



1967

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Robert J. Klein

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### Recommended Citation

Robert J. Klein, *Film Censorship: The American and British Experience*, 12 Vill. L. Rev. 419 (1967).

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# Villanova Law Review

VOLUME 12

SPRING 1967

NUMBER 3

## FILM CENSORSHIP: THE AMERICAN AND BRITISH EXPERIENCE

ROBERT J. KLEIN†

### I. REGULATION OF THE MOVIES: LEGAL AND EXTRA-LEGAL

#### A. *The Legislative Context*

IN 1907, the city of Chicago enacted the first film censorship ordinance in the United States.<sup>1</sup> Pennsylvania followed, four years later, with a statute that become the model for most subsequent legislation. No film was to be sold, leased, or exhibited in the state unless submitted to the Board of Censors and approved by it.<sup>2</sup> Between 1913 and 1922, five states and an indeterminate number of municipalities passed similar laws.<sup>3</sup>

The zeal of the Pennsylvania Board was probably typical of the early censorship agencies. Its annual reports were largely recitals of films submitted and films "modified," with very little explanation or comment.<sup>4</sup> In a survey conducted shortly after the First World War, Doctor Clifford Twombly of the New England Watch and Ward Society discovered that the Board had eliminated 1,108 scenes of "immorality and lust and indecency of all kinds" from 178 movies. On the other hand, the National Board of Review, an industry-financed previewing organization, had recommended the deletion of only 41 scenes from those same films.<sup>5</sup>

Local regulation was soon challenged and vindicated in the courts. In 1915, a motion picture distributor in Ohio sought to enjoin enforcement of that state's censorship statute. Eventually abandoning his

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† Member of the Pennsylvania Bar. A.B., Harvard University, 1962, LL.B., 1966.

1. Upheld in the state courts, after exhibition of *The James Boys* had been forbidden on grounds of "immorality." *Block v. City of Chicago*, 239 Ill. 251, 87 N.E. 1011 (1909).

2. Pa. Laws 1067, June 19, 1911.

3. MOLEY, *THE HAYS OFFICE* 55 (1945). The states were: Ohio (1913), Kansas (1913), Maryland (1916), New York (1921), Virginia (1922).

4. D. W. Griffith's *Birth of a Nation*, now considered one of the most important films ever made, is listed simply as "modified." PA. STATE BD. OF CENSORS, *LIST OF FILMS, REELS AND VIEWS EXAMINED: MAY 15TH, 1915-DECEMBER 31ST, 1917*, 39 (1918).

5. YOUNG, *MOTION PICTURES: A STUDY IN SOCIAL LEGISLATION* 46-47 (1922).

first amendment claims,<sup>6</sup> he asked the Supreme Court to find that the legislation violated the free speech provisions of the Ohio Constitution. The Court refused,<sup>7</sup> denying injunctive relief in language which for many years immunized state control over motion pictures from constitutional scrutiny:

[T]he exhibition of motion 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 part of the press of the country or as organs of public opinion.<sup>8</sup>

Agitation for additional state censoring bodies increased after the First World War. The legislatures of thirty-six states vigorously debated such proposals during the winter of 1921.<sup>9</sup> Between 1920 and 1923, at least three bills introduced in Congress sought to create a Federal Motion Picture Commission. One proposed specifically to ban the shipment in interstate commerce of films purporting to show the acts of ex-convicts, desperadoes, bandits, train robbers or outlaws.<sup>10</sup>

The clamor for federal regulation abated, however, and no general state censorship law was enacted after 1922.<sup>11</sup> In that year, the Massachusetts legislature had attempted to establish a previewing board, but the governor's veto sent the question to the voters in a state-wide referendum. The motion picture producers undertook an extensive, well-financed battle against the measure. Local theater owners, their families, and friends distributed anti-censorship literature to movie patrons and engaged in massive telephone campaigns. Others entered on speaking tours throughout the state. On November 10, 1922, Massachusetts rejected the proposal by a vote of 553,000 to 208,000.<sup>12</sup>

Today, formal censorship mechanisms exist in only two states: Maryland and Virginia. There may be as few as two municipalities (Chicago and Detroit) now actively engaged in previewing and licensing motion pictures, although many more cities have such ordinances on their books.<sup>13</sup>

### B. Self-Regulation

1. *The National Board of Censorship.* — In 1909, Mayor George McClellan revoked the licenses of all theaters in New York City, after

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6. The free-speech guarantees of the first amendment had not yet been held applicable to the states. See *Gitlow v. New York*, 268 U.S. 652 (1925).

7. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915).

8. *Id.* at 244.

9. MOLEY, *op. cit. supra* note 3, at 25.

10. *Id.* at 27-28.

11. ERNST & LINDLEY, *THE CENSOR MARCHES ON* 80 (1940).

12. See the description of these events in MOLEY, *op. cit. supra* note 3, at 53-55.

13. See note 116 *infra* and accompanying text.

some had shown sensational films to largely youthful audiences. Industry spokesmen turned immediately to Dr. Charles Sprague Smith, founder of the People's Institute and one of the initiators of the Community Center movement. Dr. Smith induced a group of leading citizens attached to the Institute to inspect and evaluate all films before they were released for exhibition in the city. Other communities soon requested these services, and the organization thus formed became known as the National Board of Censorship.<sup>14</sup>

This move toward self-regulation encouraged those who saw potential greatness in the medium; it appeased the "public" by assuring them unobjectionable films, and it delighted the companies by guaranteeing their productions the stamp of respectability. The Board, however, was financially dependent on the industry. Its income was derived almost entirely from fees for the review of pictures voluntarily submitted. Its judgments took on a decidedly liberal cast, and its rare findings that particular films were offensive proved wholly unenforceable. In 1916, it changed its name to the National Board of Review, and adopted the slogan: "Selection Not Censorship."

The next five years saw the motion picture industry subjected to increasing pressures and criticism. Existing censorship agencies, even those that worked according to written codes, cut and rejected new films with little consistency or uniformity. Furthermore, the number of local censorship boards was increasing, due in part to the ammunition Hollywood was furnishing for the anti-vice societies.

Under intense competitive pressures, the studios released a number of alluringly titled pictures which were crudely exploited. In 1919, C. B. DeMille announced the trend with *Male and Female*, a vaguely risqué film derived from J. M. Barrie's *The Admirable Crichton*.<sup>15</sup> Within a year, the first big scandals in Hollywood history stunned the nation. In February, 1920, "America's Sweetheart," Mary Pickford, took up residence in Nevada in order to get a "quickie" divorce from her husband, Owen Moore. In September, 1921, Virginia Rappe, a young, would-be actress died from internal injuries suffered during an all-night party in San Francisco, in circumstances implicating the comedian, Roscoe "Fatty" Arbuckle.<sup>16</sup>

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14. For a fuller description of these events see INGLIS, *FREEDOM OF THE MOVIES* 75-76 (1947); MOLEY, *op. cit. supra* note 3, at 30.

15. Followed by: *For Better or Worse*, *Don't Change Your Husband*, and *Forbidden Fruit*. Some were actually quite innocuous. See INGLIS, *op. cit. supra* note 14, at 62-64.

16. Shortly afterward, in Hartford, Conn., women vigilantes ripped down the screen in a theater showing an Arbuckle film. For a fuller account of these and other incidents see ANGER, *HOLLYWOOD BABYLON* 41-51 (1965).

By 1922, the industry faced the complete collapse of its respectable image as well as the imminent prospect of federal regulation. The time was ripe for it to take collective action, "over-ripe," as one commentator put it.<sup>17</sup> Like baseball in a similar crisis, it sought out a respected public official, Postmaster General Will H. Hays, to put its house in order.

2. *The Hays Office.* — The Motion Picture Producers and Distributors of America, Inc. was formally organized in March, 1922, after its director had been lured from the Harding Cabinet with a promise of a \$100,000 salary and a relatively free hand in repairing the industry's badly-damaged prestige. Hays was well-suited for the job. An Indiana teetotaler and an Elder in the Presbyterian Church, he was also "an extraordinarily shrewd judge of public opinion, a master of mass appeal and, as his months in the Post Office Department had shown, a highly successful executive."<sup>18</sup> Hays' policy was to win and keep the confidence of the public, actively to oppose any further governmental interference, and gradually to push the industry toward self-regulation.

The M.P.P.D.A. at once initiated a series of minor reforms designed to restore the movies' faded reputation. Lists of "extras" were checked, for example, to eliminate prostitutes and those with police records; the procedure was formalized in 1926 with the establishment of Central Casting.<sup>19</sup> Hays encouraged the studio publicity departments to play down the more luxurious aspects of Hollywood life.<sup>20</sup> He announced shortly afterward that his office was to be a clearing house for a constructive interchange of views between producers and the concerned public — the famous "Open Door" policy.<sup>21</sup>

In June of 1924 the organization passed a general resolution known as the "formula," calling on its members to reject questionable books, plays, and stories as source material for motion pictures.<sup>22</sup> The "formula" was doubly flawed, however. It depended entirely on voluntary adherence, and it neglected the vast majority of scripts that originated in the studios.

In October of 1927 the M.P.P.D.A. adopted Hays' list of "Don'ts and Be Carefuls," an attempted codification of the apparently random

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17. RAMSAYE, *A MILLION AND ONE NIGHTS* 816 (1964).

18. MOLEY, *op. cit. supra* note 3, at 32.

19. Newspapers commonly reported the arrest of a "beautiful movie actress" whenever a girl who worked as an extra was picked up by the police.

20. Shortly thereafter, Adolph Zukor described the motion picture city for *Time*: "No drinking — very little smoking. And as for the evenings — they're just as quiet! Why they're practically inaudible. No sound at all but the popping of the California poppies." INGLIS, *op. cit. supra* note 14, at 99.

21. HAYS, *MOTION PICTURES AND THE PUBLIC* (1926).

22. See MOLEY, *op. cit. supra* note 3, at 58-59.

objections of local censor boards.<sup>23</sup> The list noted eleven subjects to be avoided irrespective of treatment (e.g. "white slavery") and twenty-five subjects to be treated with extreme delicacy (e.g. "the institution of marriage"). This set of resolutions foreshadowed the more stringent regulation of the next decade.

3. *The Production Code*. — In March of 1930 a detailed code superseded the cautionary list of "Don'ts and Be Carefuls". Written largely by Martin Quigley, publisher of the *Motion Picture Herald*, and Father Daniel A. Lord, S.J., professor of drama at the University of St. Louis,<sup>24</sup> the Production Code catalogued forbidden themes and subjects in some detail, while severely restricting the manner in which others could be treated.<sup>25</sup> Its general principles were:

1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrongdoing, evil or sin.

2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.

3. Law . . . shall not be ridiculed, nor shall sympathy be created for its violation.<sup>26</sup>

From these premises, the draftsmen deduced a number of more specific instructions on topics ranging from adultery to seduction. Moderating their rigor, however, was the doctrine of "compensating moral values" — roughly, the notion that a picture might deal with immorality so long as "its thesis was moral."<sup>27</sup>

4. *The Production Code Administration*. — Because the Code lacked an enforcement mechanism, its initial impact on movie production was slight. In 1934, however, control passed from the Hays Office to the Production Code Administration, and the studios found themselves subject to a stringent regime of private regulation. Four developments in the intervening years probably account for the change.

