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LEGISLATION

PENNSYLVANIA—1955 SESSION—CENSORSHIP OF MOTION PICTURES

Similar to the metamorphosis of most of our media of expression, the motion picture has survived the uncertainty and novelty of infancy, the dim promise of adolescence, and at present seems to have achieved the impregnability of a sound maturity. Recognition of its growth as a praiseworthy vehicle of the arts has not, however, paralleled its meteoric development as an industry. Initially the "kinescope" was examined as a toy, capable of furnishing entertainment, and considered limited in potential. Gradually, almost imperceptibly, did the medium improve functionally, command attention resolutely, and clothe itself ultimately with the armor of the first amendment. This armor has not gone untested in the judicial arena. Often has it been summoned forth, intricately tried, once pierced, and finally nominated the victor. It is, however, these jousts and their effects which perplex legal writers. For they manifest the possibility that the motion picture, as a medium of expression, does not merit first amendment status as fully as do speech and the press.[1] It is not surprising then, that conflicting solutions, ranging from license to general censorship, should be proffered. Nor is it surprising to learn that the currently successful solution stands midway between the extremes. An unequivocal answer, which, as will appear, seems imminent, must not be sought in this Comment. Its purpose will have been achieved if the difficulties confronting the censor in his effort to curtail the license of the motion picture, are presented lucidly and completely.

I.
THE PAST.

The invention of printing in the fifteenth century, and its subsequent rapid development, unveiled promising vistas for the dissemination of ideas. Though immediately recognized as a boon to the advancement of learning, the potentialities of this new invention troubled the ruling authorities. Its progress was viewed with quiet suspicion. Thus almost inevitably, and as a protective measure, arose the framework of a controlled press. In

1. Burstyn v. Wilson, 343 U.S. 495, 502 (1952) (dictum); Hallmark Productions v. Carroll, 384 Pa. 348, 350, 121 A.2d 584, 586 (1956) (dictum); 4 CATHOLIC U.L. REV. 112 (1954); 30 NOTRE DAME LAW. 469 (1955); 4 WESTERN RES. L. REV. 148 (1953).

England, from which evolved our doctrine of prior restraint, "printing developed under royal sponsorship, and soon became a monopoly to be granted by the Crown." [2] During the Age of Faith, the focal points of suppression were blasphemy and heresy. With the advent of the Reformation, and the emergence of the state as the absolute power, attention was directed toward treason and sedition, and the advantages offered to each by a free press. The censor's preoccupation with obscenity did not commence until the reign of Queen Victoria, not long after the first murmurs of the Industrial Revolution.[3] Thus, it can be seen that the interests, or more accurately, the apprehensions of those in power determined that which was to become the subject matter of censorship.

With immense relief did England experience the lapse of her censorship statutes in 1695. The words of Blackstone capture the prevailing sentiment.

> "In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." [4]

It was, of course, considered that the modes of expression would remain static. But such has not been the course of events, and the emergence of new media has surrounded attempts at control with equally new problems. Of necessity, the motion picture did not, and has not invoked the "statute of limitations" as to obscenity which is enjoyed by the literary classics.[5] Nor was there much concern over early state and local suppression of films whatever be the basis of condemnation. A new and attractive influence had entered the community, and a realization of its potentiality for evil encouraged controlling legislation. Eventually, what had already commenced with unapprehensive confidence received the blessing of the Supreme Court in *Mutual Film Corp. v. Industrial Commission of Ohio,* wherein the ex-

2. Emerson, 20 LAW & CONTEMP. PROB. 648, 650 (1955).
3. Bantam Books v. Melko, 25 N.J. Super. 292, 96 A.2d 47, 53 (1953) (dictum).
4. 4 BLACKSTONE COMMENTARIES *151, *152.
5. Bantam Books v. Melko, 25 N.J. Super. 292, 96 A.2d 47, 53 (1953).

hibition of motion pictures was characterized as a "business, pure and simple, originated and conducted for profit." [6] In response to the novel contention that as a medium of free speech, motion pictures should not be shackled to the censor,[7] the court *held* movies are not a part of the press of the country, nor are they an organ of public opinion.[8]

