

FILM CENSORSHIP UPHELD

Kingsley Inter. Pic. Corp. v. Regents of Univ. of N.Y.,
4 N.Y.2d 349, 151 N.E.2d 197 (1958), *prob. juris. noted*,
358 U.S. 897 (1958)

The Board of Regents of the state of New York denied a license for the showing of the film "Lady Chatterley's Lover,"¹ finding that the film portrayed acts of sexual immorality as accepted behavior.² While the Appellate Division ordered the license issued,³ the New York Court of Appeals reversed, asserting that the licensing of films under a standard of sexual immorality is a legitimate state function, and that immorality can properly be equated with obscenity in order to justify the use of a prior restraint.⁴ The previous affirmance by this court of a license denial by the Board of Regents, under a somewhat different licensing standard,⁵ and its subsequent per curiam reversal by the Supreme Court,⁶ led to the amendment of the licensing statute and the form of the standard here challenged. The expansion of the scope of obscenity by the instant court to include restraint of films on the basis of a standard of "sexual immorality" and the implementation of this restraint by administrative review before general exhibition, are the issues herein considered.⁷

Although recent reversals by the Supreme Court⁸ broadly attest to

¹ At the urging of the impotent Lord Chatterley, Lady Chatterley takes a lover to provide his Lordship with offspring. As depicted by the instant case "the dominant theme of the film is the exaltation of illicit sexual love in derogation of the restraint of marriage." *Kingsley Inter. Pic. Corp. v. Regents of Univ. of N.Y.*, 4 N.Y.2d 349, 354, 151 N.E.2d 197, 199 (1958).

² The statute defines 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, accepted or proper patterns of behavior." N.Y. EDUC. LAW § 122a.

³ 4 App. Div. 2d 348, 165 N.Y.S.2d 681 (App. Div. 1957).

⁴ 4 N.Y.2d 349, 151 N.E.2d 197 (1958), *prob. juris. noted*, 358 U.S. 897 (1958).

⁵ The statute then required the refusal of a license if the film was "obscene, indecent, immoral, inhuman, sacrilegious, or [was] of such character that its exhibition would tend to corrupt morals or incite crime." N.Y. EDUC. LAW § 122.

⁶ *Commercial Pictures Corp. v. Regents of Univ. of N.Y.*, 305 N.Y. 336, 113 N.E.2d 502 (1953), *rev'd per curiam*, 346 U.S. 587 (1954).

⁷ Although the question of "definiteness" is not reached where a lack of a legitimate state interest appears, *Butler v. Michigan*, 352 U.S. 380 (1957), the New York court dismisses any criticism of vagueness by stating, "No one will deny that the Regents of New York State, just as the members of this court, know what an act of sexual immorality is . . ." 4 N.Y.2d at 351. But the constitutional inquiry at this point is whether the standard of "sexual immorality" conveys a sufficiently definite meaning to potential violators, since "immorality" alone, as a standard, fails to meet the test. *Holmby Prod., Inc. v. Vaughn*, 350 U.S. 870 (1955).

⁸ *Times Film Corp. v. City of Chicago*, 139 F. Supp. 837 (N.D. Ill. 1956),

the invalidity of "immorality" as a licensing standard, the particular theory of any one reversal is at best uncertain. The reversal in each decision may generally be accorded to any one of four infirmities: lack of a legitimate state interest, invalid as a prior restraint, lack of obscenity, or the vice of vagueness. The inferential weight of the Supreme Court's citation of *Superior Films v. Dep't of Educ. of Ohio*⁹ in their per curiam reversal of *Holmby Prod., Inc. v. Vaughn*,¹⁰ cannot, however, be so easily dismissed. The *Holmby* case involved a license denial under a finding that the picture was "immoral and obscene;" but the licensing board in the *Superior Films* case denied exhibition of an allegedly harmful "crime picture;" thus no issue of obscenity was involved. Censorship of motion pictures under a standard of obscenity not being patently invalid, the *Holmby* reversal appears to point specifically toward the invalidity of film licensing where *immorality* is the standard employed.

Decisions relied on by the New York court to sustain a state interest in public morals sufficient to justify film censorship under a standard of sexual immorality,¹¹ while containing dicta to that effect, are properly classified as "time, place and manner" decisions,¹² and as such, clearly distinguishable. These cases justify the restraint imposed because of the nature of the speech in effecting acts injurious to the public health and safety, another distinct state interest. While the permissible restraint of obscenity stems from defect in the speech itself—the lack of ideas of "socially redeeming importance"¹³—the suppression of sexually immoral views impinges upon that vital area where moral ideas compete for social

244 F.2d 432 (7th Cir. 1957) (license denial finding film "not decent and immorality featured" upheld), *rev'd per curiam*, 355 U.S. 372 (1957) (inferentially, film not obscene); *Superior Films v. Dep't of Educ. of Ohio*, 159 Ohio St. 315, 112 N.E.2d 311 (1953) (license denial finding film "harmful" upheld), *rev'd per curiam*, 346 U.S. 587 (1954); *Commercial Pictures Corp. v. Regents of Univ. of N.Y.*, *supra* note 7, (license denial finding film "immoral and tending to corrupt morals" upheld), *rev'd per curiam*, 346 U.S. 587 (1954); *Gelling v. Texas*, 157 Tex. Crim. 516, 247 S.W.2d 95 (1950) (license denial finding film "not decent and immorality featured" upheld), *rev'd per curiam*, 343 U.S. 960 (1952).

⁹ 346 U.S. 587 (1954).

¹⁰ 177 Kan. 728, 282 P.2d 412 (1955), *rev'd*, 350 U.S. 870 (1955).