*First*: Although the novelty of talking pictures had staved off disaster, the industry was severely weakened as the Depression wore on. By mid-1933, nearly one-third of the nation's theaters were closed;<sup>28</sup>

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23. For the full text, see INGLIS, *op. cit. supra* note 14, at 114-15.

24. Father Lord had also served as adviser to DeMille during the filming of *King of Kings*.

25. The full text is set out in MARTIN, *HOLLYWOOD'S MOVIE COMMANDMENTS* 271-84 (1937).

26. *Id.* at 285.

27. *Id.* at 99-101. Compensating moral values included: condemnation of wrongdoing by a "good" character, suffering worked on the wrongdoer, reform and regeneration, and punishment and retribution.

28. JACOBS, *RISE OF THE AMERICAN FILM* (1939).

estimated weekly attendance dropped to 60 million from 110 million three years earlier;<sup>29</sup> RKO and Universal went into receivership, and the Fox Film Corporation was being reorganized.<sup>30</sup>

*Second:* Box office pressures and the new possibilities of *double entendre* in spoken dialogue led Hollywood into areas forbidden by the Code. For example, the melodramatic love story (now associated with Greta Garbo) and the gangster movie (beginning with Mervyn LeRoy's *Little Caesar* in 1930) became popular genres. In *She Done Him Wrong* (1933), Mae West asked Cary Grant to "come up and see me some time," and sang the highly ambiguous "I Like a Man Who Takes His Time." All of this generated a renewal of activity by state censorship boards and, once again, demands for federal regulation.

*Third:* In 1933, the Payne Fund sponsored the publication of thirteen volumes entitled *Motion Pictures and Youth*. Although the methodology of these early empirical studies has since been criticized,<sup>31</sup> they appeared to demonstrate that the movies exerted a harmful influence on millions of young people.<sup>32</sup>

*Fourth:* Early in 1934, the newly-formed Legion of Decency announced a nationwide Catholic boycott of objectionable motion pictures. The financially ailing industry, already harassed by post-production regulation and mounting criticism in the press, capitulated in the face of this frontal attack on the box office.

On July 1, 1934, the major companies established the Production Code Administration to police their lapses in taste, naming Joseph I. Breen, a Catholic newspaperman, as its director. All members of the old M.P.P.D.A. agreed that Breen's office should have power to levy a \$25,000 fine against any company which sold, distributed, or exhibited a non-approved film.<sup>33</sup> Since the major producer-distributors then controlled the theaters in which all but the cheapest movies had to be shown if they were to yield a profit, independent and even foreign film-makers were effectively subject to P.C.A. control.

Member producers were obliged to submit proposed scripts to the Breen Office before shooting could begin. Non-members were encouraged to do so. Two examiners read each story to determine its

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29. Comment, *Censorship of Motion Pictures*, 49 YALE L.J. 87, 104 n.102 (1939).

30. INGLIS, *op. cit. supra* note 14, at 121.

31. See, e.g., ADLER, ART AND PRUDENCE (1937).

32. A typical datum was this admission by a nineteen-year-old girl: "The love scenes [in *Flesh and the Devil*] were so amorous and during them I throbbed all over. I will have to admit that I wanted someone so bad to make love to me that way." BLUMER, MOVIES AND CONDUCT 110 (1933).

33. The fine has never been invoked. INGLIS, *op. cit. supra* note 14, at 142.

suitability, remained available for later consultation, and finally, if the completed picture proved acceptable, awarded it the Production Code Seal of Approval.<sup>34</sup>

At the outset, the Breen Office censorship proved strikingly effective, and offensive themes, incidents, and language were rigorously pruned away.<sup>35</sup> Its influence declined after 1942 when the fine for exhibiting non-approved films was quietly rescinded.<sup>36</sup> In 1949, the *Paramount* anti-trust decree compelled the major companies to divest themselves of any interest in places of exhibition,<sup>37</sup> and this effectively broke whatever remaining hold the P.C.A. had on independent producers.

In recent years, the Production Code Administration has continued to issue its Seal of Approval. However, its written standards, while substantially unrevised, have been interpreted in an increasingly liberal spirit. In the last decade, only one important Hollywood film has been denied a certificate: *The Man with the Golden Arm*.<sup>38</sup> Today, the P.C.A. retains only a shadow of its former power.<sup>39</sup>

### C. Private Pressures

Easily the most powerful of private pressure groups,<sup>40</sup> the Legion of Decency began as an *ad hoc* effort on the part of several Catholic bishops to secure Hollywood's compliance with the Production Code. Recruitment was left to individual dioceses, where Catholics were asked to pledge to avoid offensive motion pictures. In 1934, an estimated 40 percent of the nation's 20 million Catholics did so.<sup>41</sup> Lists of condemned films were published and posted, the support of other groups was enlisted, and a nationwide boycott was begun. While attendance

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34. For a further description of these internal procedures, see Shurlock, *The Motion Picture Production Code*, 254 ANNALS 142 (1947); MOLEY, *op. cit. supra* note 3, at 92-93.

Like the National Board of Review, the P.C.A.'s revenues were derived from inspection charges. However, since previewing was mandatory, it is generally conceded to have been financially independent.

35. Archibald MacLeish, writing in 1938, put it less charitably. The industry had "been so careful not to offend any group . . . that it [had] ended by boring [them all]." Quoted in Comment, *Censorship of Motion Pictures*, *supra* note 29, at 106.

36. INGLIS, *op. cit. supra* note 14, at 254. It was feared that the fine amounted to a restraint of trade.

37. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881, 898-900 (S.D.N.Y. 1949), *on remand from* 334 U.S. 131 (1948).

38. The Code was changed to permit films to deal with dope addiction, after Otto Preminger went ahead and released the film. Stone, *The Legion of Decency: What's Nude? Ramparts*, No. 5, p. 48 (1965).

39. It could, as one commentator put it, "be blown away by a gentle zephyr. . . ." *Id.* at 49. Quoting Martin Quigley, Jr., editor of *Motion Picture Daily*.

40. For a description of others, see Metzger, *Pressure Groups and the Motion Picture Industry*, 254 ANNALS 110 (1947).

41. INGLIS, *op. cit. supra* note 14, at 123.



is reported to have fallen off drastically in many areas, the industry gave in before the campaign was fully under way.

The national organization, formed subsequently, is headed by a committee of five bishops. Two priests and approximately fifty laymen make up its reviewing staff.<sup>42</sup> They place all current films in one of six categories:<sup>43</sup>

A-I : Morally unobjectionable for general patronage.

A-II : Morally unobjectionable for adults and adolescents.

A-III: Morally unobjectionable for adults.

A-IV: Morally unobjectionable for adults with reservations.

B: Presumptively objectionable.

C: Condemned.

A "C" rating directs the nation's 45 million Catholics to avoid the film "as they would avoid any other occasion for sin."<sup>44</sup> More than 15,000 subscribers read these published lists, and they are reprinted in other magazines and in local Catholic newspapers.<sup>45</sup>

The Legion's apologists see its work as "critical" not suppressive. While conceding the economic impact, and hence suppressive effect, of a Legion condemnation, they argue that its principle aim is not to censor, but to create a "moral atmosphere" where offensive pictures cannot flourish.<sup>46</sup>

Within the past year, the Legion has attempted ". . . to shift its emphasis from prohibition of the wicked to promotion of the good," changing its name to the "National Catholic Office for Motion Pictures."<sup>47</sup> Recently, it cited for their "artistic vision" *Darling* and *Juliet of the Spirits*, two films, according to the *New York Times*,

42. Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326, 360 (1957).

43. Stone, *supra* note 38, at 47.

44. *Id.* at 44. In recent years, only *Kiss Me Stupid* and *The Pawnbroker* have received the Legion's "condemned" rating. *The Pawnbroker* (banned on account of two key sequences involving nudity) was later selected to represent the United States at the Berlin Film Festival.

45. Note, *Entertainment: Public Pressures and the Law*, *supra* note 42, at 361.

46. GARDINER, CATHOLIC VIEWPOINT ON CENSORSHIP 81-107 (1958). The argument is occasionally disingenuous: "It cannot be denied that from time to time the Legion is asked . . . by producers to give an opinion on a script in process; changes have occasionally been made when a producer has come for advice. But this is certainly no more 'prior censorship' than would be the guidance asked for and taken by a young writer who requested an Ernest Hemingway to read and criticize his manuscript." *Id.* at 195-96.

47. N.Y. Times, Feb. 3, 1966, p. 22, col. 1. The old name seemed to project the image of a "vigilante group."

"explicitly frank in their depictions of the seamier sides of contemporary society. . . ."48

## II. CENSORSHIP AND THE CONSTITUTION

### A. *Vague Standards, Suppression of Ideas and the Question of Obscenity*

In 1952, the Supreme Court abandoned the position it had taken thirty-seven years earlier in *Mutual Film Corp. v. Industrial Comm'n.*<sup>49</sup> In *Joseph Burstyn, Inc. v. Wilson*,<sup>50</sup> it held that motion pictures were protected expression within the first and fourteenth amendments. New York's Board of Regents had revoked the license of *The Miracle*<sup>51</sup> under a statute prohibiting the exhibition of "sacrilegious" films, and its action had been upheld by the highest tribunal of the state.<sup>52</sup> A unanimous Court reversed, holding both that New York had "no legitimate interest in protecting any or all religions from views distasteful to them . . ."<sup>53</sup> and that the effect of the "broad and all-inclusive" standard relied upon was to set the censor "adrift upon a boundless sea amid a myriad of conflicting currents of religious views. . . ."<sup>54</sup>

1. *The Vagueness Doctrine.* — Between 1952 and 1955, the Court handed down four per curiam decisions rejecting a good deal of familiar statutory language. These cases almost certainly rested on the suggestion in *Burstyn* that censorship standards might be so indefinite as to be constitutionally defective.

In *Gelling v. Texas*,<sup>55</sup> the city of Marshall had denied a license to the film *Pinky*, finding it "of such character as to be prejudicial to the best interests of the people of said City. . . ."<sup>56</sup> *Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y.*<sup>57</sup> was a challenge to

48. *Ibid.*

49. 236 U.S. 230 (1915).

50. 343 U.S. 495 (1952). The holding was foreshadowed in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (dictum).

51. An Italian film starring Anna Magnani as a demented peasant girl. She is seduced by a stranger she believes to be St. Joseph, and concludes that her child is the result of a miraculous conception. For a somewhat harsh description see 303 N.Y. 242, 257, 101 N.E.2d 665, 671 (1951). For a more sympathetic discussion see *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 507-16 (Frankfurter, J., concurring) (1952).

52. 303 N.Y. 242, 101 N.E.2d 665 (1951).

53. 343 U.S. 495, at 505.

54. *Id.* at 504.

55. 343 U.S. 960 (1952), reversing per curiam 247 S.W.2d 95 (Tex. Crim. App. 1952).

56. *Id.* at 960. *Pinky* describes the return to the South of a Negro girl who has been passing in the North as white. She rejects her white fiancée, who still loves her after discovering her secret, and she resolves to spend her life improving the condition of the Southern Negro.

