Maryland Law Review

Volume 28 | Issue 3 Article 8

Book Reviews

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Movies, Censorship, And The Law. By Ira H. Carman. University of Michigan Press, Ann Arbor: 1966. Pp. 339, including appendices, table of cases, bibliography and index. $7.95.

Students of constitutional law have long observed that the rulings of the Supreme Court are significant only to the extent that they are meaningfully translated at the lowest levels of grass roots administration. Otherwise, the mandates of the highest court in the land might just as well be relegated to the stratosphere of judicial abstractions. A most valuable service has been rendered by political scientists who have documented the "cultural lag" between the mystique of judicial pronouncements and the reality of administrative implementation. Professor Ira H. Carman joins this group in his interesting and provocative treatment of movie censorship.

A startling revelation of the well-documented interviews contained in Professor Carman's book is the extent to which personalized and subjective criteria motivate the movie censors in states and localities requiring prior approval of films. It is not at all unusual for the censors to deliberately exclude given portions of a film, *Roth v. United States*[1] notwithstanding, because of the presence of nudity, coarse language, statements derogatory to the government, or other matters deemed unfit for presentation to children. Since many hearings are *ex parte,* the decisions of the censors are insulated from public pressure and from the film owner. Because delays in the exhibiting of first-run films are so costly to the owners, there are few, if any, legal challenges to censors' rulings and accommodation becomes the prevailing *modus operandi.* Professor Carman concludes that motion picture censorship, wherever it is put into practice, "flouts the supreme law of the land day after day and year after year."

A basic question is whether prior restraint of films would be compatible with the guarantee of freedom of expression if in fact the censors did conform to the rulings of the United States Supreme Court. Professor Carman believes that the frequency of per curiam decisions in this area and the wide divergence of views prevailing among the members of the Court indicate that the Court has a long way to go before a clear definition of either obscenity or pornography is established. If the guidelines are unclear to the justices of the Supreme Court, one would imagine that they would utterly confuse the members of a censor board. This might well be the case except for the fact that many of the film censors are completely oblivious to Court standards.

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1. 354 U.S. 476 (1957). The *Roth* case held that the standard for obscenity is ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

Even if the guidelines for censors' decisions were clearly delineated, the fact remains that censorship hearings are devoid of the procedural guarantees of due process under which substantive rights can be asserted. A possible awareness of some of these procedural shortcomings prompted the Court to recommend a new approach to be used in censorship hearings. The Court in *Kingsley Books, Inc. v. Brown*[2] upheld for the first time a "prior" restraint on the sale of books. The statute approved by the Court in that case allowed a city attorney to seek an injunction to prevent the dissemination of obscene materials. A trial was to be granted to the defendant within one day after the issuance of the injunction and if the materials in question were found objectionable they would be surrendered to the police or be destroyed. A similar type of injunctive procedure was recommended by the Court for movie censorship in *Freedman v. Maryland*.[3] On the basis of the past performance of most censors it would seem that the inclusion of judges as an integral part of the censorship machinery must necessarily be an improvement.

Still, this new emphasis on procedural safeguards fails to cope with the substantive issue of whether it is constitutional to require movie-makers to obtain official sanction before they can exercise free expression. Despite the fact that movies have graduated into the revered category of first amendment freedoms,[4] they nevertheless remain distinct from other forms of expression, for which prior sanction is not permitted, the *Kingsley* case notwithstanding. Thus a licensing regulation possesses a chameleon-like quality; although patently unconstitutional when applied to newspapers, books, political speeches, or religious sermons, it becomes a constitutionally sanctioned use of police power when applied to motion pictures.[5] The author of *Movies, Censorship, and the Law* ends his study with the conclusion that the Supreme Court has continuously failed to seize the opportunity to provide the same degree of protection for works of art on film that is presently accorded written representations.

Despite the significant contributions of Professor Carman's book, at least a few areas of confusion remain. Is the basic issue merely that censorship is obnoxious because of its quality of prior restraint, or would it be equally obnoxious if similar results were obtained from subsequent restraint? The Court in the *Freedman* case has come as close as possible to recasting the principle of prior restraint in the image of subsequent restraint. There is no doubt that, absent prior censorship, a minimal guarantee of speech would exist in the form of the complete and absolute freedom to exhibit any kind of motion picture at least once. Such a guarantee is certainly more consistent with the idea that no individual in a free society should have the burden of proving his right to express himself. Nevertheless, in the long run, subsequent restraint may sabotage free expression as effectively as prior restraint if an individual is aware that he will suffer severe criminal penalties for publishing or exhibiting "obscene" works. The

2. 354 U.S. 436 (1957).
3. 380 U.S. 51 (1965).
4. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
5. *See* Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

more timid movie-makers may even create an extra-legal means of obtaining prior approval from the authorities and thus effectively re-establish prior censorship.

