

Movie Censorship Standards under the First Amendment

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CONCLUSION

The entire question of immunity may be relegated to a position of no significance if upon rehearing the court decides to withdraw or change its prior decision. The purpose of this paper is solely to point up the overwhelming opinion of scholars and the trend of the states to do away with the old theory. If the reader's curiosity is kindled, a reading of the *Kane-land* case will lead him to innumerable authorities whose discussion of the problem is too copious and lengthy for this paper.

MOVIE CENSORSHIP STANDARDS UNDER THE FIRST AMENDMENT

With the advent of a multitude of moving pictures with prurient overtones heralded by a spicy variety of come-hither advertising, there is much concern as to what type of censorship is acceptable to the Supreme Court of the United States. Quite unlike the poem by Stoddard King, the movies do not arrive equipped with an asterisk.¹

To the present day the Supreme Court has struck down such standards as "best interests," "immoral," "tend to corrupt morals," "harmful," and "alluringly portrays adultery as proper behavior." The problem of censorship then is twofold. First, a standard acceptable to the United States Supreme Court must be determined and second, an attempt must be made to define the extent of allowable censorship, if any exists.

The first case to be considered in a review of censorship case law is *Mutual Film Corp. v. Ohio*,² decided in 1915 wherein the Supreme Court of the United States for the first time ruled on movie censorship. This decision was to remain the law of the land until 1952. The statute involved in this case stated: "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."³ The most important contention of the plaintiffs so far as this discussion is concerned was that the censorship violated the constitutional guarantees of Freedom of Speech in both the United States and Ohio Constitutions. The Court in upholding the statute under the Ohio Constitution, said:

¹ "A writer owned an Asterisk, and kept it in his den,
Where he wrote tales (which had large sales) Of Frail and erring men,
And always, when he reached the point where carping censors lurk,
He called upon the Asterisk to do his dirty work."

"The Writer and the Asterisk," *The Desk Drawer Anthology*, compiled by Alice Roosevelt Longworth and Theodore Roosevelt, Doubleday, Doran & Co., pp. 416 (1931).

² 236 U.S. 230 (1915).

³ *Ibid.*, at 240.

[I]t cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as a part of the press of the country or as organs of public opinion.⁴

In this instance the Court did not rule on the statute's constitutionality under the U.S. Constitution, but concluded that since a movie had such a great capacity for evil due to its method of communication and popular appeal that the censorship thereof is not beyond the power of government.

From the time of the *Mutual* decision in 1915 until *Burstyn v. Wilson*⁵ in 1952 only once was there any indication that movies were included within the guaranties of the First Amendment. By way of dictum in *United States v. Paramount Pictures*⁶ the Supreme Court stated: "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."⁷

BURSTYN V. WILSON—THE TURNING POINT

In 1952, in the *Burstyn* case, the Supreme Court, for the first time, brought movies within the protection of the First and Fourteenth Amendments at least to the extent that they could not be censored as "sacrilegious." The movie involved was entitled "The Miracle" and was denied an exhibition permit by the New York Board of Regents on the ground that it was "sacrilegious" within the meaning of the New York movie censorship statute.⁸

The Supreme Court of the United States reversed the New York Court of Appeals emphasizing that "[t]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . ."⁹ and concluded by "hold[ing] only that under the First and Fourteenth Amendment a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."¹⁰

At that time, the turning point in movie censorship had been reached with the inclusion of movies within the Freedom of Press and the specific overruling of the *Mutual* case "to the extent that [it] is out of harmony

⁴ *Ibid.*, at 244.

⁵ 343 U.S. 495 (1952).

⁶ 334 U.S. 131 (1948).

⁷ *Ibid.*, at 166.

⁸ A motion picture shall not be licensed if it is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." New York Education Law (McKinney, 1953) c. 16, sec. 122.

⁹ *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952).

¹⁰ *Ibid.*, at 506.

with the views here set forth."¹¹ The Court, thus, had abandoned the half-century old ruling that movies were merely a business, pure and simple, divorced from the normal channels of public communication.