57. 346 U.S. 587 (1954), reversing per curiam 305 N.Y. 336, 113 N.E.2d 502 (1953).

the Board's action in banning *La Ronde* on the grounds that it was "immoral" and "would tend to corrupt morals."<sup>58</sup> A companion case, *Superior Films, Inc. v. Department of Educ.*,<sup>59</sup> arose out of the Ohio Censor Board's rejection of two films, *M* and *Native Son*, "on account of being harmful," in the latter case by contributing to "racial misunderstanding."<sup>60</sup> The fourth per curiam reversal was *Holmby Prods., Inc. v. Vaughn*.<sup>61</sup> This suit ultimately overturned the Kansas State Board of Censors' disapproval of *The Moon is Blue* as "obscene, indecent and immoral, and tending to debase or corrupt morals."<sup>62</sup>

The vice in each of these cases was not the failure to give fair warning or the deterrent effect on marginally protected speech usually associated with broad, overhanging statutory language.<sup>63</sup> None of the legislation involved was self-enforcing; none attached automatic criminal penalties to private acts, apart from that of disobeying an express order of the censor board. The real difficulty with standards like "immoral" or "sacrilegious," in the context of a licensing statute, is that they encourage arbitrary and erratic administration. Because of their imprecision in the first instance, and the impossibility of meaningful clarification on review, they delegate to the censor an enormous authority for *ad hoc* decisions. In Professor Bickel's phrase, they short-circuit the lines of responsibility provided by the political process.<sup>64</sup>

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58. 305 N.Y. 336, 113 N.E.2d 502 (1953). As described by the Court of Appeals, the film "from beginning to end deals with promiscuity, adultery, fornication, and seduction. It portrays ten episodes . . . each deal[ing] with an illicit amorous adventure between two persons, one of the two partners becoming the principal in the next." 305 N.Y. at 339, 113 N.E.2d at 502-03. The British Film Academy voted *La Ronde* the "best film from any source British or foreign" for 1951. Record, p. 43.

59. 346 U.S. 587 (1954), reversing per curiam 159 Ohio St. 315, 112 N.E.2d 311 (1953).

60. 159 Ohio St. at 316-17, 112 N.E.2d at 312-13. *M* (1932) was the last of director Fritz Lang's films made in Germany. Peter Lorre plays a psychopathic child-killer, tortured by his conscience, and pursued by an underworld organization as well as by the police. The Ohio Censor Board noted: "This motion picture is filled with brutal crime. Two cold-blooded murders are presented, another implied, and a third attempted. . . . Twice, the methods for abducting children on the streets are elaborated." 159 Ohio St. at 329, 112 N.E.2d at 318. *Native Son*, based on the well-known novel by Richard Wright, is the story of an embittered young Negro who accidentally kills a white girl, tries desperately to cover the traces of his crime, and is finally apprehended and sentenced to death. Mr. Wright plays the lead role in the film.

61. 350 U.S. 870 (1955), reversing per curiam 177 Kan. 728, 282 P.2d 412 (1955).

62. 177 Kan. at 730, 282 P.2d at 413. The film is standard bedroom farce, chiefly notable for its then daring use of language like "pregnant," "virgin," "mistress."

63. See Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Of course, to the extent that an adverse ruling by the censor renders the production company's investment less valuable, or even worthless, these statutes do carry an "unearned increment of deterrence." Since no official decision can be made until after the film is completed, the producer's pocketbook may encourage him to stay well on the safe side of whatever doubtful line has been established.

64. BICKEL, *THE LEAST DANGEROUS BRANCH* 151 (1962).

2. "Ideological Censorship. — In *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*,<sup>65</sup> the Supreme Court ruled expressly that a motion picture may not be suppressed because it advocates proscribed conduct. Kingsley sought to exhibit the french film *Lady Chatterley's Lover*, based on the novel by D. H. Lawrence. The Motion Picture Division of the State Education Department objected to three scenes as "immoral," and ordered that they be cut before any public showing.<sup>66</sup> Kingsley refused, and the order was affirmed in the Court of Appeals on the ground that, although the film was not obscene, it alluringly portrayed adultery as "proper behavior."<sup>67</sup>

The Supreme Court took the case on the Court of Appeals' terms and unanimously reversed. Passing the question of obscenity, which had been declared to be irrelevant, the majority held part of the statute unconstitutional as plainly contravening the guarantees of the first and fourteenth amendments:

What New York has done . . . is to prevent the exhibition of a motion picture because that picture advocates an idea — that adultery under certain circumstances may be proper behavior.

. . . The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.<sup>68</sup>

Professor Kalven reads the Court's decision as a rejection of the notion of "thematic obscenity," the view that ideas as well as images can be obscene.<sup>69</sup> This is a nice but overly subtle point. The dominant "theme" of a work is, after all, one of the touchstones identified in *Roth v. United States*.<sup>70</sup> To attempt to spin out distinctions between these two uses of the word seems hardly worth the candle. The real relevance of the *Kingsley* holding is in the area of political censorship, as once was practiced in England.<sup>71</sup> Until American censors show

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65. 360 U.S. 684 (1959).

66. *E.g.*, "Reel 2D: Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress, to end of sequence." Record, p. 10.

67. 4 N.Y.2d 349, 351, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958). The Court of Appeals relied on the catch-all definition of an "immoral" film in N.Y. EDUC. LAW, § 122-a: "[A film whose dominant effect] is erotic or pornographic; or which portrays acts of sexual immorality . . . or impliedly presents such acts as desirable, acceptable, or proper patterns of behavior." The holding radically altered the posture of the case.

68. 360 U.S. at 688.

69. Kalven, *The Metaphysics of the Law of Obscenity*, 1 SUP. CT. REV. 1, 28 (1960).

70. 354 U.S. 476 (1957).

71. Thus, in the twenties and thirties, the work of Russian film-makers like Eisenstein and Pudovkin was not available to the British public. Although the British Board of Film Censors was rarely candid in explaining its decisions in these cases, its examiners were clearly repelled by the films' revolutionary fervor. See text at notes 173-76 *infra*, and see generally MONTAGU, *THE POLITICAL CENSORSHIP OF FILMS* (1929).

some aggressiveness in that direction, the case will simply have to stand by itself.

3. *The Question of Obscenity.* — The last of the Supreme Court's per curiam reversals struck down Chicago's ban on the exhibition of *The Game of Love*, which had been denied a license on the ground that it was "immoral and obscene."<sup>72</sup> The Court's reference to *Alberts v. California*<sup>73</sup> suggests that it applied the prurient interest test independently and determined that the film was not obscene.

In *Jacobellis v. Ohio*,<sup>74</sup> the Court for the first time faced squarely the question of the proper test of obscenity to be applied to motion pictures. Nino Jacobellis, a theater manager in Cleveland Heights, Ohio, was convicted of possessing and exhibiting an obscene film, *The Lovers*. Made in France and starring Jeanne Moreau, the picture describes an affair between the wife of a country editor and a young Parisian innocently invited to the editor's home. At one point, according to the *New York Herald Tribune's* critic, the pair engage in "some of the frankest love scenes yet seen on film. . . ."<sup>75</sup> The Ohio court described the picture as "87 minutes of boredom" and "drivel," and "three minutes of complete revulsion during the showing of an act of perverted obscenity."<sup>76</sup>

The Supreme Court reversed in six separate opinions. The prevailing view, as enunciated by Mr. Justice Brennan, held the *Roth* test<sup>77</sup> properly applicable to motion pictures. However, it elaborated a good deal on the *Roth* language, holding that three conditions must be satisfied before a film may be found obscene:<sup>78</sup> (1) its "dominant theme" must appeal to "prurient interest"; (2) its descriptions must go "substantially beyond customary limits of candor"; and (3) it must deal with sex in a manner that has no redeeming "social importance."<sup>79</sup>

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72. *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957), *reversing per curiam* 244 F.2d 432 (7th Cir. 1957). The court of appeals described the film as follows: "[T]he thread of the story is supercharged with a . . . series of illicit sexual intimacies and acts. . . . [A] flying start is made when a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. . . . The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized. 244 F.2d 432, at 436.

73. 354 U.S. 476 (1957).

74. 378 U.S. 184 (1964).

75. Record, p. 494.

76. 173 Ohio St. 22, 28, 179 N.E.2d 777, 781 (1962).

77. The test is whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. . . ." 354 U.S. at 489.

78. 378 U.S. at 191.

79. The language "utterly without redeeming social importance" had been descriptive, not definitional, in *Roth*.

The Court added the important corollary that "the constitutional status of the material may not be made to turn on a 'weighing' of its social importance against its prurient appeal. . . ." <sup>80</sup> In short, each of these sub-tests must be satisfied independently. Furthermore, the "contemporary community standards" to be applied are "national," those of society at large, and do not vary, at least in theory and for purposes of review, from county to county, or town to town. <sup>81</sup>

Only Mr. Justice Goldberg noted the inconsistency in the Ohio court's "revulsion" at a single three-minute scene and its purported application of the "dominant theme" test. <sup>82</sup> That test raises special problems in the case of motion pictures.

The common practice of ordering specific sequences cut from a film before permitting its public exhibition almost surely contravenes the *Roth-Jacobellis* requirement that the work be judged as a whole. The *Lady Chatterley's Lover* case might have settled the point had the Court not taken the easier "suppression of ideas" approach. <sup>83</sup> Theoretically, the censor's deletions could be justified only if he determined that the film, uncut and considered in its entirety, would support an after-the-fact obscenity prosecution. It is surely unrealistic to suppose that such judgments are often made, or even attempted. <sup>84</sup>

Where deletions are no longer in issue, as in an obscenity prosecution or an in rem action against a film, it may be urged that the offensive sequences are in themselves obscene, and irrelevant to the dominant theme of the work. In the case of banned books, when this contention has been made, the courts have asked whether the assertedly "irrelevant" passages were "necessary" to the communication of the author's theme. <sup>85</sup> A subjective or "artistic" necessity would seem to be the proper test — not whether the work might have survived without the disputed sequences, but whether the author or director felt that he needed to use them to produce the effect he desired. <sup>86</sup>

In three recent decisions, <sup>87</sup> the Supreme Court further refined, and perhaps a little confused, the developing standards of obscenity.

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80. 378 U.S. at 191. Cf. *Commonwealth v. Baer*, \_\_\_\_ Pa. Super. \_\_\_\_, \_\_\_\_ A.2d \_\_\_\_ (1967) (Opinion by Hoffman, J., filed March 23, 1967).

81. *Id.* at 192-95.

82. *Id.* at 197-98.

83. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959). See text at notes 65-71 *supra*.

84. In light of *Freedman v. Maryland*, 380 U.S. 51 (1965), the point may be academic. The censor's power is now limited to initiating a civil action. See text at note 112 *infra*. However, an exhibitor may still be induced to make deletions through extra-legal pressures.

85. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 1, 88-93 (1960).

86. See *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 501-02 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433, 437-39 (2d Cir. 1960) (*LADY CHATTERLEY'S LOVER*).

87. A Book Named "John Cleland's *Memoirs of a Woman of Pleasure*" v. Attorney Gen. of Mass., 383 U.S. 413 (1966) (hereinafter cited as *Memoirs v. Massachu-*

The Court reaffirmed the three-step test enunciated in *Jacobellis* as well as the injunction that each step is to be applied independently.<sup>88</sup> It held the term "average person" capable of meaning the primary audience at which a work is directed:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.<sup>89</sup>

Finally, it accorded constitutional significance to the concept of "pandering" — "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of [one's] customers."<sup>90</sup>

The principal uncertainty in these cases is the precise function of evidence of commercial exploitation. Probably, it bears only on the question of the work's redeeming social importance, the third of Mr. Justice Brennan's tests. The rationale suggested is that a defendant in a criminal prosecution should not be permitted to rely on the work's claimed social value, if that is not the basis upon which it is traded in the marketplace.<sup>91</sup> An alternative reading, making the "circumstances of production and dissemination" determinative in any "close case," would all but shut off review on appeal. If a finding of "pandering" were supported by the evidence, all inquiry into the tests announced by *Roth-Jacobellis* would be foreclosed.