¹¹ *Kovacs v. Cooper*, 336 U.S. 77 (1949) (power to prohibit things bringing harm to its people); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941) (state interest in social order and morality); *Near v. Minnesota*, 283 U.S. 697 (1930) (power to enforce primary requirements of decency).

¹² *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). A state statute requiring a license for a parade was sustained against the attack of vagueness because the discretion of the administrator was limited to considerations of "time, place, and manner."

¹³ *Roth v. U.S.*, 354 U.S. 476, 484 (1957). Concerning the criticism that obscenity restraint also requires justification by establishing the probability of an injurious overt act, see Note, 18 OHIO ST. L.J. 137 (1957). This note will not discuss the propriety of Justice Harlan's statement in *Roth* (concurring in part and dissenting in part): "[T]he court seems to assume that obscenity is a peculiar

approval. Where films are denied exhibition because of an immoral content, expressions of morality are regimented in accordance with the moral posture assumed by the state; the very nature of the process necessarily suppresses minority opinions adverse to the view of the state. Although there were other issues upon which the reversal might reasonably have been based, the decision of the Supreme Court in *Burstyn v. Wilson* did deny, in one branch of the opinion, that the protection of religious groups from the effect of sacrilegious films was a legitimate state interest. This branch of the opinion, grounded as it was upon the tendency of the process to suppress the expression of minority views,¹⁴ is sufficiently analogous to justify denial of a similar interest here.

Assuming the propriety of sexual immorality as a standard, its implementation in the form of a prior restraint is questionable. The statement of Justice Clark in *Burstyn*, "It is not necessary for us to decide . . . whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films,"¹⁵ is accorded considerable weight by the majority here, but its validity, if ever established, is even more questionable today.¹⁶ What the Supreme Court has done since then is more significant than what it has said; the High Court has yet to sanction a single instance of administrative censorship.¹⁷ The *Roth* opinion, while recognized as having established the "prurient interest" test,¹⁸ also lends tacit approval to the determination of the fact of obscenity by an adjudicative process wherein the jury applies the test. Although this implication of *Roth* is decidedly limited by the decision in *Kingsley Books v. Brown*,¹⁹ where the majority sanctioned a process combining an interim injunction with a judge-determination of obscenity,²⁰ a vital distinction affecting the degree of free speech invasion still exists between the practical operation of an adjudicative process on one hand and administrative censorship on the other.

genus of speech and press, which is as distinct, recognizable and classifiable as poison ivy. . . ." 354 U.S. at 497.

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

¹⁵ *Id.* at 498.

¹⁶ Following the U.S. Supreme Court's per curiam reversal of *Superior Films v. Dep't of Educ. of Ohio*, *supra* note 8, the Supreme Court of Ohio in *R.K.O. Radio Pictures Corp. v. Dep't of Educ. of Ohio*, 162 Ohio St. 263, 122 N.E.2d 769 (1954), unable to secure the required majority to declare an act unconstitutional, simply considered any licensing act of the Department to be "unreasonable."

¹⁷ Cases cited note 8 *supra*.

¹⁸ "[A] thing is obscene if, considered as a whole, its predominant appeal is to prurient interest. . . ." 354 U.S. 476, 487 n.20 (1957).

¹⁹ 354 U.S. 436 (1957) (four dissents, probably highwater mark of permissible prior restraint).

²⁰ In the opinion of at least one member of the Supreme Court, the jury, by representing a cross-section of the community, becomes especially competent to apply the test for obscenity, and determination by any other method is rever-

Where the right to show films depends upon a censor's review of the film before exhibition, the administrative intensity, as compared with the less frequent and less encompassing action of a local prosecutor, results in a greater degree of substantial interference with free exhibition. While the prosecutor's actions are inclined to be selective, depending upon the nature of the violation and the availability of evidence, the censor's job is to censor; each and every film must be viewed. This review before exhibition prevents access to community standards. Under a system of subsequent punishment a particular film may gain such community approval that an indictment would be dismissed or a verdict reached favorable to the defendant. Since a license denial represents in our more populous states a substantial loss in pecuniary gain, each denial or compulsory deletion tends to suppress the subsequent production and distribution of films bordering on the substance of previously excluded films. In contrast, a local exhibitor, in borderline cases, may be willing to run the risk of subsequent prosecution if a jury trial is accorded.

The right to a judicial determination of the propriety of the film tends to insulate the trier of fact from the initiator of the action, thus minimizing the effect of crusading pressure groups. In comparison, film censorship thus far indicates a tendency to be particularly accessible.²¹ First amendment rights are further imperiled by the creation in some cases of an appellate tribunal within the censorship machinery, thus insulating administrative discretion from review under constitutional standards. Once in the state courts, the traditional lack of deference to state administrative agencies appears to have been replaced by a requirement that the appellant sustain the burden of showing an abuse of administrative discretion.²²

At present a statute aimed at the restraint of obscene films satisfies the minimum constitutional requirements by incorporation of the following; restraint in point of time after exhibition to the general public, application of the prurient interest test to determine the existence of obscenity, and a judicial determination of the fact of obscenity. Broad statutes, similar to the one upheld in the instant case, encroach on the free exchange of ideas and should not be permitted. Prior restraint in the form of compulsory review of films before exhibition must likewise fail if tested by the standard of the *Kingsley Books* case—a pragmatic assessment of the substance of free speech suppressed by the operation of the statute in particular circumstances.²³

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sible. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 448 (1957) (concurring opinion, Brennan, J.).

²¹ For examples of the influence of pressure groups on the censoring function see Note, 68 HARV. L. REV. 493 (1955).

²² See Note, 60 YALE L.J. 696, 698, n.6 (1951).

²³ 354 U.S. at 442.