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Motion Picture Censorship - a Constitutional Dilemma - Superior Films, Inc. v. Department of Education

Casenotes

MOTION PICTURE CENSORSHIP — A CONSTITUTIONAL DILEMMA

Superior Films, Inc. v. Department of Education[1]

No less enigmatic than the ancient riddle of the Sphinx was the recent *per curiam* decision of the Supreme Court of the United States reversing the holdings of the highest courts of New York[2] and Ohio[3] on the issue of the constitutionality of certain aspects of current motion picture censorship statutes. The Court of Appeals of New York had upheld the refusal by the Motion Pictures Division of the State Education Department and the Regents of the University of the State of New York to grant a license for the public exhibition of the motion picture "La Ronde," because the reviewing board found that the movie was "immoral" and would "tend to corrupt morals" within the meaning of the New York statute. The New York censorship law provides that:

> ". . . the director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor."[4]

The Ohio court had upheld the banning of the film "M" on account of its being *harmful*.[5] The Ohio law states that ". . . only such films as are, in the judgment and discretion of the department of education, of a moral, educational, or amusing and harmless character shall be passed and approved by such department."[6] The censorship puzzle has

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[1] Superior Films, Inc. v. Dept. of Education of the State of Ohio, Film Censorship Division and Commercial Pictures Corp. v. Regents of the University of New York, 346 U. S. 587 (1954).

[2] Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336, 113 N. E. 2d 502 (1953).

[3] Superior Films v. Dept. of Education, 159 Oh. St. 315, 112 N. E. 2d 311 (1953).

[4] New York Education Law, Sec. 122.

[5] *Supra*, n. 3.

[6] Ohio Rev. Code (Anderson's Desk Ed., 1953), Sec. 3305.04.

been further complicated in Maryland by the recent overruling of the refusal by the Maryland State Board of Motion Picture Censors to license "The Moon is Blue"[7] on the ground that it was "indecent" and "immoral" within the meaning of Section 6 of Article 66A of the Annotated Code of Maryland (1951 Ed.), which provides that "The Board . . . shall approve and license such films or views which are moral and proper, and shall disapprove such as are sacrilegious, obscene, indecent, inhuman or immoral, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes."

The inarticulate majority of the Supreme Court was content to rest upon the sole cited precedent of *Joseph Burstyn, Inc. v. Wilson.*[8] The *Burstyn* or "Miracle Case" held that motion pictures are within the First Amendment guarantees of freedom of speech and press, and protected from invasion of those rights by the states under the Fourteenth Amendment; and that therefore a state cannot prevent exhibition of a motion picture on the ground that it is "sacrilegious" because that term as an administrative standard cannot be objectively and precisely defined and applied. The "Miracle Case" did not rule whether censorship of motion pictures in every case is an unconstitutional exercise of prior restraint upon expression violative of the free speech and press guarantees of the First and Fourteenth Amendments. Nevertheless, any full discussion of the present status of motion picture censorship laws must embrace the twin issues raised before the New York[9] and Ohio[10] courts and later before the Supreme Court:[11] (1) constitutional limitations upon restraint of speech or other forms of communications prior to utterance or publication; and (2) adequacy of the statutory standards employed by the agency censoring the film strips.

Prior Restraints

In order to develop the divergent views on the place of freedom of speech and press in our constitutional heritage, let us follow the natural cleavage of the Supreme Court running through the Jehovah's Witnesses Cases.

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[7] United Artists Corp. v. Traub, Baltimore City Court, Docket 16, Fol. 295, Dec. 7, 1953. See Daily Record, Dec. 10, 1953.

[8] 343 U. S. 495 (1952).

[9] *Supra*, n. 2.

[10] *Supra*, n. 3.

[11] *Supra*, n. 1.

The anti-censorship philosophy of Justices Black and Douglas, for want of a better label, we shall call the "categorical view." Their conclusions are based upon a strict interpretation of the words of the First Amendment. Mr. Justice Douglas has stated this view succinctly as follows:

> "The First and the Fourteenth Amendments say that Congress and the States shall make 'no law' which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take that step."[12]

This strict interpretation of the First Amendment is necessary, they feel, because of the historic development of freedom of press and speech in England and America.