As new constitutional doctrine, these decisions raise at least two difficulties not adequately canvassed by the prevailing opinions. The introduction into the post-*Roth* law of what Professors Lockhart and McClure have called the notion of "variable obscenity"<sup>92</sup> means that no single court test can ever, theoretically, determine whether a work is within the protection of the first amendment. A given book or film may be found both obscene and not obscene in different prosecutions, depending on the circumstances of its sale. The probable chilling effect of such a result was accurately described by Mr. Justice Brennan himself in *Jacobellis*:<sup>93</sup> "It would be a hardy person who would sell

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setts); *Mishkin v. New York*, 383 U.S. 502 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966).

88. 383 U.S. 413, at 418.

89. 383 U.S. 502, at 509.

90. 383 U.S. 463, at 467.

91. 383 U.S. 463, at 470; 383 U.S. 413, at 420.

92. Under which the central inquiry is into the nature of the work's appeal in the eyes of its disseminator and of its primary audience. See Lockhart & McClure, *supra* note 85, at 68-70, 93.

93. 378 U.S. 184, at 194.

a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one 'community' holding it to be outside the constitutional protection." Secondly, the Supreme Court has recently encouraged state in rem actions or limited injunctive remedies against allegedly obscene books or films.<sup>94</sup> Such proceedings seem a reasonable compromise between the suppressive bias of systems of prior restraint and the *in terrorem* effect of subsequent criminal prosecutions. No prosecutor of ordinary acuteness, however, will miss the lesson in the Court's reversal in *Memoirs v. Massachusetts*. If an equitable action against a book results in the exclusion of evidence as to advertising and distribution, then it seems likely that this thoroughly rational procedure will not often be employed.<sup>95</sup>

The applicability of the new doctrine to motion pictures raises some further problems. In *Ginzburg v. United States* and *Mishkin v. New York*, the production, distribution, and advertising of the condemned material were all chargeable to the defendant.<sup>96</sup> Exhibitors of commercial motion pictures, on the other hand, are never involved in production. In a prosecution of a theater manager, his "pandering" could be shown only by the way in which he held the film out to the public. Hence, the only immediate result of these decisions may be to clean up offensive local advertising.<sup>97</sup> Furthermore, if the censor board should attack the film prior to exhibition, following the procedure approved in *Freedman v. Maryland*,<sup>98</sup> evidence of the film's advertising would be unavailable.

### B. Prior Restraint

The doctrine of prior restraint forbids any officially imposed censorship in areas of expression protected by the first and fourteenth

94. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Freedman v. Maryland*, 380 U.S. 51 (1965).

95. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Thus, the Court was careful to note that its decision did not exclude the possibility of a successful, after-the-fact criminal prosecution against an individual bookseller. In that event, a showing that the defendant had "commercially exploited" *Fanny Hill* would be highly relevant, and probably determinative. The Massachusetts in rem attack, however, like most civil proceedings, sought to suppress the book throughout the State, *without reference to the circumstances of any particular sale*. "In this proceeding . . . the courts were asked to judge the obscenity of *Memoirs* in the abstract. . . . All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panders because it so pervasively treats sexual matters cannot alter the fact . . . that the book will have redeeming social importance . . . [in other contexts]." *Id.* at 420-21.

96. The Court noted, *e.g.*, that *Mishkin* told his authors "' . . . [T]he sex had to be very strong, it had to be rough, it had to be clearly spelled out. . . .'" 383 U.S. 502, at 505.

97. See Crowther, *How About Those Movie Ads?*, N.Y. Times, March 27, 1966, § 2, p. 1, col. 5.

98. 380 U.S. 51, 61 (1965). See text at note 111 *infra*.



amendments.<sup>99</sup> As enunciated by Chief Justice Hughes, however, the constitutional prohibition is not absolute: "[T]he primary requirements of decency may be enforced against obscene publications."<sup>100</sup> Later cases have relied principally on this language, as well as an asserted greater "capacity for evil"<sup>101</sup> in the film medium in order to justify broad regulation of motion pictures at the state and local level.

In *Times Film Corp. v. City of Chicago*,<sup>102</sup> the Supreme Court faced a flat challenge to motion picture licensing. Petitioner tendered the required fee but refused to submit its movie *Don Juan* to the Chicago censors. Instead, it sought a federal district court order directing the city to issue an exhibition permit, on the ground that the statutory requirement of pre-submission constituted on its face an invalid prior restraint. The Supreme Court stated the question before it as: "[W]hether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."<sup>103</sup> Writing for a majority of five, Mr. Justice Clark concluded that it did not. "It is not for this Court," he wrote, "to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances."<sup>104</sup> The opinion concluded with the reminder that: "[W]e are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record."<sup>105</sup>

The difficulty with *Times Film* as an attack on administrative licensing was precisely its "broadside" nature. In Professor Bickel's phrase, the materials of judgment had been "truncated."<sup>106</sup> Nothing in the record indicated the nature of the film; nothing explained the mechanics of the censor board's procedures; nothing permitted an evaluation of the objectionable features of prior restraints. The case was deliberately framed at a high level of abstraction so as to force on the Court the broadest possible holding. It was not then prepared to rule that under no circumstances could a state require the submission of a film prior to its exhibition.

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99. Its roots lie in the seventeenth century English struggle for a free press. In Blackstone's words: "The liberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 4 COMMENTARIES 151, 152; quoted in CHAFEE, *FREE SPEECH IN THE UNITED STATES* 8 (1946).

100. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

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

102. 365 U.S. 43 (1961).

103. *Id.* at 46.

104. *Id.* at 50.

105. *Ibid.*

106. BICKEL, *op. cit. supra* note 64, at 138.

In *Freedman v. Maryland*,<sup>107</sup> the issue was brought to the Supreme Court for a second time. Appellant Freedman refused to submit his film *Revenge at Daybreak* to the local censors and was later fined for exhibiting an unlicensed motion picture. Unlike the Times Film Corporation, he challenged the statute's constitutionality in the context of an appeal from a criminal conviction. This difference in timing may account for the Court's greater willingness to examine the particular censorship mechanism under attack. Had the statute been upheld, appellant would have had no further opportunity in the course of litigation to press his constitutional claim.<sup>108</sup> Furthermore, he presented the Court with a fuller record than had previously been before it. It contained a lengthy examination of the board members as to their competence and their procedures, as well as an admission from the state that *Revenge at Daybreak* was not an obscene film. Finally, he directed his attack not at pre-censorship generally, but at a particular "statutory context in which judicial review may be too little and to late. . . ."<sup>109</sup>

Reversing unanimously, the Court held that the procedural scheme of the Maryland statute failed to provide adequate safeguards against undue inhibition of protected expression. The Court noted that risk of delay in obtaining judicial review, especially damaging to motion pictures which rely heavily on current publicity, was built into the state's procedure. In the one reported Maryland case, final vindication of the film on review had taken ten months.<sup>110</sup> Furthermore, the statute made no provision for judicial participation in the censor board's decision; the exhibitor carried the burden of originating any litigation, as well as the burden of proof in such proceedings.

Specifically, the *Freedman* court held: (1) The burden of proving that the film is unprotected expression must rest on the censor; (2) While the state may require advance submission of all films, only a procedure requiring a prompt judicial determination will suffice to impose a valid final restraint; and (3) Any temporary restraint imposed must be limited "to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."<sup>111</sup> One possible scheme, suggested by the Court, would be to allow the exhibitor or distributor to submit the film early enough to assure an

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107. 380 U.S. 51 (1965).

108. For an elaboration of this suggestion, see Mishkin, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 149-52 (1965).

109. *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

110. *Id.* at 55. The reference is to *United Artists Corp. v. Maryland Bd. of Censors*, 210 Md. 586, 124 A.2d 292 (1956).

111. *Id.* at 59.

orderly final disposition of the case before the scheduled exhibition date.<sup>112</sup>

The *Freedman* decision effectively moderates most of the repressive aspects of pre-censorship<sup>113</sup> while preserving its principal advantage — the exhibitor's immunity, after submission of his film, from subsequent criminal prosecution. Insistence on a prompt judicial decision should end the familiar process of delay which renders even final vindication of a film unprofitable. The requirement that the censor bear the burden of proof should bring regulation of motion pictures into harmony with traditional notions of adversary procedure. Shifting the burden of initiating court action should reduce the censor's bias in favor of suppression, by placing on him the same restraints — the likely expenditure of money, time, and personnel — now faced by the prosecutor who contemplates criminal proceedings. Finally, the active participation of the judiciary, with the censor relegated to the role of prosecutor, should reduce the incidence of overzealous and unintelligent administrative activity.

### C. Some Recent Problems: Seizure Pending Criminal Prosecution and Regulation by Threat of Arrest

In May 1965, on the authority of *Freedman*, a New York Supreme Court struck down that state's censorship law; the Kansas Supreme Court took a similar action in July 1966.<sup>114</sup> On April 8, 1965, however, the Governor of Maryland signed into law an emergency measure which substantially rewrote that state's censorship law, in conformity with *Freedman*. The constitutionality of the new act was upheld in the state courts in *Trans-Lux Distrib. Corp. v. Maryland State Bd. of Censors*.<sup>115</sup> As a result, licensing systems now exist in only two states, Maryland and Virginia, and, according to one estimate, in only two cities, Chicago and Detroit.<sup>116</sup> The classic censor board may be rapidly vanishing. But the urge to suppress "objectionable" motion pictures is not.

1. *Seizure Pending Criminal Prosecution.* — A film entitled *Olga's House of Shame* opened at Philadelphia's Art-Spruce Theater in mid-November 1964. On November 23, after numerous complaints

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112. *Id.* at 61.

113. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

114. *Cambist Films, Inc. v. Board of Regents of the Univ. of the State of N.Y.*, 46 Misc. 2d 513, 260 N.Y.S.2d 804 (Sup. Ct. 1965); *State v. Columbia Pictures Corp.*, 197 Kan. 448, 417 P.2d 255 (1966).

115. 240 Md. 98, 213 A.2d 235 (1965).

116. Brief for the ACLU as Amicus Curiae, p. 3, *Freedman v. Maryland*, 380 U.S. 51 (1965).

had been received, a county detective attended a regular public showing. He returned the following day, armed with the proper warrants, to arrest the exhibitor and seize the film. Four months later, the trial court ordered the indictment quashed; only then was the film returned.<sup>117</sup> The case illustrates how easily a motion picture may be suppressed, not by pre-censorship, but incident to a subsequent criminal prosecution.

Recent Supreme Court decisions suggest that the procedure followed by the Philadelphia District Attorney was constitutionally defective. In *A Quantity of Copies of Books v. Kansas*,<sup>118</sup> a state law authorized the seizure of obscene material before an adversary determination of its obscenity. Acting on *ex parte* warrants, police seized 1,715 copies of thirty-one named paperbacks from a local distributor. At a full hearing seven weeks later, the books were judicially determined to fall within the statutory ban, and ordered destroyed. Without reaching the substantive question, the Supreme Court held that the delay between seizure of the books and an adversary determination of their obscenity required reversal. The Kansas procedure threatened to abridge the public's right to unobstructed circulation of non-obscene, or marginally protected works.<sup>119</sup> Seizure of a film is, after all, tantamount to seizing *all* copies of a given book. The vice in both cases would seem to be the same.

