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CONSTITUTIONAL LAW—OBSCENITY—The Right to an Adversary Hearing on the Issue of Obscenity Prior to the Seizure of Furtively Distributed Films

Obscene material is presently viewed by the United States Supreme Court as falling outside the protection of the first amendment's guarantees of freedom of speech and press.1 The Court has defined a work to be obscene when, "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."2 In developing a test of obscenity, the Court has further elaborated that

2. 354 U.S. at 489.

In Stanley v. Georgia, 394 U.S. 557, 559 (1969), the Supreme Court held that the "mere private possession of obscene matter cannot constitutionally be made a crime." By so holding, the Court raised the issue of the continuing validity of its holding in Roth that obscenity is not protected by the first amendment.

In Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), prob. juris. noted, 397 U.S. 984 (1970), a three-judge federal district court enjoined the prosecution of a film exhibitor for exhibiting an obscene film to the public. After noting that the exhibitor prevented minors from entering his theater and warned his audience in advance of the possibly offensive nature of the film, the court stated: "... we think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned." 306 F. Supp. at 1368. The court in Karalexis felt that the right to possess or view obscene material, recognized in Stanley, implied a right to receive such material, with a corresponding right in the seller to sell or exhibit it. Several other courts have reached similar results on the basis of Stanley that are contrary to a strict reading of Roth. See United States v. Dellapis, 433 F.2d 1252 (2d Cir. 1970); United States v. Lethe, 312 F. Supp. 421 (E.D. Cal. 1970).

On the other hand, several courts have rejected such arguments and have sum-
three 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.

Most states, as well as the federal government, have traditionally enacted statutes dealing with obscenity. As a result, the Supreme Court has often been presented with challenges to overzealous applications of state and federal procedures that have posed threats to nonobscene and therefore constitutionally protected expression. In particular the Court has had to deal with this problem in the context of prior restraints. Notwithstanding the fact that the drafters of the Constitution designed the first amendment to prohibit prior restraints, the Supreme Court has held that not all prior restraints are unconstitutional. Thus, the Court has had to develop standards for the procedures that the states and the federal government must follow in imposing prior restraints, in order to distinguish between unconstitutional infringements of constitutionally protected expression and constitutionally permissible prior restraints.

This Note will discuss the procedural safeguards that must be provided when allegedly obscene materials are seized prior to distribution. The discussion will emphasize a consideration of the question whether the procedural requirements with respect to the seizure of printed materials are also applicable to the seizure of films, particularly held that Stanley does not extend beyond the narrow facts in that case. For example, in Raphael v. Hogan, 305 F. Supp. 749 (S.D.N.Y. 1969), the court emphasized that the Supreme Court had explicitly stated in Stanley that Roth and its progeny were not affected by the Court’s holding in that case. 394 U.S. at 568. See also Gable v. Jenkins, 309 F. Supp. 988 (N.D. Ga. 1969).

The issue of the extent to which Stanley applies beyond its facts may soon be resolved, since Karalexis is before the Supreme Court this term. See 397 U.S. 984 (1970) (noting probable jurisdiction). If the Court does hold that Stanley implies a right to sell, as well as to possess obscene materials, the procedural safeguards discussed in this Note may be largely irrelevant since the substantive law will itself extend a significant degree of protection to exhibitors and sellers of obscene materials.

6. M. SHAPIRO, supra note 5, at 152.
ticularly those films that are being or are intended to be furtively distributed.

I. **CONSTITUTIONALLY REQUIRED PROCEDURAL SAFEGUARDS**
**APPLICABLE TO PRIOR RESTRAINTS ON LITERATURE**

The Supreme Court first had occasion to focus on the procedures that a state must follow in seizing allegedly obscene materials in *Marcus v. Search Warrant of Property 104 East Tenth Street, Kansas City, Missouri*. In that case, approximately 1,100 copies of 280 different publications were seized by the sheriff from five newsstands pursuant to a state statute. The newsstand owners claimed that the seizures did not satisfy the constitutional requirements embodied in the first amendment's protection of free speech and press because the statutory framework did not provide for a hearing prior to seizure to determine whether the publications actually were obscene, and because it allowed police officers to make the essentially judicial determination of which publications were obscene.

The Court ruled that the warrants authorizing the seizures failed to meet the requirements of the due process clause of the fourteenth amendment because they were based on the assertions of a single police officer, were issued in an ex parte proceeding, and had authorized the executing officers to use their own discretion to determine which materials were obscene and therefore subject to seizure. The Court stressed that this procedure lacked a step “designed to focus searchingly on the question of obscenity.” The Court held that the lack of such a “step” to determine judicially whether the publications were in fact obscene—an omission that left this crucial determination totally within the discretion of the local police—constituted a violation of the newsstand owners' rights under the first amendment. The Court stated: “Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.”

9. Mo. Rev. Stat. § 542.380 (1959), which provides in part:
   Upon complaint being made, . . . to any officer authorized to issue process . . . that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant . . . to search and seize any of the following property or articles . . . any . . . books . . .
10. The warrants were issued based on the assertions of a single police officer who asserted personal knowledge of the fact that the persons named in the warrants sold obscene materials. The warrants authorized “any peace officer in the State of Missouri . . . [to] search the said premises . . . and . . . seize . . . [obscene materials] and take same into your possession . . .” 367 U.S. at 722.
11. 367 U.S. at 732.
12. 367 U.S. at 733. This holding of the Supreme Court reversed the decision of
The Court's holding in Marcus was ultimately based neither on the broad discretion given the executing officers nor on the fact that the warrants were issued on mere assertions, although the Court mentioned both of these considerations as factors in its decision. Rather, the Court based its holding on the lack of a judicial step designed to protect nonobscene materials from seizure—a protection that ostensibly could be achieved by requiring a determination of obscenity prior to seizure. The need for such a step in order adequately to protect nonobscene material was made clear by the fact that, at the trial which followed the seizure, 180 of the 280 publications seized were determined not to be obscene. Yet, as a result of the original seizure, these 180 publications were removed from circulation for a period of two months.

In A Quantity of Books v. Kansas, a case involving the seizure of 1,715 copies of thirty-one different publications from a newsstand, the Supreme Court squarely faced the issue whether an adversary hearing prior to the issuance of a search warrant authorizing the seizure of allegedly obscene books was constitutionally required. The Kansas statute relied on by the police for the seizure of allegedly obscene materials did provide for a subsequent judicial determination of whether the material seized was obscene, but it did not provide for a prior adversary hearing on the issue. The warrant involved had, however, been issued following an ex parte proceeding that was somewhat more exacting than that in Marcus. The warrant was also more specific than the warrants involved in Marcus since it at least specified by title the books that were to be seized. Nevertheless, these factors were not sufficient to satisfy the Supreme

the Missouri supreme court, which had sustained the procedures employed to seize the material. On remand, the practical effect of this reversal probably would be the quashing of the search warrants and the granting of the appellant's motion for return of the seized materials.

14. 367 U.S. at 724.
16. KAN. STAT. ANN. § 21-1102c (1963) (repealed 1970) provided in part that:
   Any peace officer seizing . . . [obscene books] shall leave a copy of such warrant . . . and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such seizure. At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized . . . were kept upon the premises where found in violation of any of the provisions of this act.
17. See notes 9 & 10 supra. At the proceeding in A Quantity of Books, the state Attorney General alleged that fifty-nine novels, all published by the same company, were obscene. He submitted copies of several of these novels to the issuing judge, who examined them and determined that the court had "reasonable grounds" to believe that the fifty-nine paperbacks published by that company were obscene. 378 U.S. at 208. The judge then issued a warrant authorizing seizure of the particular novels identified by the Attorney General. 378 U.S. at 208-09.
The Court specifically held that an adversary hearing on the factual issue of obscenity was required prior to seizure, on the ground that "if the seizure of books precedes an adversary determination of the obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books."\(^\text{19}\)

Moreover, it should be noted that although the appellant in *A Quantity of Books*, like the appellants in *Marcus*, was granted a hearing on the obscenity issue following seizure, the Court made it very clear that such a hearing was not sufficient to remove the constitutional infirmity.\(^\text{20}\) The Court stressed the fact that whenever materials are seized prior to a hearing, there occurs a total restraint on circulation without a determination of obscenity—the very result that the first amendment was designed to protect against.\(^\text{21}\)

Given this rationale for the Court's decision, it is clear that although the interval between the seizure and the hearing in *A Quantity of Books* was not as long as the two-month interval in *Marcus*, this fact still could not constitutionally validate Kansas' procedure. Although the restraint was of shorter duration, the infirmity was not of a lesser degree because the restraint was still total.

