CENSORSHIP OF OBSCENE LITERATURE BY
INFORMAL GOVERNMENTAL ACTION

Mr. Burton. What was the final result of this comic-book situation? Were the distributors or dealers prosecuted?

Mr. Case. No. There was a definite threat of prosecution . . . [W]e had about 80 . . . [titles] that we submitted to the Wayne County prosecuting attorney’s office wherein we felt there was a violation of the law . . . [W]e . . . informed the distributor, that is, the wholesaler, who, in turn, notified the publisher, that they were in violation of our State statute, that they would have to be withheld from circulation, or that they could be defended in court, as the case may be, in a test case, and such a test case had. The result was that they were withheld . . .

Mr. Burton. And you did find that it was possible to get cooperation if the proper approach was made?

Mr. Case. Oh, yes, it is possible; yes, sir.

Mr. Burton. Later was this approach on the part of the Detroit distributors extended to any other materials?

Mr. Case. Yes.

Mr. Burton. Such as magazines and pocket-size books?

Mr. Case. Yes, it was, and it is still being done. . . . Now in 1951 we called in— we have two distributors in Detroit. We called in the one independent distributor—the other is the American News Co.—and on one we had voluntary cooperation which, naturally, is the ideal method of suppression of this type of material, and the other was forced. . . . So far in each instance the material in question has been withheld from circulation . . .

Mr. Rees. What results have you had with respect to convictions in cases that have been submitted to the court?

Mr. Case. We have not to date, sir, lost a case in court. We have had no instances up to the present time, as far as the pocket-size books are concerned, as having gone into court. They have always been withdrawn voluntarily.¹

Legislation making the distribution of obscene literature a crime has been enacted in all jurisdictions but two.² Such statutes have not, however, been widely invoked, perhaps because of a deep-seated feeling that obscenity prosecutions increase the popularity of the publication in question.³

¹Testimony of Inspector Herbert W. Case of the Detroit Police Department, Hearings before the House Select Committee on Current Pornographic Materials, 82d Cong. 2d Sess. 114-17 (1952).

²New Mexico and Alaska are the two exceptions. Report of the House Select Committee on Current Pornographic Materials, 82d Cong. 2d Sess. 32–33 (1952). The Hearings and Report of this Committee are hereafter referred to as the Gathings Comm. Hearings and the Gathings Comm. Report, respectively.

³"...I can go out and pick any book that you might declare to be indecent or obscene, in violation of any State law, but how is suppression to be made with reference to law enforcement? I go to a particular place, I make the arrest, seize all the books he has, and it is going to take months and months before the criminal court is finished with him.

"What happens in the interim?

"[O]ne case . . . took over 2 years, but . . . a month after the arrest was made, they were
straints which prevent distribution of questioned publications may avoid this problem, but it has long been thought that direct censorship raises serious constitutional questions.\(^4\)

The result has been, in periods of anxiety over the spread of "obscenity," to look to less formal governmental action in the hope of avoiding the practical difficulties of prosecutions on the one hand and the constitutional difficulties of prior restraints on the other. There are many indications today that we are in the midst of such a period, and the informal schemes of censorship are mushrooming. This comment will concern only the problems raised when local public officials, usually the police, attempt to prevent the distribution of objectionable literature by informal methods.\(^5\)

Apparently a list of all the communities in which informal governmental censorship has been applied has never been compiled, but it is known that the following local officials have recently engaged in this practice:

the police chief of Youngstown, Ohio;\(^6\)
the county prosecutor of Middlesex County, New Jersey;\(^7\)
the Commissioner of Licenses of New York City;\(^8\)
the police chief of East Chicago, Ohio;\(^9\)
the district attorney of Denver, Colorado;\(^10\)
the prosecuting attorney of Trenton, New Jersey;\(^11\)
the police chief of Cleveland, Ohio;\(^12\)

selling these books under the counter, not for its price, not for double its price, but for triple the price.

"The action that we took there made a fortune for that man and, what did he wind up with? A fine.

"As a practical law-enforcement officer . . . I have no intention of going out and making a fortune for a guy that is going to print rot and filth.

". . . I certainly . . . might be violating my trust, my oath of office, or I might not be enforcing the law, as I should, but I can't see going out and making an arrest on any book that you have here and letting all the other book stores sell—I can't see it. That is not suppression, crime prevention, to me." Testimony of Inspector Roos of the New York Police Department, Gathings Comm. Hearings 265, 271.

\(^{\text{4}}\) See pages 221-24 infra.
\(^{\text{5}}\) See Lockhart and McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 (1954), for an excellent discussion of current practices in the field of obscenity and present movements in the law.

