

Censorship of Motion Pictures

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CENSORSHIP OF MOTION PICTURES

Rarely does a decision of the Supreme Court of the United States attract the attention of sociologist and churchman to the same degree that it rouses the interest of jurist and parties in interest. But this occurred upon the report of the recent decision on motion picture censorship statutes, *Superior Films, Inc. v. Department of Education of State of Ohio, Division of Film Censorship; Commercial Pictures Corporation v. Regents of University of State of New York*.¹ In this decision, the Supreme Court of the United States reversed the judgments of the Supreme Court of Ohio and the Court of Appeals of New York, each of which had upheld the censorship statute of its respective state against the charge of unconstitutionality.² The Court stopped short of ruling on state censorship as a whole, but its decision may be interpreted as a significant step in a trend toward absolute exemption of motion pictures from censorship. It is this trend with which the layman and the lawyer alike are concerned. It presents another example of the now familiar progressive expansion of federal power and consequent limitation of the rights of the states. This indication was pointed up by the fact that Associate Justice William O. Douglas, with whom Associate Justice Hugo Black concurred, filed a separate opinion, proclaiming that *all* censorship violates the Fourteenth Amendment: "In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."³ There was no *Per Curiam* opinion in this case, but merely an indication that the decision was based upon the prior ruling of the Supreme Court of the United States in *Joseph Burstyn, Inc. v. Wilson*.⁴

The *Burstyn* case involved the rescission by the Commissioner of Education of the State of New York of the license to exhibit the film, "The Miracle," on the ground that it was "sacrilegious."⁵ A New York statute provides for examination and licensing of each film submitted to the proper administrative officers of the state, "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ."⁶ In their appeal from the New York decision to the Supreme Court of the United States, the distributors of the film, "The Miracle," alleged: (1) that the New York statute violated the Fourteenth Amend-

¹ 74 S. Ct. 286 (1954).

² *Superior Films, Inc. v. Department of Education of State of Ohio, Division of Film Censorship*, 159 Ohio 315, 112 N.E. 2d 311 (1953); *Commercial Pictures Corp. v. Board of Regents of University of State of New York*, 305 N.Y. 336, 113 N.E. 2d 502 (1953).

³ 74 S. Ct. 286, 287 (1954).

⁴ 343 U.S. 495 (1952).

⁵ *Ibid.*, at 497.

⁶ N.Y. Education Law (McKinney, 1953) § 122.

ment, as a prior restraint upon the freedom of the press; (2) that it interfered with freedom of religion; (3) that the word, "sacrilegious," was too indefinite to satisfy the requirements of "due process," under the Fourteenth Amendment.⁷ The Court recalled that it had laid down, in *Gitlow v. People of State of New York*, the principle that the freedom of speech and of the press, guaranteed by the First Amendment against abridgment by the federal government, is within the freedoms protected by the "due process" clause of the Fourteenth Amendment against state interference.⁸ In the *Burstyn* case, the Supreme Court was confronted squarely, for the first time, with the issue of whether or not that freedom of the press extended to motion pictures.⁹ The film in controversy in the *Burstyn* case, "The Miracle," portrayed a young shepherdess, who was confronted by a bearded stranger, whom she imagined to be Saint Joseph. The stranger plied the girl with wine and violated her innocence. Mister Justice Frankfurter, in his concurring opinion, quoted a reviewer's description of this incident as "only briefly and discreetly implied."¹⁰ The Supreme Court of the United States reversed the state court's decision, because, "under the First and Fourteenth Amendments, a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."¹¹ But the Supreme Court made it clear that "whether a state may censor motion pictures under a clearly-drawn statute designed to prevent the showing of obscene films . . . is a different question from the one now before us."¹²

The Supreme Court of Ohio upheld the Division of Film Censorship of the Department of Education of Ohio, in its refusal to license the motion picture, "M."¹³ The refusal was based upon the censor's finding that the film was "harmful,"¹⁴ within the scope of the statute allowing only such films as are in the judgment and discretion of the Board of Censors of a moral, educational or amusing and harmless character," to be exhibited.¹⁵ The state court explained that the First Amendment to the Federal Constitution does not guarantee absolute freedom of every kind, but, in the

⁷ 343 U.S. 495, 499 (1952).

⁸ 268 U.S. 652, 666 (1925).

⁹ In *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948), this principle was first announced, but freedom of the press was only remotely connected with the issue of this case.

¹⁰ 343 U.S. 495, 507 (1952).

¹¹ *Ibid.*, at 506.

¹² *Ibid.*

¹³ *Superior Films Inc. v. Department of Education of State of Ohio, Division of Film Censorship*, 159 Ohio 315, 112 N.E. 2d 311 (1953).

¹⁴ *Ibid.*, at 316.