While in *Marcus* it was judicially determined that only 100 of the publications seized were obscene, all of the materials seized by the sheriff in *A Quantity of Books* were subsequently determined to be obscene. In *Marcus* the Court utilized the fact that most of the seized publications were finally determined to be nonobscene to strengthen its argument that the type of police discretion involved was a danger to the circulation of nonobscene books; in effect, then, the Court in *A Quantity of Books* extended *Marcus* on the strength of the potential suppression of the circulation of nonobscene material, despite the fact that the procedure used in that case did not in fact so result.\(^\text{22}\) Thus, on the basis of *Marcus* and *A Quantity of Books* it is clear that the statute authorizing the seizure of allegedly obscene material must include as a part of the process a judicial step embodying a prior adversary hearing on the obscenity issue, at least in the context of printed matter.

\(^{18}\) 378 U.S. at 208.

\(^{19}\) 378 U.S. at 213.

\(^{20}\) 378 U.S. at 212-13.

\(^{21}\) 378 U.S. at 210-11. See also text accompanying note 6 supra.

\(^{22}\) In Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), cert. denied, 397 U.S. 920 (1970), the court used similar reasoning to justify extending the rule of *A Quantity of Books* to motion pictures. The court stressed the size of the theater and calculated the size of the potential audience that might be prevented from viewing the film if its seizure should be upheld. See notes 63 & 64 infra and accompanying text.
II. APPLICATION OF THE SAFEGUARDS TO MOTION PICTURES

In *Joseph Burstyn, Incorporated v. Wilson*, the Supreme Court held that the protections of the first amendment extended to motion pictures. The Court stressed the significance of motion pictures as a medium for the communication of ideas and concluded that expression by means of motion pictures is included within the free speech and free press guarantees of the first amendment. The Court specifically held in *Joseph Burstyn* that the first amendment, through the due process clause of the fourteenth amendment, protected a film from being banned merely on the ground that it was considered "sacrilegious" in nature. The Court found that the challenged New York procedure—requiring that films be licensed before being exhibited—was constitutionally defective in that it vested in the censor unlimited restraining power over motion pictures, since the definition given "sacrilegious" was broad and all inclusive. It expressly avoided deciding the issue whether state censorship to prevent the showing of obscene movies would be permissible under a closely drawn statute. Nine years later, however, in *Times Film Corporation v. Chicago*, the Court rejected the claim that a procedure requiring the submission and examination of films prior to exhibition was per se unconstitutional.

23. 343 U.S. 495 (1952).
24. 343 U.S. at 502. The Court noted, however, that this protection—like that for other means of expression—is not absolute. 343 U.S. at 502. It also stated that the peculiar nature of films might require that special rules be developed in this area. 343 U.S. at 503.
25. N.Y. EDUC. LAW § 122 (McKinney 1947) provided:
   The director of the division [motion picture division of the education department] . . . shall cause to be promptly examined every motion picture film submitted . . ., and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefore . . .
26. 343 U.S. at 504-05. The New York Court of Appeals had defined sacrilegious, as used in the statute, to mean "simply this: that no religion, as that term is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule." *Joseph Burstyn, Inc. v. Wilson*, 303 N.Y. 242, 258, 101 N.E.2d 665, 672 (1951).
27. 343 U.S. at 505-06.
29. However, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court examined the activities of the Rhode Island Commission to Encourage Morality in Youth and determined that while prior restraints were not per se unconstitutional, neither were they per se constitutional. This Rhode Island Commission was charged under state law with the task of "educat[ing] the public concerning any book, . . . containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth . . . and to investigate and recommend the prosecution of all violations of said sections . . ." 372 U.S. at 59-60. In practice, when the Commission determined that a particular book was obscene, it would notify the book distributor that it had made this determination and request that he remove the book from circulation. The Commission would also remind the distributor of its authority to recommend
In *Freedman v. Maryland*, the Supreme Court considered the constitutionality of a prior restraint imposed by a state statute that required all films to be submitted to a censorship board for approval before exhibition. A theater owner sought to challenge the constitutionality of the statute, and exhibited an admittedly nonobscene film without the board's prior approval. The owner was convicted under the statute and his conviction was affirmed by the Court of Appeals of Maryland. On appeal to the Supreme Court, the theater owner argued that the statute was an unconstitutional prior restraint on freedom of expression because it created a danger that even nonobscene films would be affected by the blanket prohibition. He based his claim on the fact that the Maryland procedure allowed the suppression of a film by a censorship board without a judicial determination on the issue of obscenity; the board's decision was final unless the exhibitor himself appealed to the courts—a time-consuming process—and obtained a reversal of that decision.

Starting from the premise that any prior restraint on freedom of expression is presumed invalid, the Court agreed with the appellant that the Maryland statute was unconstitutional. The Court's decision, as in *Marcus*, turned on the fact that "there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review." The Court also stressed that the lack of a time limit for the completion of the board's initial determination on the obscenity issue injected into the procedure a risk of delay that in practice may have made the censor's determination final.

Recognizing that a censor may not be sufficiently responsive to the constitutionally protected right of free expression, the Court held that a noncriminal process requiring prior submission of a film to a censor must take place under procedural safeguards designed to obviate the dangers of a censorship system. The Court then "went prosecution if he should fail to cooperate. The Court stressed that this constituted an informal system of censorship without adequate procedural safeguards. 372 U.S. at 70-71. Therefore, the Court held that the Commission's practices violated the fourteenth amendment.

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31. Md. Ann. Code art. 66A, § 2 (1957) (repealed 1965) provided: "It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film . . . in the state of Maryland unless the said film . . . has been submitted . . . and duly approved and licensed by the Maryland State Board of Censors . . . ."
33. 380 U.S. at 54.
35. 380 U.S. at 57.
36. See text accompanying notes 11-13 supra.
37. 380 U.S. at 55.
on to prescribe the equivalent of a code of censorship procedure": 38 
(I) the burden of proving that the film is obscene must be on the 
censor; 39 (2) the advance-submission procedure cannot be adminis­
tered in such a manner that the decision of the censor is given an 
effect of finality, because only a judicial determination in an ad­
versary proceeding insures the necessary sensitivity to freedom of 
expression, and, therefore, only such a procedure is sufficient to 
(b) the decision of the censor is given an 
effect of finality, because only a judicial determination in an ad­
versary proceeding insures the necessary sensitivity to freedom of 
expression, and, therefore, only such a procedure is sufficient to 

Taken together these procedural requirements mean that a censor 
may not take any action on his own that will result in a final restraint 
on the exhibition of a film. Moreover, a state's procedures may not 
create a risk that the exhibition of a film will be substantially delayed, 
since in practice such delay may have an over-all chilling effect on 
exhibition.

Citing both Marcus and A Quantity of Books, the Court in 
Freedman stressed the importance of an adversary hearing and a 
judicial determination of the issue of obscenity prior to any lengthy 
restraint on the public exhibition of a film. 44 However, although 
the Court stressed the need for a judicial determination of ob­
scenity before the imposition of any final restraint, it did not hold 
that the rule of A Quantity of Books must be applied per se in the 
context of motion pictures. If the Court had applied A Quantity of 
Books across the board, it would have had to hold further that an 
adversary hearing was required prior to the imposition of any 
restraint on the exhibition of a film. If it is assumed that Freedman 
did not overrule Marcus and A Quantity of Books, it is then argu­
able that the rules governing the procedural safeguards required 
for prior restraints are different for films than for books.

