The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Businesses in the Mid-Town Area

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I. INTRODUCTION

FOR generations, Times Square in mid-town Manhattan was known as the entertainment mecca of the United States; indeed, the fame of the area was the subject of song and story and of such apppellations as the "Great White Way." In the years gone by, the New York theater — based in Times Square — was the equal and often the rival of the London stage in the English speaking world.

Today, matters stand differently. A recent newspaper article described Times Square in the following graphic language:

The theater languishes in this quartier latin, and the Times still lingers there, along with about two dozen respectable restaurants. The rest is raunch and hustle in this after-hours animal kingdom. To watch theatergoers fleeing for their lives after the final curtain is to experience some of the primitive terror of the last days of Pompeii.¹

In July of 1976, the Chairman of a New York City mayoral committee reported its findings with respect to Times Square:

The Committee's findings to date have been mostly in the area of sex related businesses and its impact on midtown. Succinctly stated, they are as follows:
1. Sex related businesses are not compatible with non-sex related businesses and drive out non-sex related businesses.
2. The vacancies created by the outflow of non-sex related businesses are filled with more sex related businesses.
3. Sex related businesses have undermined the economy of the midtown area with resultant financial impact upon the City and City services.
4. Sex related businesses attract more felony type crime than non-sex related businesses and that the concept of victimless crime is a myth.²

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² Mayor's Midtown Citizens Committee, Report to Members of the Mayor's Midtown
In the summer of 1976, the Honorable Sidney Baumgarten, Assistant to the Mayor of the City of New York and Project Director of the Midtown Enforcement Project, requested the author to draft a Nuisance Abatement Law dealing with New York City's problem of illegal sex related businesses. Such proposed legislation was drafted by the Citizens Committee reprinted in Midtown Enforcement Project, Report of Operations for January 19, 1976 through December 8, 1976, app. E 4-10 (1976). With respect to the finding that "the concept of the victimless crime is a myth," a recent study of juvenile prostitution in the Times Square area states: "The suggestion that juvenile prostitutes are victims is not made in a figurative sense. These girls are often the prey of individuals who see them as unusually vulnerable; in addition, they are victimized by the conditions under which they live." Criminal Justice Center of John Jay College of Criminal Justice, Juvenile Prostitution in Midtown Manhattan 58 (1977). In his introduction to the American edition of The Wolfenden Report, Karl Menninger, M.D., stated: "Prostitution themes make amusing fare for motion picture and musical comedy fans; audiences laugh heartily and commend the clever spectacle to their friends. They can do this only because they know almost nothing of the sordid, miserable, stifling, syphilitic existence of the girls who look so cute in the movie stories." Committee on Homosexual Offenses and Prostitution, The Wolfenden Report 5 (1963).

An extensive literature exists with respect to prostitution and its causes. See, e.g., F. Adler, Sisters in Crime, The Rise of the New Female Criminal 55-83 (1975); The Wolfenden Report, supra; Juvenile Prostitution in Midtown Manhattan, supra at 101-12 (bibliography).

3. "On January 19, 1976, the Midtown Enforcement Project (hereafter referred to as MEP or Project) began operations. As proposed and sponsored by the office of Mayor Abraham D. Beame, the purpose of the MEP is to operate a multi-agency Task Force designed to identify, investigate and prosecute illegal activities in the Midtown area. The Project consists of three components: planning, inspectional and legal. It is funded by the Law Enforcement Assistant Administration through the New York State Division of Criminal Justice Services and the New York City Criminal Justice Coordinating Council." Midtown Enforcement Project, Report of Operations for January 19, 1976, through December 8, 1976, at 1 (1976). "One of the primary functions of the Project is to 'consider the desirability of legislative changes', and the Planning Unit, together with Consultants is charged with the responsibility of developing new enforcement approaches and analyzing current laws and procedures in order to recommend needed changes." Ibid. at 7. The Project has concerned itself with street prostitution, establishments which cater to or foster street prostitution, off-street, organized prostitution establishments, premises featuring live obscene and lewd conduct, pornographic material depicting children of young age or bestiality, other major pornographic uses, and crimes related to the foregoing in the Times Square area. Ibid. at 16-17. In its prosecutorial function, the Project has utilized three types of civil actions: proceedings to enjoin permanently the maintenance of houses of prostitution pursuant to Article 23 of Title II of the New York Public Health Law, proceedings to abate violations of the Administrative Code of the City of New York, and eviction proceedings under the New York Real Property Actions and Proceedings Law. Ibid. at 12.

4. For purposes of this article, "illegal sex related businesses" means houses of prostitution (sometimes euphemistically referred to as "massage parlors"), book stores which sell obscene books, establishments which conduct obscene live performances, obscure peep shows, and movie theaters which show obscene movies. The term "prostitution" should be understood as that term is defined in the New York Penal Law: "A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." N.Y. Penal Law § 230.00 (McKinney Supp. 1976). The term "obscene" is to be understood as that term is defined in N.Y. Penal Law § 235.000 (McKinney Supp. 1976), which definition is set forth in
author and was passed by the New York City Council with one change on July 6, 1977 and signed by the Mayor on July 28, 1977.\footnote{10 infra. Section 235.00(1) was amended by Chapter 989 of 1974 N.Y. Laws, effective September 1, 1974, to bring New York's law relating to obscenity into conformity with the decision of the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973). Hechtman, Supplementary Practice Commentary to N.Y. Penal Law § 235.00 (McKinney Supp. 1976).}

The Nuisance Abatement Law\footnote{5. Int. No. 1180, The Council of the City of New York, enacted as New York City Admin. Code, Ch. 26 Title C (1977). A copy of the legislation appears in the appendix to this article. The legislation as drafted by the author was changed in one respect by the enacted bill. See text at notes 110-24 infra. Unless otherwise indicated all references are to the legislation as enacted into law.} is civil rather than criminal in nature.\footnote{6. The Nuisance Abatement Law [hereinafter cited as NAL] amended Chapter 16 of the Administrative Code of the City of New York by adding a new title C.} Substantively, it defines certain illegal sex oriented businesses as nuisances.\footnote{7. NAL § C16-2.3.} More specifically, premises used for the purposes of prostitution,\footnote{Id. § C16-2.2(a)-(c).} obscene performances,\footnote{Id. § C16-2.2(b). The term “prostitution” has the same meaning as defined in N.Y. Penal Law § 230.00 (McKinney Supp. 1976). The Penal Law definition is set forth in note 4 supra. With respect to actions to enjoin a nuisance defined therein, the subdivision provides, in language borrowed from N.Y. Pub. Health Law § 2324(3)(a) (McKinney 1971), that “evidence of the common fame and general reputation of the ... [premises] ... shall be competent evidence to prove the existence of the public nuisance.” NAL § C16-2.2(a). Again, in language borrowed from N.Y. Pub. Health Law § 2324(3)(c), the subdivision provides that if evidence of the reputation of the premises is sufficient to establish the existence of a public nuisance, “it shall be prima facie evidence of knowledge thereof and acquiescence and participation therein and responsibility for the nuisance” on the part of certain persons connected with the premises. Id. The subdivision also provides that two or more convictions for acts of prostitution on the premises within one year preceding an action respecting the nuisance “shall be presumptive evidence” that the premises are a public nuisance. Id.} and the promotion of obscene
material\textsuperscript{11} are defined as nuisances. Because experience has indicated that illegal sex oriented premises are often in violation of various state and local laws unrelated to sexual activity,\textsuperscript{12} the Nuisance Abatement Law also declares that premises which are in violation of certain of such laws are public nuisances.\textsuperscript{13}

Procedurally, the statute empowers the New York City corporation counsel to maintain civil actions, on behalf of the City, against any of the nuisances defined in the statute.\textsuperscript{14} An action for a permanent injunction lies with respect to certain defined nuisances;\textsuperscript{15} an action

an action respecting the nuisance shall be presumptive evidence that the premises are a public nuisance.

11. NAL § C16-2.2(c). Like section C16-2.2(b), section C16-2.2(c) provides that the term "obscene" has the same meaning as defined in the relevant section of the New York Penal Law. For the definition of "obscene," see note 10 supra. The term "material" has the same meaning as defined in the New York Penal Law. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner." N.Y. Penal Law § 235.00(2) (McKinney 1967). "Promote" is intended by the author to have the same meaning as that given it in section 235.00(4) of the Penal Law: "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." Id. § 235.00(4). The subdivision provides that two or more convictions of persons for promotion of or possession with intent to promote obscene material on the premises within one year preceding an action respecting the nuisance shall be presumptive evidence that the premises are a public nuisance.


13. NAL § C16-2.2(d)-(l). For example, subdivision (d) would include premises wherein there are occurring violations of the New York City Building Code (premises operated without a certificate of occupancy or contrary to a certificate of occupancy or premises wherein unauthorized structural changes were made).

Subdivision (e) would include premises which are nuisances as defined by the New York City Health Code, premises which are "infected and uninhabitable" houses as defined by the Health Code, and premises which litter in violation of the Sanitation Code.

Subdivision (f) would include premises which are used for businesses not licensed as required by law such as unlicensed massage businesses.

Subdivision (g) would include premises wherein, within the period of one year prior to the commencement of an action under the proposed bill, there had occurred five or more violations of articles 220 (controlled substances offenses) and 225 (gambling offenses) of the New York Penal Law.

Subdivision (h) would include premises wherein alcoholic beverages are being sold without a license.

Subdivisions (i) and (j) would include premises which are being operated in violation of certain of the environmental provisions of the New York City Administrative Code.