The harbinger of a free press, John Milton, in 1644, penned his famous *Areopagitica* attacking the licensing system which had straight-jacketed the printed word under the Tudor and Stuart kings. Chief Justice Hughes in *Lovell v. Griffin*[13] reflected:

> "The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.'[14] And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one'."[15]

Blackstone wrote in 1765:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licensor,

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[12] *Ibid.* Mr. Justice Douglas, with whom Mr. Justice Black agrees, in a memorandum opinion.

[13] 303 U. S. 444 (1938).

[14] MILTON, AREOPAGITICA.

[15] *Supra*, n. 13, 451.

> . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government."[16]

In seventeenth century America there was no such thing as a free press. The royal governors were ordered to permit no matter to be printed without "especial leave and license first obtained."[17] Defiance by Colonial editors to censorship was so effective that by the middle of the eighteenth century a free American press was a *fait accompli.* Vestiges of suppression existed only in isolated instances, such as the suppression exercised by the Sons of Liberty vigilantes during the turbulent Stamp Act period.[18] As stated by one commentator:

> "Freedom of press was sorely tried in the harsh, confusing days following the passage of the Coercive Acts, but American thinkers did their sincere best to defend the central position they had assigned to this freedom in the pattern of constitutional government."[19]

Following closely upon the heels of the Coercive Acts was John Dickinson's famous "Letter to the Inhabitants of the Province of Quebec," which was adopted by the First Continental Congress in October, 1774. That important, joint Colonial document declared freedom of the press as one of the basic rights "without which a people cannot be free and happy."[20] The Virginia Declaration of Rights in June, 1776, stated that ". . . the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick *(sic)* governments."[21] Most of the other original thirteen states adopted similar declarations or bills of rights which were incorporated into their respective constitutions in accordance with the fondness of the Revolutionary generation for written documents to insure a standing law beyond the caprice of popular rule.[22] Thus

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[16] BLACKSTONE, COMMENTARIES (Lewis's Ed., 1902), Vol. IV, 151-2.
[17] Quoted in ROSSITER, SEEDTIME OF THE REPUBLIC (1953), 29.
[18] MORGAN, EDMUND S. AND HELEN M., THE STAMP ACT CRISIS (1953), 199.
[19] ROSSITER, *op. cit., supra,* n. 17, 385.
[20] *Ibid,* 399.
[21] S. E. MORISON, SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION (2d Ed., 1929), 150-1.
[22] The Massachusetts court in 1825 said about its state's guarantees of free press that:
> "The main purpose of such constitutional provisions is '. . . to prevent all such *previous* restraints upon publications as had been practiced by

as we have seen, colonial experience and political expression set the stage for the insistence by the ratifying conventions upon the incorporation of a declaration of rights into the new constitution.

In the light of this historical setting therefore, we may examine the views of the Founding Fathers on the Bill of Rights in general, and on the First Amendment in particular, to discover whether these men intended to qualify the expression "no law abridging the freedom of speech or of the press." The foremost spokesman for the Constitution as originally drafted, Alexander Hamilton, in No. 84 of the Federalist scoffed at bills of rights as "stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, . . ."[23] On the subject of the liberty of the press, Hamilton stated that:

> ". . . whatever has been said about it in . . . (the constitution) of any other state, amounts to nothing. . . . Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; . . . whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. . . . the only solid basis of all our rights."[24]

Madison at first regarded coolly the suggestion that the proposed constitution needed an additional bill of rights, and in a letter to Jefferson said:

> "My own opinion has always been in favor of a bill of rights; . . . At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others."[25]

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other governments, . . . to stifle the efforts of patriots toward enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the rights to keep fire arms, which does not protect him who uses them for annoyance or destruction'."

Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 313 (1825). Also quoted by Holmes in Patterson v. Colorado, 205 U. S. 454, 462 (1907).

[23] THE FEDERALIST, (Sesquicentennial Ed.), 558.

[24] *Ibid*, 560. Hamilton also cautioned against "aphorisms . . . which would sound much better in a treatise on ethics than in a constitution of government." *Ibid*, 558-9.

[25] Letter to Thos. Jefferson, October 17, 1788. See S. K. PADOVER, THE COMPLETE MADISON (1953), 253.