It is possible that the Supreme Court has in fact established a differ­
et set of rules for films than for books. In Joseph Burstyn the Court

39. 380 U.S. at 58.
40. 380 U.S. at 53-55.
41. 380 U.S. at 58-59.
42. 380 U.S. at 59.
43. 380 U.S. at 59.
44. 380 U.S. at 58-59.
45. See text accompanying note 19 supra.
said: "[n]or does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." Yet, it is also possible to explain the Court's refusal in Freedman to apply the rule of A Quantity of Books across the board in the context of films on the more narrow ground that the facts in the two cases dictated a stricter rule in A Quantity of Books. For example, one commentator has explained the difference between Freedman and A Quantity of Books by noting that Freedman involved only a prior restraint of expression, whereas A Quantity of Books involved a seizure as well, and therefore raised fourth amendment as well as first amendment considerations. Arguably, the cases might also be distinguished on the ground that Freedman does not authorize a final restraint prior to a judicial hearing on the issue of obscenity. Therefore, Freedman, like A Quantity of Books, would require that an adversary hearing be held prior to a seizure because a seizure is a final restraint on circulation, whereas the maintenance of the status quo approved by Freedman is only a temporary prior restraint. However, this distinction has been criticized as a semantic game, since it is not clear that a seizure can never be a temporary restraint.

In Lee Art Theater, Incorporated v. Virginia, a case involving an allegedly unconstitutional seizure of films, the Supreme Court was afforded an opportunity to clear up some of the confusion created by its earlier decisions in this area. The films at issue in Lee were admitted into evidence—over the objection of the defendant-theater owner—in a criminal prosecution in which the theater owner was charged with violating a state obscenity statute. The seizure was authorized by a warrant based on the affidavit of a single police officer, who stated that from personal observation of the films he had determined that they were obscene.

In a per curiam decision upholding the petitioner's contention that the seizure was unconstitutional, the Court noted that it had declared a similar seizure unconstitutional in Marcus, and it cited that case as precedent for its decision in Lee. However, the Court did not cite A Quantity of Books, nor did it discuss the requirement of an adversary hearing on the issue of

46. 343 U.S. at 503.
48. Id. at 1412.
51. 392 U.S. at 637. The seizure in Marcus was quashed on the ground that the procedure followed lacked a judicial step designed to focus searchingly on the question of obscenity. See notes 8-13 supra and accompanying text.
obscenity. In fact, the Court's only references to the issue of what constitutes a constitutionally adequate procedure in a film seizure case were its statement that "we need not decide in this case whether the justice of peace should have viewed the motion picture before issuing the warrant,"52 and its citation of Freedman.53

The Court's reliance on Marcus emphasizes that in film seizure cases, as in cases involving the seizure of books, administrative and law enforcement officials cannot constitutionally be given the discretion to determine which materials are obscene and are therefore subject to seizure. Rather, the issue of obscenity must be decided judicially to ensure that the decision will be objective and that nonobscene materials will be protected from suppression. The failure of the Supreme Court in Lee to cite A Quantity of Books in conjunction with its reliance on Marcus raises the question whether Lee stands for the proposition that an adversary hearing is unnecessary prior to the seizure of allegedly obscene films.54 Although the Court in Lee failed to address itself directly to this question, it may be inferred from the opinion in that case that the rule of A Quantity of Books does not apply. If a prior adversary hearing were required, it would be irrelevant whether a justice of the peace viewed the film prior to issuing a warrant in an ex parte proceeding. It is clear, however, that the Court did not view this latter consideration as irrelevant since the opinion expressly referred to it as an issue to be decided in the future.55 Therefore, the Court may be implying that, in the context of films, an adversary hearing prior to seizure is unnecessary.56

However, most commentators have expressed the opinion that an adversary hearing is required prior to the seizure of allegedly

52. 392 U.S. at 637.
53. It is not clear from the Court's opinion in Lee what proposition the Court's citation of Freedman was meant to sustain.
54. In Freedman, for example, the Court cited Marcus and A Quantity of Books together as authority for the proposition that a judicial determination on the issue of obscenity is necessary. 380 U.S. at 58.
55. 392 U.S. at 637.
56. Even though the rule of A Quantity of Books may not apply to films, it may be unwarranted to interpret the Court's opinion in Lee so broadly. The Court's citation of Freedman may imply that the rule of A Quantity of Books is applicable in the context of films at least to the extent that Freedman emphasized the importance of an adversary judicial determination of the issue of obscenity prior to a final restraint. Although it is not clear that a seizure is a per se final restraint, see text accompanying note 48 supra, and although Freedman itself did not involve a seizure, it does seem possible to interpret Freedman to mean that unless a seizure is followed quickly by an adversary determination, it will have the characteristics of a final restraint because it could cause the type of delay that could have a chilling effect on the exhibition of films. See text between notes 43-44 supra. Thus, the reliance in Lee on Freedman may imply that an adversary judicial hearing on the issue of obscenity must be held within a very brief time after the seizure of a film.
obscene films. They argue that an adversary proceeding helps ensure that freedom of expression will not be unnecessarily restricted. In addition, the commentators point out that the requirement of an adversary proceeding prior to seizure in film cases is justified because of the serious effect that an ex parte order may have on a film exhibitor's business. Thus, one commentator notes:

Since the film is presumably being shown, the exhibitor is given no notice that he may quickly need to obtain a substitute film. There is, therefore, a clear danger of a temporary interruption of an exhibitor's business. This is, of course, not the case in the normal book situation since the bookseller can continue to sell other materials.

Such a complete interruption of an exhibitor's business may deprive the public of the opportunity to see the film at all, whereas in a case in which books are involved, either other copies of the material may be available elsewhere, or all the copies of the book may not have been seized. Even in a large metropolitan area, where several copies of a film may be shown at the same time by different exhibitors, the effect of the seizure of a single exhibitor's copy of the film may be to deprive his customers of an opportunity to see the film by unduly increasing the distance they would have to travel to view that film at another theater. Moreover, the fact that any one exhibitor might have his copy of an arguably obscene film seized, resulting in great harm to his business, would tend to discourage all of the exhibitors from showing that film. Therefore, the threat of such a seizure would have a chilling effect on the exhibition of films.

The Second Circuit Court of Appeals has been persuaded by these arguments with respect to the seriousness of the seizure of a single copy of a film. Furthermore, most of the lower federal courts have not applied Lee as authority for an exception to the rule of A Quantity of Books—requiring a prior adversary hearing—in film seizure cases, at least when the film seized was being exhibited to the public at large.

58. See Monaghan, supra note 57 at 534.
59. Id. at 534-35.
60. See Bethview Amusement Corp. v. Cahn, 416 F.2d 410, 412 (2d Cir. 1969); Astro Cinema Corp. v. Mackell, 422 F.2d 293, 295-96 (2d Cir. 1970).
In these film seizure cases the lower federal courts have stressed the right of the public to unrestricted access to nonobscene materials protected by the first amendment. For example, in *Bethview Amusement Corporation v. Cahn*, the Court of Appeals for the Second Circuit stressed the widespread effect on protected expression that resulted when the film in question was seized from a theater: "Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from preventing a similarly large number of books from being circulated." Indeed, with the exception of one case, the lower federal courts have failed even to discuss *Lee* in cases involving the seizure of allegedly obscene films. Typically, the courts have merely stated that they are bound by the decision in *A Quantity of Books* in cases involving film seizures as well as in cases in which books were seized.

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62. See *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 641 (4th Cir.), cert. denied, 396 U.S. 983 (1969). In *Tyrone*, the Fourth Circuit held the rule of *A Quantity of Books* applicable to the seizure of films. The film involved in *Tyrone* had been seized from a public theater pursuant to a search warrant. The court found this warrant to be defective because an adversary hearing had not been held prior to its issuance, and ordered the film returned to its owner. The court did, however, order the owner of the film to make copies of it available to the prosecutor for use in a trial involving the alleged violation of a state obscenity statute. See also *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410, 412 (2d Cir. 1969).

63. 416 F.2d 410 (2d Cir. 1969), cert. denied, 397 U.S. 920 (1970). In *Bethview* the court faced a situation involving the seizure of a film based on a search warrant issued without a prior adversary hearing by a judge who had seen the film. Citing *A Quantity of Books*, the court held that an adversary hearing is constitutionally required before seizure of a film being shown to the public, and upheld an injunction ordering the return of the film to the theater. 416 F.2d at 412.

64. 416 F.2d at 412.