Subdivision (k) would include premises which are in violation of the New York City Zoning Resolution regulating "adult uses." In 1976, the United States Supreme Court held that Detroit's zoning resolution regulating "adult uses" was on its face constitutional. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

Subdivision (l) would include premises which are criminal nuisances as defined by the New York Penal Law. N.Y. Penal Law § 240-45 (McKinney 1967).

14. NAL § C16-2.3(a)-(b).

15. Id. § C16-2.3(a). An action to enjoin permanently the maintenance of a house of
for a civil penalty is applicable to one other nuisance defined in the statute. In an action for a permanent injunction, if sufficient proof were presented by the corporation counsel, the court, upon ex parte application, could grant a temporary restraining order or a temporary closing order, or both, pending the hearing and determination of a motion for a preliminary injunction. In an action for a civil penalty, if sufficient proof were presented by the corporation counsel, the court, upon ex parte application, could grant a temporary order restraining the persons maintaining the business from making a “bulk transfer” of inventory and assets pending the hearing and determination of a motion for a preliminary injunction to enjoin such transfer.

II. THE INADEQUACY OF PRESENT LAWS RELATING TO ILLEGAL SEX RELATED BUSINESSES

1. Laws Relating to Prostitution

In a comprehensive manner, New York labels as criminal conduct, participation by the “prostitute” and the “customer” in an act of prostitution, as well as the promoting and permitting of prostitution. The Penal Law defines as offenses: prostitution (engaging in or offering to engage in sexual conduct with another for a fee), patronizing a prostitute (engaging in sexual conduct with another and paying for such service), promoting prostitution (providing the services of prostitution), and certain nuisances violative of city and state statutes would lie (NAL § C16-2.2(a)).

16. See text accompanying notes 113-22 infra; NAL § C16-2.3(b).
17. NAL §§ C16-2.6, C16-2.8, C16-2.9.
18. NAL §§ C16-2.15, C16-2.16, C16-2.17.
19. N.Y. Penal Law § 230.00 (McKinney Supp. 1976); see note 4 supra. Pursuant to section 230.10, a male, who offers to sell his sexual services to either a male or female is guilty of prostitution. Prostitution is a class B misdemeanor punishable by imprisonment for no more than three months (id. § 70.15(2)), or by a fine of no more than $500 (id. § 80.05(2)), or by probation for no more than one year (id. § 65.05(3)(b)), or by a sentence of unconditional discharge (id. § 65.20).

Chapter 344, 1976 N.Y. Laws, effective July 11, 1976, added section 240.37 to the Penal Law. Section 240.37 makes loitering for the purposes of engaging in prostitution a punishable offense. The statute has been criticized as unconstitutionally vague. See Hechtman, Practice Commentary to § 240.37 (McKinney Supp. 1976). One court, however, has sustained the statute against such attack. People v. Smith, 88 Misc. 2d 590, 393 N.Y.S.2d 239 (Sup. Ct. 1977)

20. Section 230.05 of the Penal Law provides: “A person is guilty of patronizing a prostitute when: 1. Pursuant to a prior understanding, he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or 2. He pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him; or 3. He solicits or requests another person to engage in sexual conduct with him in return for a fee.” N.Y. Penal Law § 230.35 (McKinney 1967). Patronizing a prostitute is a violation punishable by imprisonment for not more than 15 days (id. § 70.15(d)), or by a fine of not more than $250 (id. § 80.05(4)), or by a
stitutes as a business enterprise), and permitting prostitution (allowing the use of premises for prostitution purposes). The New York Penal Law further provides a variety of punishments for these defined criminal acts, including imprisonment, fines, probation, and conditional and unconditional discharges.

conditional discharge for no more than a term of one year (id. § 65.05(3)), or by a sentence of unconditional discharge (id. § 65.20).

21. N.Y. Penal Law §§ 230.20, 230.25, 230.30 (McKinney 1967). Promoting prostitution is divided into three degrees. The basic crime, promoting prostitution in the third degree, is defined by section 230.20 as follows: "A person is guilty of promoting prostitution in the third degree when he knowingly advances or profits from prostitution." Id. § 230.20. Promoting prostitution is raised to the second degree when a defendant advances or profits from prostitution by means of a house of prostitution, or by means of a "prostitution business or enterprise involving prostitution activity by two or more prostitutes," or when a defendant advances or profits from the prostitution of a person under nineteen years of age. Id. § 230.25. The crime is raised to the first degree when a defendant advances prostitution by force or intimidation, or advances or profits from the prostitution of a person less than sixteen years. Id. § 230.30.

The Penal Law defines the terms "advance prostitution" and "profit from prostitution" as follows: 1. 'Advance prostitution.' A person 'advances prostitution' when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution. 2. 'Profit from prostitution.' A person 'profits from prostitution' when, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity." N.Y. Penal Law § 230.15 (McKinney 1967).

The crime in its third degree is a class A misdemeanor (id. § 230.20) punishable by imprisonment for no more than one year (id. § 70.15(1)), or by a fine of no more than $1,000 (id. § 80.05(1)), or by probation for no more than three years (id. § 80.00(3)(b)), or by a conditional discharge for a term of no more than one year (id. § 65.05(3)(b)), or by a sentence of unconditional discharge (id. § 65.20). The crime in its second degree is a class D felony (id. § 230.25) punishable by imprisonment either for an indefinite term of not more than seven years or by a definite term of one year or less (id. § 70.00(1), (2)(d) & (4)), or by a fine not exceeding twice the amount of the defendant's gain from the commission of the crime (id. § 80.00(2)), or by probation for no more than five years (id. § 65.00(3)(a)(i)).

The crime in its first degree is a class C felony (id. § 230.30) punishable by imprisonment either for an indefinite term of not more than fifteen years (id. § 70.00(1) & (2)(c)), or by a fine not exceeding twice the amount of the defendant's gain from the commission of the crime (id. § 80.00(2)), or by probation for no more than five years (id. § 65.00(3)(a)(i)), or by a conditional discharge for a term of no more than three years (id. § 65.05(3)(a)), or by a sentence of unconditional discharge (id. § 65.20).

22. "A person is guilty of permitting prostitution when, having possession or control of premises which he knows are being used for prostitution purposes, he fails to make reasonable effort to halt or abate such use. Permitting prostitution is a class B misdemeanor." N.Y. Penal Law § 230.40 (McKinney 1967); see note 19 supra for the punishments prescribed for a class B misdemeanor.

23. See notes 19-22 supra.
On its face, the Penal Law would appear to be an effective weapon for the elimination of illegal sex related businesses whose principal raison d'etre is prostitution. This is not, however, the case. Let us suppose that a police officer visits the "Happy House Massage Parlor" (a house of prostitution), and is greeted by a receptionist who offers him the massage services of any one of ten females. The officer selects one "Xaviera" ("X"), goes with her to a cubicle, and is there solicited to engage in sexual conduct for a fee. At this point, the officer has reasonable cause to arrest X for prostitution. But the officer lacks sufficient grounds to arrest the receptionist or any other employee of Happy House for any offense. Let us assume that the officer arrests X on a prostitution charge. If she elects to stand trial, she could defend either by completely denying the charge—posing an issue of credibility for resolution by the fact finder—or by claiming entrapment.

24. See N.Y. Penal Law § 230.00 (McKinney 1967), quoted in note 4 supra. The Criminal Procedure Law defines reasonable cause as follows: "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it . . . ." N.Y. Crim. Proc. Law § 70.10(2) (McKinney 1971).


Section 140.10(1)(a) provides: "[A] police officer may arrest a person for (a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence . . . ." N.Y. Crim. Proc. Law § 140.10(1)(a) (McKinney 1971).

25. In New York City, since the punishment for prostitution is limited to no more than three months' imprisonment (see note 19 supra), the defendant would not be entitled to a jury trial in New York City Criminal Court. N.Y. Crim. Proc. Law § 340.40(2) (McKinney 1971); see Baldwin v. New York, 399 U.S. 66 (1970) (the jury trial guarantee of the sixth and fourteenth amendments applies only to state criminal trials where the punishment which could be imposed exceeds six months).

In New York, entrapment is an affirmative defense which a defendant has the burden of establishing by a preponderance of the evidence. N.Y. Penal Law §§ 25.00(2), 40.05 (McKinney 1975). Section 40.05 defines entrapment in the following manner: "In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."
successful on either defense, X would be entitled to an acquittal. If unsuccessful, X could face incarceration for a term of up to three months. In Manhattan, however, the odds are that X would not be sentenced to a prison term. In any event imprisonment of X would simply mean that, for the term of her incarceration, she would be prevented from plying her trade. Her colleagues in Happy House and its owners, managers, and agents would still have a viable prostitution business.

Of course, in our illustration, law enforcement is not confined to the technique of having undercover police officers enter Happy House in the hope of being solicited to engage in sex. The local prosecutor, if he had the time and resources, could decide to investigate Happy House by means of a grand jury. Let us assume that the prosecutor subpoenas X and her nine colleagues hoping to extract evidence from them before the grand jury that would implicate the owners and operators of Happy House. If the witnesses exercised their constitutional right not to incriminate themselves, the grand jury would have to grant them immunity or the prosecutor would be unable to obtain


27. See note 19 supra.


29. "A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons, impaneled by a superior court and constituting a part of such court, the functions of which are to hear and examine evidence concerning offenses . . . and to take action with respect to such evidence as provided in section 190.60." N.Y. Crim. Proc. Law § 190.05 (McKinney 1971). In essence, section 190.60 together with sections 190.65(1) and 190.70(1) of the Criminal Procedure Law authorize a grand jury to prefer charges against an individual if the evidence before them is legally sufficient to justify such action, and if they are satisfied that there is reasonable cause to believe that the individual committed an offense. Id. §§ 190.60, 190.65(1), 190.70(1).