But

> "supposing a bill of rights to be proper . . . I am inclined to think that *absolute* restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy."[26]

Yet Madison later championed the proposed bill of rights before the First Congress stating that "the freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution."[27] In America, he said after the Bill of Rights had been adopted,

> " '. . . the great and essential rights of the people are secured against legislative as well as against executive ambition . . . not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also'."[28]

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[26] *Op. cit., ibid*, 255. This correspondence with Jefferson illustrates the balanced, intellectual approach Madison took toward the constitutional issues facing the new nation. His writings reveal an amazing foresight and regard for the consequences of the extension of the accepted axiomatic doctrines of his day into the pattern of an expanding society. Prof. E. S. Corwin has said that "as to Madison's paternity of the Constitution . . . I think if there had to be a Father of the Constitution, . . . Madison was probably the most eligible candidate." 27 New York Univ. L. Rev. (1952), 277, 298.

[27] In the same speech he said:

> "Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body (Parliament), the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed."

From 1 Annals of Congress 1789-1790, 434. Quoted in Bridges v. California, 314 U. S. 252, 264 (1941). Parenthetical material supplied.

[28] From REPORT ON THE VIRGINIA RESOLUTIONS, MADISON'S WORKS, Vol. 4, 543. Quoted by Hughes, C.J., in Near v. Minnesota, 283 U. S. 697, 714 (1931). Compare the above passage with Hamilton's *No. 84* of THE FEDERALIST, *supra*, n. 23. The Virginia Resolutions, attributed to Madison, stated:

> "That this state, having, by its Convention which ratified the Federal Constitution, expressly declared that, among other essential rights, 'the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States' and . . . having, with other states, recommended an amendment for that purpose, ..."

H. S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY (5th Ed., 1949), 182.

From these and similar gems of our rare heritage, Justices Black and Douglas believe they have discovered formidable precedents for a categorical interpretation of the First Amendment. In other words the Founding Fathers meant what they said, when they framed the amendment in such absolute terms. Jefferson had suggested to Madison that the First Amendment should read:

> "The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations."[29]

Is not that *right* as defined by Jefferson essentially that First Amendment *freedom* of speech and press concerning which "no law" can be passed in abridgment? "Freedom of speech," says Mr. Justice Douglas, "though not absolute, *Chaplinsky v. New Hampshire*,[30] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[31] The First Amendment is inapplicable to certain words in the nature of verbal acts,[32] defined by Justice Murphy in *Chaplinsky v. New Hampshire*[33] as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[34] Summing up in the words of Justice Black, ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."[35]

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[29] Letter to Madison, 1789. From S. K. PADOVER, THOMAS JEFFERSON ON DEMOCRACY, (Mentor Book) 48. Alexander Hamilton defined the liberty of the press as "the right to publish with impunity, truth, with good motives, for justifiable ends though reflecting on government, magistracy, or individuals." People v. Croswell, 3 Johns (N. Y.) 337. For the relationship of criminal libel to the scope of free speech and press, see COOLEY, CONSTITUTIONAL LIMITATIONS (8th Ed., 1927), Vol. 2, Ch. 12.

[30] 315 U. S. 568 (1942).

[31] Terminiello v. Chicago, 337 U. S. 1, 4 (1949).

[32] Gompers v. Bucks Stove & Range Co., 221 U. S. 418 (1911).

[33] *Supra*, n. 30.

[34] *Ibid*, 572.

[35] Bridges v. California, *supra*, n. 27, 265. This so-called "preferred position" given free speech is attacked by Justice Frankfurter in his concurring opinion in Kovacs v. Cooper, 336 U. S. 77, 89 (1949), noted in 10 Md. L. Rev. 355 (1949).

Though frequently colored by dissents, the holdings in the free speech cases reveal that the Supreme Court has repeatedly condemned censorship in its various disguises. While prior restraints by way of injunction have been countenanced under certain circumstances,[36] the Court has struck down censorship by administrative action. For example, administrative action was found repugnant to the Constitution under statutes requiring that a license be obtained from a public official prior to publication or utterance where the following media of communication were involved: distribution of religious handbills;[37] use of sound trucks;[38] public meeting or speechmaking on public property;[39] solicitation of union membership;[40] door-to-door canvassing for the distribution of religious publications[41] or soliciting funds for religious purposes.[42] Other statutes involving unlawful suppression of expression: imposed a license tax on newspapers[43] or religious publications;[44] involved peaceful picketing;[45] forbade printing of a newspaper that is "malicious, scandalous and defamatory."[46]

However, there are a few cases permitting previous restraints on the grounds either that the First Amendment does not apply;[47] or because the limitations upon the administrator are such that he is prevented from discriminating against any utterances of which he does not approve.[48]

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[36] Drivers Union v. Meadowmoor Co., 312 U. S. 287 (1941), and Giboney v. Empire Storage Co., 336 U. S. 490 (1949), involving picketing.