65. The only lower federal court that has relied on *Lee* is the Court of Appeals for the First Circuit, in *United States v. Santiago*, 424 F.2d 1047 (1st Cir. 1970). The defendant in *Santiago* was prosecuted under 18 U.S.C. § 1465 (1964) and convicted of transporting obscene material in interstate commerce. The films involved were seized from the defendant's suitcase as he debarked from a plane. Based on a tip that the defendant was going to New York to pick up stag films that he would then bring back with him to Puerto Rico, the police had obtained a warrant authorizing the seizure. Although the court was faced with the issue whether an adversary hearing is required prior to the issuance of a warrant authorizing the seizure of allegedly obscene films, it specifically declined to decide the question. 424 F.2d at 1048. Instead, the court analyzed the case to *Marcus* and *Lee* in that the warrants involved in all three cases were based on the affidavit of a single police officer. See note 10 supra and text following note 50 supra. Reviewing the information presented to the United States commissioner who issued the warrant, the court concluded that it was not sufficient to justify a seizure of materials protected by the first amendment. The court did not decide whether the warrant would have withstood a fourth amendment test of probable cause, as the court applied a stricter first amendment test. The court stated that the issue was "whether there was made that particularly strong showing needed to justify a search for matter prima facie entitled to the special protection of the First Amendment." 424 F.2d at 1048.

66. See, e.g., *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410, 411-12 (2d Cir. 1969); *Cambist Films v. Duggan*, 420 F.2d 687, 689 (3d Cir. 1969); *Tyrone, Inc. v. Wilkinson*,...
The argument that a hearing prior to seizure should not be required in film cases because of the potential danger that the films may be altered before the hearing has also not persuaded the federal courts. The courts have suggested several ways to alleviate this danger. In Bethview the court said that the danger could be obviated by an ex parte restraining order. Additionally, it noted that if the prosecution for violation of an obscenity statute required a copy of the film for use at a criminal trial, a court could order the exhibitor to make a copy available. The court further suggested that a subpœna duces tecum could be used to accomplish this. The consequences resulting from the violation of such court orders would differ depending on the enforcement statutes of the jurisdiction whose court issued the order.

Several courts have also rejected the contention that allegedly obscene films may be seized incident to arrest without a warrant, and, of course, without a prior adversary hearing on the issue of obscenity. In these cases the courts have generally based their holdings on first amendment grounds. This disposition of these cases is unnecessary since they could be disposed of with the same result on fourth amendment grounds alone. In Chimel v. California, the Supreme Court held that a search incident to arrest must be limited in scope to the area within the control of the person being arrested. The Court stressed that this limited search was allowed to protect the arresting officer and to prevent the arrestee from destroying any destructable evidence within his reach. Since a motion picture film is not easily destructable without matches or a cigarette lighter, and is not a ready weapon when on a projector, there would appear to be no justification for allowing it to be seized incident to arrest. Therefore, the police should be required to obtain a warrant authorizing

410 F.2d 639, 641 (4th Cir.), cert. denied, 396 U.S. 985 (1969); Metzger v. Pearcy, 393 F.2d 202, 204 (7th Cir. 1969). For example, in Cambist the court stated: "it is now settled that the First and Fourteenth Amendments to the Constitution require that there be an adversary judicial hearing and determination of obscenity before a warrant may be issued to search and seize alleged obscene materials." 420 F.2d at 689.

67. Demich, Inc. v. Ferdon, 426 F.2d 643, 646 (9th Cir. 1970); Bethview Amusement Corp. v. Cahn, 416 F.2d 410, 412 (2d Cir. 1969).
68. 416 F.2d at 412.
69. 416 F.2d at 412. See, e.g., Ex Parte Hart, 240 Ala. 642, 200 S. 783 (1941), in which the court explained that the subpœna duces tecum was known at common law, and was used to order a person to produce an article at trial that was in his possession and that was relevant to the trial.
71. Cambist Films v. Duggan, 420 F.2d 687, 688-89 (3d Cir. 1969); Metzger v. Pearcy, 393 F.2d 202, 204-05 (7th Cir. 1968).
72. Cambist Films v. Duggan, 420 F.2d 687, 689 (3d Cir. 1969); Metzger v. Pearcy, 393 F.2d 202, 204 (7th Cir. 1968).
74. 395 U.S. at 762-63.
the seizure of a film, and an adversary hearing should be held prior to the issuance of this warrant. One court has recognized that *Chimel* does apply to cases in which the film is seized incident to arrest. In *United States v. Wild*, the Court of Appeals for the Second Circuit upheld the specific seizure before it, but only after stressing that *Chimel* could not be applied retroactively.

At least in the lower federal courts, then, it seems well settled that an adversary hearing is required before a warrant may be issued for the seizure of a film or before an officer may seize a film incident to the arrest of an individual charged with violating an obscenity statute. However, it should be noted that all of the cases discussed above involved films that were being or were intended to be shown openly to the public—not films that were being or were intended to be furtively distributed. Thus, it is possible that a case involving the furtive distribution of a film may involve different considerations that would therefore cause it to fall outside the rule requiring an adversary hearing prior to seizure.

### III. Application of Procedural Safeguards to Furtive Distribution of Motion Pictures

#### A. An Exception to the Rule of A Quantity of Books

In *United States v. Pryba*, the Federal District Court for the District of Columbia held that the requirement of an adversary hearing on the issue of obscenity prior to the seizure of motion picture films, rather than being a rule of rigid application, depends on the facts of the particular case.

The films involved in *Pryba* had been furtively shipped to the defendant news company and were being concealed at the time of seizure. When seized they were neither being sold to the public nor were they being publicly displayed. Furthermore, the prosecution

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75. 422 F.2d 34 (2d Cir. 1969).
76. 422 F.2d at 38.
79. 312 F. Supp. at 469.
80. The films involved in *Pryba* were shipped from San Francisco to New York by air. They had been wrapped in an unmarked package that was delivered to the airline by a person described as extremely nervous who evaded the questions of an airline supervisor concerning the contents of the package. Because of the suspicious circumstances, the airline supervisor had the package opened and determined that it contained "hard core pornography." He notified the FBI and then shipped the package. 312 F. Supp. at 468.
81. A search warrant was issued to the FBI on the basis of an affidavit by the airline employee who had ordered the package opened and who described in the affidavit the films contained therein. The FBI observed the delivery of the package to a news company in Washington (a delivery service transported the package from New York to the news company), and then executed the warrant, retrieving the package from the
offered no evidence to prove that these would have been, in the near future, either viewed by a large number of people or sold to the public at large. On the contrary, counsel for the defense made clear that the films were not intended for public distribution. The court observed: "[T]he existence of a public interest in viewing these materials is not readily apparent. The furtive manner of their shipment and their concealment . . . lend credence to the argument that these films were never intended for public display or viewing."

On these grounds, the court distinguished the case before it from cases involving films in the public domain—i.e., those films that were being shown to the public—and from cases involving mass seizures. It suggested that the reasons for applying the rule of *A Quantity of Books*—to protect the public's right to view non-obscene materials and to curb the potential chilling effect on the exercise of first amendment rights—were not relevant to those situations involving films not in the public domain. The court then concluded that an exception to the rule of *A Quantity of Books* should be recognized in a case involving a furtive distribution, and that an adversary hearing prior to the seizure of films should not be required in such a case.

The court buttressed its conclusion by pointing out that in a case in which a film is openly displayed or in which books are being sold to the public, "a request for a copy might be honored and certainly a purchase can be made" by the police, and therefore, an adversary hearing can be held before any seizure. The court contrasted this type of situation with that in *Pryba*, stating that because of the furtive manner in which the films involved were transported and stored, it would have been extremely difficult for the government to participate in an adversary hearing prior to seizure. The court's concern centered around the difficulties that the government

ceiling of the building. Five days after the seizure the Government offered to hold an adversary hearing on the issue of obscenity, but the defense counsel did not show an interest in such a proceeding; therefore, a decision on the obscenity issue was never reached. The defendant was charged with knowingly receiving obscene materials with the intent to disseminate such matter under D.C. CODE ANN. § 22-2001(a)(1)(E) (Supp. II, 1969). The defendant moved that the films be suppressed as evidence, but the court denied that motion. 312 F. Supp. at 463.