¹⁵ Ohio Administrative Code (Baldwin, 1948) § 154-47b.

field where basic decency and morals would be outraged by the impact of offending motion pictures, state action is permissible, provided that the censorship statute is sufficiently definite to enable a reviewing court to evaluate the determination of the censors passing upon the character of each film.

A description of the picture, "M," as incorporated into the opinion, presents an epic filled with brutal crime; a schizophrenic killer is treated with sympathy, and an underworld boss is depicted as vastly more efficient than the police. Americans, who are constantly exposed to lurid topics, even in comic books, television programs, and newspaper stories, might, at first instance, concur with the decision of the Supreme Court of the United States and agree that "M," is not grossly offensive to the prevalent standards of morality and decency. In fact, the National Legion of Decency evaluated this film in Class B, that is, objectionable in part, not in Class C, reserved for totally condemned productions. On the other hand, citizens who have embarked upon a nation-wide drive to curb juvenile and adult delinquency, cannot refuse to acknowledge the extraordinary possibilities of this particular medium upon unrestricted audiences and its "greater capacity for evil, particularly among the youth of a community."¹⁶ It was this vast potentiality, this power of visual vividness, which induced the states, recognizing the patent weakness and belated ineffectiveness of penal statutes, to create administrative boards to *prevent* abuses.

The second decision reversed by the Supreme Court of the United States, in its most recent decision on censorship, was the affirmance, by the New York Court of Appeals, of the determination of the Regents of the University of the State of New York that the picture, "La Ronde," was not entitled to be licensed for public exhibition.¹⁷ The regents maintained that the motion picture was "immoral," and "would tend to corrupt morals," within the meaning of Section 122 of the New York Education Law.¹⁸ The New York Court of Appeals found that:

the film from beginning to end deals with promiscuity, adultery, fornication and seduction. . . . At the very end, the narrator reminds the audience of the author's thesis: "It is the story of everyone."¹⁹

The critical question presented by the "La Ronde" case is whether the statutory standards represented by the terms, "immoral," and "tends to corrupt morals," were precise enough to satisfy the requirements of due

¹⁶ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

¹⁷ Commercial Pictures Corp. v. Board of Regents of State of New York, 305 N.Y. 336, 113 N.E. 2d 502 (1953).

¹⁸ N.Y. Education Law (McKinney, 1953) § 122.

¹⁹ 305 N.Y. 336, 339, 113 N. E. 2d 502, 503 (1953).

process. The New York Court of Appeals decided that the terms were sufficiently precise, within the context of the statute and within the pale of common experience. Judge Desmond, in his concurring opinion, added the following interpretation of the disputed statute:

Its reference is to the generally accepted civilized code of morals—its prohibition is of *materia contra bonos mores*. . . . Our Federal and State Constitutions assume that the moral code, which is part of God's order in this world, exists as the substance of society. The people of this State have acted through their Legislature on that assumption. We have not so cast ourselves adrift from that code, nor are we so far gone in cynicism, that the word, "immoral," has no meaning for us. Our duty, as a court, is to uphold and enforce the laws, not seek reasons for destroying them.²⁰

By reversing the "La Ronde" decision, the Supreme Court of the United States has added weight to evidence that, in recent years, it has begun to doubt the existence of the absolute principles of a moral code. The decision is reminiscent of the unfortunate words of the late Chief Justice Vinson:

Nothing is more certain in modern society than the principle that there are no absolutes, but a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature.²¹

If this "principle" were valid, it would seem almost impossible to arrive at a precise standard, whereby the state, in its legitimate exercise of police power, could determine what communication should be either punished or enjoined in the interest of the general welfare.

Chicago, in 1907, was first to enact an "ordinance prohibiting the exhibition of obscene and immoral pictures of the classes and kinds commonly shown in mutoscopes, kinetoscopes, cinematographs, and penny arcades."²² The constitutionality of motion picture censorship was tested for the first time in *Mutual Film Corporation v. Industrial Commission of Ohio*,²³ in which the court refused to place motion pictures within the protection of the First Amendment to the Federal Constitution, under the theory that such exhibitions were a part of business, not a part of the press. In *Gitlow v. People of the State of New York*,²⁴ the freedoms of press and speech of the First Amendment were assumed, for the purposes of that case, to be within the liberties protected by the "due process" clause of the Fourteenth Amendment. This assumption was confirmed and enlarged as a general principle in *Near v. Minnesota*.²⁵ This general principle, in turn, was applied to motion pictures in the *Burstyn* case.²⁶

²⁰ *Ibid.*, at 352 and 510.

²¹ *Dennis v. United States*, 341 U.S. 494, 508 (1951).

²² Chicago. Proceedings of the City Council, 1907-1908, at 3051 (1909).

²³ 236 U.S. 230 (1915).

²⁵ 283 U.S. 716 (1931).

²⁴ 268 U.S. 652 (1925).

