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LIABILITIES OF THE EXTRA-LEGAL CENSOR

SCOPE

The question dealt with here is the liability, if any, of censors motivated by moral as distinguished from political beliefs, viz., those groups which attempt (generally successfully) to suppress literature through means other than resort to the courts or mere persuasion by the exercise of free speech. Although the actuating premises under which these groups operate are open to doubt, this question will not be touched upon. The purpose of this article is to point up the many important problems involved in the sensitive area of extra-legal book censorship.

THE PROBLEM

Because of the practical problems of prosecution under criminal auspices the constitutional limitations of prior restraint, these groups have found refuge through informal methods of suppression. This activity has evolved from organized actions by groups to protect themselves from prejudice, such as action by Jewish groups against Oliver Twist, Roman Catholic pressure aimed at The Nation, and the Negroes' resentment of The Birth of a Nation, to attempts to protect others from moral degradation. Movements have taken hold in many cities. These groups are generally voluntary associations of public spirited citizens, many times with a public official such as the Chief of Police in their midst or at the helm. The procedure generally is to compile a list of allegedly objectionable books or to use one already compiled, i.e., the National Organization of Decent Literature lists, and to send letters to storekeepers asking their "cooperation" in removing these books. This request is fortified by making the latter aware of the local ordinance against obscene literature. Next come check visits to the stores and the rewarding to a cooperating store of a plaque or sticker to show compliance. This reward is subject to be taken away upon future failure to cooperate. Where the group is purely unofficial in nature (not having been organized or authorized to act by the city or town, which would thus raise the problem of the delegability of this police power and the protection of the United States Constitution first and fourteenth Amendments) there is the overt threat of boycott and sometimes prosecution. Where the group has official sanction, the threat of prosecution is

6. 163 Publishers Weekly 1058 (Feb. 28, 1953); the list includes Detroit, Baton Rouge, Oklahoma City and Youngstown.
Cooperation is thus elicited: the small entrepreneur generally has neither the money nor the courage to resist a criminal prosecution or to institute a civil suit, to say nothing of loss of business which would result from the mere accusation that he "sells dirty books to children."^9

THE QUESTION—WHAT CAN BE DONE?

Leaving aside the problem of what standards should be applied in deciding that a book is obscene, a concept which the courts have not as yet fully defined,^10 the question is what rights and remedies are possessed by society and the economically injured party, bookseller, distributor and publisher? Also involved here are questions as to the rights of the group (usually children) whose protection is sought. Do they or their parents have a right to choose the protectors? Do they have a right not to be protected? Has the state or city by passing an obscene literature statute set itself up as the sole protector under a preemption theory or is there room for joint protection? If there is no preemption, who else then may participate? Parent? Church? Civic groups?

THE STATE

The only remedy of the State would have to be found in the penal statutes. It is possible that in some states the action of these groups inasmuch as they involve group activity and threats in order to accomplish their aims, may be indictable offenses under conspiracy or extortion statutes. If the book is actually (by statutory and judicial standards), obscene, perhaps the compounding of crime statutes would come into operation; the New York Penal law does not seem broad enough to accomplish this.^11

THE INDIVIDUAL HARMED ECONOMICALLY

(A) Prima Facie Tort

In its classic sense this is intentionally to do that which is calculated in the ordinary course of events to damage and which does in fact, damage another in

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8. This assumes that the individual against whom pressure is exerted knows whether the group has official sanction or not. It is this writer's opinion that the assumption generally is that the group is official since the group name generally includes the name of the municipality in which the group is operating.

9. For a detailed study of the operation of these groups see Lockhart & McClure, Op. cit. supra note 5 at 309-16.


11. N. Y. Penal Law 530, 570, 580 (5), 850 etc.
that person's property or trade, if done without just cause or excuse. The elements are thus intent, damage and lack of justification.