81. 312 F. Supp. at 469.
82. "The cases cited by the defendants deal exclusively with situations where the allegedly obscene material was in the public domain at the time of seizure, or where massive seizures have occurred." 312 F. Supp. at 469. But cf. Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1970), in which the court refused to distinguish the mass seizures in *A Quantity of Books* from the seizure of a single copy of film, holding that a restraint clearly results in any case in which materials intended to be exhibited are seized.
83. 312 F. Supp. at 469.
84. 312 F. Supp. at 469.
85. 312 F. Supp. at 470.
might have in attempting to obtain either a copy of the film or sufficient information concerning the film to present at an adversary hearing. Proof of the location of the films at any given time, which is necessary in order to establish that the party ordered to deliver the film did in fact have the film in his possession, may be quite difficult to establish when furtive transportation, concealed possession, and private distribution are involved.

In addition, the court expressed concern that films would be altered prior to being delivered to the officials in compliance with a court order. The court's fears were based on the belief that, contrary to the usual situation in which a film is exhibited openly to the public and the copy submitted to the court may be checked against the public copy, a court order or subpoena duces tecum would not be an adequate method for securing unaltered copies of the film in the furtive-distribution situation because there would be no way for the police or prosecutor to know if the surrendered copies had been altered.

The court's decision in Pryba is clearly open to attack in at least two respects. First, the court partially justified its decision to uphold the validity of the seizure by noting that the minimal danger to first amendment rights was "diminished by the government's proffer of an adversary hearing on the issue of obscenity . . . to be held only five days after the seizure." However, the Supreme Court firmly rejected a similar contention in A Quantity of Books, stressing that the seizure in that case amounted to a permanent restraint on circulation and holding that such a restraint was not permissible prior to a judicial determination of obscenity. Second, the court in Pryba relied on the federal district court decision in United States v. Alexander as authority for its conclusion that an adversary hearing is not required prior to seizure in cases involving furtive distribution of films. However, the Court of Appeals for the Eighth Circuit has since reversed the decision of the district court in Alexander.

In Alexander the Eighth Circuit held that a hearing on the issue of obscenity is required prior to the seizure of films in all situations—

86. The court said, "... officers . . . should not be required to make the futile gesture of requesting that copies be made available . . . ." 312 F. Supp. at 470.
87. The court said, "... to believe that the same films would be proffered to the court in the same condition as when first viewed by the employee is to blink reality." 312 F. Supp. at 470.
88. 312 F. Supp. at 470.
89. 312 F. Supp. at 470.
90. 378 U.S. at 212-13. See text following note 19 supra.
even those involving allegedly obscene films that are being or are intended to be furtively distributed. The reasoning of the court imports a rejection of the contention that there is an exception to the rule of A Quantity of Books. The films involved in Alexander, like those in Pryba, were furtively transported and stored. After an ex parte hearing a magistrate issued the warrants authorizing their seizure on the basis of an affidavit filed by an FBI agent. The court emphasized that the bulk of authority supports the proposition that the rule of A Quantity of Books applies to the seizure of allegedly obscene films, and concluded that “Books was intended to protect the constitutional right to free and full dissemination of non-obscene expression.” Then, the court discussed the reasoning of the court in Pryba and specifically rejected that case’s exception to the rule of A Quantity of Books, which was based on the distinction between films in the public domain and films planned for private distribution.

At the outset, the court in Alexander rejected Pryba to the extent that the holding in that case was based on the lack of a public interest in free circulation stemming from the fact that the films would not be made available to the general public:

[T]o afford First Amendment procedural protections only to speech directed to a large segment of the public, or speech which has “currency in the daily lives of the American people,” is to ignore the purpose of, and experience under, that Amendment.

Indeed, the court reasoned that the protection provided by a prior adversary hearing may be especially necessary when the material is to be distributed to a minority of the populace since it is in just such situations that the material is most likely to be suppressed.

93. 428 F.2d at 1173.
94. Alexander involved a shipment of footlockers from New York to Minneapolis. Two of these lockers were accidentally broken open in New York. An examiner then had all the lockers opened, after he observed that, in his judgment, the contents of the broken lockers were obscene materials. The examiner believed that all of the lockers contained obscene materials, and he therefore sent a copy of one of the magazines, along with the destination of the shipment, to the FBI in Minneapolis. When the shipment arrived in Minneapolis, FBI agents followed it to its destination. They then appeared before a magistrate and filed an affidavit requesting a warrant authorizing the search of the building where the shipment had been delivered and authorizing the seizure of the materials that had been shipped in the lockers. A warrant was issued in an ex parte proceeding, and when the agents failed to find all of the material for which they were searching on the first premises searched, two other warrants authorizing further searches were issued in ex parte proceedings. In all, 1700 copies of twenty-nine films, and 266 copies of eight magazines and booklets were seized during these searches. See 428 F.2d at 1170-71.
95. 428 F.2d at 1175.
96. 428 F.2d at 1175.
97. See notes 80-83 supra and accompanying text.
98. 428 F.2d at 1175.
ularly if it is of such a nature that it will be unpopular with the majority.\textsuperscript{99}

In addition, the court in \textit{Alexander} rejected the \textit{Pryba} exception to the extent that it was based on the furtive manner in which the material was to be distributed: “Nor are we persuaded that the manner in which the material is disseminated forms a rational basis for limiting the procedural safeguards embodied in the \textit{Books} rule.”\textsuperscript{100} The court pointed out that unpopular expression, including non-obscene materials that are constitutionally entitled to protection, are often disseminated by means other than those used for the expression of more popular ideas.\textsuperscript{101} Moreover, the court disagreed with the fear of the \textit{Pryba} court that requiring an adversary hearing in a furtive-distribution situation would cause severe difficulties for law enforcement officials.\textsuperscript{102} Viewing these difficulties as not insurmountable, the court cited \textit{Bethview, Tyrone, Incorporated v. Wilkinson},\textsuperscript{103} and \textit{Metzger v. Pearcy}\textsuperscript{104} as cases which demonstrated that means are available for obtaining copies of the films.\textsuperscript{105} Although it may still be argued that these cases do not solve the alteration problem—one of the court's main concerns in \textit{Pryba}\textsuperscript{106}—the court in \textit{Alexander} was more concerned with the possible infringement of first amendment rights and felt that this danger outweighed the potential difficulties that law enforcement officials may have in obtaining a true copy of the films.\textsuperscript{107}

Thus, the court of appeals in \textit{Alexander} flatly rejected the major premises on which the \textit{Pryba} exception to the rule of \textit{A Quantity of Books} was founded.\textsuperscript{108} It concluded that the size of the segment of the populace reached should not be determinative of the issue whether expression must be afforded procedural protections from prior restraint under the first amendment, and it found that the furtive manner of distribution did not impose insuperable evidentiary obstacles to a prior adversary hearing and that minority

\textsuperscript{99} 428 F.2d at 1175.

\textsuperscript{100} 428 F.2d at 1175. The court stated further, “to the extent that \textit{Pryba} draws a distinction between private and public in applying \textit{Books}, it is on questionable ground.” 428 F.2d at 1175 n.11.

\textsuperscript{101} 428 F.2d at 1175 n.12. E.g., the underground newspapers that are so common today.

\textsuperscript{102} See notes 84-87 supra and accompanying text.


\textsuperscript{104} 399 F.2d 202 (7th Cir. 1968).

\textsuperscript{105} 428 F.2d at 1176. The court ordered that on remand, the district court “shall enter an order requiring the materials seized to be returned,” but required that the owners deliver copies of the titles named in the warrants to the United States attorney, for use in any criminal trial. 428 F.2d at 1176.

\textsuperscript{106} See note 87 supra and accompanying text.

\textsuperscript{107} 428 F.2d at 1175-76.

\textsuperscript{108} See text accompanying notes 81-88 supra.
views may often require such unusual means of dissemination even when the expression of those views is not obscene.