A most pertinent question, too, is whether the Court, despite its failure to define obscenity, has established guidelines for obscenity which are pointing in the direction of protecting free expression. The *Hicklin* doctrine[6] has been rejected[7] and obscenity is now to be determined by "the dominant theme of the material taken as a whole."[8] A film may be proscribed only when the work goes substantially beyond the customary limits of candor in describing such matters as sex, nudity or excretion and is utterly without redeeming social importance.[9] Contemporary community standards by which to judge whether material as a whole appeals to prurient interest seem to be evolving in terms of national standards rather than provincial community standards.[10] Still, I would in the end agree that, "Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."[11]

Thus we come to the crux of the matter. Is there something so unique about obscenity that it is sufficient for the Court to take judicial notice of its dangers? Professor Carman speaks of the need for establishing ground rules for obscenity and is understandably sympathetic with the need to protect children. However, at the present rate of development, one may well have to protect the adults from the children instead of vice-versa. Without meaning to be facetious, however, this reviewer would point out that freedom for the different forms of expression, like freedom or equality for persons of different races, is far too important to be subject to gross discrimination based on distinctions of dubious scientific validity.

Professor Carman has written a challenging book which hopefully will help to bring about a very necessary re-examination of the issue of movie censorship.

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Vietnam And International Law: An Analysis Of The Legality Of The U.S. Military Involvement. By the Consultative Council of the Lawyers Committee on American Policy Toward Vietnam. New York: 1967. Pp. 162. $3.75.

The controversy over the American involvement in the Vietnamese war has reached such a stage of acridity that the lines of argument in defense of this involvement, as well as those in opposition,

6. *See* Regina v. Hicklin, L.R. 3 Q.B. 360 (1868).
7. Roth v. United States, 354 U.S. 476 (1957).
8. *Id.* at 489.
9. Jacobellis v. Ohio, 378 U.S. 184, 191–92 (1964).
10. *See Id.* at 192–95.
11. Roth v. United States, 354 U.S. 476, 512 (1957) (dissenting opinion).

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have become blurred. The war is either praised or damned in all of its facets, from the political to the sociological; military, economic, and moral considerations tend to be mixed into an amalgam to bring support to the Administration's position or to decry the baseness of the war effort. While it is true that all these elements — political, military, economic, social, or moral — play a legitimate role in an examination of the meaning and nature of the American involvement, no qualitative differentiation is made between these elements. The polarization of opinion is so extreme that the war effort is either supported absolutely or condemned absolutely.

Under these circumstances, serious doubt may be cast upon the relevance of examining the American involvement purely on its legal merits. Assuming that the decision to intervene massively with American troops was predicated upon political considerations, such as the application of the "domino" theory and the policy of containment to Asian conditions, any legal justification for the intervention would amount to a superimposition of a pseudo-legality upon a political actuality. Indeed, the Consultative Council of the Lawyers Committee on American Policy Toward Vietnam published its analysis of the legality of the war in response to a State Department memorandum entitled: *The Legality of the United States Participation in the Defense of Viet-Nam,* which was published on March 4, 1966,[1] more than a year after the United States became an active participant in the Vietnamese war, and then only after the legality of United States policy had been questioned by a private group of American lawyers.

The Consultative Council, composed of eleven noted authorities on international law and international politics,[2] set itself the task of testing the legal adequacy of the State Department memorandum of law; its unanimous conclusion was that in all respects, the memorandum was grossly inadequate.[3] The very unanimity of this finding may be taken as an indication of the fact that the Consultative Council did not choose to constitute itself so as to provide a broad cross-section of legal opinion,[4] but it does not necessarily impugn the validity of the Council's conclusions.

