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Censoring the Movies

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CENSORING THE MOVIES

Two far extremes of opinions, which often clash in American public life, are represented today, in one part of that shifting and never-quiet battlefield, by the "no-privacy" zealots on one hand, and the "no-controls" party on the other. Our role, in writing this paper, is not that of a referee splitting the pugilists apart, or of an expert quoting odds on the outcome. We are merely taking a brief and non-prophetic spectator's look at a minor but not insignificant corner of the arena wherein is being waged the set-to over censorship of motion pictures.[1]

This argument was warmed up by the Supreme Court's 1952 decision[2] invalidating New York State's ban on the picture called "The Miracle." When that litigation reached Washington, D. C., the stage was set, it was thought, for a clear-cut answer to the question pressed on the court: can any precensorship of films ever be constitutional? But, as it turned out, a categorical answer was not forthcoming. The Court did make official its 1948 dictum,[3] or hint, that moving pictures, like newspapers and radio, are included within "the press," and so entitled to First (and Fourteenth) Amendment protection.[4] That, of course, was a flat and express reversal, by the Supreme Court, of so much of *Mutual Film Corp.* v. *Industrial Comm'n*[5] as had announced that the exhibition of moving pictures is a "business pure and simple," and that accordingly, films, of whatever kind, are not "part

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[1] Presently statewide censorship exists in seven states: Kansas, Maryland, Massachusetts, New York, Ohio, Pennsylvania and Virginia. Besides this, there is city or village censorship in about 60 municipalities in Alabama, Arkansas, California, Connecticut, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Washington and Wisconsin. According to newspaper reports, the Motion Picture Association of America has several times announced its intention to carry on, in the courts and elsewhere, to abolish all forms of governmental censorship of motion pictures.

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

[3] United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[4] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[5] 236 U.S. 230, 244 (1915).

of the press of the country." At least from this distance, the *nonsequitur* is apparent, since the same test would have denied to the New York Times a place "as part of the press of the country."

However, we assume that the real reason why, in the *Mutual Film* case, motion pictures were denied constitutional rights to "press" freedom was because, usually they are not vehicles of news or opinion, but mere shows or entertainments. As such, they were, or so it seemed in 1915, typical of those public stage exhibitions traditionally (as in Britain under the Lord Chamberlain) subject to the police power, and entirely lacking in the purposes and public need which characterizes the "press," and which have been thought to mandate freedom of expression for journals of news and opinion. Thus the *Mutual Film* decision itself seemed reasonable enough when it was announced. Most motion pictures exhibited in American theatres were, or are, in the nature of stage plays — tragedy, comedy, farce, musicals or whatnot. They just simply are not vehicles or organs of opinion, have none of the marks of the "press," and so lack its grounds for demanding freedom from censorship. Of course, the *Mutual Film* case, and others,[6] overlooked, or failed to give appropriate separate treatment to newsreels, which are similar to newspapers, and so should have been judicially declared to be part of the "press." But it was all or none in 1915 in *Mutual Film,* and come 1952, it was all or none again in *Burstyn,* when the Supreme Court covered all motion pictures under the First Amendment's blanket of freedom.

But *Burstyn* did not in fact hold that the extension to films of First Amendment protection automatically voided all prior restraints thereof. Indeed, the Supreme Court was careful to leave open the question as to whether a "clearly drawn statute designed and applied to prevent the showing of obscene films"

6 Pathe Exchange, Inc. v. Cobb, 236 N.Y. 539, 142 N.E. 274 (1915).

would be unconstitutional.[7] The *Burstyn* holdings are two: [8] first, that motion pictures are included in the First Amendment's "press"; and second, that for a variety of reasons, the word "sacrilegious" in the New York motion picture censorship act [9] could not constitutionally serve as a standard for denying a license for a film submitted to the New York authorities. This same statute forbids the licensing not only of "sacrilegious" films, but also those which are "obscene" or "immoral," or "would tend to corrupt morals." On June 4, 1953, the New York Court of Appeals, in *Commercial Pictures Corp. v. Board of Regents,*[10] upheld the State Education Department's denial of a license for the exhibition in New York State of the French import "La Ronde," on the ground that the picture was immoral and tended to corrupt morals. To come to that conclusion, the Court of Appeals majority had to hold, as in *Burstyn,* that state legislation imposing previous restraints on the exhibition of motion pictures is not necessarily and per se unconstitutional.[11] However, it is to be noted that one of the dissenting judges stated his own belief to the contrary.[12]