VAGUENESS—ANATHEMA OF MOVIE CENSORSHIP

A few months subsequent to the *Burstyn* case an appeal from a conviction under an ordinance of the City of Marshall, Texas, for the exhibition of a motion picture previously denied a license, came before the Court. In this case, *Gelling v. Texas*,¹² the appellant in spite of a ruling by a local board of censors that the picture is "of such character as to be prejudicial to the best interests of the people of said City,"¹³ exhibited the picture and was convicted of a misdemeanor.

The Court reversed the conviction in a memorandum decision citing the *Burstyn* case and the case of *Winters v. New York*.¹⁴ It will be remembered that the *Burstyn* case reversed the New York Court of Appeals on the sole ground that censorship using only the criteria of "sacriligious" was odious to the First and Fourteenth Amendments; from this it may be concluded that *Burstyn* has been expanded to reject the criteria used in the *Gelling* case. The *Winters* case concerned prosecution under a statute prohibiting the distribution of magazines featuring criminal deeds, bloodshed and lust, and resulted in the conviction of the defendant bookseller. The Court, in *Winters*, reversed the conviction of the bookseller, stating, "where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."¹⁵

In summarizing the *Gelling* case, the conclusion is inescapable that when "the censor is set adrift upon a boundless sea,"¹⁶ censorship will not be allowed where the standard used is vague and indefinite.

Two cases arose in 1953, further extending the area within which movies were constitutionally protected. Both were decided by the Supreme Court in *Superior Films v. Dept. of Education*,¹⁷ a per curiam, memorandum decision based only on the *Burstyn* case.

In the Ohio case, the motion picture "M" was denied a permit merely, "on account of [its] being harmful,"¹⁸ and the movie "Native Son" was denied a permit since it was "harmful: because [it] contributes to racial misunderstanding, presenting situations undesirable to the mutual interests of both races; against public interest in undermining confidence that justice

¹¹ *Ibid.*, at 502.

¹² 343 U.S. 960 (1952).

¹³ *Ibid.*, at 960.

¹⁴ 333 U.S. 507 (1948).

¹⁵ *Ibid.*, at 520.

¹⁶ 343 U.S. 495, 504 (1952).

¹⁷ 346 U.S. 587 (1954).

¹⁸ *Superior Films v. Dept. of Education*, 159 Ohio St. 315, 316, 112 N.E.2d 311, 312 (1953).

can be carried out; presents racial frictions at a time when all groups should be united against everything that is subversive."¹⁹

In the New York case the motion picture "La Ronde" was denied a license on a ruling that it was "immoral" and "would tend to corrupt morals."²⁰ From the reversal, another memorandum decision, this time with *Burstyn* as the sole authority, it must be assumed, that the standards applied did not have the benefit of "a clearly drawn statute designed and applied to prevent the showing of obscene films."²¹ In this further extension of *Burstyn*, it seems clear that the criteria used must be definite and not a vague potpourri of inexact terminology.

In 1955, the Kansas State Censor Board had disallowed the showing of the motion picture "The Moon is Blue" on a finding that the film was "obscene, indecent and immoral, and such as tends to debase or corrupt morals."²² The Supreme Court, in *Holmby Productions v. Vaughn*,²³ reversed the decision of the Kansas Supreme Court upholding the censorship ruling. The ruling, continuing the practice of memorandum decisions, was based only on the *Burstyn* and *Superior* cases. In view of this, and realizing that the *Superior* case was decided on the basis of the *Burstyn* case, we must conclude that the *Burstyn* decision has again been expanded and that the constitutional fortress cannot be besieged by an inexact standard.

OBSCENITY ENTERS THE PICTURE

The City of Chicago, in 1957, censored the movie "Game of Love" under Chicago's censorship ordinance,²⁴ expressly stating that the film was "immoral and obscene."²⁵ The Supreme Court of Illinois upheld the censor

¹⁹ *Ibid.*, at 317, 313.

²⁰ *Commercial Pictures Corp. v. Bd. of Regents*, 305 N.Y. 336, 339, 113 N.E.2d 502 (1953).

²¹ *Burstyn v. Wilson*, 343 U.S. 495, 506 (1952).

²² *Holmby Productions v. Vaughn*, 177 Kan. 728, 729, 282 P.2d 412, 413 (1955).

²³ 350 U.S. 870 (1955).

²⁴ Municipal Code of Chicago, c. 155-4, provides: "Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship. If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit."