\(^{\text{10}}\) Ibid.
\(^{\text{11}}\) Ibid.
the police chief of South Bend, Indiana;\textsuperscript{13}
the state's attorney-general of Massachusetts;\textsuperscript{14}
the prosecutor's office of Jersey City, New Jersey;\textsuperscript{15}
the prosecuting attorney of Detroit, Michigan.\textsuperscript{16}

It has also been reported that the police in Springfield and Holyoke, Massachusetts, successfully banned the best-seller \textit{From Here to Eternity} by these methods.\textsuperscript{17}

Recently, a congressional committee investigating current pornographic material (the Gathings Committee) lent its prestige to informal governmental censorship as a means of combatting what it characterized as an inherently dangerous situation. The committee reported that the problem of "obscene" material was reaching alarming proportions. Pocket-size books were categorized as having "largely degenerated into media for the dissemination of artful appeals to sensuality, immorality, filth, perversion, and degeneracy."\textsuperscript{18} Many magazines were considered equally undesirable,\textsuperscript{19} while the "flagrantly misnamed 'comics'... glorify crime, [and] make a mockery of democratic living and respect for law and order."\textsuperscript{20}

There was a complete disavowal of formal censorship methods:

Censorship definitely is not a practical or adequate answer to problems in the field of obscenity. . . . There are other means of handling this problem than by the ban of the censor, means which can be applied without danger of infringing on the freedom of the press and without calling undue attention to the indecent nature of the literature in question.\textsuperscript{21}

One of the "other means" which was extolled by several witnesses\textsuperscript{22} in the hearings was the use of threats of obscenity prosecutions to intimidate distributors and retailers. The committee evinced particular interest in the testimony of Detroit Police Inspector Case, a leading exponent of this

\textsuperscript{13} American Book Publishers Council, Recent Censorship Developments, Sept. 18, 1953, at 4.
\textsuperscript{14} Testimony of Herbert Monte Levy, Gathings Comm. Hearings 349, 357-58.
\textsuperscript{15} Statement of Alfred D. Siemenski, ibid., at 316-20.
\textsuperscript{16} Testimony of Herbert W. Case, ibid., at 112-43. Consult also Lockhart and McClure, op. cit. supra note 5, at 311-16.
\textsuperscript{17} Testimony of Herbert Monte Levy, Gathings Comm. Hearings 358.
\textsuperscript{18} Gathings Comm. Report 3.
\textsuperscript{19} Ibid., at 2.
\textsuperscript{20} Ibid., at 2, 26.
\textsuperscript{21} Ibid., at 5.
\textsuperscript{22} Consult testimony of Samuel Black, Gathings Comm. Hearings 38; Inspector Roy E. Blick of the Metropolitan Police Department (Washington, D.C.), ibid., at 64-65; Inspector Herbert W. Case of the Detroit Police Department, ibid., at 112-43; Representative Alfred D. Siemanski, ibid., at 316-18.
method; Chairman Gathings praised the Inspector's work highly. The committee's report reproduced almost in full the testimony of Inspector Case; in sharp contrast, testimony emphasizing the dangers of this method was brushed off with a curt editorial comment.

The techniques employed in informal censorship by public officials may take many forms. The most prevalent practice is to send letters to booksellers or distributors stating that the writer considers certain books objectionable, and intimating that criminal prosecutions under the obscenity laws will be initiated against all who sell them. More subtly, the police may make a "request for cooperation," implicit with a threat that non-cooperation will produce "trouble." Such "trouble" may include visits by building inspectors, fire inspectors, health inspectors, or any of a number of other officials who might find technical violations of some law or ordinance. Or it may involve a disrupting police raid, a withdrawal of police protection from the offender's place of business, or the stationing of uniformed policemen inside his store. These informal restraints—"informal" because they operate outside the normal legal machinery—may be classified together under the generic term "police censorship."

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The popularity of threats of prosecution to eliminate undesirable publications is due in large measure to the effectiveness of this technique. Frequently the warnings are directed against distributors, rather than booksellers, because pressure may be more readily concentrated on the smaller group.

23 Gathings Comm. Hearings 142-43.
25 The testimony of Patrick Murphy Malin and Herbert Monte Levy, Gathings Comm. Hearings 342-59, was in large part a discussion of the dangers of police censorship. It was summarized as follows in the committee report: "Their views as expressed orally and in prepared statements were, in substance, pleas against governmental precensorship and for freedom of speech and of the press. Frequently, throughout the five days of hearings, the chairman and other members had found it necessary to make public announcements that the very idea of censorship was as repugnant to the committee as it was to the publishing industry; that the only proposals that might be made would be directed against those few reprehensible individuals who for selfish gain were systematically engaged in abusing their constitutional privilege of freedom of speech and of the press." Gathings Comm. Report 111.

Other possibilities of control were discussed. Obscenity prosecutions under present law were not considered as a curative. Gathings Comm. Report 5. Another method of control suggested was informal pressure against dealers by "civil and religious organizations." Ibid., at 3. The formal recommendation was self-regulation by the publishers. Ibid., at 120. However, a number of important publishers did not prove receptive at the hearings, feeling they were violating no law, and seeing no reason for self-restraint of the magnitude requested by the committee. Testimony of John O'Connor (Bantam Books), Gathings Comm. Hearings 289-315; Ralph Foster Daigh (Fawcett Publications), ibid., at 2-34. Compare the testimony of Arch Crawford (Magazine Publishers Association), ibid., at 181-213; Milton H. Gladstone (Arco Publishing Co.), ibid., at 215-31; Max Shapiro (Cadillac Publishing Co.), ibid., at 104-12; Martin Scheer (Eugenics Publishing Co. and Personal Books, Inc.), ibid., at 91-104.
A recent case stated the results of letters to the four distributors of a proscribed book in Middlesex County: "The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received." Similar effects were reported to the Gathings Committee. Mr. Herbert Monte Levy of the American Civil Liberties Union indicated that while the threats of prosecution in Massachusetts continued against Lait and Mortimer's *U.S.A. Confidential*, "you could not get a copy of that book anywhere in Massachusetts."