Section 190.25(6) provides: "The legal advisors of the grand jury are the court and the district attorney." Id. § 190.25(6). Finally, section 190.50(2) provides: "The people may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge." Id. 190.50(2).

30. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege is, of course, binding on the states. Malloy v. Hogan, 378 U.S. 1 (1964).
their testimony. Assuming the witnesses were granted immunity and gave testimony that implicated the owners and operators of Happy House in the crime of promoting prostitution, the prosecutor could not legally convict the owners and operators on this testimony alone. New York law would require evidence independent of the prostitutes' testimony in this situation. Such corroboration would be impossible to obtain unless Happy House kept incriminating books and records or unless the prosecutor could comply with the stringent New York statutory requirements for an eavesdropping warrant to obtain the required corroboration. If the prosecutor had legally sufficient evidence to obtain an indictment, the indicted Happy House entrepreneurs could remain in business if they were free on bail. If convicted and sentenced to prison, the entrepreneurs could still operate Happy House if they appealed and managed to remain free on bail pending the appeal. Finally, even if the convicted entrepreneurs went to prison, other persons who had managed to elude prosecution could continue the operations of Happy House.

It should be clear from the above analysis that, while the substantive provisions of New York's Penal Law prohibit the operation of Happy House, the State's criminal procedure provisions are ill suited to terminating its operations.

On the other hand, as a matter of substantive civil law, in its Public Health Law, New York has declared houses of prostitution to be nuisances and has provided injunctive procedures for their elimination. The statute provides that an action in equity may be maintained in the supreme court by the district attorney or any citizen of the county involved to "perpetually" enjoin the nuisance existing in that county. The action is commenced by the service of a summons and verified complaint upon the persons maintaining the nuisance.

32. See notes 19-22 supra.
33. "A person shall not be convicted of promoting prostitution... solely on the uncorroborated testimony of a person whose prostitution activity he is alleged to have advanced... or from whose prostitution activity he is alleged to have profited...." N.Y. Penal Law § 230.35 (McKinney 1967).
35. Section 2320 of the Public Health Law provides: "1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of... prostitution is guilty of maintaining a nuisance. 2. The building, erection, or place, or the ground itself, in or upon which any... prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance are hereby declared to be a nuisance and shall be enjoined and abated...." N.Y. Pub. Health Law § 2320 (McKinney 1971).
36. Id. § 2321.
37. Id. §§ 2321(1)-(2) & 2322.
38. Id. §§ 2321(3), (5). On or before the commencement of the action, plaintiff may file with
The court is authorized to grant an ex parte order temporarily restraining the maintenance of the nuisance, pending the hearing and determination of a motion for a preliminary injunction. If a permanent injunction is granted, the statute provides that the final judgment shall contain provisions for the seizure and sale of the chattels used in the maintenance of the nuisance and for the closing of the premises for one year.

Procedurally, the injunctive action established by the New York Public Health Law is far superior to a criminal prosecution as a means of eliminating houses of prostitution. The action for injunctive relief seeks the direct abatement of the house of prostitution, while the criminal prohibition seeks to punish the persons operating the illegal business. As has been seen, the criminal provisions will not necessarily effect an abatement of the illegal premises. There is, nevertheless, a flaw in the injunctive proceedings defined by New York's Public Health Law, since, while the action is pending, a defendant may, as a practical matter, brazenly disregard a temporary restraining order or preliminary injunction prohibiting his continued maintenance of the house of prostitution. There is little reason to believe that the entrepreneur of a house of prostitution will obey a temporary court order to cease and desist when he has already disregarded Penal Law prohibitions against his criminal activities and when the pain of contempt is but a miniscule item balanced against the profits of his illegal business. Moreover, these factors also serve to give the entrepreneur reason to delay the trial date for as long as possible.

This defect in the New York Public Health Law was one of the factors which prompted the request that the author draft the Nuisance Abatement Law. The new law attempts to remedy the defect by authorizing, in appropriate circumstances, an ex parte temporary closing order and the continuance of the provisions of the ex parte

40. Id. § 2329(1). The owner of the closed premises can have the premises re-opened if he pays the costs of the action, posts a bond in the amount of the full value of the property, and satisfies the court that he will immediately abate the nuisance and prevent it from being again established. Id. § 2332(1).
41. See text at notes 19-34.
order in a preliminary injunction. A temporary closing order would authorize the New York City Police to padlock the premises and to keep them closed pending further order of the court. The logical outcome of such an order would be to discourage operators of houses of prostitution from seeking to delay their trials. In addition, the law requires a speedy adversary hearing and a determination of the propriety of the ex parte order. In the event the closing order is continued, a speedy trial and determination of the action are required.

2. Laws Relating to Obscenity

In a manner comparable to its provisions against prostitution, the Penal Law also prohibits many aspects of the obscenity industry. Specifically, the Penal Law defines and punishes obscene performances and the promotion of obscene material. For example, persons who knowingly publish, manufacture, wholesale, or retail obscene books or magazines are guilty of the crime of obscenity in one of two degrees. Likewise, any person producing, presenting, directing, or participating in an obscene live show or play would be guilty of the crime of second degree obscenity.

For the same reasons that the New York Penal Law's anti-prostitution provisions are ineffective in eliminating houses of prostitution, its criminal provisions proscribing obscenity are not effective weapons for the elimination of the obscenity entrepreneur.

42. NAL §§ C16-2.6(a).
43. Id. §§ C16-2.8(a), C16-2.10(b), (c).
45. Id. §§ 235.05-06 (McKinney Supp. 1976). Section 235.05 provides: "A person is guilty of obscenity in the second degree when, knowing its content and character, he: 1. Promotes, or possesses with intent to promote, any obscene material; or 2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity. Obscenity in the second degree is a Class A misdemeanor." Id. § 235.05. For the punishment prescribed for a Class A misdemeanor, see note 21 supra.

Section 235.06 provides: "A person is guilty of obscenity in the first degree when, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote, any obscene material. Obscenity in the first degree is a Class D felony." Id. § 235.06. For the punishment prescribed for a Class D felony, see note 21 supra. The definitions of the terms "obscenity" and "performance" are set forth in note 10 supra, the terms "material" and "promote" are defined in note 11 supra.

Section 235.00(5) defines the term "wholesale promote" as follows: "'Wholesale promote' means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purposes of resale." N.Y. Penal Law § 235.00(5) (McKinney Supp. 1976).
46. See note 45 supra.
47. See note 45 supra.
48. See text at notes 19-34 supra.
New York has created a civil action to enjoin permanently certain aspects of the obscenity trade. This statute authorizes a district attorney and other specified public officials to bring an action in state supreme court to enjoin the publication, distribution, sale, and display of obscene material such as books, magazines, and movies. A trial is mandated within one day of the joinder of issue and a decision is required within two days of the conclusion of the trial. In the event a permanent injunction is granted, the judgment must provide for the seizure and destruction of the material found to be obscene.

Although it provides a speedy and effective remedy against obscene material such as books or magazines, the statute has important shortcomings as a procedure for directly attacking the business of the obscenity entrepreneur. It does not, for example, deal at all with the purveyor of live shows and plays. Furthermore, in dealing with the manufacturer of obscene material, the statute focuses on particular editions of a book or certain issues of a magazine. Thus, if the manufacturer loses the injunction action he remains free to manufacture other obscene material and to continue to produce different versions or editions of previously enjoined material.

To cure the deficiencies inherent in New York's criminal and civil regulation of obscenity, the Nuisance Abatement Law focuses on the obscenity entrepreneur as a business entity. For constitutional reasons, the action for injunctive relief is not available as a means of eliminating the large scale business dealer in obscenity. Therefore, the statute provides an action for a civil penalty of $1,000 for each day a premises has been used for the sale or promotion of obscene material. There is also provision in the judgment for the seizure and destruction of the material found to be obscene. The civil penalty provisions of the judgment could be satisfied by the seizure and sale of the non-obscene assets of the defendant.


51. Id. § 6330(2).
52. Id. § 6330(3).
53. See text at notes 110-21 infra.
54. NAL §§ C16-2.2(b) and (c), C16-2.13, C16-2 14(a). See notes 10-11 supra for definitions of the terms "obscene," "performance," "promotion," and "material."
55. NAL § C16-2.19(a).
56. See id. § C16-2.19(b).
material and seizure and sale of the other property would deprive the obscenity entrepreneur of the means of continuing his illegal business.