During the thirty-seven years in which the movie industry was awaiting its emancipation, the judiciary was busied with problems created by another media of expression, the press, which was struggling to shake off the burdens of legislative interference. This period evinces the development of those principles which were to rescue the cause of freedom for the movies; but it also marks an era to which one might profitably resort in seeking to determine the possibility of a legislature's successfully fashioning a censorship statute. In an opinion read by Chief Justice Hughes the Supreme Court in *Near v. Minnesota* condemned previous restraint of the press as unconstitutional.[9] In *Grosjean v. American Press Co.*, a tax upon newspapers computed on the basis of circulation was *held* an abridgement of the freedom of the press, and inimical to an informed public opinion which is "the most potent of all restraints upon misgovernment." [10]

The newspaper had been granted its freedom. The novel was confronted with difficulties of another nature. Obscenity became the pitfall of numerous literary attempts, and in the process of their examination before the bar, the antiquated test enunciated in *Regina v. Hicklin*,[11] surrendered to the rule laid down by Judge Hand in the leading case of *United States v. Ulysses*.[12] Then was born *l'homme moyen sensuel*, who has since been consulted in the determination of that which is obscene. Therein was fashioned the judgment as a whole theory; and there is promulgated the "statute of limitations" as to the classics.

> "In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the work is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content." [13]

6. Mutual Film Corp. v. Industrial Commission, 236 U.S. 230, 244 (1915).

7. Previously the usual attack upon movie censorship statutes was upon the basis of unlawful discrimination and the taking of property without due process of law. *E.g.*, Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909).

8. Mutual Film Corp. v. Industrial Commission, 236 U.S. 230 (1915).

9. Near v. Minnesota, 283 U.S. 697 (1937).

10. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

11. "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." 3 Q.B. 360, 371 (1868).

12. 72 F.2d 705 (2d Cir. 1934).

13. *Id.* at 708.

Thus while the cinema labored under the lash of the censor, two tenets of the law were moulded; one of which was to lead to emancipation, the other, namely the evolution of the word obscenity and supplementary words as satisfactory statutory standards, which could be employed to revive the reign of the censor.

II.

THE PRESENT.

Burstyn v. Wilson held that expression by means of motion pictures is included within the free speech and free press guarantees of the first and fourteenth amendments,[14] thus overruling *Mutual Films,* which had denied this status to motion pictures. Though this would indicate that all further conjecture on the matter might more profitably be directed elsewhere, the decision has not, for reasons within the opinion itself, provoked such a pessimistic outlook. The Court explained that although the purpose of the first amendment guarantee of a free press was calculated to prevent prior restraints upon publications, exceptional cases could justify the imposition of a clearly drawn censorship statute.[15] Questions of the constitutionality of such a statute directed against obscenity were specifically left open.[16] The implications of this omission become more pertinent when it is recalled that the basis for declaring the New York statute invalid was the vagueness of the standard "sacrilegious," [17] whereas it must have been apparent to the Court that the word "obscene" embodies a standard sufficiently certain to satisfy due process requirements.[18]

With the favor bestowed upon the cinema as a precedent, other forms of the entertainment world sought refuge from the eye of the censor. The theatre and television were afforded the protection previously limited to speech and the press.[19] The New Jersey Supreme Court stated that burlesque "is a form of speech and prima facie expression protected by the State and Federal Constitutions." [20] However, the court was alert to limit the protection to legitimate burlesque as opposed to modern burlesque, the operator of which "knows, and everything in his theatre indicates he knows,

14. Burstyn v. Wilson, 343 U.S. 495 (1952).

15. *Id.* at 502, 503; 49 NW. U.L. REV. 390 (1954); 102 U. PA. L. REV. 671 (1954).

16. See, Burstyn v. Wilson, 343 U.S. 495 (1952); American Civil Liberties Union v. Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954); 4 CATHOLIC U.L. REV. 112 (1954); 30 IND. L.J. 462 (1955).

17. Burstyn v. Wilson, 343 U.S. 495 (1952); United Artists Corp. v. Maryland State Board of Censors, 124 A.2d 292 (Md. 1956).

18. Swearingen v. United States, 161 U.S. 446 (1896); Burstein v. United States, 178 F.2d 665 (9th Cir. 1950); New American Library of World Literature v. Allen, 114 F.Supp. 823 (N.D. Ohio 1953); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); United States v. Two Obscene Books, 99 F.Supp. 760 (N.D. Cal. 1951); Brown v. Kingsley Books, 151 N.Y.S.2d 639, 134 N.E.2d 461 (1956); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945). *Contra,* Bantam Books v. Melko, 25 N.J. Super. 292, 96 A.2d 47, 55 (1953) (dictum).

19. Superior Films v. Department of Education, 346 U.S. 587 (1954); Adams Theatre Co., v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953).

20. Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519, 520 (1953).

that he is giving a sex show, sans excuses, sans philosophy and above all sans clothes. He is in that sense a professional purveyor of sex." [21]

In contrast to the success enjoyed by these media of entertainment within the Supreme Court, has been the consistent failure of the state legislatures to fashion a sound censorship statute. Each effort has met with failure, but in the form of a pronouncement which, like the *Burstyn* decision, seemed to point the way toward possible success. The words used, not the method employed, has been the turning point. This is by no means an approval of censorship, for it might as easily be interpreted as the absence of any reason on the part of the Court to examine the method, due to the patent constitutional shortcoming; or, more optimistically, as a determination "that the particular films involved did not possess those qualities which would justify censorship." [22] Still, in view of the feasibility of a precise statute alluded to in the *Burstyn* decision, it is deduced that censorship of movies is not per se invalid.[23] But the area in which the censor remains operative has been steadily delimited.[24] Presently a censorship statute may not embody as a standard, "sacrilegious," [25] "prejudicial to the best interests of the people," [26] "immoral and harmful," [27] "immoral, tending to corrupt morals." [28] Following this pattern, the Pennsylvania Supreme Court, in *Hallmark Productions v. Carroll,* somewhat reluctantly struck down its censorship statute, holding "indecent, immoral, tending to debase and corrupt morals" as unconstitutionally void for vagueness.[29] The Pennsylvania Legislature immediately responded to this decision by rushing a proposed amendment to the floor of the General Assembly.[30] The bill provides that it shall be "unlawful to sell, lease, lend, exhibit or use any motion-picture, film, reel or view in Pennsylvania which is obscene, lewd, lascivious, filthy or vile." [31] Fully manifest within the bill is the crippling effect of *Hallmark.* There is retained the Board of Censors, but it has lapsed into an office which has been stripped of most of its former powers. Included is a section authorizing board disapproval with subsequent notice to the offending exhibitor, but the concrete effects of such disapproval seem un-

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21. *Id.* at 523.

22. American Civil Liberties Union v. Chicago, 3 Ill.2d 334, 121 N.E.2d 585, 589 (1954).

23. 42 CALIF. L. REV. 122 (1954); 30 IND. L.J. 462 (1955).

24. 42 CALIF. L. REV. 122 (1954); 3 DE PAUL L. REV. 227 (1954).

25. Burstyn v. Wilson, 343 U.S. 495 (1952).

26. Gelling v. Texas, 343 U.S. 960 (1952).

27. Superior Films v. Department of Education, 346 U.S. 587 (1954).

28. Commercial Pictures Corp. v. Board of Regents, 346 U.S. 587 (1954).

29. Hallmark Productions v. Carroll, 384 Pa. 348, 121 A.2d 584 (1956).

30. PA. H. 675, read in the Senate on March 26, 1956, proposed to amend the Pa. Censorship Act of 1915. Deleted from the Act was a provision making it unlawful to exhibit a film unless submitted and duly approved by the Pa. State Board of Censors. Of particular interest are the requirements of Section 24 of the proposal providing for registration of each person who intends to sell, lease exhibit or use any film reel, and requiring notice to the Board at least forty-eight hours before exhibition.

31. PA. H. 675, Sec. 2, Sess. of 1955.

clear.[32] In substance, and except for one section,[33] the proposal smacks of an effort to stem any influx of objectionable films by the constitutionally approved method of subsequent punishment, as opposed to the former prior restraint.

Thus in a manner similar to the evolution of legislative attempts to control objectionable literature, the censor has been deprived of many of his most treasured weapons by the rule of void for vagueness. Hope for amelioration of this rule seems futile. His alternative points to a continued search for adequate standards. Should he reflect upon those thirty-seven years during which he controlled the motion picture, he would find that not all standards employed have failed. The adventures of the novel before the various state and federal courts reveal a basis upon which censorship statutes can be fashioned which should surmount the frustrating void for vagueness barrier. An analysis of the cases from *Regina v. Hicklin*,[34] to the astute opinion of Justice Hand in *Ulysses*[35] would remind him that in subsequent forays into the Supreme Court under the banner of censorship, he should arm himself with a weapon directed specifically against obscenity.