Seizure is, in any event, a devastatingly effective repressive device. The *Quantity of Books* decision heavily relied on *Kingsley Books v. Brown*,<sup>120</sup> which upheld New York's limited injunctive remedy against obscene material. It is true that the procedure there approved included an *ex parte*, pendente lite injunction as part of a scheme "... during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding. . . ."<sup>121</sup> But the statute conditioned its use on a trial within one day after joinder of issue and a decision two days after trial. Furthermore, the Supreme Court has intimated that New York could not punish disobedience of such an interim order if the material should later be found non-obscene.<sup>122</sup> Obviously, no exhibitor, no matter how strongly he disagrees with the prosecutor's judgment, can continue to show a film after its seizure.

The fact that an objectionable film is seized incident to its exhibitor's prosecution can furnish no ground for distinguishing these

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117. The trial court was affirmed on appeal in an exhaustive and able opinion by Hoffman, *J. Smith v. Crumlish*, 207 Pa. Super. 516, 218 A.2d 596 (1966).

118. 378 U.S. 205 (1964).

119. *Id.* at 213.

120. 354 U.S. 436 (1957).

121. *Id.* at 440.

122. *Marcus v. Search Warrant*, 367 U.S. 717, 736 (1961).

cases. It is true that a preliminary hearing on the obscenity question would be largely dispositive of the later proceedings, that it would probably require a good deal of time for preparation, and that it might be subject to demand for jury trial. But this is only to say that the state is put to a choice; whether to attack the film<sup>123</sup> or its exhibitor. If it chooses the latter, it must depend on the soundness of its case and the possibility of multiple arrests, and not on seizure to deter the film's subsequent exhibition.

It would seem too late to argue that the "books" doctrine should not carry over into the "films" cases. The differences in the two media may, in particular instances, make a difference in the Court's substantive conception of obscenity, but they cannot validate a defective system of restraint.<sup>124</sup>

2. *Regulation by Threat of Arrest.* — The city of Boston has no board of censors. Officially, it relies on the Commonwealth's criminal statutes to prevent the exhibition of obscene films.<sup>125</sup> Unofficially, the Chief of the City's Licensing Division superintends an impressive system of informal restraint.<sup>126</sup> If a new picture opens in Boston, after censure by the Legion of Decency and other groups, he dispatches a police officer and a member of the City's Law Department to attend a public showing. Their reports are checked against the early reactions of the public, and if "all" sources agree that the film is "obscene in the constitutional sense,"<sup>127</sup> a meeting with the theater manager is arranged. He is "requested" to delete any offensive sequences or to discontinue exhibition of the film. In five years, the City has not found it necessary to institute criminal proceedings.

The Boston procedure is a sophisticated version of the technique of suppression by threat of arrest. The local exhibitor's interest in his reputation, as well as his fear of prosecution, are generally stronger than his desire to defend the integrity of a film. Relying on this, police officers and public prosecutors throughout the country have been able to check the circulation of "objectionable" books and movies with relative ease, and without the need to test their private determinations in a court of law.<sup>128</sup>

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123. Through some rational in rem procedure, such as that recommended in *Freedman v. Maryland*, 380 U.S. 51 (1965).

124. See *Freedman v. Maryland*, *supra* note 123, at 58. The Court relied heavily on the "books" cases noted above.

125. MASS. GEN. LAWS ch. 272, § 32 (1959).

126. The following description is condensed from Verani, *Prior Restraint*, May 1964 (unpublished third year paper, Harvard Law School) 75-80.

127. *Id.* at 77.

128. Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326, 361 (1957). The use of Legion of Decency lists is quite common in areas with large Catholic populations.

Publishers or national distributors of material locally suppressed may be entitled to injunctive relief.<sup>129</sup> A few cases have held that state obscenity statutes grant only the authority to prosecute and that the use of express or implied threats amounts to unauthorized censorship.<sup>130</sup> Since all of these cases involve official action under color of state law, the provisions of the fourteenth amendment are, of course, applicable. One litigant has successfully based federal jurisdiction on the post-Civil War Civil Rights Act.<sup>131</sup>

One Supreme Court ruling explores these questions. *Bantam Books, Inc. v. Sullivan*,<sup>132</sup> dealt with a "Commission to Encourage Morality in Youth" which had been established by the Rhode Island Legislature. Although its function was nominally "educational," in fact the Commission notified local booksellers that it had found specified materials "objectionable" and intimated that it would recommend prosecution unless their sale were discontinued. Bantam's local outlet refused to handle any books named in such a notice. The Court held Bantam entitled to injunctive relief. It described the Commission's practice as "... a form of regulation that creates hazards to protected expression markedly greater than those that attend reliance upon the criminal law."<sup>133</sup> The record below, the Court said:

... amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed "objectionable" and succeeded in its aim. We are not the first court to look through forms to the substance, and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.<sup>134</sup>

The difficulty with the Court's decision is in its tenuous distinction between permissible "private consultation" with law enforcement officers and the forbidden technique of suppression by threat:

[W]e do not mean to suggest that private consultation between law enforcement officers and distributors . . . can never be constitutionally permissible. We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding

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129. See, e.g., *Kingsley Int'l Pictures Corp. v. Blanc*, 396 Pa. 448, 153 A.2d 243 (1959) (*And God Created Woman*).

130. *New Am. Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953); *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903 (N.D. Ind. 1957) (*Playboy* magazine). But cf. *Pocket Books, Inc. v. Walsh*, 204 F. Supp. 297 (D. Conn. 1962) (distinguishing "mere warning" from order to suppress).

131. 42 U.S.C. § 1983 (1952). *HMH Publishing Co. v. Garrett*, *supra* note 130; see also, *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

132. 372 U.S. 58 (1963).

133. *Id.* at 70.

134. *Id.* at 67.

the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.<sup>135</sup>

Arguably, then, the vice in the Rhode Island case was either the "delegation" of advisory power to a semi-autonomous body, or the over-broad standard employed by the Commission. But *Bantam Books* may also mean to reject any formalized process of screening followed by "advice" and implied threats, where the "consultation" is all in one direction and the aim is clearly extra-legal regulation. This would seem the preferable reading, in light of the ease with which such "warning" techniques may abridge the circulation of protected expression. In the case of films, such a reading would seem mandatory, because of the Court's recent insistence on judicial participation in any process of restraint, and the exhibitor's small incentive to resist the sort of deletions which cannot, after all, be made in the case of books.

### III. THE BRITISH EXPERIENCE

#### *A. Self-Regulation and the Cinematograph Act*

In Great Britain, the Cinematograph Act of 1909<sup>136</sup> almost accidentally laid the foundation for motion picture censorship. A statute aimed at minimizing the fire-hazard in theaters, it required inflammable films to be exhibited only in premises licensed by a local County Council. The licensing authority was directed to impose "such terms and conditions" as it deemed necessary,<sup>137</sup> and their breach was made a criminal offense.<sup>138</sup> Two years later, the courts decided that the act was not limited to considerations of safety. A County Council might, for example, properly condition its license on an exhibitor's undertaking to forego Sunday performances.<sup>139</sup>

In the meantime, the English press, goaded by the industry's frequent offenses against good taste, had begun to agitate against "Filth in the Film."<sup>140</sup> The newspaper campaign, the fear of hostile censorship, exasperation with haphazard local interference, a genuine desire for uniform regulation, and, ironically, the American example of 1909, propelled British exhibitors toward a scheme of self-regulation. In 1912 they formed the British Board of Film Censors, an autonomous, financially independent reviewing agency.

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135. *Id.* at 71-72.

136. 9 Edw. 7, c. 30.

137. 9 Edw. 7, c. 30, § 2(1).

138. 9 Edw. 7, c. 30, § 3.

139. *London County Council v. Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445.

140. Low, *HISTORY OF THE BRITISH FILM*, 1906-14, 85-86 (1949).

The Board's first President, a former reader of plays for the Lord Chamberlain, established few initial prohibitions.<sup>141</sup> His office rejected only a handful of pictures as unfit for public exhibition. In some cases, it sought changes; for the rest, it classified the films as either "U" (recommended for all — "universal") or "A" (recommended for persons over sixteen or children accompanied by their parents — "adult").

An increasing number of County Councils conditioned cinema licenses under the 1909 Act on exhibition in compliance with the B.B.F.C.'s recommendations. In *Ellis v. Dubowski*,<sup>142</sup> the court struck down such a provision as unreasonable and ultra vires, because the licensing authority had "no power to create an absolute body from which no right of appeal exists."<sup>143</sup> But four years later a similar condition, under which the local authorities retained the power to revise the Board's judgments, met with court approval.<sup>144</sup>

In 1952 Parliament belatedly extended the reach of the 1909 statute to exhibitions at which non-inflammable film is used — a recognition that the whole regulatory structure had been built on the inflammability of celluloid.<sup>145</sup> Since 1925, however, there has been no effective challenge to the legal framework of English film censorship. No "constitutional" attack on the present scheme of enforced classification, as a "restraint on freedom of the press," would seem possible.<sup>146</sup>

Despite the traditional English hostility to pre-censorship, regulation of the drama and other public entertainments has persisted for three-hundred years. In the seventeenth century, the law looked upon actors as "rogues and vagabonds" because they had no master. Many sought the king's patronage, and submitted to his control of stage plays and royal licensing of theaters.<sup>147</sup> In 1737 Sir Robert Walpole took advantage of this familiar usage in order to dampen the satirical spirit then prevalent on the English stage. He persuaded Parliament to pass a bill giving the Lord Chamberlain statutory power to license all stage plays.<sup>148</sup> The Theaters Act of 1843 reinforced this au-

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141. Nudity and representations of the living figure of Christ were not permitted — two clear, "if incongruous," principles. *Id.* at 89.

142. [1921] 3 K.B. 621.

143. *Id.* at 625.

144. *Mills v. London County Council*, [1925] 1 K.B. 213. It read: "N[o] film . . . which has not been passed for universal exhibition by the [BBFC] shall be exhibited in the premises without the express consent of the Council during the time that any [unaccompanied] child under or appearing to be under the age of 16 years is therein. . . ." *Id.* at 219.

145. Cinematograph Act, 1952, 15 & 16 Geo. 6, c. 6.

146. See, e.g., WADE & PHILLIPS, *CONSTITUTIONAL LAW* 530-31 (7th ed. 1965); MITCHELL, *CONSTITUTIONAL LAW* 272-76 (1964).