The reasons for the effectiveness of this technique are readily apparent. Seemingly there is a choice open to each seller—he may submit to the police request or risk a court test on the obscenity of the publication. But there is in fact no real choice. It is highly improbable that any bookseller or distributor would care to risk going to court. Proceedings to test the obscenity of a book are criminal in nature, and criminal prosecutions are personally unpleasant. There is always the chance that a short jail term or heavy fine will be imposed. Moreover, the interest which a bookseller or distributor has in any one book is very small. He sells many books; refusal to sell a book upon the prompting of the local police does not place the seller at a competitive disadvantage toward other retailers or distributors, since all are subject to the same pressure. The threats operate even more strongly, perhaps, against retailers because they can ill afford to chance the loss of public goodwill which a criminal prosecution may entail. An obscenity prosecution makes the seller appear to be a degrader of children and a panderer to the adolescent mind; the public will almost certainly condemn him.

The books which may so readily be banned by these methods are usually chosen in a manner which in no way resembles due process of law. It is common for some group without legal standing to compile a list of books which it deems obscene or subversive and to send the list to the local police officials. If the organization has even a minimum amount of influence or respectability, the police may as a favor send letters to booksellers or distributors, and the censorship has begun. In Middlesex County, New Jersey, for example, a "voluntary committee on objectionable literature," working closely with the county district attorney, made the selections; in Jersey City, New Jersey, "groups of religious, civic, and educational leaders"

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27 Ibid., at 298, 50.
28 See, in particular, the testimony of Inspector Case, page 216 supra.
29 Gathings Comm. Hearings 349.
pass on the books.\textsuperscript{33} In contrast, in Detroit, Michigan, the local police officers "skim off the filth" by examining all pocket-size books before they are sold in Detroit.\textsuperscript{34} There is also a tendency to exchange lists, a practice which entails certain questionable assumptions concerning the similarity of laws in the different states. Thus, the police chief of Youngstown, Ohio, at one time was threatening prosecutions if any of 335 books or 33 magazines was sold. Through his own initiative several titles had been added to the impressive list supplied by Detroit's Inspector Case.\textsuperscript{35}

The unofficial groups use either their own interpretation of the obscenity or subversion statutes, or their personal beliefs as to what the general public should not be permitted to read, and it is a foregone conclusion that many books are listed which the courts would uphold as nonobjectionable.\textsuperscript{36} There is no right of appeal from this informal decision, except perhaps by a "re-hearing" before the same group. None of the traditional constitutional safeguards against arbitrary or unreasonable action are available. Valuable property rights of individuals who do not appear before the group are thus foreclosed.\textsuperscript{37}

Three recent cases have passed on the legality of police censorship. In Ban-
tam Books, Inc. v. Melko\textsuperscript{38} and New American Library of World Literature, Inc. v. Allen\textsuperscript{39} local officials in New Jersey and Ohio were enjoined from using threats of obscenity prosecutions to suppress books.\textsuperscript{40} However, in Sunshine Book Co. v. McCaffrey\textsuperscript{41} the court refused to enjoin threats of license revocation against newsdealers in New York City.\textsuperscript{42}

\textsuperscript{33} Gathings Comm. Hearings 317.
\textsuperscript{34} Ibid., at 116.
\textsuperscript{36} Detroit may be an exception to this statement. Public officials alone compile the list. Policemen of the License and Censor Bureau examine all pocket-size books before they are distributed. The books are placed into three categories: "One, which have been approved, read by ... [the bureau] and approved ... ; [two, which are] partially objectionable ... but ... would [not] be a good case to present to court ... ; [and three, which the bureau] definitely feel [are] ... a violation of the law...." Books in the third group are submitted to the prosecutor's office, which makes the final decision as to the obscenity of the book. Gathings Comm. Hearings 116–20. Mr. Case claims that the courts have quite generally agreed with the administrative decision. Ibid.
\textsuperscript{37} As a group, the publishers suffer most. They have the greatest financial interest in the books but virtually never have a chance to appear before the censor.
\textsuperscript{39} 114 F. Supp. 823 (N.D. Ohio, 1953).
\textsuperscript{41} 112 N.Y.S. 2d 476 (S. Ct. N.Y. Co., 1952).
\textsuperscript{42} Cf. Dell Publishing Co. v. Beggans, 110 N.J. Eq. 72, 158 Atl. 765 (Ch., 1932).
The conclusions in *Bantam Books* and *New American Library* may be justified on at least three grounds; both courts apparently relied on a combination of the three.

(1) In both instances it was held that police censorship is a form of unconstitutional prior restraint.\(^4\)

That it is a prior restraint seems clear. The public officials by threats force the withdrawal of the listed books before sale without court trial:

Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naïve. His [letters were] . . . taken by the distributors as a plain mandate to remove the books listed as “objectionable”. . . . [The letters] did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County’s action spread to other counties and markets . . . .