The core of the Consultative Council's argument questions the contention of the State Department that the United States is legitimately engaged in collective self-defense against aggression, as provided in Article 51 of the Charter of the United Nations. By tracing the history of the splitting of Vietnam into two zones at the Geneva Accords of 1954, the Consultative Council insists that this division

1. *See also* VIET-NAM IN BRIEF, Department of State Publication 8173 (December, 1966); LEGAL BASIS FOR U.S. MILITARY AID TO SOUTH VIET-NAM, Department of State Publication 8285 (August, 1967).

2. R.A. Falk, T.H.E. Fried, R.T. Barnet, T.H. Herz, S. Hoffman, W. McClure, S.H. Mendlovitz, R.S. Miller, H.J. Morgenthau, W.G. Rice, and Q. Wright.

3. Quincy Wright, one of the members of the Consultative Council, came to similar conclusions earlier in a briefer and far more elegant exposition in *Legal Aspects of the Viet-Nam Situation,* 60 AM. J. INT'L L. 750 (1966).

4. The contrary opinion was expressed in Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam,* 61 AM. J. INT'L L. 1 (1967). *See* Underwood & Moore, *The Lawfulness of United States Assistance to the Republic of Viet-Nam,* 112 CONG. REC. 14943 (1966). *See also* An, *The 1954 Geneva Accords Revisited,* 4 INTERCOLLEGIATE REV. 7 (1967).

was created only for a period of two years to separate the combatants (the French and the Viet-Minh) and to prepare for national elections in both sections in Vietnam. It is the Council's contention that these elections were sabotaged by the United States and the puppet government of Ngo Dinh Diem, and that as a consequence, the United States violated the spirit and the letter of the Geneva Accords, to which it associated itself in 1954. It further contends that the attempt to freeze the demarcation line between the two zones is in continued violation of the Accords, that no two sovereign national entities were created at Geneva and that the United States therefore involved itself in an internal conflict. The Council denies that the government of South Vietnam had the legal right to invite the United States to join in collective self-defense under Article 51 of the Charter because no overt attack on the part of the North had been proved until after the American intervention had already taken place, and because South Vietnam is not a member of the United Nations. It contends that from 1961 to the present, the United States has violated Articles 2(4) and 33(1) of the Charter, which forbid the use of force or the threat of the use of force and which require the pacific settlement of disputes. It maintains that the air attacks on North Vietnam undertaken by the United States since February, 1965, constitute illegal reprisals under the Charter and violate the principle of proportionality recognized by pre-Charter international law. The Consultative Council further argues that the United States has violated Article 53 of the Charter by not adhering to its regional defense agreements as required by the SEATO Treaty. Finally, it contends that the American intervention in Vietnam violates the provisions of the United States Constitution, which recognizes the binding quality of treaties and the supremacy of international law.

Although the cumulative effect of this work is to strip the State Department's memorandum of law of any respectability, to a large extent, this critique rests on a very narrow definition of the meaning of Article 51 of the Charter and on a somewhat tenuous claim that the South Vietnamese Republic is not technically an independent state. Furthermore, the Consultative Council readily admits that the Ho Chi Minh government has been equally guilty of violating the Geneva Accords of 1954, thus casting doubt on the extent to which the United States was obligated to abide by their provisions, particularly if the principle of the *clausula rebus sic stantibus*[5] were invoked.

To a large extent, this attack on the State Department memorandum reinforces a long-held impression of this reviewer that while such legal justifications are fair game to anyone who wishes to demolish them, the task of doing so is too easy, and it is not sporting to take full advantage of one's opportunities. If it is understood that the memorandum is a legal super imposition on a hard political reality, then its built-in weaknesses become readily apparent. The Consulta-

5. "A name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed." BLACK'S LAW DICTIONARY 1432 (4th ed. 1957).

tive Council, in the last paragraph of its analysis, implicitly recognizes that the problem of Vietnam can only be resolved on the basis of national interest: "It is our belief that a conscientious and impartial re-examination will establish the illegality of the current United States position . . . and that it will further reveal that it is in the short-term and long-term interest of the United States to bring these policies into conformity with international law."[6]

*Eric A. Belgrad**

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6. CONSULTATIVE COUNCIL OF THE LAWYERS COMMITTEE ON AMERICAN POLICY TOWARD VIETNAM, VIETNAM & INTERNATIONAL LAW: AN ANALYSIS OF THE LEGALITY OF THE U.S. MILITARY INVOLVEMENT at 86 (1967).

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