²⁵ *American Civil Liberties Union v. Chicago*, 3 Ill.2d 334, 336, 121 N.E.2d 585, 587 (1954).

board, and the United States Court of Appeals for the Seventh Circuit upheld the Illinois Supreme Court because of its favorable reaction to the interpretation of the Chicago Ordinance by that court.²⁶

The Supreme Court of the United States reversed the Court of Appeals in *Times Film Corp. v. Chicago*,²⁷ again in a memorandum decision, this time founded on *Alberts v. California*.²⁸ The *Alberts* decision set down a judicially approved standard of "obscenity" declaring: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."²⁹

Since the Court based its opinion on the *Alberts* case which decided that obscenity was not included within the protection of the First and Fourteenth Amendments, the Court was probably indicating that the film was truly *not* obscene, at least, not obscene as the Court defines obscenity. Regarding proper standards, a further observation may be drawn, namely that the Chicago Ordinance, as interpreted by the Illinois Supreme Court is acceptable, in as much as it was before the Court, which did not choose to rule unfavorably, or to be more exact and less charitable, it did not rule on it at all.

SUPPRESSION OF IDEAS: A NEW ASPECT

The Board of Regents of the University of the State of New York, in 1959, denied a license for the exhibition of the picture "Lady Chatterley's Lover" on the ground that the whole theme of this motion picture is the presentation of adultery as a "desirable, acceptable and proper pattern of behavior."³⁰ The New York Court of Appeals in upholding the Board of Regents said, the New York legislature, "requires the denial of a license to any motion picture which *portrays* acts of sexual immorality [here adultery] as proper behavior."³¹ The court, however, apparently felt that it made no difference as to the manner of portrayal, that is, whether the portrayal was obscene. It shifted from obscenity to sociology and asked: "What can society do about protecting itself from motion pictures which are corruptive of the public morals?"³² The question was answered by holding that a motion picture can be denied a license because it portrays adultery as proper behavior.

²⁶ *Times Film Corp. v. Chicago*, 244 F.2d 432 (C.A. 7th, 1957).

²⁷ 355 U.S. 35 (1957).

²⁸ 354 U.S. 476 (1957).

²⁹ *Ibid.*, at 489.

³⁰ New York Education Law (McKinney, 1953) c. 16, §§ 122, 122-a. (Supp., 1959).

³¹ *Kingsley v. Regents*, 4 N.Y.2d 349, 355, 151 N.E.2d 197, 200 (1958) (emphasis supplied).

³² *Ibid.*, at 358, 201.

In refuting the notion that motion pictures can be censored without regard to obscenity, the United States Supreme Court in the case of *Kingsley Int. Pictures v. Regents of the University of N.Y.*,³³ said:

What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an *idea*—that adultery under certain circumstances may be proper behavior. Yet, the First Amendment's basic guarantee is of freedom to advocate ideas.³⁴

Implicit in New York's sociological argument was the Court of Appeals' feeling that "proper adultery" was contrary to the moral standards, the religious precepts, and the legal code of its citizenry. In answer, the Supreme Court stated:

Its [the Constitution's] guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.³⁵

The Court concluded by saying that: "Advocacy of conduct proscribed by law is not . . . a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."³⁶ It is interesting to note here the curious blending of two different areas of law, subversion, and censorship. The blending is compelling no less than it is curious, because here, as in the prosecution of subversive cases under state and federal legislation, it is observed that a mere idea, with nothing more, no matter how dreadful, can never be suppressed unless there is an incitement to some activity which will bring the idea to a stage wherein it will be susceptible to sanctions imposed by law and within constitutional limitations. Further, both deal with the First Amendment which is generally conceded to be the bulwark of a democracy.³⁷

It becomes apparent from a review of the cases that the censorship

³³ 360 U.S. 684 (1959).

³⁴ *Ibid.*, at 688 (emphasis supplied).

³⁵ *Ibid.*, at 689.

³⁶ *Ibid.*, at 689.