We have here a clear case of previous censorship in the area of literary obscenity. . . .\(^4\)

If the restraint is applied to a book protected by the First and Fourteenth Amendments, fundamental personal rights are clearly violated. But under present law some books may be beyond the pale of the First Amendment.\(^4\) It is still unsettled whether prior restraints applied against such books are invalid.\(^4\) If the Supreme Court should decide that prior restraints are

\(^4\) It was held to violate the federal Constitution. Though the courts did not consider the question, police censorship seems to involve “state action” in terms of the Fourteenth Amendment prohibitions. It involves the action of a state official under color of his office to achieve a goal he believes is in the best interest of the state. See Ex parte Virginia, 100 U.S. 339, 346–47 (1879). Cf. Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945). Consult Applicability of the Fourteenth Amendment to Private Organizations, 61 Harv. L. Rev. 344 (1948). But consult Hale, Unconstitutional Acts as Federal Crimes, 60 Harv. L. Rev. 65 (1946); Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials, 40 Harv. L. Rev. 969 (1927).

\(^4\) “[T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . .” Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

This dictum was given real content in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). See also note 61 infra.

There appear to be limits, however, even to the power of the state to punish for the distribution of certain literature. See *Commonwealth v. Gordon*, 66 Pa. Dist. and Co. 101 (City Ct., 1948), aff'd *Commonwealth v. Fiegenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950). Lockhart and McClure, op. cit. supra note 5, at 352 et seq., make a careful examination of the meager authorities and also reach this conclusion.

per se unconstitutional, police censorship would, of course, fall. So long as prior restraints are not unconditionally struck down, the question remains whether police censorship may be employed to suppress books not protected by the First Amendment.

Police censorship suffers many of the same infirmities which have caused the Supreme Court to strike down other prior censorship techniques. The Court has consistently refused to uphold systems which vest state officials with unlimited or overly broad discretion to suppress speech. The content of the speech is not controlling: if the legislative standards are inadequate to confine the official within the permissible area of unlawful communication, the system may be successfully challenged by any interested person. In *Kunz v. New York* the conviction of a rabble-rousing preacher for addressing a street meeting without obtaining a permit was set aside because the police commissioner had been permitted to exercise complete discretion in ruling on license applications. Speaking for the Court, the late Chief Justice Vinson declared:

The Court below has mistakenly derived support for its conclusion from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. . . . We do not express any opinion on the propriety of punitive remedies which the New York authorities may utilize. We are here concerned with suppression—not punishment. It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.

Police censorship seems to fall easily within this language. It necessarily implies unchecked administrative discretion vested in the police. Conceivably the official may select the books to be proscribed in a purely arbitrary man-

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v. Collins, 323 U.S. 516 (1945); Largent v. Texas, 318 U.S. 418 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938). Compare Saia v. New York, 334 U.S. 558 (1948), with Kovacs v. Cooper, 336 U.S. 77 (1949). The most recent case, Superior Films v. Dept of Education of Ohio, supra, is especially provocative. In a per curiam opinion two Ohio censorship systems were overturned because the standards "immoral" and "harmful" were unconstitutionally vague. The term "obscene" has not yet been considered by the Supreme Court.

The cases have been determined on a preliminary point and the question of the legality of prior restraints has not been reached. However, in a concurring opinion in the Superior Films case, Mr. Justice Douglas argued that all prior restraints are unconstitutional. It is possible that the present court is not prepared to go so far as Justice Douglas, but there is no conclusive evidence. Consult Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533 (1951).

See cases cited note 46 supra, and particularly Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The Court, however, saw the film. See the concurring opinion of Mr. Justice Reed, ibid., at 506–7.

ner, or he may authorize any group to make the selection. The degree of discretion involved in police censorship appears to be considerably greater than the discretion granted under a statutory provision which orders that "sacrilegious" motion pictures shall be denied a license. Such a provision has been held to be unconstitutionally vague, because it permitted unchecked administrative discretion in its application.

(2) A separate but closely related ground on which the decisions in Bantam Books and New American Library were based is the deprivation of valuable property rights without due process of law which the blacklist selection methods entailed. Independent of free-speech considerations, police censorship generally will result in a denial of the procedural requirements of the Fourteenth Amendment. As already indicated, there is no opportunity to challenge adverse testimony, no right to a hearing, no assurance that the decision will be made by a qualified person or tribunal, and no right to a review of the decision when adverse.

The peculiar sanctions of police censorship could conceivably be applied against books chosen in a manner consonant with the requirements of due process, but there seems to be no instance of a system which so qualifies. Moreover, it seems unlikely that such a system will ever come into being, since the intended advantages of police censorship, lack of publicity and flexibility of administration, result largely from the absence of requirement of a formal hearing.

(3) Constitutional issues aside, however, the police in Youngstown and Middlesex County did not have statutory authority to cause the removal of the books from the shelves without a court order. Therefore the police action was an unwarranted assumption of power by state officials under color of state law. Since the property rights injured by these lawless acts were inestimable, a sound case for equitable relief was presented. This ground alone is sufficient in both Bantam Books and New American Library; and therefore the constitutional questions were not necessarily involved in

49 Of course, there are no standards at all for police censorship.


51 The informal pattern held unconstitutional in Niemotko v. Maryland, 340 U.S. 268 (1951), closely resembles that of police censorship, in that there was a complete lack of legislative direction to the police officers.

52 See discussion in note 43 supra.

53 See pages 220–21 supra.


56 Consult 43 C.J.S., Injunctions § 158 (1945), and authorities collected therein, notes 97 and 98.
either decision. Both courts, however, placed considerable emphasis on the constitutional issues.