147. ALCHIN, *MANUAL OF LAW FOR THE CINEMA TRADE* 16-17 (1934).

148. The Theatres Act, 1737, 10 Geo. 2, c. 28.



thority.<sup>149</sup> Today, no play may be publicly performed in England without prior examination and approval by the Lord Chamberlain.<sup>150</sup>

Whether a story told in a motion picture is a "stage play" within the meaning of the Theatres Act has never been litigated. The statute has been held to apply, however, to a production in which the actors worked entirely beneath the stage, while the audience saw only their reflections through a series of mirrors.<sup>151</sup> Probably, the licensing powers of the Lord Chamberlain would have extended to films, especially after the introduction of "talkies," had not an earlier regulatory scheme made his supervision unnecessary.<sup>152</sup> For similar reasons, no prosecution under the Obscene Publications Act<sup>153</sup> has been attempted against a commercial motion picture.<sup>154</sup>

### B. *The British Board of Film Censors*

1. *Theory and Practice of Classification.* — The cinema trade itself selects the President of the British Board of Film Censors. Usually a man prominent in public life,<sup>155</sup> he in turn appoints the Secretary and the Board's staff of eight examiners. Ideally, these are men with "... a first class education; knowledge of life and experience of the world; common sense, a sense of humor and imaginative insight into audience reactions."<sup>156</sup> In practice, they are persons with an interest in motion pictures, informally recommended to the Secretary by film societies and similar groups.<sup>157</sup>

The Board is a non-profit organization, entirely self-supporting through fees charged for the inspection of films. The scale of fees varies from time to time in order to insure that income for any five-year period approximates expenses. At present, the rate for an ordinary 105-minute feature is £66 (\$185); for a 35-minute short, £30 (\$84).<sup>158</sup>

Once a film is submitted, the Secretary assigns two examiners to report on it. If they disagree, or if the film presents special problems, it may be screened several times. At the outset, the Board placed each

149. An Act for Regulating Theatres, 1843, 6 & 7 Vict., c. 68.

150. See Lewis, *Censorship: GBS had a Word for It*, N.Y. Times, Feb. 13, 1966, § 2, p. 8.

151. Day v. Simpson, 18 C.B. (N.S.) 680 (1865).

152. See *Cinematograph Censorship*, 76 SOL. J. 177 (1932).

153. 7 & 8 Eliz. 2 (1959).

154. Cf. Samuels, *Obscenity and the Law*, 61 LAW SOCIETY'S GAZETTE 729 (1964).

155. Presently, the Rt. Hon. The Lord Harlech, once ambassador to the United States.

156. The British Board of Film Censors (Official Pamphlet), 1 (1966).

157. Letter to Robert J. Klein from Mr. John Trevelyan, Secretary, BBFC, March 24, 1966.

158. *Ibid.*

film in one of two categories: "U" or "A."<sup>159</sup> In 1933 it introduced the "H" certificate to denote pictures too "horrific" to be seen by children whether or not accompanied by their parents. A number of films formerly released with an "A" were re-issued with an "H," including *Frankenstein*, *The Invisible Man*, and *Dr. Jekyll and Mr. Hyde*.<sup>160</sup> In 1950 the Board created the "X" certificate, also barring children under sixteen, which subsumed the old "H" category, as well as "adult" problem films and "erotics."

Introduction of the "X" certificate was clearly a liberalizing measure. With only the "U" and the "A" available, according to the Secretary of the Board, ". . . grown up cinema goers [were] having their intelligence sacrificed for the sake of the youngsters, whom we [could] not keep out."<sup>161</sup> By 1954 a total of seventy-three "X" features had been released. "[A]bout a third can fairly be described as being adult in theme and treatment, another seven or eight qualify as being adult in theme. . . . [A] fair proportion of the American films (e.g. *Captive Wild Woman*, *The Beast From 20,000 Fathoms*) would probably previously have been absorbed in the "H" category. . . ."<sup>162</sup> A few films, now acknowledged classics, might not have been passed at all under the old regime. These include: *Nous Sommes Tous Des Assassins*, *Los Olvidados*, and *Rashomon*.<sup>163</sup> About one hundred (or nine percent) of the films submitted in each of the last five years have been released with an "X".<sup>164</sup>

Although it is not generally appreciated, the B.B.F.C. often requires deletions in films submitted. How frequently this happens is no longer ascertainable, since detailed record-keeping in the area has been abandoned. Because distributors often ask the examiners to specify cuts which would make an "X" film suitable for "A" classification, the Board feels such figures are misleading.<sup>165</sup> However, in

159. See text at note 141 *supra*. The theory of the "A" classification is that the parent ought to decide in these cases whether to take the child to see the film, not that his presence is an automatic safeguard. Gunston, *The Film Censor in Britain*, 191 CONTEMP. REV. 342, 344 (1957).

160. FORD, CHILDREN IN THE CINEMA 93 (1939). English censors have shown a consistent antagonism toward American horror films. For example, prints in that country of *Return of the Vampire* failed to show a famous series of close-ups of the vampire's destruction. Columbia had built a wax replica of Bela Lugosi over a skeleton. The subsequent shots of melting wax and protruding bones were seen only in the United States. Everson, *Cut Copies*, Sight and Sound, No. 2, p. 94 (1955).

161. Quoted in *Report on the X*, Sight and Sound, No. 3, p. 123 (1954).

162. *Id.* at 123-24.

163. *Id.* at 124.

164. Letter to Robert J. Klein from the Secretary, BBFC, March 17, 1966. Roughly, 14% are released with an "A", and the remaining 77% are passed for general exhibition.

165. *Ibid.*

1954, its Secretary stated: "There's no secret about it. We cut approximately one film in three."<sup>166</sup>

The B.B.F.C. also bans some films entirely, by the simple expedient of refusing them any certificate. Their titles are now kept confidential but they number approximately ten each year.<sup>167</sup> "[Most are] not films of any notable quality, but are the kind of material that circulates to the 'Nudie-theatres' [in the United States]."<sup>168</sup> Occasionally, one of England's 700 county councils has been sufficiently impressed to pass a rejected picture for local exhibition. When the Cambridge justices permitted a public screening of *The Wild One* in 1955, "several magazines sent reporters, and the literary weeklies praised the film; motorcycle clubs turned up in force, and, a sprinkling of national celebrities wrote to reserve seats."<sup>169</sup> The excitement was as much an indication of the rarity of the event as it was a tribute to the merits of the particular film.

The cinema industry, in practice, works very closely with the Board, because of the enormous economic consequences that attach to its decisions. Advance submission of scripts is nearly universal among British producers, and it is quite common with American productions in England.<sup>170</sup>

Although the B.B.F.C. has, thus, borrowed at least one procedure of the old Hays Office, it has chosen to abandon a good deal of the rigidity that characterized that organization. It does not work according to a formal written "Code," preferring to ". . . judge each film on its merits and to consider each incident and line of dialogue in relation to the tone of the film as a whole."<sup>171</sup> It has admitted to making "artistic judgments." *La Ronde*,<sup>172</sup> for example, passed because it was "so witty and charming" and in spite of the fact that "it was all about people sleeping together."<sup>173</sup>

2. *The Critics.* — Public criticism, as the following cases illustrate, has focused largely on two areas of the Board's activity. In each instance, the B.B.F.C. moved slowly to correct obvious abuses of its censoring power. Today, apart from minor skirmishes on esthetic points, the critics' voices are very much muted.

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166. *The Small Knife*, Sight and Sound, No. 4, p. 207 (1956). He added that American violence most frequently offended, estimating that, without it, the number of films cut could be reduced to one in ten.

167. Letter to Robert J. Klein from the Secretary, BBFC, March 17, 1966.

168. *Ibid.*

169. *'The Wild One' at Cambridge*, Sight and Sound, No. 1, p. 5 (1955).

170. Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

171. The British Board of Film Censors (Official Pamphlet) (1966).

172. The film which was finally vindicated by the United States Supreme Court in *Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 346 U.S. 587 (1954). See *supra* note 58.

173. *The Small Knife*, *supra* note 166, at 208.

The early attitude of the British Board of Film Censors toward matters of political controversy suggested its deep susceptibility to governmental influence. In 1928, for example, it admitted banning the English film *Dawn* after the Foreign Secretary noted that it might arouse fresh hostility and bitterness toward Germany.<sup>174</sup> On the other hand, the Board's quasi-official status allowed the Government to ". . . play Pontius Pilate to any public protest, declaring in the Commons that it had no responsibility for the censors who were entirely private, while at the same time the censors knowing the arrangement to be rickety and a target for much public question, were eager to anticipate the Government's lightest wishes. . . ."<sup>175</sup>

Even where the hand of the Government was not apparent, films touching on current political questions often did not reach the British screen. In the twenties and thirties, a number of post-Russian Revolution classics were rejected for highly dubious reasons. The Board refused to pass Eisenstein's *Potemkin*, for example, on the ground that it might incite British troops to mutiny. Its President, Mr. T. P. O'Connor, gave one critic the following explanation for the banning of Pudovkin's silent film *Mother*:

O'Connor said that the scene showing the strikers hiding firearms under the floorboards of the home of one of them clearly violated the ban on teaching methods of crime, since every audience no doubt contained potential strikers and if they thought of arming themselves this would show them where to hide their weapons. He rejected my suggestion that most audiences would be likely also to include potential policemen and that the film might teach these where to look for the arms the strikers hid.<sup>176</sup>

In the last twenty years, however, the notion that political controversy ought to be suppressed has been discarded. Nearly all the once-banned films have now received certificates for public exhibition.<sup>177</sup>

Films of more general social protest have also had difficulty winning the censor's approval. One classic instance is *Night Patrol*, a quasi-educational picture which revealed how girls were lured to London by White Slavers' advertisements. On its completion in 1930, the Board refused certification because "domestic servants were badly wanted in London, and . . . the film might discourage girls from coming to help London out of that difficulty."<sup>178</sup> After a personal

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174. THE FACTUAL FILM 212 (1947), a survey sponsored by the Darlington Hall Trustees.

175. MONTAGU, FILM WORLD 267 (1964).

176. *Id.* at 265.

177. Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

178. KNOWLES, THE CENSOR, THE DRAMA, AND THE FILM 227 (1934).

appeal by Mr. George Bernard Shaw, the Board's President upheld the ban on the broader ground that it violated a prohibition on references to the White Slave or drug traffic. Mr. Shaw then wrote to the editor of the *Times*:

I know, of course, that as the series of considered moral judgments for which the public look to the Film Censor are absurdly impracticable, his business reduces itself to the enforcement of a few rules of thumb through which any unscrupulous person can drive a coach and six, though they are intolerably obstructive and injurious to conscientious authors; but this particular rule seems to me beyond all bearing except by those who have pecuniary interests in the White Slave . . . traffic.<sup>179</sup>

Shaw's letter undoubtedly hastened the Board's decision to abandon its detailed code of prohibitions.<sup>180</sup>

### C. *The Board and the British Public*

The really striking fact that emerges from a study of the British Board of Film Censors is how little public protest its activities have evoked. English distributors and exhibitors, unlike their American counterparts in recent years, have made no significant legal challenge to motion picture regulation. No book-length discussion of British movie censorship exists. In the law journals, the civil libertarians are peculiarly silent. The newspapers remain indifferent, and even the specialists' magazines are constructive in their criticisms.

What follows is this writer's tentative effort to account for the apparent satisfaction with film censorship in England:<sup>181</sup>

1. The taste and intelligence of B.B.F.C. reviewers, their attention to the artistic merit of individual films, and the loose, flexible quality of their announced standards should make for less absurd, more civilized judgments than those of American agencies.<sup>182</sup>

2. The Board's categories and age restrictions, at least in theory, should result in relatively few deletions<sup>183</sup> and even fewer films wholly banned to adults. Protests of children under sixteen, after all, are rarely persuasive.

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179. London Times, Feb. 17, 1930, p. 15.