III.
THE FUTURE.

Circumstances indicate that the threshold of invoking an unequivocal answer as to whether censorship of films on the basis of obscenity is constitutional has been attained. Of particular significance in this respect is *Brown v. Kingsley Book Co.*,[36] wherein the New York Court of Appeals examined, in the light of constitutional restraints, the efforts of the legislature to augment the penal statute against obscenity, by devising an equitable action by way of injunction. The court seems acutely concerned with minimizing the similarity between prior restraint and the injunctive process contained in the statute in issue. However, the very author from which the court has gathered much of its information on the topic offers as his second example of prior restraint, "injunction or similar judicial process enforced through a contempt proceeding."[37] As would be expected, the case of *Near v. Minnesota*,[38] is discussed in the majority opinion. The apparent purpose of counsel for the defendant's allusion to this case, is

32. While the prior law made continued exhibition after Board disapproval unlawful, it is not clear that a similar sanction has been retained in the proposal.
33. PA. H. 675, Sec. 20: "Any duly authorized employe of the board may enter any place where films reels or views are exhibited and such employe is hereby empowered and authorized to prevent the display or exhibition of any film reel or view or part or parts thereof which has been disapproved by the board."
34. (1868) 3 Q.B. 360.
35. 72 F.2d 705 (2d Cir. 1934).
36. 151N.Y.S.2d 639, 134 N.E.2d461 (1956). Of collateral interest concerning the case is the fact that one Jack Koslow, one of Brooklyn's juvenile "thrill-killers" of a few years ago, was an avid reader of the sadistic-type publication against which the injunction proceedings were brought. N.Y. Joint Leg. Committee to Study the Publication of Comics Rep., Leg. Doc. 37, 14 (1955).
37. Emerson, 20 LAW & CONTEM. PROB., 648, 655 (1955). The author lists as other examples of prior restraint, licensing laws, motion picture censorship, registration of lobbyists or political organizations.
38. 283 U.S. 697 (1937).

to indicate the Supreme Court's view that prior censorship is "abhorrent to our traditions."[39] Ignoring a sparkling opportunity to distinguish on the basis that the issue of prior restraint statutes directed against obscenity has been specifically left open by the Court, the opinion contents itself with distinguishing on the mechanics and scope of the Minnesota statute.[40] It would seem that the solution to the primary and only issue presented by the case is concisely stated by Judge Desmond in a manner in which the Supreme Court could well interpret the majority opinion.

> "Answering the one argument made to us, we hold on most ample authority that the First Amendment does not protect obscene books against prior restraint."[41]

When confronted with a similar statute, the Supreme Court of Illinois in *American Civil Liberties Union v. Chicago*, ruled that censorship on the basis of obscenity is not offensive to the Constitution, and that Supreme Court decisions in the area are not to be interpreted as invalidating all film censorship.[42] Dicta within this case offers valuable advice concerning appellate provisions within censorship statutes.

> "We think, therefore, that upon review of the censor's action, the plaintiff does not carry a burden of proving that that action was arbitrary and unreasonable, but rather that it must affirmatively be made to appear that the film fairly falls within the proscriptive terms of the ordinance."[43]

CONCLUSION.

It would be neither wise, nor of any particular value to attempt a prediction as to the Supreme Court's reaction to a censorship statute under circumstances wherein the void for vagueness rule is not available. However, this timidity is not shared by all, some of whom conclude that a state's interest in morality, and the evil caused by objectionable films is not sufficient to justify legislative invasion in the realm of free speech as examined under the clear and present danger test.[44] This is an issue of the purest conjecture, particularly in view of the paucity of informative precedents.

The consoling aspect of the problem is that its solution appears to be imminent. And the stimulus which could readily precipitate an unequivocal answer is glowingly illustrated in the Illinois and New York statutes currently authorizing censorship.

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39. Hannegan v. Esquire Inc., 327 U.S. 146, 151 (1946).
40. Brown v. Kingsley Books, 151 N.Y.S.2d 639, 134 N.E.2d 461 (1956).
41. *Id.* at 648 (Concurring opinion, Desmond J.).
42. American Civil Liberties Union v. Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954).
43. *Id.* at 594.
44. 18 ALBANY L. REV. 47 (1954); 49 NW. U.L. REV. 390 (1954). But see, Brown v. Kingsley Books, 151 N.Y.S.2d 639, 134 N.E.2d 461 (1956); 30 NOTRE DAME LAW. 469 (1955); 4 WESTERN RES. L. REV. 148 (1953). The current clear and present danger test as ennunciated in Dennis v. United States, 341 U.S. 494 (1951), examines the statute from the standpoint of whether the evil sought to be avoided thereby, discounted by its improbability, is such as will justify an invasion of free speech or press to the extent necessary to effect its avoidance.