[37] Lovell v. Griffin, 303 U. S. 444 (1938); Schneider v. State, 308 U. S. 147 (1939); Largent v. Texas, 318 U. S. 418 (1943).

[38] Saia v. New York, 334 U. S. 558 (1948), noted in 9 Md. L. Rev. 285 (1948).

[39] Hague v. C.I.O., 307 U. S. 496 (1939); Kunz v. New York, 340 U. S. 290 (1951); Niemotko v. Md., 340 U. S. 268 (1951).

[40] Thomas v. Collins, 323 U. S. 516 (1945).

[41] Martin v. Struthers, 319 U. S. 141 (1943).

[42] Cantwell v. Connecticut, 310 U. S. 296 (1940).

[43] Grosjean v. American Press, 297 U. S. 233 (1936).

[44] Murdock v. Pennsylvania, 319 U. S. 105 (1943); also Jones v. Opelika, 319 U. S. 103 (1943), rev'g. Jones v. Opelika, 316 U. S. 584 (1942).

[45] Thornhill v. Alabama, 310 U. S. 88 (1940).

[46] Near v. Minnesota, 283 U. S. 697, 701 (1931).

[47] Where the words are in the nature of verbal acts, *supra, circa*, n. 32. See Gompers v. Bucks Stove & Range Co., 221 U. S. 418 (1911). According to Justice Murphy in Chaplinsky v. New Hampshire, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem." *Supra*, n. 30, 571. *Cf.* Board of Education v. Barnette, 319 U. S. 624 (1943); Mutual Film Corp. v. Ohio Indus'l Comm., 236 U. S. 230 (1915).

[48] Cox v. New Hampshire, 312 U. S. 569 (1941); Kovacs v. Cooper, 336 U. S. 77 (1949). Justice Douglas attacked such reasoning as an "ominous and alarming trend". ". . . the Court . . . has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate 'within reasonable limits' the right of free speech." Beauharnais v. Illinois, 343 U. S. 250 (1952), *dis. op.*, 284, 285.

On the basis of the latter reasoning, a conviction of a Jehovah's Witness was upheld under a New Hampshire statute prohibiting an unlicensed parade upon a public street or highway.[49]. Another 5-4 decision upheld a statute which forbade sound trucks to operate on streets when amplified to a loud and raucous volume.[50] A conviction of the parents under the Massachusetts child labor laws was upheld where Jehovah's Witnesses literature was being distributed by a nine year old child on the streets of a city.[51]

Movie censorship was given the green light in the Mutual decision[52] in 1915, where it was said of the infant motion picture industry that movie exhibition was "a business pure and simple, originated and conducted for profit, . . . not to be regarded, . . . as part of the press of the country or as organs of public opinion."[53] Thirty-seven eventful years later, "in an age when 'commerce' in the Constitution has been construed to include airplanes and electromagnetic waves,"[54] the Supreme Court recognized the maturity of the industry in the *Burstyn* case,[55] holding that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[56] But to the chagrin of Justices Black and Douglas, the Court dodged the issue of whether "the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."[57]

Mr. Justice Frankfurter conceived the First Amendment not as a monument inscribed in the ineradicable precepts of the Founding Fathers, but rather as an organic thing; dynamic, yet sensitive to the conflicting rights and interests so ubiquitous in the modern community. During the arguments before the Court in our principal case,[58] it has been reported that the Associate Justice "took issue with counsel's position that all censorship was banned. He wondered whether it was necessary to go that far and

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[49] *Ibid.*

[50] Kovacs v. Cooper, 336 U. S. 77 (1949), noted in Md. L. Rev. 355 (1949).

[51] Prince v. Massachusetts, 321 U. S. 158 (1944).

[52] Mutual Films Corp. v. Ohio Indus'l Comm., *supra*, n. 47.

[53] *Ibid*, 244.

[54] CHAFEE, FREE SPEECH IN THE UNITED STATES (1941), 545. Chafee contended that movie censorship was unconstitutional, and suggested as a substitute, appraisal of objectionable films by a jury, after indictment.