B. The Reasonable-Cause Test and Approach

At this point in time it is not clear whether the courts of appeal for the other circuits agree with the Eighth Circuit that a prior-adversary hearing should be required in a furtive-distribution situation. Perhaps in an attempt to avoid this issue, some courts have employed a “probable cause” approach in such cases. For example, in United States v. Melvin, the Court of Appeals for the Fourth Circuit held that it was error to allow allegedly obscene films, which had been seized from a suitcase inside a home, to be introduced into evidence against the defendant in a criminal trial.

The court in Melvin rested its decision on the ground that the films were the product of an illegal search and seizure in that there had not been “probable cause” for issuance of the search warrant. Although Melvin was decided after Tyrone, Incorporated v. Wilkinson, in which the Fourth Circuit held that the rule of A Quantity of Books applied to the seizure of films, the court mentioned neither the rule itself nor its possible application to this case. Rather, the court examined the information presented to the United States commissioner who had issued the warrant, and sought to determine whether it was sufficient to establish probable cause. In determining that probable cause was lacking, the court applied a fourth amendment test, citing Aguilar v. Texas and Spinelli v. United States. Moreover, in attempting to determine what the standard of probable cause should be in a film seizure case, the court cited Lee Art

110. 419 F.2d 136 (4th Cir. 1969).
111. The defendant was charged with violating a federal obscenity statute, 18 U.S.C. § 1462 (1964), which provides for a fine and/or imprisonment for knowingly transporting and receiving from a common carrier obscene materials which have been carried in interstate commerce. The court rejected the defendant’s argument that the Supreme Court’s holding in Stanley v. Georgia, 394 U.S. 557 (1969), should protect the defendant in this case. The court said that despite the holding in Stanley that a person could not be criminally punished for possessing obscene materials in the privacy of his home, see note 2 supra, Congress still retained plenary power over interstate commerce and could establish regulations governing the interstate shipment of obscene materials. 419 F.2d at 139.
112. The court in Melvin found that probable cause was lacking because the warrant was based on the tip of an informer of unknown reliability and because there was no evidence before the magistrate that indicated the film was obscene. 419 F.2d at 140-41.
Theater, Incorporated v. Virginia,\textsuperscript{116} noting as a distinction the fact that "[i]n that case [Lee], the motion picture was open for viewing by the public and the officer might therefore easily have viewed the film and reported its contents to the justice of the peace."\textsuperscript{117}

It is arguable that, by making this distinction, the court was implying not only that an adversary hearing is not necessary in a furtive-distribution situation, but that it is easier to establish probable cause when films are being concealed and furtively distributed than when films are being openly displayed to the public.\textsuperscript{118}

If, in the future, the Fourth Circuit should in fact apply a less strict test of probable cause in cases in which furtive distribution is involved—with the result that the police could obtain search warrants more easily—it would likely do so on the grounds that it is difficult in such cases for the police to pinpoint the exact location of the film and to obtain an unaltered copy. Indeed, the court in Pryba based its holding, at least in part, on these policy considerations.\textsuperscript{119} These same considerations may have been behind the court's reasoning in Melvin as well—especially since the court's application of a probable-cause test to determine the validity of the seizure of films is so different from the strict application of A Quantity of Books in the Fourth Circuit's previous decision in Tyrone, Incorporated v. Wilkinson.\textsuperscript{120}

Thus, it seems clear that the Fourth Circuit views the furtive-distribution situation as clearly distinguishable from the situation involving the public exhibition of films. If this analysis is correct, that court may be expected to follow Pryba and uphold the seizure of furtively distributed films even though an adversary hearing has not been held prior to the issuance of a warrant. On the other hand, it is possible that this analysis reads too much into the court's opinion in Melvin and that the court applied the probable-cause test


\textsuperscript{117} 419 F.2d at 141.

\textsuperscript{118} That is, the court might apply the usual fourth amendment tests to such a case rather than the stricter standards usually applied in a search and seizure case with first amendment overtones. The court in Melvin did rely solely on a fourth amendment test. See text accompanying notes 114 & 115 supra. Usually courts apply a stricter test when the material to be seized is arguably protected by the first amendment. For example, in United States v. Santiago, 424 F.2d 1047 (1st Cir. 1970), the court, in examining the facts to see if probable cause had been established, stated that the issue was "whether there was made that particularly strong showing needed to justify a search for matter prima facie entitled to the special protection of the First Amendment." 424 F.2d at 1048.

\textsuperscript{119} See note 87 supra and accompanying text.

\textsuperscript{120} 410 F.2d 639 (4th Cir.), cert. denied, 395 U.S. 985 (1969). See note 62 supra. It should be noted that in Tyrone the film was viewed not only by the people supplying the affidavits, but also by the magistrate who issued the warrant. Nevertheless, although the requirements of the Lee decision were arguably complied with, the court held that the rule of A Quantity of Books applied. 410 F.2d at 641.
merely as a means of avoiding a decision on the merits of the prior adversary hearing question. 121

Similarly, in United States v. Marti, 122 the Court of Appeals for the Second Circuit found invalid the warrants used to seize purportedly obscene films that were being furtively transported in interstate commerce for the purpose of sale and distribution. 123 The court held that the warrants were invalid not because of a failure to hold an adversary hearing prior to seizure but because they lacked specificity. 124 Once again, it is possible that this court was merely avoiding deciding the case on first amendment grounds and might not follow the Pryba doctrine in a case in which it did not have this alternative.

In United States v. Rich, 126 however, the Court of Appeals for

121. For example, in United States v. Santiago, 424 F.2d 1047 (1st Cir. 1970), the court invalidated warrants used to seize allegedly obscene films that were being furtively distributed and transported. These warrants were issued without a prior adversary hearing on the issue of obscenity. However, the court deliberately reserved consideration of the question whether the rule of A Quantity of Books is applicable to all film seizure cases, and invalidated the warrants on other grounds. Specifically, the court held that the application for the warrant was insufficient in that it did not show reasonable cause to conduct a search. It seems clear that the court applied the reasonable-cause test merely to enable it to avoid a decision on the merits of the prior adversary hearing question. The court said: "Nor . . . need we consider sophisticated questions of adversary, pre-seizure hearings . . . . The government case falls on ordinary First Amendment principles." 424 F.2d at 1048.

122. 421 F.2d 1263 (2d Cir. 1970).

123. The issue of the validity of the warrants was raised on appeal of a conviction for violating 18 U.S.C. § 1465 (1964). This statute condemns the transportation of obscene materials in interstate commerce for the purpose of sale and distribution. The warrants in Marti had been issued by a judge in an ex parte proceeding and were based on the affidavit of a New York policeman. They authorized the seizure of any material found to violate the New York obscenity law, N.Y. PENAL LAW § 235.05 (McKinney 1967).

124. In fact, although Marti was decided after Bethview, the court did not mention in its opinion either the Supreme Court's decision in A Quantity of Books or the requirement that an adversary hearing be held prior to the seizure of films. Once again, it would seem that the only logical explanation for such an omission was that the court felt that a case involving a motion picture being openly shown in a public theater was so unlike a case involving a furtive distribution that it was not worth either the time or space required to distinguish the two situations. The court presumably viewed the two situations as separable and therefore appropriate for different rules. This theory is strengthened when it is noted that one of the major justifications the Second Circuit gave for requiring a prior adversary hearing in Bethview—the size of the audience prevented from seeing the film, 416 F.2d at 412—is not readily available in a furtive-distribution case. In the latter situation, it is nearly impossible to determine whether any audience is in fact prevented from seeing the film. Even if such an audience did exist, it seems likely that it would not be as large as that in the public-domain situation, and this fact would tend to undercut the Bethview rationale. By contrast, the Eighth Circuit in Alexander stated that the size of the intended audience is irrelevant. 428 F.2d at 1175. At this point it is unclear whether the Second Circuit would give more weight to the public-private distinction underlying Pryba than did the Eighth Circuit in Alexander. It is possible that the line of reasoning used by the court in Bethview was merely a convenient means to muster added support on those facts for an already determined conclusion. On the other hand, it is clear that this line of reasoning was central to the holding of the district court in Pryba.