III. THE NUISANCE ABATEMENT LAW

The Nuisance Abatement Law consists of both substantive and procedural provisions. Substantively, it defines twelve nuisances.\(^5\) Procedurally, it creates an action for a permanent injunction against eleven of the defined nuisances\(^8\) and a civil penalty with respect to one.\(^5\)

Three of the defined nuisances relate to illegal sex oriented businesses and nine pertain to non-sexual violations of state and local law. The three illegal sex oriented businesses defined as nuisances are premises used for (1) purposes of prostitution;\(^6\) (2) for purposes of obscene performances;\(^6\) and (3) for purposes of promoting obscene material,\(^6\) as those terms are defined by the New York Penal Law.\(^6\)

The other defined nuisances deal with such matters as violations of the Building Code, the Health Code, and licensing laws.\(^6\)

Procedurally, an action for a permanent injunction would lie to enjoin the operation of a premises for the purposes of prostitution, or of obscene performances, and to enjoin the operation of a premises constituting a non-sexual nuisance defined by the legislation.\(^6\) With respect to premises conducted for the purpose of promoting obscene material, only the action for a civil penalty would lie.\(^6\) Both actions could be brought solely by the corporation counsel of the City of New York.\(^6\)

1. The Action for a Permanent Injunction

An action for a permanent injunction would be commenced in the supreme court by service of the summons in the manner prescribed by the New York Civil Practice Law and Rules upon the owner, lessor, and lessee of the property where the nuisance is being maintained.\(^8\) In

\(^5\) Id. § C16-2.2.
\(^6\) Id. §§ C16-2.4, C16-2.5(a).
\(^8\) Id. §§ C16-2.13, C16-2.14(b).
\(^5\) Id. § C16-2.2(a).
\(^6\) Id. § C16-2.2(b).
\(^8\) Id. § C16-2.2(c).
\(^5\) See notes 9-11 supra.
\(^6\) NAL §§ C16-2.2(d)-(l); see text at notes 12-13 supra.
\(^8\) NAL §§ C16-2.4, C16-2.5(a).
\(^5\) Id. §§ C16-2.13, C16-2.14.
\(^6\) Id. §§ C16-2.3(a)-(b).
\(^8\) Id. §§ C16-2.5(a), (b) & (d); N.Y. Civ. Prac. Law §§ 301-26 (McKinney 1972 & Supp. 1976). Since the action is civil in nature, service of the summons on a domestic corporation or a
rem jurisdiction over the premises involved would be obtained by affixing the summons to the door of the premises and by mailing the summons by certified or registered mail, return receipt requested, to one of the owners of some interest in the property.69 A notice of pendency of the action could be filed against the property involved when the action is commenced or thereafter.70 As is true of civil actions in New York generally, the complaint could be served with the summons, or afterwards, upon demand therefor by the defendant.71 Thereafter, the New York Civil Practice Law and Rules ("CPLR") provisions governing pleadings and pre-trial disclosure would be applicable.72 Trial of the action would be by the court without a jury.73

After the commencement of the action, the court would be empowered, upon a contested hearing, to grant a preliminary injunction

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69. NAL § C16-2.5(e). In fact, the corporation counsel would be required to name the premises as a defendant by describing it by block, lot number, and street address and by naming at least one of the owners of some part of or interest in the property as defendant. Id. § C16-2.5(b).

70. Id. § C16-2.5(e); see note 38 supra.

71. N.Y. Civ. Prac. Law § 3012(a)-(b) (McKinney 1974). The action is civil in nature. NAL § C16-2.5(a).


73. In New York, equitable actions are not triable as of right by a jury. Expressway Realities v. Sidjack Realty Corp., 35 Misc.2d 639, 230 N.Y.S.2d 455 (Sup. Ct.), aff'd 17 App. Div. 2d 926, 233 N.Y.S.2d 1013 (1st Dep't 1962); In re Britton, 187 Misc. 70, 60 N.Y.S.2d 466 (Sur. Ct. 1946). An action for a civil penalty would be triable by a jury since it involves a claim for a sum of money only. N.Y. Civ. Prac. Law § 4101(1) (McKinney 1963). Under the circumstances defined by NAL section C16-2.5, the corporation counsel could couple a claim for injunctive relief and a demand for a penalty. If he did so, he would not thereby become entitled to a jury trial; nevertheless, the defendant might well be entitled to a jury trial with respect to the issues raised by the penalty claim. DiMenna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917).

The proposed statute creates several presumptions to enable the corporation counsel to make out a prima facie case at trial. Several have already been mentioned. See note 9 supra. The legislation provides that the person in whose name the real estate involved is recorded in the office of the County Clerk or City Register is presumptively the owner thereof. NAL § C16-2.5(f). It also provides that, whenever there is evidence that a person was a manager, operator, supervisor, or in any way in charge of the premises at the time of the nuisance, a presumption arises that such person was an agent or employee of the owner or lessee of the premises. Id. § C16-2.5(g).
either closing the premises or enjoining the maintenance of the nuisance. In this event, a trial of the action would be required to be held within three days of the order and the action determined within three days of the conclusion of the trial. Upon a motion for a preliminary injunction, the court could grant, ex parte, a temporary order restraining continuation of the nuisance or a temporary order closing the premises. The legislation provides that such temporary orders could be granted only upon the court's being satisfied that there is "clear and convincing evidence that a public nuisance is being conducted . . . and that the public health, safety or welfare immediately requires [such] order," and upon the conditions that the hearing for the preliminary injunction be held "at the earliest possible time but in no event later than three days" from the date the order is granted and that "a decision on the motion for a preliminary injunction . . . be rendered by the court within three days" after the hearing on the motion.

74. NAL §§ C16-2.6(a), C16-2.8(a). In New York, it is the rule that a preliminary injunction will not be granted unless it is established to the court's satisfaction that there is a strong likelihood of plaintiff's success in the action and that he has no other available remedy. See Park Terrace Caterers, Inc. v. McDonough, 9 App. Div. 2d 113, 191 N.Y.S.2d 1001 (1st Dep't 1959). These principles would be applicable to the determination of motions for preliminary injunctions under this legislation with one exception—the corporation counsel would not be required to show that it has no adequate remedy at law. NAL § C16-2.5(a).

A defendant who is subject to a preliminary injunction may move at any time to vacate or modify it. N.Y. Civ. Prac. Law § 6314 (McKinney 1963). He may also appeal to the Appellate Division from the granting of a preliminary injunction. Id. § 5701(a)(2)(i).

75. NAL § C16-2.6(a).

76. Id. §§ C16-2.6(a), C16-2.8(a), C16-2.9(a).

77. Id. §§ C16-2.8(a), C16-2.9(a). According to Dean Jerome Prince, the term "clear and convincing evidence" has a meaning which is "none too clear" when used with respect to the problem of burden of proof in the trial of civil cases. J. Prince, Richardson on Evidence 75 (10th ed. 1973). Whatever the term may mean with respect to litigated hearings, it is not applicable to judicial consideration of the temporary orders involved in the proposed law because of the ex parte nature of these orders. By "clear and convincing evidence" this author means that, after cautious and careful consideration of the evidence presented, the court must be reasonably satisfied that the alleged nuisance exists, that its continued existence sufficiently threatens the public health, safety, or welfare of the community so as to warrant an immediate, ex parte interference with the property rights of the persons involved in the nuisance.

Service of either order would be required to be made personally in the manner provided for civil process unless the court directed otherwise. NAL §§ C16-2.8(b), C16-2.9(b).

A temporary closing would direct the padlocking of the premises. Id. § C16-2.10(d). Both temporary closing orders and temporary restraining orders would provide for the posting of notices of the order and the order on the premises, and for inventory of the property on the premises. Id. § C16-2.10(e) and (c).

Mutilation of posted notices or orders and wilful disobedience of the aforementioned orders would be punishable offenses. Id. § C16-2.10(e) and (f).

These provisions for enforcement of temporary orders would also apply to preliminary injunctions. Id. § C16-2.6(c).
Under the legislation, a judgment awarding a permanent injunction would also direct the seizure and sale of property used in the maintenance of the nuisance, and would also award the city its actual costs, disbursements, and expenses of investigating the business and of bringing and maintaining the action. Closing of the premises could also be ordered for any period of up to a year from the date of judgment. The closing could be vacated upon the defendant's posting a bond in the amount of the property involved and upon proof that the nuisance would not be maintained during the period that the premises had been ordered closed. The judgment could also authorize the city to remove any construction found to violate the Building Code. Finally, the judgment would become a lien upon the property where the nuisance was maintained. A defendant against whom a judgment was entered would have the right to appeal to the Appellate Division, and to apply for a stay of enforcement either to the court entering the judgment or to the Appellate Division.

2. The Action for a Civil Penalty

The action for a civil penalty would be commenced in the supreme court by service of summons in the manner prescribed by the New York CPLR upon all persons conducting, maintaining, or permitting the nuisance. Since the action would be civil in nature, the CPLR would be applicable to the maintenance and prosecution of the action. The parties would be entitled to a jury trial.

A temporary restraining or closing order could be vacated, after notice to the corporation counsel, upon proof by a defendant that the nuisance has been abated and upon condition that the corporation counsel have the right to inspect the premises to ascertain whether or not the nuisance has been resumed. Such orders could also be vacated, upon notice, if the court were satisfied that the public health, safety, or welfare will be protected during the pendency of the action, and if the defendant posted a bond equal to the assessed valuation of the property or in such amount as may be fixed by the court. A defendant subject to either of the aforementioned temporary orders would have further remedies against such orders under the Civil Practice Law and Rules. He could move, without notice, before the judge, who made the orders, to vacate or modify them or, in the alternative, he could seek such relief in the Appellate Division. Venue would lie in the county where the nuisance exists.

This is true because the action is for a sum of money only. N.Y. Civ. Prac. Law § 4101(1) (McKinney 1963); see Colon v. Lisk, 153 N.Y. 188, 47 N.E. 302 (1897).
After the commencement of the action, the court would be empowered, upon a contested hearing, to grant a preliminary injunction enjoining the defendant from making a "bulk transfer," which the legislation defines as "any transfer of the major part of the materials, supplies, merchandise, or other inventory or equipment of the transferor in . . . [premises] where the public nuisance is being conducted, maintained or permitted that is not in the ordinary course of the transferor's business."\(^8\) If a preliminary injunction is granted, a trial of the action is required within three days of the entry of the order and the action would have to be determined within three days after the conclusion of the trial.\(^8\) The court could grant, ex parte, such a temporary restraining order upon a motion for a preliminary injunction.\(^9\) It could, however, only be granted if the court were satisfied that there is "clear and convincing evidence that a public nuisance . . . is being conducted, maintained, or permitted . . . ."\(^9\) A hearing on the motion must be held "at the earliest possible time but in no event later than three days"\(^9\) from the date the order is granted and "a decision on the motion for a preliminary injunction shall be rendered within three days" after the hearing.\(^9\)

The statute creates two presumptions to enable corporation counsel to make out a prima facie case at trial. See notes 10-11 supra.

