected by two federal district courts.<sup>97</sup> They held that material must be declared obscene in the adversary proceeding and the defendant must be given the opportunity to refrain from further dissemination of those items before any criminal sanctions can be applied. The underlying rationale is that the obscenity of material to which the first amendment can be applied is an issue of fact to be determined by the jury, that a person might not be held to know a fact whereas he is presumed to know the law, and, therefore, that a violation

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<sup>93</sup> *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 641 (4th Cir. 1969).

<sup>94</sup> "It is therefore altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults." *People v. Kahan*, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334, 258 N.Y.S.2d 391, 392 (1965). *See also* *Ginsberg v. New York*, 390 U.S. 629 (1968); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966); *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966).

<sup>95</sup> N.C. GEN. STAT. §§ 19-9 to -26 (Supp. 1969).

<sup>96</sup> N.C. GEN. STAT. § 19-13(a) (Supp. 1969).

<sup>97</sup> *Delta Book Distributors, Inc. v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1969); *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

of an obscenity law should result only when the material that has been determined obscene in an adversary hearing is *subsequently* disseminated. In *Delta Book Distributions, Inc. v. Cronwich*,<sup>98</sup> a three-judge district court said:

Since prior restraint upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.<sup>99</sup>

In *Sokolic v. Ryan*,<sup>100</sup> the court ruled that "[a]ny criminal prosecution here prior to an adversary hearing and without plaintiff having the subsequent opportunity to refrain from selling materials determined to be obscene is violative of his First Amendment rights."<sup>101</sup> The court added that "suppression of the dissemination of literature can occur only when one sells or offers for sale materials that have been previously declared obscene in an adversary proceeding."<sup>102</sup> If the rationale of these two cases is applied in North Carolina, it is doubtful that any conviction for a violation of an obscenity statute could be obtained at all since there are no legislative provisions for an adversary hearing.

#### CONCLUSION

If criminal prosecutions for dissemination of obscenity continue to be considered necessary,<sup>103</sup> statutes should be enacted in North Carolina and all other states that conform with the constitutional requirements for seizure of obscene materials. New York's procedure was upheld by the United States Supreme Court in *Kingsley Books, Inc. v. Brown*,<sup>104</sup> and the Virginia statutory scheme<sup>105</sup> recently was accepted by the Fourth

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<sup>98</sup> 304 F. Supp. 662 (E.D. La. 1969).

<sup>99</sup> *Id.* at 667.

<sup>100</sup> 304 F. Supp. 213 (S.D. Ga. 1969).

<sup>101</sup> *Id.* at 216.

<sup>102</sup> *Id.* at 217.

<sup>103</sup> For an opinion that all obscenity laws should be eliminated and that the control of obscene material should be accomplished by civil remedies, see *Elison & Graham, Obscenity: A Compromise Proposal*, 30 MONT. L. REV. 123 (1969).

<sup>104</sup> 354 U.S. 436 (1957). For details of the New York scheme that was accepted by the Supreme Court, see 354 U.S. at 437 n.1 (1957).

<sup>105</sup> For an excellent statutory scheme dealing with the adversary hearing from its inception to its conclusion and delicately balancing rights of the individual without impairing the power of the state, see VA. CODE ANN. § 18.1-236.3 (1960)