_Sunshine Book Co. v. McCaffrey_ illustrates a different approach to the problem of police censorship. The Commissioner of Licenses of New York City listed several nudist magazines in a letter to newsstands, and concluded the letter with the following ominous remark: "In the event you display or offer for sale any of the above identified publications . . . steps will be taken looking to the suspension or revocation of your license."

The plaintiff asked for three remedies: (1) an injunction against the criminal prosecutions which had been initiated against several newsdealers who were charged with selling the listed nudist magazines; (2) an injunction against the institution of future charges against newsdealers who might sell the magazines; and (3) an injunction against the threats of license revocations made by the Commissioner against any newsdealer who sold any of the magazines. All three requests were denied. The refusal of the first two was probably correct. Only by the institution of criminal prosecutions can the question of violation be decided by a jury in a court of law.

The court's ruling on the third request is open to serious question. The plaintiffs argued that the Commissioner did not have the power to revoke licenses of newsdealers because of the publications they sold or exhibited for sale; that even granting the power he could not properly apply it against those who sold plaintiffs' magazines because they were not obscene; and that the Commissioner's letter was an unconstitutional prior restraint upon the distribution of the magazines.

The court apparently treated the issue of the Commissioner's power in terms of his authority to revoke licenses in general. Relying on authorities which supported a power to make regulations regarding licensed businesses, Judge Corcoran concluded that this authority implied a power to revoke the licenses of those who violated the regulations. This conclusion seems proper, but does not necessarily meet the thrust of plaintiffs' contentions which go to the exercise of this power to determine what publications may be sold. Although approving the Commissioner's power to "safeguard public morals," the court did not explicitly consider the free-speech problem which the exercise of that power against newsdealers entails.

The court next determined that the Commissioner had power to send out letters warning newsdealers that their licenses would be revoked if they exhibited or sold objectionable magazines. But it would seem that the power to threaten revocation does not necessarily follow from the power to

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88 Ibid., at 479.
revoke. A revocation is a judicially reviewable act; a threat, without more, is not. Similarly, it has been held that the power of the police to initiate prosecutions does not necessarily imply power to threaten prosecutions. The acts of the New York Commissioner of Licenses were closely analogous to the acts of the Middlesex and Youngstown police, but the court did not consider the distinction here suggested.

Judge Corcoran further held that the prior restraint imposed was not unconstitutional. He construed the threat as encompassing only those issues which contained nudes, held these publications obscene, and, therefore, concluded that the restraint was applied only to publications not protected by the First and Fourteenth Amendments.\(^6\)

It may be questioned, however, whether in the proceeding before him it was proper for Judge Corcoran to make any determination as to the possible obscenity of the magazines. Traditionally such determinations have been made in criminal actions where there is a right to trial by jury. A court of equity may wish to assure itself that the probability of success in a pending or threatened prosecution is reasonably high,\(^6\) but this is a different matter from an outright determination of criminal liability. The danger of making such a determination is that if the judge finds the publications obscene, but the jury acquits in the later proceeding, the prior restraint stands, even though the publications have been held to be within the protection of the First Amendment.\(^6\)

The result in *Sunshine Books* may be justified on a narrow ground. Criminal prosecutions which necessarily would involve an adjudication of the obscenity question were pending, and the only question before the court was the protection of property rights in the period before a conclusive determination of the ultimate issue of obscenity. On the facts of the case, the question of the constitutionality of police censorship was not necessarily

\(^6\) "[Near v. Minnesota, 283 U.S. 697 (1931)] did not hold that, even if obscene periodicals are openly and continuously sold in a community, the public is helpless to prevent recurrences by anticipatory action. . . . [B]oth the majority and minority opinions indicated that, in such a situation, a community could protect itself by previous restraint." Ibid., at 485.

\(^6\) For example, in a case involving alleged misuse of legal process for private ends. Commission Row Club v. Lambert, 116 S.W. 2d 732 [St. Louis (Mo.) C.A., 1942] (semble).

\(^6\) Subsequent to Judge Corcoran's opinion denying interlocutory relief, the plaintiffs moved for a jury trial on the issue of obscenity. The first jury was unable to reach a verdict; the second finally rendered a 10-2 verdict against the plaintiffs. Letter from O. John Rogge, Counsel for Plaintiffs. The danger is well illustrated by a comparison of the difficulties the jury had in reaching their verdicts with the relative ease with which Judge Corcoran found against the plaintiffs.

The reasons traditionally given for the refusal of the courts of equity to determine the issue of criminal liability are that it would be a usurpation of the functions of a court of law, and it may be impossible to unravel complicated issues of fact from preliminary affidavits alone. 43 C.J.S., Injunctions § 156 (1945); Delaney v. Flood, 183 N.Y. 323, 76 N.E. 209 (1906).
raised. It was only necessary to decide whether the presumption of lawfulness would protect the right of sale from restraints *pendente lite.*

In all three cases the defendants argued that their actions were lawful because they were grounded in powers that naturally adhered to their positions as guardians of the peace and order. It was their clear duty, they felt, to prevent criminal acts as well as to prosecute such acts after they had occurred. Indeed, the preventive function of the criminal law may be considered paramount, with the prosecutory function as a means toward that end. For example, if a policeman sees someone preparing to throw a rock through a window, he is authorized to threaten prosecution to prevent a breach of the peace. In fact, he is derelict in his duty if he does not give such a warning. This, it was argued, the police officers were doing when they warned distributors and booksellers that if certain books were sold, prosecutions under the obscenity laws would be initiated.