[55] Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952).

[56] *Ibid*, 502.

[57] *Ibid.* In a recent decision by the Toledo Municipal Court (Ohio), State v. Smith, 108 N. E. 2d 582 (1952), it was held that the Ohio censorship law was unconstitutional when applied to newsreels.

[58] Superior Films, Inc. v. Ohio, 346 U. S. 587 (1954).

stated, 'Why lawyers insist on absolutes is something I'll never understand!' "[59] The same mystery had apparently haunted him earlier in the *Burstyn* case where in a concurring opinion Mr. Justice Frankfurter succinctly stated his position on movie censorship in his singular brand of rhetoric, as follows:

> "We are asked to decide this case by choosing between two mutually exclusive alternatives: that motion pictures may be subjected to unrestricted censorship, or that they must be allowed to be shown under any circumstances. But only the tyranny of absolutes would rely on such alternatives to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities. It would startle Madison and Jefferson and George Mason could they adjust themselves to our day, to be told that the freedom of speech which they espoused in the Bill of Rights authorizes a showing of 'The Miracle', from windows facing St. Patrick's Cathedral in the forenoon of Easter Sunday, just as it would startle them to be told that any picture, whatever its theme and its expression, could be barred from being commercially exhibited. The general principle of free speech, expressed in the First Amendment as to encroachments by Congress, and included as it is in the Fourteenth Amendment, binding on the States, must be placed in its historical and legal contexts. The Constitution, we cannot recall too often, is an organism, not merely a literary composition."[60]

In other opinions, Mr. Justice Frankfurter has been critical of the Court's attempted crystalization of rigid rules to be determinative of all cases, instead of recognizing the need for flexibility of application. In *Niemotko v. Maryland,* he said:

> "The results in these multifarious cases have been expressed in language looking in two directions. While the Court has emphasized the importance of 'free speech,' it has recognized that 'free speech' is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if

[59] 22 U. S. Law Week 3182, Jan. 12, 1954.
[60] *Supra,* n. 55, 517-518.

> interference with free expression of ideas is not found to be the overbalancing consideration."[61]

Such is the essence of the Frankfurtian rationale. His searching analysis in each case generally results in a condemnation of jurisprudence by formulas or absolutes. He denounces the so-called "preferred position"[62] given the First Amendment freedoms as a "mischievous phrase,"[63] which mechanically applied subtly implies that "any law touching communication is infected with presumptive invalidity."[64]

Likewise, Justice Jackson dissented in most of the Jehovah's Witnesses cases. He dissented from the proposition that "Courts must balance the various community interests in passing on the constitutionality of local regulations . . ."[65] saying: "It is for the local communities to balance their own interests — that is politics — and what courts should keep out of."[66] The Court has been striking "rather blindly at permit systems which indirectly may affect First Amendment freedoms. . . . I think that where speech is outside of constitutional immunity the local community or the State is left a large measure of discretion as to the means for dealing with it."[67]

With the present diversity of opinion in the Court, it is not likely that our motion picture censorship laws will be adjudged unconstitutional abridgments of freedom of speech and press solely on the ground of prior restraint. Only a change in personnel or an about-face could accomplish that end. But what may constitute a sufficiently definite administrative standard is a matter of conjecture at best.

STANDARDS

The Fourteenth Amendment says that no state shall "deprive any person of life, liberty, or property, without due process of law." "Liberty," encompassing the First

[61] 340 U. S. 268 (1951), *conc. op.*, 273, 282. Justice Frankfurter set up four criteria for deciding the free speech cases: (1) interest deemed to require regulation; (2) method used to achieve such ends; (3) mode of speech; (4) where the speaking takes place.

[62] Kovacs v. Cooper, 336 U. S. 77 (1949), *conc. op.*, 89, 90.

[63] *Ibid.*

[64] *Ibid.*

[65] Expressed by Justice Douglas in Saia v. New York, 334 U. S. 558, 562 (1948).

[66] *Ibid, dis. op.*, 566, 571.

[67] Dissenting in Kunz v. New York, 240 U. S. 290 (1951), *dis. op.*, 295, 305, 309. In the free speech cases Justice Burton usually concurs with either J. Jackson or J. Frankfurter, or both.