³⁷ "[A]dvocacy . . . is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate the the advocacy would be immediately acted on." *Whitney v. California*, 274 U.S. 357, 376 (1926) (concurring opinion). "[I]t is not the abstract doctrine . . . which is denounced . . . but the teaching and advocacy [thereof] by language ordinarily calculated to incite persons to such action." *Dennis v. United States*, 341 U.S. 494, 511 (1950). "[I]t was not necessary . . . that the trial court should have employed the particular term 'incite,' it was nevertheless incumbent on the court to make clear in some fashion that the advocacy must be of action and not merely some abstract doctrine." *Yates v. United States*, 354 U.S. 298, 325 (1956).

policies of the several states have been rejected for three separate reasons: One, vagueness of the censorship statutes; two, the movie was not obscene as obscenity is defined by the Court; and three, ideas not portrayed in a manner likely to incite to action are not subject to censorship.

CONCLUSION

Where does this leave the censor? It is evident that no matter how definite the criteria, an abstract idea without some act can never be censored.

However, the problem of proper criteria must still be solved and a standard, illusive though it may seem, must be searched for. The Supreme Court of Illinois interpretation of the Chicago Censorship Ordinance may be acceptable:

A motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the films must be tested with reference to its effect upon the normal, average person.³⁸

From a perusal of the above citation one is able to see that the Court is interested only with *obscene* movies, and not with the suppression of socially unacceptable ideas; there are no sociological overtones. Added to the foregoing is the further fact that the above criteria already seems to have Supreme Court approval since when it was before the Court in *Times Film v. Chicago*³⁹ it was not struck down, the case being resolved on the factual question of whether or not the movie was obscene.

Another possibility is the skeletal proposal of Mr. Justice Clark in his concurring opinion in the *Kingsley* case: "I see no grounds for confusion, however, were a statute to ban 'pornographic films,' or those that portray *acts of sexual immorality, perversion or lewdness.*"⁴⁰

Justice Clark goes on to say that "if New York's statute had been so construed by its highest court I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters."⁴¹

Now that we have some guide to a proper standard, and seemingly the only standards which will bear up under the Court's judicial scrutiny, the question arises: "Just what type of movies can be banned?" It is sub-

³⁸ American Civil Liberties Union v. Chicago, 3 Ill.2d 334, 347, 121 N.E.2d 585, 592 (1954).

³⁹ 355 U.S. 35 (1957).

⁴⁰ 360 U.S. 684, 702 (1959) (emphasis supplied).

⁴¹ *Ibid.*, at 702.

mitted that the only type of movie that can be banned is one which displays obscene or pornographic *acts*; nothing else and nothing less will be censorable.⁴² Innuendo, double meanings, suggestiveness, sex, ideas and nudity of and by themselves, without obscene acts, will not be susceptible of censorship.

⁴² "We hold that obscenity is not within the area of constitutionally protected speech or press." *Roth v. United States*, 354 U.S. 476, 485 (1957).

SOME ASPECTS OF PLEADING UNDER THE JONES ACT

In the thirty-nine years since the passage of the Jones Act, a substantial amount of litigation has taken place over the problem of the meaning of the Act and its terms. Much of this litigation has involved determination of problems of pleading under the Act. It is the purpose of the writer, by an examination of these cases, to acquaint the reader with the more important aspects of pleading a case under the Jones Act today.

ORIGIN OF THE ACT

The present Jones Act was enacted in 1920 as an amended form of the 1915 Merchant Marine Act¹ known as the LaFollette Act which provided:

In any suit to recover damages for any injury sustained on board vessel or in its service seaman having command shall not be held to be fellow-servants with those under their authority.²

Prior to the 1915 Act, seamen were not entitled to compensatory damages for negligent navigation or management of the ship or crew resulting in injuries to them.³ Judging by the fact that Congress, with the enactment of the 1915 Act, had expressly disallowed the fellow servant doctrine as a defense to an action by a seaman for injuries due to negligence, it would seem that Congress had interpreted some prior decisions⁴ as holding that the fellow servant doctrine was the bar to any such action and accordingly obviated that defense. Subsequent to the passage of the 1915 Act, however, it was held that the Act did not affect the rule that the negligent order of an officer or even of the master does not charge the shipowner

¹ Merchant Marine Act, 1915, 38 Stat. 1164 (1915), as amended, 46 U.S.C.A. § 688 (Supp., 1958).

² 38 Stat. 1185 (1915).

³ *The Osceola*, 189 U.S. 158 (1903).

⁴ The Supreme Court held the law to be settled: "That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew. . . ." *The Osceola*, 189 U.S. 158, 175 (1903).