125. 407 F.2d 934 (5th Cir.), cert. denied, 395 U.S. 922 (1969). The defendant in
the Fifth Circuit did not have a least alternative means for deciding the case since it found that probable cause did exist for the issuance of the warrants. Therefore, the court was forced to make a substantive decision either to uphold the seizure—because the probable cause test had been met—or to strike it down because a prior adversary hearing had not been held. The court decided to uphold the seizure.\textsuperscript{126}

It should be noted that \textit{Rich} was decided before the decisions of several district courts in the Fifth Circuit holding that the rule of \textit{A Quantity of Books} applied to film seizure cases.\textsuperscript{127} All of the district court cases, however, involved films shown openly at public theaters, whereas \textit{Rich} involved the furtive purchase and transportation of allegedly obscene materials. In none of those subsequent cases did the district courts cite \textit{Rich} or attempt to distinguish it. Since federal district courts are presumably bound by precedents set by the court of appeals for their circuit, the district courts of the Fifth Circuit must have viewed the public-domain cases as clearly distinguishable from the furtive-distribution cases. On this view, then, \textit{Rich}—like \textit{Pryba}—is direct authority for the existence of a rule contrary to that in \textit{Alexander}.\textsuperscript{128}

C. Evaluation and Analysis

Concisely stated, the crucial issue that is yet to be definitely resolved is whether situations involving the furtive transportation and distribution of allegedly obscene films should be distinguished from situations involving the public sale or exhibition of films with respect to whether an adversary hearing is required prior to the seizure of such films. As the foregoing analysis has demonstrated, several courts, including the Supreme Court, may implicitly recognize such a distinction—with the result that an exception to the rule requiring a prior adversary hearing exists in the former situation.\textsuperscript{129}

\textit{Rich} was convicted under 18 U.S.C. \S\S 1462, 1465 (1964) for interstate transportation of obscene matter for sale and distribution. On appeal, he asserted that the trial judge erred in refusing to suppress the films that had been seized. The warrant authorizing the seizure was based on the affidavit of an FBI agent, which stated that the agent had been told by a reliable informant that the defendant had sold the informant obscene materials in the past; that the agent then examined some of these items and found the informant's description of them to be accurate; that the informant told the agent that the defendant had said he was going to New York to check on a shipment of items which had not arrived; that the agent had then personally watched the defendant depart for and return from Newark by plane; and that the next day three cardboard boxes addressed to the defendant were observed at the Greyhound bus depot. The warrant authorized a search of these boxes, and the court upheld the issuance of the warrant. 407 F.2d at 935-36.

\textsuperscript{126} 407 F.2d at 935.
\textsuperscript{127} See cases cited in note 61 supra.
\textsuperscript{128} See text accompanying note 96 supra.
\textsuperscript{129} Again, it should be noted that in those cases in which the courts held only
Moreover, the Federal District Court for the District of Columbia has expressly recognized such a distinction,¹³⁰ and the Court of Appeals for the Fifth Circuit has upheld the issuance of warrants without a prior adversary proceeding in a case involving furtive distribution.¹³¹

It does seem likely, as was argued by the court in Pryba,¹³² that in cases in which films are being furtively sold and distributed it may be difficult for the police to arrange an adversary hearing prior to the issuance of a search warrant and still have any assurance that the film shown by the exhibitor at the hearing will be identical to the film that is being or is about to be furtively distributed—i.e., that it will be unaltered.

The counterargument, as advanced by the Eighth Circuit in Alexander,¹³³ is that a court may employ certain procedures to assure that a film will not be altered prior to the adversary hearing.¹³⁴ Essentially, the court in Alexander seemed to believe that court orders would eliminate any practical problems encountered by law enforcement officials.¹³⁵ This argument does not really meet the issue, however, since all of the cases and procedures cited in Alexander involved films that were being exhibited publicly. The practical problems of law enforcement officials—especially the alteration problem—will be much more difficult to solve in the furtive-distribution situation. If, in the public-domain situation, the court ordered that a copy of a film be delivered unaltered for consideration at an adversary hearing on the issue of obscenity, any violation could be easily detected. The prosecutor could simply present affidavits by persons who had seen both the original version of the film and the altered version stating that the film had been tampered with and specifying the modifications. On the other hand, if the film is being concealed and furtively distributed, it may be virtually impossible to prove that the film is no longer in its original condition because there would be no standard version of the film available with which the copy submitted for the hearing could be compared. Thus the various court orders suggested in Alexander would probably be insufficient to prevent alterations.

One procedure that might be constitutionally acceptable, and

that no probable cause existed, such a holding may have been merely a means of avoiding the first amendment issue. See note 121 supra and accompanying text.

¹³². See note 87 supra and accompanying text.
¹³³. See notes 102-07 supra and accompanying text.
¹³⁴. See text accompanying notes 67-70 supra.
¹³⁵. 428 F.2d at 1176.
that might solve the alteration problem, is suggested in dictum by the Ninth Circuit in *Demich, Incorporated v. Ferdon*.

While the court held in that case that *A Quantity of Books* was applicable to the seizure of the sole copy of a film from a theater, it questioned whether the seizure of several copies of a film of which there were many copies to be sold would be a restraint: "Where First Amendment rights are exercised by distribution and sale of materials, the proportions of the seizure may well bear on the question of whether it constituted restraint." Based on this language, it can be argued that the Ninth Circuit would uphold the seizure of a few copies of a film without a prior adversary hearing if it is being sold and distributed rather than being exhibited at a single theater. Indeed, if such a seizure were conducted pursuant to warrants issued with probable cause—albeit at an ex parte hearing—it might be upheld on the ground that its effect would be so insignificant as not to rise to the level of a constitutionally prohibited prior restraint. Therefore, although the police might choose to obtain a court order such as that suggested in *Alexander*, they are probably not constitutionally required to employ this procedure as long as the seizure can be upheld on the rationale expressed in *Demich*—even though that rationale undercuts the view taken in *Alexander*.

A second consideration raised by the district court in *Pryba* is the problem of establishing the defendant's possession of a furtively handled film. The court felt that, absent a seizure of a film prior to an adversary hearing, the film would never be produced in court at the time of the scheduled hearing; the defendant would claim that he was neither presently in possession of the film nor was he previously in possession of it, and the police would be unable to establish the contrary.

In *Alexander*, the Eighth Circuit attempted to answer this argument by referring to the availability in the furtive-distribution situation of various court orders utilized in cases involving public distribution of films. However, in order to prove that such a court order requiring a defendant to produce a film at an adversary hearing is being disobeyed, it is necessary to show that the defendant actually had the film in his possession at the time he was served with the court order. The *Pryba* court noted that although this is easily established in the case of a film open for public viewing, the burden of proof in a furtive-distribution case may be virtually impossible for

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136. 426 F.2d 643 (9th Cir. 1970).
137. 426 F.2d at 645.
138. 312 F. Supp. at 469-70.
139. 428 F.2d at 1176. See also text accompanying notes 133-37 *supra*. 
the prosecution to meet,\textsuperscript{140} and that therefore, seizure should be allowed prior to the adversary hearing in the latter situation. \textit{Alexander} failed to deal with this aspect of the problem.

There are at least two lines of reasoning, however, that the court in \textit{Alexander} could have utilized to counter the arguments of the court in \textit{Pryba}. First, just as there are witnesses whose testimony can be used to establish the possession of a publicly shown film, there may be witnesses—albeit a smaller number—who can testify to possession by the defendant even in the case of a furtively handled film. Normal police procedures are as likely to uncover such witnesses in this situation as in any other case involving police investigation.

A second, somewhat more creative method of establishing that a defendant had possession might also be available. The process would begin with the issuance by a judge of a warrant based on probable cause\textsuperscript{141} to \textit{search} the defendant's premises for specifically named films. The warrant would not, however, authorize the \textit{seizure} of those films. Rather, if the films were found in the defendant's possession, and the police conducting the search so stated in an affidavit on their return to the warrant, the defendant would be served with notice to appear at an adversary hearing and ordered to bring the named films with him to the hearing, under penalty of contempt.\textsuperscript{142} The defendant would thus be prevented from permanently disposing of the films in the time period preceding the adversary hearing, but he would still be free to rent them out or show them himself. Because of at least the theoretical possibility of utilizing this procedure, the court in \textit{Pryba} may have been wrong to the extent that it based its decision on the practical impossibility of establishing a defendant's possession of a furtively handled film without seizing the film prior to an adversary hearing.