180. See text accompanying notes 171-73 *supra*.

181. It will, incidentally, highlight the difference between British and American approaches to movie regulation.

182. See text accompanying notes 171-73 *supra*.

183. The available evidence suggests that cuts are ordered rather frequently. See text accompanying notes 165-66 *supra*. But the public cannot know this, except from internal evidence in particular cases. Since the BBFC is a national agency, uncensored versions do not ordinarily play anywhere in Britain.

3. Urban county councils occasionally override the Board's objections to particular films. Although at least ninety-eight percent of its decisions are respected by local authorities,<sup>184</sup> London cinemas do, from time to time, exhibit films which have been refused any certificate.<sup>185</sup>

4. Prior to 1952, film societies, clubs, and other non-commercial exhibitors, who used "non-flam" 16mm. film and unlicensed premises, were not subject to B.B.F.C. control.<sup>186</sup> The 1952 Act eliminated the "non-inflammable film" exemption, but specifically permitted private, non-profit organizations to show pictures not passed by the Board.<sup>187</sup>

All of the above, however, are palliatives. The real explanation for popular acquiescence in an unabashed system of pre-censorship probably lies in the nature of the available alternatives and in the structure of the B.B.F.C. itself. Nearly all writers see the alternative to B.B.F.C. control as either governmental regulation or a return to arbitrary local censorship. None suggests a remission to after-the-fact prosecutions, an escape which, in any event, local exhibitors would probably not care to hazard. Since unknown quantities are not readily weighed, most critics have opted for the status quo:

The matter is a difficult one [but], it is only too likely that an official censorship would . . . be worse than a trade censorship, for civil servants always have to play for the safety of their political chiefs, who must answer in Parliament, and a more alarming prospect still, in the constituencies.<sup>188</sup>

Finally, the structure of the B.B.F.C. itself reinforces its claims to legitimacy. In theory a private organization, there is no recourse to the courts from its decisions. Unlike the publisher of a prosecuted book, an aggrieved distributor can only hope to obtain dispensations from some few of the nation's more than 700 local authorities. In addition, the Board enjoys the principal advantage of any system of prior restraint — secrecy. It does not disclose the number of deletions it orders. The number of pictures banned, and their titles, are not generally available. No annual report has been published since 1934. In the words of the Board's present Secretary, "[Having found that] censorship is always an open target, I therefore publish as little information as possible. . . ."<sup>189</sup>

184. Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

185. The L.C.C. classifies such films "X-London." In 1963, they included *Mondo Cane* and *The Balcony*,  $U + A + X = Y$ , Drama, No. 71, winter, 1963, pp. 35, 36.

186. 43 NEW STATESMAN 262 (1952).

187. Cinematograph Acts, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 68.

188. *The Film Censor's Report for 1933*, 98 J.P. 551 (1934).

189. Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

## IV. FILM CLASSIFICATION FOR THE UNITED STATES

No American jurisdiction may censor motion pictures generally according to standards designed to protect youth. This would be to "reduce the adult population . . . to [viewing] only what is fit for children."<sup>190</sup> A few municipalities, however, have experimented with rough classification schemes.

Advocates of movie classification argue that it imposes no restriction on the content of speech, but only a limitation on the character of the audience. This is put too broadly, for the right to speak and the right to be heard are not easily separable. The Court's attention to the unobstructed circulation of protected material should have settled that point.<sup>191</sup> More plausibly, one commentator has suggested that classification is consistent with the premises of free expression, because "the liberal ethic presupposes an adult society with a certain minimum of education and the ability . . . to make fine discriminations."<sup>192</sup> In that case, a very limited infringement on first amendment guarantees might be outweighed by the state's concededly great interest in the protection of children.<sup>193</sup>

None of these arguments proved persuasive in the first court test of classification by age in this country. In *Paramount Film Distrib. Corp. v. City of Chicago*,<sup>194</sup> a local ordinance permitted the censor board to license a film for exhibition to persons over twenty-one, if it tended toward "creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist."<sup>195</sup> Paramount challenged the restricted licensing of *Desire Under the Elms*, based on the well-known play by Eugene O'Neill. The court granted injunctive relief, agreeing that the quoted standard was hopelessly vague. If the ordinance were read to forbid the exhibition of "obscene" or "immoral" motion pictures, the court continued, ". . . it is apparent that . . . [those terms] express absolute concepts. . . . None . . . can change with the age of the beholder."<sup>196</sup> Finally, it found the twenty-one-year-old age limit arbitrary and unreasonable.

The Supreme Court, however, has recently abandoned the view that what is "obscene" may not change with the susceptibility of the

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190. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

191. See, e.g., *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 213 (1964).

192. Note, *For Adults Only: The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141, 148 (1959).

193. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944).

194. 172 F. Supp. 69 (N.D. Ill. 1959).

195. *Id.* at 70.

196. *Id.* at 71.

perceiver.<sup>197</sup> While it refused to sanction, in the abstract, a test which looked simply to "sexually immature adults," a well-drafted classification ordinance might meet with court approval. *Jacobellis* intimated as much:

We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material. . . . State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children. . . .<sup>198</sup>

Furthermore, an age-classification scheme might be able to pass the tests of *Freedman v. Maryland*.<sup>199</sup> A state may still insist that all films be submitted in advance of public exhibition. If the labelling process were itself to require adversary hearings and judicial super-

197. *Mishkin v. New York*, 383 U.S. 502 (1966). To be sure, *Mishkin* focused on "material designed for and primarily disseminated to a clearly defined . . . group, rather than the public at large." *Id.* at 508. (Emphasis added.) If the Court adheres to that formulation of "variable obscenity," a film may be entitled to full constitutional protection unless, as is exceedingly rare, it is *primarily aimed* at an audience of young people. Of course, the issue in *Mishkin* was whether the defendant's books should have been banned from general circulation. The *intended* audience of a film may be less significant than its *actual* audience if the state merely seeks to forbid minors access to it, while permitting its free circulation in the adult community.

The "variable obscenity" approach was also employed in *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957), holding certain books and photographs not "obscene" within § 305(a) of the Tariff Act of 1930, 46 Stat. 688 (1930), 19 U.S.C. § 1305(a) (1965), because the materials were imported solely for the use of scholars at Indiana University, engaged in a bona fide study of human sexual behavior.

198. 378 U.S. 184, 195 (1964). Cf. *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 218 N.E.2d 668, 271 N.Y.S.2d 947, *appeal dismissed sub nom.* *Bookcase, Inc. v. Leary*, 385 U.S. 12, *rehearing denied*, 385 U.S. 943 (1966). There, in the context of a broadside challenge "limited solely to the power of the State to pass such statutes," New York's Court of Appeals upheld the constitutionality of an act penalizing the sale of obscene matter to children under seventeen. As described by Judge Keating, the statutory definition is of narrow scope. It aims at material which "(1) predominantly appeals to the prurient, shameful or morbid interest of minors, (2) is patently offensive to prevailing standards of what is suitable for minors, and (3) is utterly without redeeming social importance. . . ." 18 N.Y.2d at 76, 218 N.E.2d at 672, 271 N.Y.S.2d at 952-53. Query whether "standards of what is suitable for minors" (rather than "standards among minors") is a constitutionally proper test?

See also *People v. Tannenbaum*, 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966). There, in the context of a criminal conviction, the New York Court of Appeals upheld the constitutionality of a companion statute, proscribing sale of obscene matter to children under eighteen. The operative statutory definition of "obscenity" in *Tannenbaum* was: material "posed or presented in such a manner as to exploit lust for commercial gain and . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes. . . ." 18 N.Y.2d at 271, 220 N.E.2d at 786, 274 N.Y.S.2d at 135. With some difficulty, Judge Keating attempted to assimilate this "concededly imprecise" language into the "pandering" concept announced in *Ginzburg v. United States*, 383 U.S. 463, 467 (1966). His conclusion that the "statute gives clear and unequivocal warning of the conduct to be avoided" seems hardly defensible. 18 N.Y.2d at 273, 220 N.E.2d at 787, 274 N.Y.S.2d at 136.

199. 380 U.S. 51 (1965).



vision it would prove so cumbersome as to be almost unworkable. If, on the other hand, a specific classification served only a warning function, while remaining open to challenge in the event of a later prosecution, the scheme might prove constitutionally acceptable. Of course, a classification scheme designed to serve only a "warning function" could carry a substantial unearned increment of deterrence in practice. If fear of criminal prosecution inhibited the circulation of marginally protected work, the procedure might prove constitutionally defective, under the doctrine of *Bantam Books v. Sullivan*.<sup>200</sup>

Quite recently, in *Interstate Circuit Inc. v. City of Dallas*,<sup>201</sup> the Court of Appeals for the Fifth Circuit canvassed a number of these questions. In the fall of 1965, Dallas enacted a motion picture classification ordinance whose complex procedural machinery conforms roughly to the requirements of *Freedman v. Maryland*.<sup>202</sup> Before exhibiting any film within the city, the local theater owner must offer his own evaluation ("suitable" or "not suitable" for children under sixteen) to the Classification Board. If the Board disputes his determination, and if he remains adamant, it must seek an immediate injunction restraining exhibition of the film to children. The Board must waive all notice required by statute and join in any motion to advance the cause upon the docket, in order to insure a speedy final determination in the courts.<sup>203</sup>

Although the Fifth Circuit upheld the constitutionality of the Dallas ordinance, its labelling procedure is flawed in two respects.<sup>204</sup>

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200. 372 U.S. 58 (1962). See text accompanying notes 131-34 *supra*.

201. 366 F.2d 590 (5th Cir. 1966).

202. 380 U.S. 51 (1965).

203. Judge Thornberry offers a fuller exposition of the mechanics of the ordinance: The exhibitor files a proposed classification prior to exhibition. If the Board fails to act within five days, the proposed classification is considered approved. If the Board is not satisfied, it must view the film at the "earliest time practicable," give the exhibitor opportunity to support his proposal, and make its decision within two days thereafter. If any exhibitor files notice of non-acceptance of the Board's classification within two days after its filing, it then becomes the Board's duty to seek a temporary and permanent injunction from the Dallas district court within three days and to apply for hearing on the temporary injunction within five days. If the exhibitor requests that the matter be considered on the merits of the permanent injunction at the hearing the Board must waive its application for temporary injunction and join the exhibitor's request. If the injunction is granted and the exhibitor appeals to the Court of Civil Appeals, the Board must waive all statutory notices, file its reply to the exhibitor's brief within five days, and join the exhibitor in any motion to advance the cause on the docket. Similar provisions apply to appeal by the exhibitor to the Texas Supreme Court and to appeal by the Board from adverse decisions of the district court or the Court of Civil Appeals. If no injunction has been granted within ten days of notice of an exhibitor's non-acceptance, the Board's order is suspended. 366 F.2d 590, at 600.

204. The original scheme also provided for issuance of a special license to exhibitors who wished to show films classified as fit for adults only. That license was made revocable for repeated violations of the ordinance. Judge Hughes, in the district court, struck down this provision, correctly observing that such a penalty would abridge the right of adults to view films concededly not obscene as to them. 249 F. Supp. 19, 25 (N.D. Tex. 1965).

*First*, if the Board rejects a proposed classification, the burden shifts to the exhibitor to file a "notice of non-acceptance" of the Board's determination. Only then need the Board resort to the judicial process. Filing such notice is really equivalent to initiating litigation, a burden the exhibitor should not have to bear under *Freedman*. The result is that acquiescence in the Board's decision through inaction is made too easy and too attractive. Knowing it will not always face a court challenge, the Board may be tempted, in addition, to disapprove marginal films as a matter of policy.