Thus, the whole question of government control of obscene or corrupting films is still at large, so far as the supreme tribunal is concerned, and the question, in itself and in its implications, is indeed a large one. The wide range of the numerous opinions in the *Burstyn* and *Commercial Pictures* cases is proof enough that such inquiries take us deep down into root issues of public morality and public controls. Such problems cannot be solved by the simple device of making "censorship" a bad word, or by analogizing motion picture censorship to the prohibition of alcohol, or by cartooning the censor as a stovepipe-hatted nuisance poking his blue nose

7 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952).
8 *Id.* at 502, 505.
9 N.Y. EDUC. LAW, § 122.
10 305 N.Y. 336, 113 N.E.2d 502 (1953).
11 *Id.* 113 N.E.2d at 503-5.
12 *Id.* 113 N.E.2d at 512-14.

into other people's business and finding smut where none exists. Facile writers follow current fashion, but detour around logic and history when they deny to censorship any place in democratic governmental processes, and describe all censorship as repressive and tyrannical interference with freedom to express ideas.

The idea that the First Amendment outlaws all prior restraints on any sort of publication simply does not stand up.[13] The First Amendment's purpose is plain enough. Its intent was to forbid governmental interference, via previous restraints, with the putting forward of idea and opinions, especially as to government and public officers.[14] Whether conventional or unconventional, orthodox or unorthodox, popular or unpopular, such ideas were not to be denied expression, but were to be given their unhindered chance to compete. But the First Amendment did not license, automatically and beyond control, any and every outpouring of speech or pen, no matter how slanderous, blasphemous, obscene or seditious. Its purpose was to maintain and protect public discussion, not to destroy public order. The First Amendment did not abolish police power over utterances of whatever sort. American legal history flatly denies the assertion that First Amendment freedoms leave government powerless to prohibit publications which are obscene, or tend to corrupt morals, or incite to vice or crime.[15] Of course, governmental activity as against such publications usually takes the form of subsequent punishment rather than prior

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13 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). *See* Near v. Minnesota, 283 U.S. 697, 708 (1931); Frohwerk v. United States, 249 U.S. 204, 206 (1919); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

14 Near v. Minnesota, 283 U.S. 697, 713, 719 (1931). *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

15 *See* Winters v. New York, 333 U.S. 507, 513 (1948); Gitlow v. New York, 268 U.S. 652, 666-8 (1925); Schenck v. United States, 249 U.S. 47, 51-2 (1919); Patterson v. Colorado, 205 U.S. 454, 462 (1907); People v. Most, 171 N.Y. 423, 431, 64 N.E. 175, 178 (1902). See also 2 COOLEY, CONSTITUTIONAL LIMITATIONS 876 *et seq.* (8th ed. 1927).

restraint, but that seems to be rather a matter of method than of principle.

Motion pictures, because of the ways of their production and distribution, are well adapted to censorship. Preliminary inspection, cutting, and licensing on higher governmental levels, state-wide, is better than hit-or-miss local criminal prosecution at the will of local police officers. Precensorship of movies is not, at least in New York, a newfangled kind of interference with legitimate business, but a thirty-year old system which has dealt with tens of thousands of films, with surprisingly little criticism, resistance or litigation.

In addition to the sincere and high-principled opponents of State Censorship, there will always be, as there always have been, the purveyors of filth for profit, and the latter make full use of the arguments and protestations of the former. In the end, does it not come down to a question, not of the constitutionality of forbidding the free expression of ideas, but of whether government should have the power to keep plainly obscene or immoral material from our people?