The final consideration urged by the court in \textit{Pryba} is that the public interest in the free distribution of nonobscene materials is not present in the furtive-distribution cases—at least not on a scale sufficient to require an adversary hearing prior to seizure.\textsuperscript{143} With respect

\textsuperscript{140} 312 F. Supp. at 469-70.
\textsuperscript{141} See pt. III, B. \textit{supra}.
\textsuperscript{142} This procedure could be carried out in one of two ways. The judge could issue the search warrant and order to appear with the films at the same time, but the service and effectiveness of the order would be conditioned on the policemen's affidavit that the defendant did in fact have the specifically named films in his possession. Alternatively, upon discovery of the films during the search, the police could make an immediate return on the warrant, at which time the judge could issue the necessary order, which would then be immediately served on the defendant. Under this procedure, a police stakeout could be utilized to ensure that the defendant did not sell or move the film during the brief interim between the search and the service of the order. Obviously, the defendant could still destroy the film, but he is unlikely to do so unless there is a strong possibility that the film will be found to be obscene.
\textsuperscript{143} See notes 81-83 \textit{supra} and accompanying text.
to the scope of the first amendment's protection, this consideration presents the real constitutional issue in the furtive-distribution situation. The existence of a public interest has been crucial in all of the decisions in this area. For example, in Marcus the Supreme Court stressed that its holding was based on the lack of a procedural step to protect nonobscene materials from seizure because the public has an interest in the free circulation of such material.\textsuperscript{144} In \textit{A Quantity of Books} the Court reiterated the importance of the public's right to the unhampered circulation of nonobscene books.\textsuperscript{145}

Furthermore, the lower courts that have held the rule of \textit{A Quantity of Books} applicable to the seizure of films being exhibited at public theaters have based their holdings on the Supreme Court's expression in that case of the importance of the public interest in the free distribution of nonobscene materials.\textsuperscript{146} The split between Pryba and Alexander can be traced, basically, to the different definitions the courts gave in those cases to the concept of "public interest." On the one hand, the district court in Pryba found that the public interest in the free circulation of nonobscene films was absent in the furtive-distribution situation because of the smaller number off people likely to be involved.\textsuperscript{147} On the other hand, the Eighth Circuit in Alexander did not feel that the existence of the public interest turned on the size of the audience to be reached.\textsuperscript{148}

In Alexander the court stressed that the rule requiring a prior adversary hearing was intended by the Supreme Court to secure the constitutional right to unhampered dissemination of all nonobscene expression.\textsuperscript{149} The Eighth Circuit rejected the validity of the contention that the application of the rule of \textit{A Quantity of Books} should be contingent on the method of dissemination used since unpopular minority views are, by necessity, most likely to be disseminated in a furtive fashion and are therefore most likely to run afoul of such a rule.\textsuperscript{150}

The Eighth Circuit seems to be on very solid ground in insisting that unpopular minority views are entitled to the same protection as the views of the majority—regardless of their means of distribution; for when the Supreme Court in Marcus stressed

\textsuperscript{144} 367 U.S. at 782. See note 13 supra and accompanying text.
\textsuperscript{145} 378 U.S. at 213.
\textsuperscript{146} For example, in Metzger v. Pearcy, 393 F.2d 202, 204 (7th Cir. 1968), the court quoted \textit{A Quantity of Books}, 378 U.S. 205, 208 (1964): "... [the procedures] were constitutionally insufficient because they did not adequately safeguard against the suppression of nonobscene books."
\textsuperscript{147} 312 F. Supp. at 469.
\textsuperscript{148} 428 F.2d at 1175.
\textsuperscript{149} 428 F.2d at 1175.
\textsuperscript{150} See notes 100 and 101 supra and accompanying text.
the right of the public to the free circulation of materials\textsuperscript{151} it did not qualify this principle by extending it only to materials expressing popular views. On the contrary, it is clear that all nonobscene materials have the right to be freely circulated under the protection of the first amendment.

Furthermore, if the rationale advanced by the Pryba court becomes generally accepted and the rule of \textit{A Quantity of Books} is not applied to furtive-distribution cases on the ground that no significant public interest exists there due to the lack of a sizeable audience, the logical extension of that principle would be that the actual size of the audience should be taken into account in the public-exhibition cases as well; it would be difficult to distinguish between a furtively distributed film that is viewed by only a few people and a publicly exhibited film that is seen by as few or even fewer people. There are several objections to the results reached by this line of reasoning. First, the logical extension of such reasoning would mean that a very unpopular film, although being shown at a public theater, would not be given the procedural protections that a more popular film would be given simply because of the supposed lack of a significant public interest in that film, as evidenced by the small attendance at its exhibition. Second, if the quantity of the potential audience is to be considered relevant regardless of the method of exhibition or distribution, it may be difficult, if not impossible, to draw rational lines concerning what constitutes an audience of sufficient size to present a significant public interest that requires protection. Indeed, it may be questioned how the size of a potential audience is to be assessed at all. Given these considerations, it is submitted that the rationale of the court in \textit{Pryba} is wrong, and that the constitutional right to free expression should not be conditioned on the number of people whom the expression may reach.

A final objection to the \textit{Pryba} holding that the rule requiring a prior adversary hearing does not apply in a furtive-distribution situation is that the courts may have difficulty in defining what is meant by the term “furtive.” Therefore, to allow this exception to the rule of \textit{A Quantity of Books} raises the danger that the more unpopular the material seized, the more loosely the courts will define “furtive.” The first amendment was designed explicitly to guard against such suppression of unpopular views, and in order to prevent such inroads on the protections of the first amendment the exception recognized in \textit{Pryba} should be rejected.

\textbf{IV. Conclusion}

At this point in time, while it is clear that the rule of \textit{A Quantity of Books} requiring an adversary hearing prior to seizure applies to

\textsuperscript{151} See text accompanying note 19 \textit{supra}.
cases in which films are being or are intended to be publicly exhibited, it is not at all clear that this rule applies to cases in which films are being or are intended to be furtively distributed. The lower courts are split, and the ambiguity of the Supreme Court's opinion in *Lee* makes it dangerous to speculate on how the Court itself might decide this issue.

At the very least, the Court would probably require a procedure in the furtive-distribution situation fashioned on the basic guidelines set by the Court in *Freedman*—that is, a procedure assuring a prompt judicial decision on the issue of obscenity following the seizure. Such a procedure arguably would be only a modification of the prior-submission procedure upheld by the Court in *Freedman*. In effect, furtively distributed films would still be denied an important protection granted to publicly distributed films—the right to an adversary hearing on the question of obscenity prior to seizure. If it is assumed that furtively distributed films often express unpopular, minority views, such discrimination would place an undue burden on the expression of such views. It is submitted, therefore, that the Court should require that an adversary hearing on the issue of obscenity be held prior to the seizure of allegedly obscene films—even if the films are furtively distributed.

It cannot be denied that such a rule would lead to practical problems of law enforcement. Whatever difficulties the police may experience, however, should not be sufficient to deprive allegedly obscene films of the protections of the first amendment. This is especially true when it is noted that the dangers to society presented by the dissemination of obscenity are speculative at best. Thus, only a rule requiring an adversary hearing prior to seizure in all situations will protect unpopular expression from being suppressed by overzealous law enforcement officials.

152. See notes 49-56 *supra* and accompanying text.
153. See text accompanying notes 39-43 *supra*.
154. See notes 132-42 *supra* and accompanying text.
155. For example, the *Obscenity Report, supra* note 4, at 74, estimated that the value of all obscene materials furtively sold through the mail equals 12 to 14 million dollars per year, and the value of all obscene materials similarly sold under the counter equals 5 to 10 million dollars per year. Thus, the maximum value of allegedly obscene materials furtively distributed each year is only about 24 million out of a yearly market in obscene materials of approximately 537-574 million dollars. It is clear, therefore, that furtively distributed films are only a very small part of the general problem of obscenity. In addition, it is not at all clear that obscene materials pose any psychological or behavioral threat to our society. The *Obscenity Report* said:

In sum, empirical research designed to clarify the question (effect of exposure to obscene material) has found no evidence to date that the exposure to explicitly sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. *Obscenity Report* at 27.