The intent question is held to require, in the majority of jurisdictions, merely the intent to do the act. No intent to injure the plaintiff is necessary; his damage need only be an inevitable concomitant of the defendant's conduct. The damage question needs little discussion; as in all torts, it is a necessary element; here usually attempted to be shown by proving a decline in sales. Since this often raises difficult questions of causation, and since recovery for injury to personal reputation has been allowed under this theory, one who has been labelled "a seller of dirty books" might conceivably recover on this latter point alone, assuming no justification can be shown. This tort theory was referred to in American Mercury v. Chase, where the opinion surmised that the prima facie tort doctrine might ultimately be the leading theory upon which cases in this area would be decided. The decision there was reached by analogy to secondary boycott, and a temporary injunction was granted against the defendant, secretary of the famous (or infamous) New England Watch and Ward Society. The court had before it the issue of whether an unofficial organization, activated by a sincere desire to benefit the public and to strengthen the administration of the law, might carry out its purpose by threatening with criminal prosecution those who dealt in magazines which it regarded as illegal. In holding that this was an unlawful practice, whether the threats were express or implied, the court said lack of commercial motive was immaterial; the defendant had no right to threaten. This the court distinguished from an expression of views which is clearly an allowed and protected right. The rationale of the decision was "that the injury did not flow from the judgment of a court or public body ... defendant's judgment controls ... same result if judgment is right or wrong ... Reputable dealers won't risk it even if they believe the prosecution is unfounded ... defendants know and trade on this." This decision has been criticized in some quarters as an invasion of the freedom of speech, a problem always present in this area regardless of which point of view one adheres to. 

12. This concept was first put forth in Mongul Steamship Co. v. McGregor, Gow & Co. (1889) 23 Q. B. D. 598, 613 aff'd (1892) A. C. 25 and Introduced Into this country by J. Holmes in Atkins v. Wisconsin, 195 U. S. 194 (1904). See note 52 Col. L. Rev. 503 (1952); Holmes, Privilege, Malice and Intent, 8 Harv. L. Rev. 1 (1894).

13. See Note, op. cit. supra note 12, at 506.
16. Id., at 225.
18. 25 Mich. L. Rev. 74, (1926). At page 75 the author states: "It would seem impracticable to stop private censorship unless we are ready to enjoin all organized efforts of private persons to enforce the law."
The three most recent cases have gone off on the injunction theory. The Bantam Books and New American Library cases allowed the injunction but the right to relief was denied in the New York case. These cases all involved the action of a citizens' committee coupled with the cooperation of a law enforcement officer. In Bantam Books the defendant was the prosecutor of pleas of Middletown County. He formed or accepted the services of an advisory committee whose function it was to screen literature offered for sale in the county, to determine if it was fit for public reading. A list was prepared and letters asking cooperation were sent. The court in finding an implied threat of prosecution held that neither the prosecutor nor the committee constituted by him had authority. "The action of the defendant . . . was illegal and beyond the scope of his official authority; he violated the constitutional guarantee of freedom of press." The Appellate Court, however, narrowed the scope of the injunction to the one book contested in that proceeding, though the reasoning of the lower court was not questioned. On similar facts an injunction was also granted in the New American case, where the court held the defendant by his actions had deprived the plaintiff of his property without due process of law. The injunction was granted on the ground that damage to the plaintiff, though incapable of being accurately measured, was irreparable. In the course of its opinion the court said: "Where public officers exceed their lawful powers they no longer act as agents of government. In such cases they act with no greater legal authority than private persons or organizations. Defendant possesses no power to suppress publications with the threat of prosecution." There an overt official threat was involved, but the implication arises


20. Sunshine Book v. McCaffrey, supra note 18. The court here decided that the Commissioner of licenses for New York City did not violate any constitutional standards by sending a notice to distributors that revocation of licenses would be forthcoming if they sold certain named magazines. Thus plaintiff's prayer for injunction was denied. The theory of the court was that the doctrine of prior restraint has no application in the area of obscene literature. This assumption is questioned by Lockhart & McClure, op. cit. supra note 4.


that private organizations could also be enjoined.\(^{24}\) On the basis of these cases\(^{25}\) there seems to be ample authority to obtain an injunction.