Amendment freedoms of speech and press,[68] applies to the exhibition of motion pictures.[69] The elusive phrase "due process of law" circumscribes limitations on procedures by which the states can regulate the movies. The primary requisite of "due process" when applicable to a Board of Motion Picture Censors is that, in making its determination to ban a movie, or portion thereof, the board may use only such fixed standards as prevent the showing of a motion picture creating a clear and present danger to the moral well being of the community, but which preserve the right to exhibit any other motion picture, however obnoxious to the censor's own personal opinions.[70] To frame the statute which meets those requirements is extremely trying; for if the statute is too strict, it becomes unenforceable against the evil it was framed to prevent.[71] Therefore, a certain latitude of discretion must be allowed the reviewing board; and within such limits, protection from abuse is provided for by judicial review.

The Supreme Court has invalidated several State or local statutes because the laws were so vague and indefinite as to leave the door open to arbitrary restriction of the freedoms of expression. In *Winters v. New York*[72] a conviction of a bookdealer was set aside on the grounds that the penal statute,[73] while limiting freedom of expression, was so vague and indefinite that it failed to "give fair notice of what acts will be punished,"[74] and therefore violated "an accused's right under procedural due process and freedom of speech or press."[75] In *Kunz v. New York*[76] the Supreme Court declared void a statute creating a licensing system which vests "in an administrative official discretion to grant or withhold a permit (to use streets and parks) upon broad criteria unrelated to proper regulation of public places."[77] *Gelling v. Texas*[78] set aside an ordinance authorizing a li-

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[68] Gitlow v. New York, 268 U. S. 652 (1925).

[69] Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952).

[70] *Cf., ibid.;* also Stromberg v. California, 283 U. S. 359 (1931); Herndon v. Lowry, 301 U. S. 242 (1937); Gelling v. Texas, 343 U. S. 960 (1952); Winters v. New York, 333 U. S. 507 (1948); Kunz v. New York, *supra*, n. 67.

[71] Winters v. New York, *ibid.* (Justice Frankfurter, dissenting).

[72] *Ibid.*

[73] Sec. 1141(2) of New York Penal Law (conviction was for having for sale a publication "principally made up of criminal news, police reports, or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime.")

[74] *Supra*, n. 70, 509.

[75] *Ibid*, 510.

[76] *Supra*, n. 67.

[77] *Ibid*, 294. Parenthetical material supplied.

[78] *Supra*, n. 70.

censing board to deny a license to show a motion picture which, in its opinion, was " 'of such character as to be prejudicial to the best interests of the people of said City'."[79]

In the *Burstyn v. Wilson* case, the term "sacrilegious" was under attack. Justice Frankfurter in a lengthy concurring opinion collected some thirty-four definitions of the word using about every dictionary ever published in the English language.[80] Delivering the opinion of the Court, Mr. Justice Clark described the plight of the hapless censor in trying to apply the term "sacrilegious" to the subject matter of a motion picture:

> ". . . the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."[81]

Does the same sea exist when morality is the issue? In *"The Moon Is Blue"* case in the Baltimore City Court, Judge Moser said of the Maryland State Board of Motion Picture Censors:

> ". . . the Board indicated quite clearly that it has no 'fixed standards' by which to interpret what is indecent, obscene and immoral . . . The following is clear from the record in this case.
>
> (a) The Chairman flatly stated, 'We have no set standards'.
>
> (b) The Vice Chairman approved banning the film because it was 'trash', defined as 'just no good'.
>
> (c) The standard of the third member was what he wanted his three grandchildren, under twelve years of age, to see."[82]

The requirement of certainty in a statute may be met either by language or by settled construction.[83] "Even in *Mutual Film Corporation v. Ohio Industrial Commission*[84] . . . it was deemed necessary to find that the terms 'educational, moral, amusing or harmless' do not leave 'decision to arbitrary judgment.' Such general words were found to

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[79] *Ibid.*

[80] Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952), *conc. op.*, 507, *circa* 520 *et seq.*, and appendix 533.

[81] *Ibid*, pp. 504-5.

[82] United Artists Corp. v. Traub, Daily Record, Dec. 10, 1953.

[83] Niemotko v. Maryland, 340 U. S. 268 (1951).

[84] 236 U. S. 230 (1915).