88. NAL § C16-2.15(b) & (c). The definition of the term "bulk sale" is derived from the Uniform Commercial Code without, however, including the exceptions noted in that statute. N.Y. U.C.C. § 6-102 (McKinney Supp. 1976).

89. NAL § C16-2.15(a). See note 74 supra for a discussion of the proof requisite for the issuance of a preliminary injunction. Under the legislation, the corporation counsel would not be required to establish lack of an adequate remedy at law. NAL § C16-2.15(a). The officers serving a temporary restraining order would be required to make an inventory of the personal property used in the maintenance of the nuisance. Id. § C16-2.17(d).

A defendant could have a temporary injunction vacated upon posting a bond in the amount of the civil penalty demanded in the complaint together with the projected amount of the actual costs of the prosecution of the action as determined by the court; the application for this relief would be required to be made on notice. Id. § C16-2.18. In addition, further remedies would be available to a defendant under the Civil Practice Law and Rules. See note 73, supra.

90. NAL § C16-2.15(a).

91. Id. § C16-2.17(a).

92. Id.

93. Id. With respect to the term "clear and convincing evidence," see note 77 supra. As used in this section of the proposed law, the author intended this term to mean that, after cautious and careful consideration of the evidence presented, the court must be reasonably satisfied that the existence of the alleged nuisance has been sufficiently established so as to warrant an immediate ex parte interference with the property rights of the persons involved in the nuisance. It should be noted that the standard for a temporary order restraining a "bulk sale" is not as stringent as that pertaining to a temporary closing order. See note 77 supra. The reason is that a temporary restraint of a "bulk sale" is not as serious an interference with property rights as that resulting from enforcement of a temporary closing order.

Section C16-2.14(c) mandates that a temporary restraining order cannot be granted unless the court is satisfied that the defendants had knowledge of the nuisance involved, and provides that
A judgment awarding the civil penalty is required to be in the amount of one thousand dollars for each day the nuisance was maintained. Enforcement by execution under the CPLR would be available. The judgment must also provide for seizure and destruction of the material found to be obscene. A defendant against whom such a judgment were entered would have the right to appeal to the Appellate Division and to obtain a stay of enforcement by following the procedures outlined in the CPLR.

IV. TWO CONSTITUTIONAL ASPECTS OF THE LAW

1. The Temporary Closing Order

As has already been seen, a temporary closing order could be granted in the action for a permanent injunction, upon the corporation counsel's motion for a preliminary injunction. In drafting the provisions which would govern the issuance of such an order, the author was mindful of the constitutional dimension which such an order would entail. Specifically, enforcement of the order would involve the closing of a place of business and would deprive the owner of the use of his property without a prior litigated hearing respecting the propriety of the order. In short, a question of due process would arise under the United States Constitution.

the presumption of knowledge set forth in section 235.10(1) of the Penal Law is applicable. Id. § C16-2.14(c). That statute states with respect to criminal prosecutions: "A person who promotes or wholesale promotes obscene material or possesses the same with the intent to promote or wholesale promote it, in the course of his business is presumed to do so with knowledge of its content and character." N.Y. Penal Law § 235.10(1) (McKinney Supp. 1976). It should be noted that scienter has been held to be a constitutionally required element of any obscenity offense. Smith v. California, 361 U.S. 147 (1959).

Service of a temporary restraining order would be required to be made personally in the manner provided for civil process unless the court directed otherwise. NAL § C16-2.17(b).

A defendant could have a temporary restraining order vacated upon posting a bond in the amount of the civil penalty demanded in the complaint together with the projected amount of the actual costs of the prosecution of the action as determined by the court; the application for this relief would be required to be made on notice. Id. § C16-2.18. In addition, further remedies would be available to a defendant under the New York Civil Practice Law and Rules. See note 77 supra.

94. NAL § C16-2.14(a).

95. Id. § C16-2.19(b). Only non-obscene property could be seized by execution and sold. See NAL § C16-2.19(a).

96. Id. § C16-2.19(a).


99. See text at notes 74-84 supra.

100. NAL §§ C16-2.6(a), C16-2.8(a), C16-2.9(a) and (b).

101. The fourteenth amendment provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV § 1.
The United States Supreme Court has held that, as a general proposition, an ex parte seizure of property, that is, a seizure without a prior adversary hearing, violates due process. Exceptions to the rule do, however, exist. A government seizure without a prior hearing is constitutionally permissible if

the seizure has been directly necessary to secure an important governmental or general public interest... [if] there has been a special need for very prompt action... [and if] the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the [United States Supreme] Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

In a civil action between private parties, a provisional remedy, wherein a seizure is authorized without a prior hearing, is constitutional under the following circumstances: if the provisional remedy may only be granted by the court upon a verified affidavit demonstrating the circumstances underlying the need for the remedy; if the party seeking the relief is required to post a bond; if the party against whom the order is executed may recover possession by posting a bond or may seek an immediate vacating order; and if a prompt hearing is accorded after execution of the order.

Within the principles just enunciated, the temporary closing order

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103. Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972) (footnotes omitted). In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), the Supreme Court upheld the constitutionality of a Puerto Rico statute which authorized the seizure of vessels used for unlawful purposes, namely, transportation of narcotics, without prior notice or hearing. The constitutionality of the seizure was sustained because there was a significant governmental purpose served in preventing continued illicit use of the property, pre-seizure notice and hearing might have allowed the property to be removed from the jurisdiction or concealed, and seizure had been initiated by government officials, not self-interested private parties. Id. at 679. In contrast, a federal agency's summary seizure pursuant to statute of a helicopter subject to a civil penalty was held violative of due process because there was no showing of a need to protect the Government's interest in collecting the penalty. United States v. Vertol H21C Reg. No. N8540, 545 F.2d 648, 651 (9th Cir. 1976).
provided by the legislation would not be violative of due process. Although a closing without a prior litigated hearing is authorized, city officials could not make such a closing without an order granted by a judge predicated upon proof by affidavit.\textsuperscript{105} Such a closing order could only be granted after the court had been satisfied by clear and convincing evidence\textsuperscript{106} that a nuisance defined by the legislation as subject to permanent injunctive relief\textsuperscript{107} was established, and that the public health, safety, or welfare required such order.\textsuperscript{108} Under the legislation, the order could be vacated by the defendant's establishing that the nuisance had been abated, by his posting a bond, or by instituting ex parte procedures under the CPLR.\textsuperscript{109} A hearing would be required "at the earliest possible time but in no event later than three days" from the date of the order.\textsuperscript{110}

2. The Civil Penalty as a Constitutional Alternative to an Injunctive Remedy for Obscenity Nuisances

As previously mentioned, the Nuisance Abatement Law affords an action for a permanent injunction against houses of prostitution, premises used for promoting obscene performances, and certain defined non-sexual nuisances.\textsuperscript{111} On the other hand, premises used for the promotion of obscenity are subject to an action for a civil penalty rather than one for injunctive relief.\textsuperscript{112} As originally drafted by the author, the Nuisance Abatement Law's action for a permanent injunction was inapplicable to premises used for the promotion of obscene performances. Such a business would have been subject only to the action for a civil penalty.

In the author's opinion, first amendment guarantees\textsuperscript{113} mandate a remedial differentiation in the treatment of the nuisances defined by the legislation. With respect to houses of prostitution and the non-sexual nuisances, free speech considerations logically do not arise

\textsuperscript{105} NAL §§ C16-2.6(a), C16-2.8(a). In New York, pre-trial motions in civil actions are normally made in writing. H. Wachtell, New York Practice Under the CPLR 197 (5th ed. 1976). Such motions are brought either by notice of motion or by order to show cause supported by affidavits. N.Y. Civ. Prac. Law §§ 2211, 2214(a), (b), (d) (McKinney 1974).

\textsuperscript{106} NAL § C16-2.8(a); see note 77 supra.

\textsuperscript{107} The nuisances involved would include premises used for purposes of prostitution as well as the defined non-sex oriented nuisances. NAL §§ C16-2.2(a), (d)-(e), C16-2.4, C16-2.5(a), C16-2.6(a), and C16-2.8(a); see text at note 65 supra.

\textsuperscript{108} NAL § C16-2.8(a).

\textsuperscript{109} Note 77 supra.

\textsuperscript{110} NAL § C16-2.8(a).

\textsuperscript{111} See text at note 65 supra.

\textsuperscript{112} See text at note 66 supra.

\textsuperscript{113} See note 49 supra, where the relevant provisions of the first amendment are set forth.
because these nuisances involve conduct and not the communication of ideas. On the other hand, the subject matter of the obscenity nuisances, for example, drama, movies, books, and magazines, do entail free speech issues because these matters constitute protected free speech unless they are in fact obscene. Consequently, making houses of prostitution and the non-sexual nuisances subject to injunctive remedies would pose no free speech problems, while making the obscenity nuisances liable to an injunction would almost certainly pose such a problem.

The constitutional basis for the author's opinion is the principle that restraints imposed prior to an adversary hearing respecting, and a judicial decision determining that the restrained materials are obscene violate the first amendment. Application of the legislation's action for an injunction to the obscenity nuisances might therefore run afoul of this principle in two respects. Enforcement of the closing order and the judgment of permanent injunction would result in a closing of the premises, thereby preventing the owner from producing performances or promoting materials not judicially declared obscene after an adversary hearing. Moreover, enforcement of a closing order which has been granted solely on the basis of an ex parte showing would prevent the owner of the premises from continuing the production of performances or from promoting materials which, although judicially declared obscene, had not been the subject of a prior adversary hearing. In short, to apply the legislation's injunctive action to an obscenity nuisance would result in an unconstitutional prior restraint of free speech.