And here again we must avoid a detour. That all men, and all courts, do not agree on detailed lists of what is "obscene" or what is "immoral" does not deprive those words of meaning and application. "Obscene," for instance, is a good old common law word, with centuries of usage behind it.[16] Also, it is a sufficiently descriptive word commonly employed and readily understandable by ordinary people. So far as we can discover, "obscene," though widely used in statutes, has not been held lacking in the necessary specificity. "Obscene" means, generally, matter which, taken as a whole, and considering the public to which it is addressed (and its general motif) has a lewd and lascivious tendency, calculated to

[16] Rex v. Wilkes, 4 Burr. 2527, 98 Eng. Rep. 327 (K.B. 1770); Commonwealth v. Sharpless, 2 S. & R. 91, 102-3 (Pa. 1815); Commonwealth v. Holmes, 17 Mass. (17 Tyng) 336 (1821); State v. Appling, 25 Mo. 315 (1857); United States v. Bennett, 24 Fed. Cas. 1093, 1104-5 No. 14,871 (C.C.S.D.N.Y. 1879).

excite lustful and lecherous desires, and thus corrupt and debauch the mind and morals of those in whose hands it might fall while being susceptible to such influences. Such is the classic definition announced, in 1868, by Lord Chief Justice Cockburn in *Regina* v. *Hicklin*,[17] applying The Obscene Publications Act of 1857 [18] to a publication with the suggestive title *The Confessional Unmasked.* Despite recurring criticism, there is little doubt that it is the controlling definition in American courts today.[19] That meaning may, of course, be enlarged or circumscribed by statute, but standing alone the word carries that meaning, historically and traditionally. That men may differ as to its specific applications does not destroy it as a standard. Government puts the duty of application on its officers, judges and juries. If words of general import ("due care," "due process," "reasonable," "fraudulent," etc.) could not be so made use of, government by law, as we know it, would come to an end, and ukases, individual decrees, and special instances would be substituted. The use in statutes of more or less general terms, applied administratively by legislatively-appointed or elected officials, but subject to court review, is of the essence of the American system.

Another sort of argument runs against the use, as employed in several state censorship statutes,[20] of the word "immoral" (or its antonym "moral"). Such a word, say our modernists,

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17 L.R. 3 Q.B. 360, 371 (1868).

18 20 & 21 Vict. c. 83, § 1.

19 Swearingen v. United States, 161 U.S. 446, 451 (1896); Rosen v. United States, 161 U.S. 29, 43 (1896); United States v. One Book Entitled Ulysses, 72 F.2d 705, 708 (2d Cir. 1934); United States v. Dennett, 39 F.(2d) 564, 568 (2d Cir. 1930); King V. Commonwealth, 313 Ky. 741, 233 S.W.2d 522, 524 (1950); Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472, 473 (1930); Commonwealth v. Buckley, 200 Mass. 346, 86 N.E. 910, 911 (1909); St. Louis v. King, 226 Mo. 334, 126 S.W. 495, 498 (1910); People v. Wendling, 258 N.Y. 451, 453, 180 N.E. 169 (1932); People v. Muller, 96 N.Y. 408, 411 (1884); People v. Larsen, 5 N.Y.2d 55, 56 (Bronx County Ct. Spec. Sess. 1938).

20 KAN. GEN. STAT. § 51-103 (1949); MD. ANN. CODE GEN. LAWS art. 66A, § 6 (1951); MASS. ANN. LAWS c. 272, § 232 (1933); N.Y. EDUC. LAW §§ 1082, 1083; OHIO GEN. CODE ANN. § 154-47(b) (1938); PA. STAT. ANN. tit. 4, §§ 43, 49 (1938); VA. CODE § 2-105 (1950).

means nothing at all, since — and here is the starting point of our differences — it finds meaning only subjectively in the mind of its user, and its application will vary accordingly. Now we are back to fundamentals. We think that "immoral" means *contra bonos mores,* that is, contrary to the generally accepted civilized code of conduct for human behavior, and the "moral sense of the community." [21] The cases[22] show that this has been taken as its meaning in censorship statutes. The United States Supreme Court itself, in its 1915 *Mutual Film* decision, said that the word "moral" in the Ohio licensing law there under attack, was not too indefinite, or of too variant meaning, for use as a standard, and there seems to be no decision the other way. The trouble is not that the word "immoral" is too indefinite, but that it has been robbed of meaning by those who deny that there is any such thing as a changeless code of morals. Of course, this is not the time or place to hold that particular debate. Two court decisions, with eighty-five years between them, will serve present purposes to show that there is such a changeless code. In 1867, the Court of Appeals of New York declared that, "Sound morals, as taught by the wise men of antiquity, as confirmed by the precepts of the gospel . . . are unchangeable." [23] In 1952 the Supreme Court wrote that, "We are a religious people whose institutions presuppose a Supreme Being." [24] The second of these quotations gives the reason why we adhere to the first, and why "immoral" is an acceptable standard.