'get precision from the sense and experience of men.' "[85] The Ohio court said the tests of the Ohio censorship statute "have over a period of over 40 years acquired a definite and circumscribed meaning."[86] Apparently the Supreme Court did not think so.

The New York court majority in the *"La Ronde"* case[87] was unable to agree on the meaning of "immoral." Froessel, J. said, ". . . the words 'immoral' and 'tend to corrupt morals' . . . relate to standards of sexual morality. . . . In this sense they are kindred to 'obscene' and 'indecent' . . ."[88] A second judge defined "immoral" as *contra bonos mores.* A third wanted the latter definition to embrace the former. The dissenting judges said the meaning was indeterminate since the majority of the Court could not reach a uniform conclusion. To cure the dilemma and to satisfy the Supreme Court, the New York legislature, in 1954, defined an immoral film as one:

> "the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."[89]

A Federal statute prohibits the importation of "immoral" articles, books, etc. "Immoral" has been construed as "the opposite of moral; . . . morally evil or impure, unprincipled, vicious, dissolute."[90] In another catch-all definition it is said to be:

> ". . . not necessarily confined to matters sexual in their nature; it may be that which is contra bonos mores . . .; or 'not moral, inconsistent with rectitude, purity, or good morals; contrary to conscience or moral law; wicked; vicious; licentious, as, an immoral man or deed.' . . . Its synonyms are: corrupt, indecent, depraved, dissolute."[91]

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[85] Joseph Burstyn, Inc. v. Wilson, *supra*, n. 80, 519.

[86] Superior Films v. Dept. of Education, 159 Oh. St. 315, 112 N. E. 2d 311, 320 (1953).

[87] Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336, 113 N. E. 2d 502 (1953).

[88] *Ibid*, 507.

[89] New York Education Law, Sec. 122-a(1).

[90] United States v. One Obscene Book Entitled "Married Love", 48 F. 2d 821, 823 (D.C., S.D., N.Y., 1931); and in United States v. One Book Entitled "Contraception", 51 F. 2d 525, 527 (D.C., S.D., N.Y., 1931).

[91] Schuman v. Pickert, 277 Mich. 225, 269 N. W. 152, 154 (1936). For other definitions see 42 C.J.S. 395; Exchange Natl. Bank v. Henderson, 139 Ga. 260, 77 S. E. 36 (1913); Orloff v. Los Angeles Turf Club, 37 Cal. Sup. 2d 734, 227 P. 2d 449, 456 (1951); also 20 Words and Phrases, 159.

"Immoral" has been equated with "indecent",[92] and "indecent" held synonymous with "obscene."[93] Mr. Traub, Chairman of the Maryland Board of Censors, while favoring a definition similar to the New York resolution,[94] also considers a film about narcotics addicts to be immoral.[95]

There have been numerous cases construing the terms "indecent"[96] and "obscene."[97] "Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law . . ."[98] In the *Burstyn* case the Court left open the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."[99]

The New York legislature saw fit in 1954 to delineate a film that "incites to crime" as one:

> "the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable or respectable behavior; or which advocates or teaches the use of, . . . narcotics or habit forming drugs."[100]

Similar definitions of the operative words of the Maryland censorship law[101] might well aid the censorship board considerably in objectively approving or rejecting films; aid the movie industry in producing controversial, mature films without fear of cuts or rejection; and enable the reviewing court to review the determination of the administrative body passing upon the character of the motion picture. Difficulty and doubt will still remain, as well as the broader question of policy, beyond the scope of this comment, inherent in any censorship statute.

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[92] Schuman v. Pickert, *ibid*, 154.

[93] *Supra*, n. 90. Also Parmelee v. United States, 113 F. 2d 729 (D.C. App., 1940).

[94] *Supra*, n. 89.

[95] Discussed in interview with Mr. Traub.

[96] People v. Friedrich, 385 Ill. 175, 52 N. E. 2d 120, 122 (1944); King v. Commonwealth, 313 Ky. 741, 233 S. W. 2d 522, 523 (1950).

[97] Swearingen v. United States, 161 U. S. 446 (1896); United States v. Levine, 83 F. 2d 156 (2nd Cir., 1936, L. Hand, J.).

[98] Winters v. New York, 333 U. S. 507, 515 (1948).

[99] 343 U. S. 495, 506 (1952).

[100] New York Education Law, Sec. 122-a(2).

[101] Md. Code (1951), Art. 66A, Sec. 6.