In the author's view, the application of the legislation's civil penalty would not involve any unconstitutional restraint of free speech. As intended by the author, and as required by the legislation, a temporary

115. See NAL § C16-2.2(b), (c), and notes 10-11 supra.
117. Near v. Minnesota, 283 U.S. 697 (1931). Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), should not be construed as being contrary to the principle stated in the text. That case held the predecessor of section 6330 of New York's present Civil Practice Law and Rules constitutional under the first amendment. The statute is discussed in the text at notes 49-52 supra. In Kingsley, the restraint, which involved the seizure and destruction of certain books, did not occur until after a full adversary hearing and judicial determination that the books were obscene. See F. Schauer, The Law of Obscenity 228-46 (1976), for a complete discussion of the doctrine of prior restraint.
118. NAL § C16-2.10(d).
119. Id. § C16-2.12(c).
order restraining a bulk transfer would be issued only to preserve the status quo, that is, to prevent the owner of the premises from making a mass transfer of his stock and other property and thereby defeating enforcement of a later judgment. Free speech would not be restrained because the owner of the premises would be free to continue to present his movie or drama or to sell his books or magazines. Furthermore, a civil penalty and seizure and destruction could only be effected pursuant to a judgment entered after a trial and judicial declaration of obscenity.

The Nuisance Abatement Law enacted by the New York City Council thus differs in one respect from that drafted by the author. In its final form, nuisances involving obscene performances are subject to the action for a permanent injunction; only nuisances involving promotion of obscene material would be subject to the civil remedy. It may be that a live performance such as a dance could be considered conduct and thereby not protected by the first amendment. Yet, if a live performance were found to admit of a speech component, then first amendment guarantees would come into play. Thus, the problem of prior restraint which the author sought to avoid in drafting the Nuisance Abatement Law is present in the version enacted by the city council. Nevertheless, cases in other jurisdictions have upheld statutes prohibiting obscene performances as constitutional under the first amendment. Thus, it may be that an injunction under these circumstances would not constitute an unconstitutional prior restraint.

V. Conclusion

In drafting the Nuisance Abatement Law the author had only one goal in mind: the creation of an effective civil remedy for the elimination of illegal sex oriented businesses within a procedural framework protective of our cherished constitutional rights. Whether the author's goal will be achieved will depend upon the energetic enforcement of the Nuisance Abatement Law by public officials.

121. NAL §§ C16-2.15(b), C16-2.17(a). When a temporary restraining order is granted, a hearing on the motion for a preliminary injunction must be held within a certain time and the motion decided within a certain time. Id. § C16-2.17(a). Furthermore, the order can only be granted upon a showing of "clear and convincing evidence". Id. § C16-2.17(a); see note 77 supra.
123. See note 5 supra and accompanying text.
APPENDIX

THE COUNCIL
The City of New York

Int. No. 1180 June 21, 1977

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to the defining of public nuisances and their abatement.

Be it enacted by the Council as follows:

Section 1: Chapter sixteen of the administrative code of the city of New York is hereby amended by adding thereto a new title, to be title C, to read as follows:

TITLE C
NUISANCE ABATEMENT LAW

§ C16-2.0 Legislative declaration.—The Council of the City of New York finds that in the city of New York commercial exploitation of explicit sexual conduct through the public exhibition of lewd films, the public performance of obscene acts, the sale of obscene publications, and the use of so-called massage parlors and other premises for purposes of lewdness, assignation or prostitution, constitutes a debasement and distortion of sensitive human relationships central to family life, community welfare and the development of human personality, is indecent and offensive to the senses and to public morals and that such exploitation and flagrant violations of the building code, health laws, zoning resolutions, licensing laws, environmental laws, laws relating to the sale and consumption of alcoholic beverages and laws relating to gambling and dangerous drugs all interfere with the interest of the public in the quality of life and total community environment, the tone of commerce in the city, property values and the public safety; the council further finds that the continued occurrence of such activities and violations is detrimental to the health, safety, morals and general welfare of the people of the city of New York and of the businesses and visitors thereof. It is the purpose of the council to place in one law all existing legal and equitable remedies relating to the subject matter encompassed by this law and to strengthen existing laws on the subject. This law shall apply to existing establishments which are engaged presently in the type of activities herein declared to be public nuisances in the city of New York.
§ C16-2.1 Short Title.—This title shall be known as the “Nuisance Abatement Law”.

§ C16-2.2 Public nuisance defined.—The following are declared to be public nuisances:

(a) Any building, erection or place used for the purpose of prostitution as defined in section 230.00 of the penal law. Two or more criminal convictions of persons for acts of prostitution in the building, erection or place, within the one-year period preceding the commencement of an action under this title, shall be presumptive evidence that the building, erection or place is a public nuisance. In any action under this subdivision, evidence of the common fame and general reputation of the building, erection or place, of the inmates or occupants thereof, or of those resorting thereto, shall be competent evidence to prove the existence of the public nuisance. If evidence of the general reputation of the building, erection or place, or of the inmates or occupants thereof, is sufficient to establish the existence of the public nuisance, it shall be prima facie evidence of knowledge thereof and acquiescence and participation therein and responsibility for the nuisance, on the part of the owners, lessors, lessees and all those in possession of or having charge of, as agent or otherwise, or having any interest in any form in the property, real or personal, used in conducting or maintaining the public nuisance;

(b) Any building, erection or place used for the purpose of obscene performances. The term “obscene” shall have the same meaning as that term is defined in subdivision one of section 235.00 of the penal law. The term “performance” shall have the same meaning as that term as defined in subdivision three of section 235.00 of the penal law. Two or more convictions, as defined in subdivision thirteen of section 1.20 of the criminal procedure law, of persons for production, presentation or direction of an obscene performance or for participation in such performance, in the building, erection or place, within the one-year period preceding the commencement of an action under this title shall be presumptive evidence that the building, erection or place is a public nuisance;

(c) Any building, erection or place used for the purpose of promotion of obscene material. The term “obscene” shall have the same meaning as that term as defined in subdivision one of section 235.00 of the penal law. The term “material” shall have the same meaning as that term as defined in subdivision two of section 235.00 of the penal law. Two or more convictions, as defined in subdivision thirteen of section 1.20 of the criminal procedure law, of persons for promotion of or possession with intent to promote obscene material in the building, erection or place, within the one-year period preceding the commencement of an action under this title, shall be presumptive evidence that the building, erection or place is a public nuisance;

(d) Any building, erection or place, other than a one-or-two-family dwelling classified in occupancy group J-3 pursuant to section C26-301.1 of this code, which is in violation of article five of part one of title C of chapter twenty-six of this code or of sub-articles 102.0, 103.0, 105.0, 109.0, 121.0 or 123.0 of article one of part two of title C of chapter twenty-six of this code.
A conviction, as defined in subdivision thirteen of section 1.20 of the criminal procedure law, of persons for offenses, as defined in subdivision one of section 10.00 of the penal law, in violation of the aforesaid provisions of this code in the building, erection or place, within the period of one-year preceding the commencement of an action under this title, shall be presumptive evidence that the building, erection or place is a public nuisance;

(e) Any building, erection or place, other than a one-or-two-family dwelling classified in occupancy group J-3 pursuant to section C26-301.1 of this code, which is a nuisance as defined in section 564-15.0 of this code or which is an infected and uninhabitable house as defined in section 564-32.0 of this code or which is in violation of subdivision two of section 755(2)-7.0 of this code;

(f) Any building, erection or place used for the purpose of a business, activity or enterprise which is not licensed as required by law;

(g) Any building, erection or place wherein, within the period of one year prior to the commencement of an action under this title, there have occurred five or more violations of any of the provisions of article two hundred twenty and two hundred twenty-five of the penal law;

(h) Any building, erection or place used for any of the unlawful activities described in section one hundred twenty-three of the alcoholic beverage control law;

(i) Any building, erection or place wherein there is occurring a violation of articles nine, eleven or thirteen of part two of chapter fifty-seven of this code;

(j) Any building, erection or place wherein there is occurring a violation of articles three or four of part three of chapter fifty-seven of this code;

(k) Any building, erection or place wherein there is occurring a violation of the zoning resolution of the city regulating "adult uses" and

(l) Any building, erection or place wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law.

§ C16-2.3 Remedies.—(a) The corporation counsel shall bring and maintain a civil proceeding in the name of the city in the supreme court of the county in which the building, erection or place is located to permanently enjoin the public nuisances, defined in subdivisions (a), (b), (d), (e), (f), (g), (h), (i), (j), (k), and (l) of section C16-2.2 of this title, in the manner provided in article one of this title.

(b) The corporation counsel shall bring and maintain a civil proceeding in the name of the city, in the supreme court of the county in which the building, erection or place is located to recover a civil penalty in relation to the public nuisances defined in subdivision (c) of section C16-2.2 of this title, in the manner provided in article two of this title.

ARTICLE I

§ C16-2.4 Applicability.—This article shall be applicable to the public nuisances defined in subdivisions (a), (b), (d), (e), (f), (g), (h), (i), (j), (k) and (l) of section C16-2.2 of this title.
§ C16-2.5 · Action for permanent injunction.—

(a) Generally. Upon the direction of the mayor, or at the request of the head of a department or agency of the city, or at the request of a district attorney of any county within the city or upon his own initiative, the corporation counsel shall bring and maintain a civil proceeding in the name of the city in the supreme court to permanently enjoin a public nuisance within the scope of this article, and the person or persons conducting, maintaining or permitting the public nuisance from further conducting, maintaining or permitting the public nuisance. The owner, lessor and lessee of a building, erection or place wherein the public nuisance is being conducted, maintained or permitted shall be made defendants in the action. The venue of such action shall be in the county where the public nuisance is being conducted, maintained or permitted. The existence of an adequate remedy at law shall not prevent the granting of temporary or permanent relief pursuant to this article.