The censorship we are talking about here is quite different from, and must be carefully distinguished from, that attempt-

21 Davis v. Beason, 133 U.S. 333, 341-3 (1890); Murphy v. Ramsey, 114 U.S. 14, 45 (1885); Wightman v. Wightman, 4 Johns. Ch. 343, 349-50 (N.Y. 1820).

22 United States v. One Obscene Book Entitled "Married Love," 48 F.(2d) 821, 823 (S.D. N.Y. 1931); Block v. Chicago, 239 Ill. 251, 264, 87 N.E. 1011, 1015-16 (1909); People v. Dever, 242 Ill. App. 1, 4 (1926); Schuman v. Pickert, 277 Mich. 225, 229, 269 N.W. 152, 154 (1936).

23 Lyon v. Mitchell, 36 N.Y. 235, 238 (1867).

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

ed, as to newspapers and other periodicals, in Minnesota; and condemned by the Supreme Court in the case of *Near v. Minnesota.*[25] That Minnesota enactment dubbed as a "nuisance" the circulation of an obscene or defamatory newspaper, and authorized the Minnesota courts to "abate" such "nuisances." In the *Near* case, that statute and theory, resulted in a judgment forbidding the further publication or distribution of *The Saturday Press,* the offending paper. In other words, the defaming of public officials resulted in putting the newspaper out of business. This was censorship with a vengeance and exactly the kind of suppression of criticism that the First Amendment was, in historical fact, directed against.[26] As Chief Justice Hughes remarked, it was a revival after a century and a half "of attempts to impose previous restraints upon publications relating to the malfeasance of public officers. . . ." [27]

The difference between that kind of restraint and suppression, and the state motion picture censorship laws now in effect, are numerous and obvious. Motion pictures (always excepting newsreels and "documentary" films) are essentially fictional in content, not normally used for criticizing or exposing public men or their acts or omissions. Next, and more important as a distinction, movie censorship laws, unlike the Minnesota statute in the *Near* case, do not put a producer out of business, or put his future productions on an *Index Expurgatorius*. Films are inspected, and licensed or denied licenses, one by one (actually, outright denials are few, deletions much more common). The state does not deal out the awful penalty of total outlawry of the business itself — it deals with one offending film at a time. Finally, the film censorship statutes do not, as did the extraordinary Minnesota law, deny licenses because of "defamation" of public officials, but because their

25 283 U.S. 697 (1931).

26 *Id.* at 713-19 (1931). See note 14 *supra* and accompanying text.

27 *Id.* at 718.

obscenity or immorality is such that they will do harm to susceptible individuals, under ancient common law obscenity concepts.

It all comes down to questions of public order and decency, and of the power of democratic governments to protect order and decency from the harm done by greedy men. The industry's own use of a "Code" testifies to the need for such activity. Granted that such a power must be somewhere, equally with the power to prevent the sale of poisonous food or harmful drugs, we come to a question of method — of finding an efficient way of producing the proper and necessary result without infringement of basic rights, that is, censorship on principle, not whim. If censorship can be so carried on, there would seem to be no reason for wiping it out, especially on specious notions that all prior restraints are necessarily unconstitutional. Even in *Kunz v. New York* [28] (cited in the Supreme Court's *Burstyn* opinion) where New York City police officials were denied the right to suppress future public appearances of a street preacher who had insulted certain religions in his earlier sermons, the Supreme Court at least intimated that the license could legally have been refused, had the City ordinance expressed definite standards.

Censorship is unpopular, and understandably so. The right of free expression is a cherished one, high up in American public esteem. The use of any kind of police power to bar entrance to the arena of free discussion is not the preferred way to stop abuses. It can lead to thought control and destruction of basic freedoms. But, sadly, there are and always will be abuses and abusers in our imperfect world. In a perfect world of perfect men there would be no commercialized obscenity nor pornography nor indecency, any more than there would be adulterated food, or illicit sales of drugs. Free-

[28] 340 U.S. 290, 294-5 (1951). See also concurring opinion of Frankfurter in Niemotko v. Maryland, 340 U.S. 268, 285 (1951).

dom of expression has duties as well as rights, and when those duties are violated, in a real and substantial way so as to outrage the basic moral code, government has, I think, the constitutional as well as the moral right to stop the evil at its source, and need not wait and punish after the harm has been done.

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