*Second*, although the ordinance purports to require speedy appellate review, its language to that effect is precatory only. Dallas, of course, cannot compel the state courts to adjust their dockets to suit the city's special needs. Furthermore, it is difficult to reconcile Judge Hughes' finding in the trial court<sup>205</sup> (that a final determination can be obtained from the Texas Supreme Court in less than thirty-five days) with the fact that the recent *Viva Maria* litigation took twice that time to run its full course.<sup>206</sup>

The question of the proper standard to be applied by the Classification Board also proved difficult. Originally, the Dallas ordinance had defined "not suitable for young persons" as :

(1) Describing or portraying brutality, criminal violence or depravity in such manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons ; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extramarital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.<sup>207</sup>

The link with "incitement" to anti-social action was substantially weakened, however, in a later paragraph: "A film shall be considered 'likely to incite or encourage' crime, delinquency, or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted."<sup>208</sup>

As Judge Hughes recognized, these standards were far too broad, even under the "variable obscenity" approach. She therefore held the

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205. 249 F. Supp. 19, at 25.

206. Brief for Columbia Pictures, *et al.* as Amici Curiae, pp. 24-25, 366 F.2d 590 (5th Cir. 1966).

207. 366 F.2d 590, at 592.

208. *Ibid.*

phrase "Not suitable for young persons" to be valid only to the extent that:

. . . such films are obscene when viewed by an audience of young persons. . . . A film that is obscene when viewed by an audience of young persons is one which, to the average young person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest, substantially goes beyond the customary limits of candor in description or representation of such matters to the average young person, and is utterly without redeeming social importance.<sup>209</sup>

So construed, the definitional section of the ordinance should pass constitutional muster. But one may well doubt the propriety of this wholesale exercise in judicial redrafting, especially as the local Classification Board seems determined to adhere to the ordinance as written.<sup>210</sup>

The principal remaining difficulty with the Dallas ordinance is its failure to bring film distributors, as well as exhibitors, under the umbrella of its procedural safeguards. It is simply inaccurate to say, as Judge Thornberry does, that this is unnecessary because their interests are identical, or nearly so.<sup>211</sup> The distributor's financial stake is greater because, in a city like Dallas, a single film will invariably play at a large number of neighborhood theaters. Furthermore, the distributor's resources and, therefore, presumably, his willingness to undertake litigation are greater. Finally, he is less likely than a local theater owner to bow to pressure groups within the community. The national distributor could, therefore, serve a valuable function in "policing" the administration of an ordinance which is easily and obviously susceptible of abuse.

Assuming the objections noted above could be adequately refuted or overcome, however, they go only to the abstract constitutional permissibility of a scheme such as the one Dallas has adopted. Whether age classification would be a desirable means of regulating motion pictures in the United States is another question. Here, the British experience may prove enlightening.

Classification schemes entail the obvious practical difficulty of requiring exhibitors to exclude adolescents without interfering with the admission of adults. London cinemas have discovered young boys dressed in older brothers' clothing, some carrying unlighted cigarettes, others even armed with faked birth certificates.<sup>212</sup> However, these are discriminations which many shopkeepers (liquor dealers, for

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209. 366 F.2d 590, at 593.

210. See Brief for Columbia Pictures, *et al.* as Amici Curiae, pp. 8-9, *supra* note 206.

211. 366 F.2d 590, at 601.

212. FORD, CHILDREN IN THE CINEMA 98 (1939). The "A" film presents its own peculiar problems. In some London districts, "youths of 17 or 18 hang around the

example) are called on to make. The constitutional requirement of *scienter* would probably protect a theater manager who honestly misjudged a child's age.<sup>213</sup>

In a recent New York decision, however, that State's Court of Appeals upheld the constitutionality of an act apparently "imposing strict liability on [a] bookseller for the . . . sale of obscene matter to a minor. . . ."<sup>214</sup> Without requesting any proof of age, the defendant, Tannenbaum, had sold two copies of a magazine, "Candid," to a seventeen-year-old boy. Judge Keating's opinion is disappointing because it blurs certain important distinctions. Principally, it fails adequately to differentiate between the seller's duty of inquiry and genuine strict liability. Thus, although it concludes that the act imposes absolute liability for sale to a minor, it also notes: "The eye of experience easily perceives the difference between an infant and an adult. Where the area greys, *inquiry is required*."<sup>215</sup> Hopefully, *Tannebaum* will be distinguished in a subsequent prosecution if the bookseller shows that he made an honest mistake because he was affirmatively misled by the purchaser, or because the purchaser's appearance was not such as to put a reasonable man on notice as to his probable minority.

Strict accountability for the sale of liquor or contaminated food is, of course, an imperfect analogy in this area. An excess of caution on the part of a seller of books can pose a real threat to enjoyment of the first amendment's guarantees. Courts should be alert to safeguard the right of the adult reader, however youthful he may appear, to unobstructed circulation of material which, as to him, is protected expression.

The real danger in classification is that it can result in a general, informal "censorship" whose touchstone is "suitability for adolescent audiences." Economic loss to the exhibitor or to the producer (in the case of a nationwide scheme) could easily deprive adult audiences of films not certified as fit for juvenile consumption.

The British Board of Film Censors denies that classification operates as a restriction on adult entertainment:

Some "X" films are very profitable, and they can be so because recent surveys have shown that about 70% of the normal cinema audience are between the ages of 16 and 34. Apart from this, a really attractive movie can be profitable in any category.<sup>216</sup>

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cinema entrances, waiting, in the role of 'adult guardians,' to find girls 14 or 15 who want to see the film, and towards whom the youths have intentions which may not be indicated until they are side by side in the blackness of the cinema." *Id.* at 100.

213. See, e.g., *Smith v. California*, 361 U.S. 147 (1959).

214. *People v. Tannenbaum*, 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966).

215. 18 N.Y.2d at 274, 220 N.E.2d at 788, 274 N.Y.S.2d at 137. (Emphasis added.)

216. Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

Nevertheless, it is clear that the Rank Organization, which controls one of the two major theater circuits in England, has deliberately refused to make or screen any film bearing an "X" certificate.<sup>217</sup> Since the larger cinemas depend on family audiences, the judgment is a matter of economic common sense. But it is also clear that any domestic distributor "looking for an outlet for his film knows that he hasn't a hope of getting his money back if he is denied a circuit release. . . ." <sup>218</sup> In consequence, many producers "who make 'X' films for the British market have to fall back, in part, on the custom of rather specialized types of cinema — some of which will not accept films that they consider to be insufficiently pornographic."<sup>219</sup>

In 1955 Mr. Michael Croft submitted a script based on his novel, *Spare the Rod*, to the British Board of Film Censors. The novel dealt with an inefficiently run school and the moral deterioration of its teachers. The Board proposed an "X" certificate for the film, on the ground that such subjects should not be debated before children of school age. Shortly thereafter, plans for completing the picture were dropped. Mr. Croft then wrote to the *Spectator*:

Since the publicity over this film I have been approached by two independent producers. The censorship has borne fruit; one producer would like to make the film as a "quickie" with a "good sex angle," viz., between the young teacher and a girl pupil, so that it could be sold as "the sexiest school film ever;" the other producer would like to use the title but rewrite the story so that it would be sure of an "A" certificate. To these suggestions I have made the obvious reply.<sup>220</sup>

It may be assumed that Mr. Croft's case is not unique. According to the *Economist*, in 1955, "[We are] drawing perilously near to the stage where . . . no film with a serious social purpose can be made in Britain at all. . . ." <sup>221</sup> In fact, the situation has improved somewhat since the introduction of the "X" certificate. British companies were daring enough to produce a mere four of the first seventy-three films which the Board licensed for exhibition to adults only.<sup>222</sup> In 1965, however, twenty-five per cent of the "X" films released in England were British-made.<sup>223</sup>

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217. *X in a Spot*, 174 *ECONOMIST* 20 (1955). It is not clear whether Rank still adheres to this policy. No statement is available from Associated British Pictures, the other major circuit.

218. Houston, *The Power of the Circuits*, Sight and Sound, No. 4, p. 174 (1963).

219. *X in a Spot*, *supra* note 217, at 20.

220. 194 *SPECTATOR* 15 (1955).

221. *X in a Spot*, 174 *ECONOMIST* 20 (1955).

222. *Report on the 'X'*, Sight and Sound, No. 3, p. 123 (1954).

223. Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

## V. CONCLUSION

The plain lesson of the British experience is that motion picture classification may impose a censorship as rigorous and suppressive as the system it is designed to replace. To the extent that this has not happened in England, much credit is due to the intelligence and independence of the British Board of Film Censors, and the flexibility of their announced standards. In the past, no American censorship agency, private or public, has demonstrated a similar adaptive capacity. Nothing in the American experience suggests that a classification scheme would work as well here in practice as in theory it ought to.

If other cities should choose to follow the example of Dallas, as seems likely, the consequences for the film industry and the American public are not altogether unpredictable. Britain's experience suggests that the powers of a "classification" agency, however clearly defined at the outset, are not easily limited in practice. The tendency is to abandon mere labelling in favor of the total prohibition of youthful audiences from offensive films (the "X" certificate).

With its authority thus augmented, the "classification" board wields formidable powers. A local exhibitor, for example, who loses a potential family audience (the effect of an "X" classification), learns a costly lesson in the economics of "objectionable" motion pictures. In the future, he will be prepared for informal, off the record bargaining where four or five hundred feet of film may be cut in return for a general certificate of approval. The result, as Boston residents may have already learned, can be an especially bland movie fare.

It is also safe to predict that Hollywood's reaction to haphazard local "classification" would parallel that of British producers in 1912.<sup>224</sup> The larger companies would hastily arouse what is now the industry's sleepy watchdog — the "Valenti Office." Like the British Board of Film Censors, that organization could then exercise a substantial and direct influence on the content and production of all major films with a hope of commercial success. A good deal would then depend on the intelligence and flexibility of Mr. Valenti's staff members.

If the United States does not move in the direction of "classification," informal regulation through threat of arrest will continue to exercise a significant check on the freedom of local exhibitors. This sort of control is potentially more destructive than "classification," because it tends to focus on the representation of "improper" conduct and ideas as well as exaggerated sexuality; because it admittedly seeks

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224. See text accompanying notes 140-41 *supra*.

to protect the adult as well as the youthful viewing public; and because its front-line administrators are generally police officers.

If the movies seem so much more vulnerable than books, it is because differences in the two media make them so. A Hollywood production is usually a team effort, commercially motivated and representing a substantial capital investment. The producer is, first of all, a businessman, and the director, unlike the author of a book, is rarely an artist of such stature as to be able effectively to defend the integrity of the finished work. At the local level, moreover, a published book can only be suppressed. An indelicate film can always be cut.

Movies and books obviously appeal to different kinds of audiences. Films are thought to pose a greater threat to the young precisely because so large a percentage of the audience is made up of children. Only those who read easily and well buy books — presumably a literate, sophisticated, adult audience. Finally, exhibitors are far more susceptible to local pressures than are booksellers. They are licensed, for example, at the outset, and informal administrative sanctions, quite apart from the penalties of the criminal law, are thus available to the censor.

These are points which it would be well for the courts to consider, as the movies are subjected to increasing formal and informal regulatory pressures. It is only in this context, after all, that the importance of the first amendment's guarantees to the medium of the motion picture can be fully appreciated.