**OTHER THEORIES ON WHICH ACTIONS COULD BE BASED**

**Declaratory Judgment**

There are other theories on which actions could be based. It has been suggested that at the first sign of attack a declaratory judgment should be sought so as to establish the legal status of the attacked book.\(^{26}\) This, of course, is expensive and slow. However, an action of this nature might conceivably be brought in order to question the authority of power of the censorship group. This would in essence, serve the same purpose as an injunction but its scope might be broader, however, in that the defendant's rights could be fixed as to all possible plaintiffs and not limited solely to the rights and obligations between the defendant censor and the suing plaintiff. In addition, this would be less expensive than to test the status of the questionable book and the constitutional question as to the place of literature dealing with sex could be raised.\(^{27}\)

An action based on trade libel conspiracy might also be used.\(^{28}\) Other potential methods for finally adjudicating the status of these books and their place in the constitutional scheme, or for compensation based on damage caused may lie in a suit under the Federal Civil Rights Act;\(^{29}\) or if public funds are being used, a taxpayers' action, depending upon the law of a particular jurisdiction; an action based upon malicious prosecution\(^{30}\) may also lie.

Other suggestions such as legislation penalizing this type of attack on literature and laws to force invocation of the applicable ordinances have also been put forth.\(^{31}\) A solution might also be in a ruling of the Supreme Court of the United States giving constitutional protection to literature dealing with sex. This, it is

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24. This reasoning can be questioned on the ground that the true rationale for enjoining the defendant was that he was acting under color of authority and thus the implication is defeated. But see note 8 supra; The question is then raised, is actual color of right necessary or does a mere belief on the part of the party injured that the actor has such authority suffice?

25. See for additional authority 23 U. KAN. CITY L. REV. 94 (1954) and material there cited.

26. See op. cit. supra, note 3.

27. See op. cit. supra, note 5.


29. See op. cit. supra, note 3, at 497, n. 68, 69.


RECENT DECISIONS

thought, would do much to induce local authorities to pay less attention to pressure groups.\(^2\) This latter thought coincides with the theory that private organizations acting in the capacity of censors are within the reach of the fourteenth amendment, in that they exercise powers similar to the state.\(^3\) These remedies appear to be beyond the grasp of the ordinary dealer in books, however.

CONCLUSION

The conclusion of others that this problem is insolvable and no method of attaining relief is available at this point seems incorrect. However, the suggestions put forth in this article are only suggestions, the ultimate solutions lie elsewhere—in the courage of book dealers and other citizens who in the last instance must demand and defend their rights.

Joseph D. Mintz

Constitutional Law: Fifth Amendment Privilege

Relator was held in contempt of court for refusing to answer, in spite of immunity granted by the State, questions of a Louisiana Grand Jury investigating public bribery. An indictment charging violations of a federal statute arising out of alleged gambling activities was pending against him in a United States District Court. Reversing the conviction, the Louisiana Supreme Court held (4-3), to require answers concerning his gambling activities would violate his privilege against self-incrimination guaranteed by the Fifth Amendment. *State v. Dominguez*, 228 LA. 284, 82 So. 2d 12 (1955).

Article 1, section 11 of the Louisiana Constitution grants an exemption from compulsory self-incrimination “except as otherwise provided in this constitution . . .” The privilege is denied by Article 19, section 13, in bribery investigations but the compelled testimony “shall not afterwards be used against him in any judicial proceeding . . .” Immunity is also provided for by statutory provisions dealing with the subject matter of public bribery. *West's Louisiana Revised Statutes*, §§14:121, 15:468.

The questions which relator refused to answer sought to connect him with the bribery of police officers during his operations of lotteries. Such testimony would have been very pertinent to the pending federal prosecution which, of course, could not be prevented by the State-granted immunity.

It is well settled that the fifth amendment is not applicable to the states.

\(\text{32. \text{Lockhart & McClure, op. cit. supra, note 5.}}\)
\(\text{33. \text{Note 61 Harv. L. Rev. 344 (1948).}}\)