(b) The summons; the caption; naming the building, erection or place as defendant. The corporation counsel shall name as defendants the building, erection or place wherein the public nuisance is being conducted, maintained or permitted, by describing it by block, lot number and street address and at least one of the owners of some part of or interest in the property.

(c) In rem jurisdiction over building, erection or place. In rem jurisdiction shall be complete over the building, erection or place wherein the public nuisance is being conducted, maintained or permitted by affixing the summons to the door of the building, erection or place and by mailing the summons by certified or registered mail, return receipt requested, to one of the owners of some part of or interest in the property. Proof of service shall be filed within two days thereafter with the clerk of the court designated in the summons. Service shall be complete upon such filing.

(d) Service of summons on other defendants. Defendants, other than the building, erection or place wherein the public nuisance is being conducted, maintained or permitted, shall be served with the summons as provided in the civil practice law and rules.

(e) Notice of pendency. With respect to any action commenced or to be commenced by him pursuant to this article, the corporation counsel may file a notice of pendency pursuant to the provisions of article sixty-five of the civil practice law and rules.

(f) Presumption of ownership. The person in whose name the real estate affected by the action is recorded in the office of the city register or the county clerk, as the case may be, shall be presumed to be the owner thereof.

(g) Presumption of employment or agency. Whenever there is evidence that a person was the manager, operator, supervisor or, in any other way, in charge of the premises, at the time a public nuisance was being conducted, maintained or permitted, such evidence shall be presumptive that he was an agent or employee of the owner or lessee of the building, erection or place.

(h) Penalty. If, upon the trial of an action under this title or, upon a motion for summary judgment in an action under this title, a finding is made that the defendant has intentionally conducted, maintained or permitted a public nuisance defined in this title, a penalty, to be included in the judgment, may
be awarded in an amount not to exceed one thousand dollars for each day it is
found that the defendant intentionally conducted, maintained or permitted
the public nuisance. Upon recovery, such penalty shall be paid into the
general fund of the city.

§ C16-2.6 Preliminary injunction.—(a) Generally. Pending an action for a
permanent injunction as provided for in section C16-2.5 of this article, the
court may grant a preliminary injunction enjoining a public nuisance within
the scope of this article and the person or persons conducting, maintaining or
permitting the public nuisance from further conducting, maintaining or
permitting the public nuisance. An order granting a preliminary injunction
shall direct a trial of the issues within three days after joinder of issue or, if
issue has already been joined, within three days after the entry of the order.
Where a preliminary injunction has been granted, the court shall render a
decision with respect to a permanent injunction within three days after the
conclusion of the trial. A temporary closing order may be granted pending a
hearing for a preliminary injunction where it appears by clear and convincing
evidence that a public nuisance within the scope of this article is being
conducted, maintained or permitted and that the public health, safety or
welfare immediately requires the granting of a temporary closing order. A
temporary restraining order may be granted pending a hearing for a prelimi-
nary injunction where it appears by clear and convincing evidence that a
public nuisance within the scope of this article is being conducted, maintained
or permitted.

(b) Enforcement of preliminary injunction. A preliminary injunction shall
be enforced by the city agency at whose request the underlying action is being
brought. In the event the underlying action is being brought at the direction
of the mayor, or at the request of several city agencies or by the corporation
counsel, on his own initiative, or upon the request of a district attorney, the
order shall be enforced by the agency designated by the mayor. The police
department shall upon the request of the agency involved or upon the
direction of the mayor, assist in the enforcement of the preliminary injunc-
tion.

(c) Preliminary injunctions, inventory, closing of premises, posting of or-
ders and notices, offenses. If the court grants a preliminary injunction, the
provisions of section C16-2.10 of this article shall be applicable.

§ C16-2.7 Motion papers for preliminary injunction.—The corporation
counsel shall show, by affidavit and such other evidence as may be submitted,
that there is a cause of action for a permanent injunction abating a public
nuisance within the scope of this article.

§ C16-2.8 Temporary closing order.—(a) Generally. If, on a motion for a
preliminary injunction pursuant to section C16-2.6 of this article, the corpo-
ration counsel shall show by clear and convincing evidence that a public
nuisance within the scope of this article is being conducted, maintained or
permitted and that the public health, safety or welfare immediately requires a
temporary closing order, a temporary order closing such part of the building,
errection or place wherein the public nuisance is being conducted, maintained
or permitted may be granted without notice, pending order of the court
granting or refusing the preliminary injunction and until further order of the court. Upon granting a temporary closing order, the court shall direct the holding of a hearing for the preliminary injunction at the earliest possible time but in no event later than three days from the granting of such order; a decision on the motion for a preliminary injunction shall be rendered by the court within three days after the conclusion of the hearing.

(b) Service of temporary closing order. Unless the court orders otherwise, a temporary closing order together with the papers upon which it was based and a notice of hearing for the preliminary injunction shall be personally served, in the same manner as a summons as provided in the civil practice law and rules.

§ C16-2.9 Temporary restraining order.—(a) Generally. If on a motion for a preliminary injunction pursuant to section C16-2.6 of this article, the corporation counsel shall show by clear and convincing evidence that a public nuisance within the scope of this article is being conducted, maintained or permitted and that the public health, safety or welfare immediately requires a temporary restraining order, such temporary restraining order may be granted without notice restraining the defendants and all persons from removing or in any manner interfering with the furniture, fixtures and movable property used in conducting, maintaining or permitting the public nuisance and from further conducting, maintaining or permitting the public nuisance, pending order of the court granting or refusing the preliminary injunction and until further order of the court. Upon granting a temporary restraining order, the court shall direct the holding of a hearing for the preliminary injunction at the earliest possible time but in no event later than three days from the granting of such order; a decision on the motion for a preliminary injunction shall be rendered by the court within three days after the conclusion of the hearing.

(b) Service of temporary restraining order. Unless the court orders otherwise, a temporary restraining order and the papers upon which it was based and a notice of hearing for the preliminary injunction shall be personally served, in the same manner as a summons as provided in the civil practice law and rules.

§ C16-2.10 Temporary closing order; temporary restraining order.—(a) Generally. If on a motion for a preliminary injunction, the corporation counsel submits evidence warranting both a temporary closing order and a temporary restraining order, the court shall grant both orders.

(b) Enforcement of temporary closing orders and temporary restraining orders. Temporary closing orders shall be enforced by the agency at whose request the underlying action is being brought. In the event the underlying action is being brought at the direction of the mayor, or at the request of several city agencies or by the corporation counsel on his own initiative, or upon the request of a district attorney, the order shall be enforced by the city agency designated by the mayor. The police department shall, upon the request of the agency involved or upon the direction of the mayor, assist in the enforcement of a temporary closing order or a temporary restraining order.

(c) Inventory upon service of temporary closing orders and temporary
restraining orders. The officers serving a temporary closing order or a temporary restraining order shall forthwith make and return to the court an inventory of personal property situated in and used in conducting, maintaining or permitting a public nuisance within the scope of this article and shall enter upon the building, erection or place for such purpose.

(d) Closing of premises pursuant to temporary closing order. The officers serving a temporary closing order shall, upon service of the order, command all persons present in the building, erection or place to forthwith vacate the premises. Upon the building, erection or place being vacated, the premises shall be securely locked and all keys delivered to the officers serving the order who thereafter shall deliver the keys to the fee owner, lessor or lessee of the building, erection or place involved. If the fee owner, lessor or lessee is not at the building, erection or place when the order is being executed, the officers shall securely padlock the premises and retain the keys until the fee owner, lessor or lessee of the building is ascertained, in which event, the officers shall deliver the keys to such owner, lessor or lessee.

(e) Posting of temporary closing order and temporary restraining order; posting of notices; offenses. Upon service of a temporary closing order or a temporary restraining order, the officer shall post a copy thereof in a conspicuous place or upon one or more of the principal doors at entrances of such premises where the public nuisance is being conducted, maintained or permitted. In addition, where a temporary closing order has been granted, the officers shall affix, in a conspicuous place or upon one or more of the principal doors at entrances of such premises, a printed notice that the premises have been closed by court order, which notice shall contain the legend “closed by court order” in block lettering of sufficient size to be observed by anyone intending or likely to enter the premises, the date of the order, the court from which issued and the name of the office or agency posting the notice. In addition, where a temporary restraining order has been granted, the officers shall affix, in the same manner, a notice similar to the notice provided for in relation to a temporary closing order except that the notice shall state that certain described activity is prohibited by court order and that removal of property is prohibited by court order. Mutilation or removal of such a posted order or such a posted notice while it remains in force, in addition to any other punishment prescribed by law, shall be punishable, on conviction, by a fine of not more than two hundred fifty dollars or by imprisonment not exceeding fifteen days, or by both, provided such order or notice contains therein a notice of such penalty. The police department shall, upon the request of the agency involved or upon the direction of the mayor, assist in the enforcement of this subdivision.

(f) Intentional disobedience of or resistance to temporary closing order or temporary restraining order. Intentional disobedience of or resistance to a temporary closing order or a temporary restraining order, in addition to any other punishment prescribed by law, shall be punishable on conviction, by a fine of not more than five hundred dollars or by imprisonment not exceeding six months or by both.