²⁶ 343 U.S. 495 (1952).

This nation's highest court has approved the right of the state to interfere with the personal liberty of its citizens in order to prevent physical disease;²⁷ the same court has condoned the sterilization of individuals by the state to prevent the perpetuation of inheritable imbecility;²⁸ but, when confronted with acts calculated to plunge this nation into an abyss of spiritual corruption, more dangerous than mass revolution, the Supreme Court of the United States refuses to act. History bears witness to the fate of peoples who became indifferent to the vice of indiscriminate sexual immorality.

No one of us who has passed through the last thirty years needs any proof of the final outcome of theories that divorce morality and law. Totalitarianism and all its horrors in Germany, Russia, and elsewhere are the logical and inevitable result of such a divorce.²⁹

Men have a right freely and prudently to propagate throughout the State what things soever are true and honorable, so that as many as possible may possess them; but . . . vices which corrupt the heart and moral life, should be diligently repressed by public authority, lest they insidiously work the ruin of the State.³⁰

If it be conceded that the state has regulatory power over the media of mass communication, then the means of regulation should be examined to determine whether they conflict with the First and Fourteenth Amendments. It has never been asserted that the exercise of prior restraint over communication is particularly congruent with the American ideal of freedom, but neither is immorality especially consonant with the religious traditions underlying the legal framework of this nation. "We are a religious people whose institutions presuppose a Supreme Being."³¹ Neither the purveyors of filth, who would make the Constitution a "cloak of protection for those who would poison our minds and rob the flower of purity from our youth,"³² nor the nations who have embraced amorality can free themselves from the censorship of the law of God, who gave to this universe and this nation a code of morals.

The Roman Catholic Church recognizes the necessity for prior restraint, in proscribing immoral literature, for the welfare of its members: "Jus et officium libros ex justa causa prohibendi. . ."³³ Furthermore, according to its discipline, no permission exempts one from the natural law prohibi-

²⁷ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

²⁸ *Buck v. Bell*, 274 U.S. 200 (1927).

²⁹ Le Buffe and Hayes, *American Philosophy of Law* 11 (5th ed., 1953).

³⁰ Leo XIII, *Human Liberty*, in *The Great Encyclical Letters* 152 (1903).

³¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

³² *The New World*, p. 1, col. 1 (Jan. 22, 1954).

³³ *Codex Juris Canonici* (1918) Canon 1395, § 1.

tion against reading books which place the reader in proximate spiritual danger.³⁴ If such regulations are deemed essential when dealing with the printed word, how much more essential are safeguards in the area of moving pictures and stereoscopy.

The problem of securing to the State the right to protect itself, while preserving individual rights, cannot be reduced to a mathematical formula. "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale."³⁵ Yet, freedom and order are compatible. The requirement of procedural due process must be fulfilled in the area of mass communication as well as in other areas of applicability. Accordingly, a motion picture censorship statute must lay down a definite standard, because indefiniteness affords opportunity for arbitrary and capricious judgment. The Supreme Court of the United States has ruled that the term, "sacrilegious," provides no valid standard, but would set the censor adrift upon a "boundless sea amid a myriad of conflicting currents of religious views, with no chart but those provided by the most vocal and powerful orthodoxies."³⁶ But are the words, "indecent and immoral," to be regarded as "ephemeral and ambiguous,"³⁷ when the average person of healthy and wholesome mind knows well enough what they mean? Jurists have defined such broad terms as "good moral character,"³⁸ "moral turpitude,"³⁹ and "obscene";⁴⁰ they should be able to define the terms, "indecent and immoral." With a rudimentary knowledge of English, a regard for truth and justice, and some mastery of legal *savoir faire*—the least requisites of an attorney—a solution should be evolved to provide statutes, clear and adequate, neither imposing the moral code of a saint, nor demanding the reticence of a prude; such statutes would tend to preserve the sacredness of marriage, the wholesomeness of family life, and the health and welfare of the citizens of state and nation. The premise that it is manifestly impossible to specify every picture which would be considered *contra bonos mores*, is obvious, but the necessity of arresting the moral crisis of motion pictures, which is growing ever more acute, should be equally apparent.

³⁴ Burke, *What Is the Index?* 74 (1952).

³⁵ *Gitlow v. People*, 268 U.S. 652, 669 (1925).

³⁶ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952).

³⁷ *Commercial Pictures Corp. v. Regents of University of New York*, 305 N.Y. 336, 366, 113 N.E. 2d 502, 519 (1953).

³⁸ *In re Hopp*, 179 Fed. 561, 563 (E.D. Wis., 1910).

³⁹ *United States ex rel. De George v. Jordan*, 183 F. 2d 768, 770, 771 (C.A. 7th, 1950).

⁴⁰ *Swearingen v. United States*, 161 U.S. 446, 451 (1896).