Both *Bantam Books* and *New American Library* rejected this argument, though the exact grounds for the rejection are not clearly stated. In an earlier New Jersey case, *Dell Publishing Co. v. Beggans,* arising on similar facts, Vice-Chancellor Bigelow accepted the analogy, however, and refused to enjoin threats of confiscation:

An order by police officers that a magazine be not sold has no more legal weight than a similar order given by a private individual. It is effective, however, because it carries an implied threat that disobedience will be followed by arrest and prosecution. Complainant contends that any action by the police in advance of the commission of a crime (not amounting to a breach of the peace) is unlawful; that their only function is to wait until a crime has been accomplished and then to arrest and prosecute. I do not think this sound. In my opinion the police have a preventive function; if they have reason to believe a crime is contemplated, they may properly give warning that, if the crime is committed, they will proceed against the wrong-doer.

The *Dell Publishing* case has little or no present precedent value. Even before it was repudiated in *Bantam Books,* it had not been followed.

The analogy approved in *Dell Publishing* seems unsound. Whether there

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64 The court could have decided there was good reason to believe that the pending obscenity proceedings would be successful and, therefore, the loss of property rights in the interim should not be avoided. Since the mere pendency of proceedings would of itself cause a serious decline in the desire of licensed newsstands to handle the magazines, the refusal to enjoin the threats of license revocation does not seem unreasonable.

66 This is the argument lying behind the inevitable defense claim that the action is lawful. None of the opinions have analyzed the argument carefully. See Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479, 485 (N.D. Ohio, 1921).

67 Ibid., at 74, 767.

appears to be an imminent danger of a rock going through a window is a question of fact on which there can be little disagreement. The same cannot be said about the imminence of a violation of the obscenity laws. The obscenity standard is so flexible and the result of a prosecution is so unpredictable that a policeman's determination of illegality is most unreliable. It is doubtful whether a policeman may prevent the commission of an act when he has no assurance that the act is unlawful.

There is a second factor which vitiates the analogy. The freedom to publish and distribute books is directly protected by the Constitution. One would expect, therefore, that an even higher degree of certainty would be required to justify suppression of books by threatening prosecution.

One element which has confused discussions of the regulation of obscenity is the presence of material that is "obscene per se." Such material, which is usually sold under the counter at extravagant prices, is clearly obscene under any test. Because of its limited availability, such material poses very different problems of control than those created by some widely distributed, openly sold magazines and pocket-size books. Nonetheless, there seems to be no place for the use of police censorship even against clearly obscene material. The police may and should prefer criminal charges, and there is no danger of causing increased sales because of the court proceedings.

Restraints on the sale of literature which is openly exhibited, however, present serious constitutional questions. It is probably true, as previously noted, that obscenity proceedings instituted against such material increase its popularity considerably, so that there is a real danger of increasing rather than suppressing the sale of material which later may be held obscene. But to permit the police to cause withdrawal of such material in anticipation of a future court decision is to invite serious restrictions on the freedom of the press.

Police censorship as presently practiced provides an excellent illustration of the reality of these dangers. An effective prior restraint, it is simply a device for evading the publicity attendant on a court hearing. The practices followed do not even approach compliance with elementary requirements of due process of law. There is unchecked administrative discretion, absence of formal standards, and no right of appeal. The official may act at will and is accountable to no one.

II

The unlawful actions which this form of police censorship involves may be remedied by court orders restraining the offending police officers. The way should remain open, however, for the institution of judicial proceedings

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69 See, for example, 1 Chafee, Government and Mass Communications 200 et seq. (1947); Gathings Comm. Report 5; Lockhart and McClure, op. cit. supra note 5, at 320 et seq. (1954).
if a formal adjudication of the obscenity of any book is desired by the police.\textsuperscript{70}

The restraining orders should be broad enough to restrain the practice generally, even if arising out of the suit of an individual publisher. The subsequent history of the \textit{Bantam Books} litigation has been particularly unfortunate in this respect. The original decree was broad:

That the Prosecutor of the Pleas of Middlesex County and all persons acting for him, directly or indirectly, and any so-called citizens’ committees now functioning or hereafter to be appointed, be and they are hereby enjoined permanently from writing any letters to any persons, whether newsdealers, distributors, or otherwise, of the same tenor and effect as those set forth in the complaint.\textsuperscript{71}

In the course of his lengthy opinion, however, Judge Goldmann stated that he personally could not find \textit{The Chinese Room} objectionable.\textsuperscript{72} On appeal, the Supreme Court of New Jersey, in a brief per curiam opinion, seized on this somewhat informal holding and limited the injunction to protect \textit{The Chinese Room} only.\textsuperscript{73} By its casual modification of Judge Goldmann’s order, the Supreme Court vitiated the reasoning behind his decision and all but nullified its effect. For, as has been suggested, the thrust of his argument was that police censorship is an unconstitutional prior restraint, irrespective of the content of the publication. If the court intended to accept this position, its limitation of the order to one book, based on a statement about the merits of that book, makes little sense. However, the court did not express disapproval of Judge Goldmann’s views.