§ C16-2.11 Temporary closing order; temporary restraining order; defen-
(a) A temporary closing order or a temporary restraining order shall be vacated, upon notice to the corporation counsel, if the defendant shows by affidavit and such other proof as may be submitted that the public nuisance within the scope of this article has been abated. An order vacating a temporary closing order or a temporary restraining order shall include a provision authorizing agencies of the city to inspect the building, erection or place which is the subject of an action pursuant to this title, periodically without notice, during the pendency of the action for the purpose of ascertaining whether or not the public nuisance has been resumed. Intentional disobedience of or resistance to an inspection provision of an order vacating a temporary closing order or a temporary restraining order, in addition to any other punishment prescribed by law, shall be punishable, on conviction, by a fine of not more than five hundred dollars or by imprisonment not exceeding six months, or by both. The police department shall, upon the request of the agency involved or upon the direction of the mayor, assist in the enforcement of an inspection provision of an order vacating a temporary closing order or temporary restraining order.

(b) A temporary closing order or a temporary restraining order may be vacated by the court, upon notice to the corporation counsel, when the defendant gives an undertaking and the court is satisfied that the public health, safety or welfare will be protected adequately during the pendency of the action. The undertaking shall be in an amount equal to the assessed valuation of the building, erection or place where the public nuisance is being conducted, maintained or permitted or in such other amount as may be fixed by the court. The defendant shall pay to the city, in the event a judgment of permanent injunction is obtained, its actual costs, expenses and disbursements in investigating, bringing and maintaining the action.

§ C16-2.12 Permanent injunction.—(a) A judgment awarding a permanent injunction pursuant to this article may direct the sheriff to seize and remove from the building, erection or place all material, equipment and instrumentalities used in the creation and maintenance of the public nuisance and shall direct the sale by the sheriff of such property in the manner provided for the sale of personal property under execution pursuant to the provisions of the civil practice law and rules. The net proceeds of any such sale, after deduction of the lawful expenses involved, shall be paid into the general fund of the city.

(b) A judgment awarding a permanent injunction pursuant to this article may authorize agents of the city to forthwith remove and correct construction and structural alterations as provided in section C26-85.5 of this code.

(c) A judgment awarding a permanent injunction pursuant to this article may direct the closing of the building, erection or place by the sheriff, to the extent necessary to abate the nuisance, and shall direct the sheriff to post a copy of the judgment and a printed notice of such closing conforming to the requirements of subdivision (e) of section C16-2.10 of this article. Mutilation or removal of such a posted judgment or notice while it remains in force, in addition to any other punishment prescribed by law, shall be punishable, on conviction, by a fine of not more than two hundred fifty dollars or by
imprisonment not exceeding fifteen days, or by both, provided such judgment contains therein a notice of such penalty. The closing directed by the judgment shall be for such period as the court may direct but in no event shall the closing be for a period of more than one year from the posting of the judgment provided for in this subdivision. If the owner shall file a bond in the value of the property order to be closed and submits proof to the court that the nuisance has been abated and will not be created, maintained or permitted for such period of time as the building, erection or place has been directed to be closed in the judgment, the court may vacate the provisions of the judgment that direct the closing of the building, erection or place. A closing by the sheriff pursuant to the provisions of this subdivision shall not constitute an act of possession, ownership or control by the sheriff of the closed premises.

(d) Intentional disobedience or resistance to any provision of a judgment awarding a permanent injunction pursuant to this title, in addition to any other punishment prescribed by law, shall be punishable by a fine of not more than five hundred dollars, or by imprisonment not exceeding six months, or by both.

(e) Upon the request of the agency involved or upon the direction of the mayor, the police department shall assist in the enforcement of a judgment awarding a permanent injunction entered in an action brought pursuant to this title.

(f) A judgment rendered awarding a permanent injunction pursuant to this article shall be and become a lien upon the building, erection or place named in the complaint in such action, such lien to date from the time of filing a notice of lis pendens in the office of the clerk of the county wherein the building, erection or place is located. Every such lien shall have priority before any mortgage or other lien that exists prior to such filing except tax and assessment liens.

(g) A judgment awarding a permanent injunction pursuant to this title shall provide, in addition to the costs and disbursements allowed by the civil practice law and rules, upon satisfactory proof by affidavit or such other evidence as may be submitted, the actual costs, expenses and disbursements of the city in investigating, bringing and maintaining the action.

ARTICLE 2

§ C16-2.13 Applicability.—This article shall be applicable to public nuisances defined in subdivision (c) of section C16-2.2 of this title.

§ C16-2.14 Action for civil penalty.—(a) Generally. Upon the direction of the mayor, or at the request of the head of a department or agency of the city, or at the request of a district attorney of any county within the city or upon his own initiative, the corporation counsel shall bring and maintain a civil proceeding in the name of the city in the supreme court to recover a civil penalty against any person conducting, maintaining or permitting a public nuisance within the scope of this article. The amount of any civil penalty awarded in a judgment entered pursuant to this article shall be in an amount
of one thousand dollars for each day the public nuisance has been conducted, maintained or permitted. Upon recovery, such penalty shall be paid into the general fund of the city. The venue of such action shall be in the county wherein the public nuisance is being conducted, maintained or permitted.

(b) The summons and its service; naming of parties as defendants. The corporation counsel shall name as defendants all persons conducting, maintaining or permitting a public nuisance within the scope of this article. Other persons may be named as defendants pursuant to the rules governing joinder of parties set forth in the civil practice law and rules. The summons shall be served in the manner provided by the civil practice law and rules.

(c) Scienter. A temporary restraining order shall not be granted nor shall a judgment be entered against a defendant unless the court is satisfied that the defendant had knowledge of the public nuisance which he conducted, maintained or permitted. The presumption of knowledge provided by subdivision one of section 235.10 of the penal law shall be applicable to this article.

§ C16-2.15 Preliminary injunction.—(a) Generally. Pending an action pursuant to section C16-2.14 of this article, the court may grant a preliminary injunction enjoining a defendant from making a bulk transfer, as defined in subdivision (b) of this section. An order granting a preliminary injunction shall direct a trial of the issues within three days after joinder of issue or, if issue has already been joined, within three days after entry of the order. Where a preliminary injunction has been granted the court shall render a decision with respect to the final determination of the action within three days after the conclusion of the trial. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears by clear and convincing evidence that a public nuisance within the scope of this article is being conducted, maintained or permitted. The existence of an adequate remedy at law shall not prevent the granting of a temporary injunction or a temporary restraining order pursuant to this article.

(b) “Bulk transfer” defined. A “bulk transfer” is any transfer of a major part of the materials, supplies, merchandise or other inventory or equipment of the transfer or in the building, erection or place where the public nuisance is being conducted, maintained or permitted that is not in the ordinary course of the transferor’s business.

(c) Enforcement of preliminary injunction. A preliminary injunction shall be enforced by the agency or agencies specified in subdivision (b) of section C16-2.6 of this title.

(d) Preliminary injunction; inventory. If the court grants a preliminary injunction, the provisions of subdivision (d) of section C16-2.17 of this article shall be applicable.

§ C16-2.16 Motion papers for preliminary injunction.—The corporation counsel shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action for a civil penalty within the scope of this article.

§ C16-2.17 Temporary restraining order.—(a) Generally. If on a motion for a preliminary injunction pursuant to section C16-2.15 of this article, the corporation counsel shall show by clear and convincing evidence that a public
nuisance within the scope of this article is being conducted, maintained or permitted, a temporary restraining order may be granted without notice restraining the defendants and all persons from making or permitting a “bulk transfer” as defined in subdivision (b) of section C16-2.15, pending order of the court granting or refusing the preliminary injunction and until further order of the court. Upon granting a temporary restraining order, the court shall direct the holding of a hearing for a preliminary injunction at the earliest possible time but in no event later than three days from the granting of such order; a decision on the motion for a preliminary injunction shall be rendered by the court within three days after the conclusion of the hearing.

(b) Service of temporary restraining order. Unless the court orders otherwise, a temporary restraining order and the papers upon which it was based and a notice of hearing for a preliminary injunction shall be personally served, in the same manner as a summons as provided in the civil practice law and rules.

(c) Enforcement of temporary restraining order. A temporary restraining order shall be enforced by the city agency or agencies specified in subdivision (b) of section C16-2.6 of this title.

(d) Inventory upon service of temporary restraining order. The officers serving a temporary restraining order shall forthwith make and return to the court an inventory of personal property situated in and used in conducting, maintaining or permitting a public nuisance within the scope of this article and shall enter upon the building, erection or place for such purpose.

§ C16-2.18 Vacating a temporary injunction or a temporary restraining order.—When the defendant gives an undertaking in the amount of the civil penalty demanded in the complaint together with costs, disbursements and the projected actual costs of the prosecution of the action to be determined by the court, upon a motion of notice to the corporation counsel, a temporary injunction or a temporary restraining order shall be vacated by the court. The provisions of the civil practice law and rules governing undertakings shall be applicable to this article.

§ C16-2.19 Judgment.—(a) Seizure and destruction of obscene material. A judgment awarding a civil penalty pursuant to this article shall direct the sheriff to seize and remove from the building, erection or place and to forthwith destroy all material found by the court or jury to be obscene as defined in section 235.00 of the penal law.

(b) Enforcement of the judgment for a civil penalty. A judgment awarding a civil penalty shall be enforced by the sheriff pursuant to the provisions of the civil practice law and rules.

ARTICLE 3

§ C16-2.20 Title not exclusive remedy.—This title shall not be construed to exclude any other remedy provided by law for the protection of the health, safety and welfare of the people of the city of New York.

§ C16-2.21 Separability.—If any clause, sentence, paragraph, subdivision, section or part of this title shall be adjudged by any court of competent
jurisdiction to be invalid, in whole or in part, such judgment shall not affect, impair or invalidate the remainder thereof or the application of any such clause, sentence, paragraph, subdivision, section or part of this title to other persons and circumstances.

§ 2. This local law shall take effect immediately.