The present prosecutor in Middlesex County has interpreted the Supreme Court's opinion as a repudiation of Judge Goldmann's decision and an authorization to continue the use of police censorship. In his view, if any publisher objects to the practice he may bring an equitable proceeding, and the chancellor will enjoin the threats if, in his determination, the banned books are not obscene.\textsuperscript{74} If the merits of the individual book are not determinative of the constitutionality of the threats, this result is highly unsatisfactory. Litigation would be necessary for each book on the blacklist; the publisher would thus be put to considerable expense and trouble to defend his constitutional right to distribute literature in the face of inherently invalid threats. Moreover, the time lag between listing and vindica-

\textsuperscript{70} Apparently all the cases are unanimous on this limitation to the decree. New American Library of World Literature, Inc. v. Allen, 114 F. Supp. 823 (N.D. Ohio, 1953); Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479, 481 (N.D. Ohio, 1921). The decree entered in Bantam Books is discussed below.

\textsuperscript{71} Decree entered by Judge Goldmann, par. 7 (supplied by plaintiff’s counsel).


\textsuperscript{73} Bantam Books, Inc. v. Melko, 14 N.J. 524, 103 A. 2d 256 (1954).

\textsuperscript{74} N.Y. Times, p. 34, col. 4 (March 9, 1954).
tion will cause books to be suppressed for considerable periods without the availability of recourse in the interim.

III

Police threats need not involve criminal prosecutions under the obscenity laws. The more subtle forms of police censorship may conveniently be considered in terms of the type of sanction threatened: proceedings for offenses other than violations of the obscenity laws, and police actions other than the institution of prosecutions. These forms of police censorship are not easily combatted.

Discussion of the threat of the institution of proceedings for unrelated offenses is not entirely academic. The threat "to send the inspectors around" can be extremely effective in any city where there are lengthy, strict, or outmoded health and safety ordinances. City-wide compliance is often an impossible goal, and the inspectors have considerable discretion as to where suit will be initiated. It would probably prove difficult to demonstrate systematic discrimination against non-cooperating booksellers for purposes of suits against the officials based on a denial of equal protection of the laws. 75

For example, these methods have long been used to censor movies and the legitimate theater in the city of Chicago. A writer for the American Civil Liberties Union has described the pressures brought to bear on a recent film, The Miracle:

After a long search for a large hall without license involvements (the police had threatened license revocation proceedings against any commercial theater which showed the film), we were fortunate to receive the invitation for a private screening from the First Unitarian Church of Hyde Park. Again pressures were brought to bear. Agents of the City Building Inspector and Fire Prevention Bureau carefully scrutinized the church and inspected the projection equipment, in spite of the fact that 16 mm. film copies of the film had been made available for the showing. Police Commissioner O'Connor told the press that we would have police at the screening. Private showings took place on August 15 and 18 and again inspectors and policemen appeared. 76

An injunction against such practices does not lead to an adjudication on the obscenity of the publication, and in a sense all the threats remain outstanding indefinitely. An injunction against threats of obscenity prosecutions forces the police either to desist or to institute proceedings that will definitively determine the character of the publication. 77 If criminal pro-


76 American Civil Liberties Union, Brief, Chicago Division, at 2 (August 1952). Consult also Jack, Blue Pencil Over Chicago 10 (pamphlet published by the American Civil Liberties Union, 1949).

77 If a decision is handed down by the highest court of the state on the obscenity of the book, the rules of precedent militate against a second test of the obscenity of the book. If a
ceedings under a fire ordinance are instituted upon the sale of the objectionable book, the proceeding does not approach the question of the merits of the book, and further prosecutions against the same or different booksellers may still be initiated.

Injunctions prohibiting the institution of all prosecutions against booksellers can hardly be advocated as a general solution. Booksellers should not be given the advantage of complete immunity to regulatory laws, simply because their position in relation to police censorship would be stronger if they were not required to comply with the regulations. If this alternative is ruled out, the pressures may become so subtle and complex that courts of equity will be powerless to correct the situation.

There is one important practical limitation to this form of pressure. The time and money available to public officials are limited, and inspectors would probably hesitate to deplete their resources by making hundreds of inspections in buildings in which only minor violations may be found in order to enforce the threats of some other branch of the police force. This form of police censorship, therefore, is perhaps best dealt with by encouraging disregard of the threats and as close compliance as possible with the laws and ordinances in question.

The second form of subtle pressure involves the use of threats of extralegal action by the police. Numerous possibilities are open, ranging from a withdrawal of police protection to stationing several policemen in the shop at all times. An injunction against both the threats of such action and the action itself appears practicable. While courts of equity generally hesitate to interfere with the enforcement of the criminal law, numerous cases have held that the police will be enjoined from taking arbitrary action that will harm property interests or civil rights when the action does not pro-

lower court hands down a decision, the rules of precedent may not apply. However, it is doubtful if either police or seller would care to risk a second proceeding in the hope that a different decision would be reached.

Numerous authorities are collected in 43 C.J.S., Injunctions § 156 (1945). See Meadville Park Theatre Corp. v. Mook, 337 Pa. 21, 10 A. 2d 437 (1940); Strand Amusement Co. v. Owensboro, 242 Ky. 772, 47 S.W. 2d 710 (1932); Russo v. Miller, 221 Mo. App. 292, 3 S.W. 2d 266 (1928); Biagini v. Shoemaker, 122 Wash. 204, 210 Pac. 193 (1922); Randolph v. Kessler, 95 Kan. 32, 147 Pac. 1132 (1915); Rosenberg v. Arrowsmith, 82 N.J. Eq. 570, 89 Atl. 524 (Ch., 1914); Kearney v. Laird, 164 Mo. App. 406, 144 S.W. 904 (1912). Compare Iannella v. Piscataway Tp., 138 N.J. Eq. 598, 49 A. 2d 491 (Ch., 1946), with cases cited note 80 infra.

Consult The Requirement of a "Property Right" as a Basis for Equitable Jurisdiction, 20 Rocky Mt. L. Rev. 304 (1948). And consult Equitable Protection of Personal Rights, 33 Cornell L. Q. 579 (1948): "In spite of salvos of artillery from the professors, sniping by case noters in law reviews, and precision bombing from above by appellate judges, the shibboleth that 'Equity protects only Property Rights' still survives this withering fire and occasionally contrives to disturb the tranquility of the suitor who thought the courts were dependable allies in his view that the human personality is more sacred than material wealth." But consult Protection of Personal Rights in Equity, 15 Univ. Chi. L. Rev. 226 (1948).
vide a direct avenue to a regular court process. For example, in a recent Texas case, Roper v. Winner, the police closed up a night club because the roof violated the building code and, therefore, the night club constituted a nuisance. No court appearance was ordered, nor was an explicit description of necessary repairs supplied as required by law. The Texas Court of Civil Appeals affirmed a restraining order:

Appellants have created an extra-legal remedy, have then found appellees guilty in some sort of ex parte method, have invoked severe sanctions against them so as to put them out of business, and have afforded them no opportunity to be heard, tried, or correct any faults. This is not a suit to enjoin the enforcement of the law. It is a suit to require enforcement of the law. It is a suit to prohibit self-made, self-tried, and self-executed law. The action here complained against is the excessive use of authority, and equity will intervene when an officer transcends lawful bounds.

The distinction seems sound, and while all the cases cannot be reconciled, the chances for equitable relief appear excellent. The threatened police activity against booksellers is admittedly for the purpose of preventing the sale of books without court proceedings so that under the doctrine of the cases it may be properly enjoined.

IV

Police censorship appears to be a continuing phenomenon. It is a constant temptation to police and pressure group alike, for it is effective and leaves little trace. General solutions appear impossible because of the diversity of these censorship techniques. It would seem, however, that early judicial


81 Roper v. Winner, 244 S.W. 2d 355, 357 (Tex. Civ. App., 1951).

82 E.g., Monfrino v. Gutelius, 66 Ohio App. 293, 33 N.E. 2d 1003 (1939); Burkitt v. Beggans, 103 N.J. Eq. 7, 142 Atl. 181 (Ch., 1928); Conte v. Roberts, 58 R.I. 353, 192 Atl. 814 (1937); Deeb v. Stoutamire, 53 S. 2d 873 (Fla., 1951). There are some harsh cases. In Harmon v. Police Commissioner of Boston, 274 Mass. 56, 174 N.E. 198 (1931), the plaintiff alleged that the police entered his place of business to search for illegal liquor thirty-four times without a search warrant and thirty-six times with a warrant. No illegal liquor had ever been found. The court refused to enjoin further searches: "Equity will not ordinarily interfere." Cf. also Adams v. Chesapeake Oyster & Fish Co., 34 Colo. 219, 82 Pac. 528 (1903).

83 For comment on the problem of equitable relief against police officers, see, e.g., Equity—Equitable Relief Against Police Interference with Business, 8 Ohio St. L. J. 215 (1942); Enjoining of Criminal Statutes, 27 Georgetown L. J. 235 (1938); Equity Jurisdiction to Enjoin Criminal Prosecutions under Concededly Valid Statutes, 22 Va. L. Rev. 353 (1936); Enjoining Criminal Prosecutions, 37 Calif. L. Rev. 685 (1949).
determination of the obscenity of challenged publications would alleviate the situation considerably. A wider use, at the first sign of police opposition, of the declaratory judgment procedure now available in many states or of the "quasi-in-rem equity" proceeding with which Massachusetts is experimenting would be desirable. Either procedure immediately brings the publisher into court to defend his books and tends to discourage police censors from attacking his publications.

The same technique has been applied to a similar problem of police activity—is a machine a game of skill or of chance? Thrillo, Inc. v. Scott, 15 N.J. Super. 124, 82 A. 2d 903 (1951).


SECTION 3 OF THE CLAYTON ACT—"LAW UNTO ITSELF"

Proponents of theories of pure competition frowned on agreements to deal with a single seller as being unduly restrictive both of the right to buy where one pleased and the right to compete freely for the business of all buyers. Such theory was apparently responsible for the passage of Section 3 of the Clayton Act. The relevant provisions are:

It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . . or other commodities, whether patented or unpatented . . . or fix a price, charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

The "where-the-effect" clause of this section has been, as was anticipated in the congressional debates, difficult for the courts to interpret. The statement in United States v. Standard Oil Co. (Standard Stations) that "the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected" was thought to settle the criterion by which exclusive-dealing agreements would be declared illegal. Since then, however, this decision has been subjected to analysis and attack by the commentators, to interpretation by the lower courts.

Consult Stevens, Unfair Competition 91 (1917); Clark and Clark, How to Control Trusts 98–103 (2d ed., 1912).


337 U.S. 293, 314 (1949).