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Constitutional Law - Motion Picture Censorship - Artistic Merit of Film as Whole Not Sufficient to Redeem Obscene Parts

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counsel, has little sporting chance pitted against the knowledgeable and practiced prosecuting attorney. In Norway, it has been the practice for the past seventy years to allow every accused a defense counsel of his choice at government expense in addition to providing the investigative power of the police department to summon witnesses and gather evidence.[39] The due process and equal protection clauses are fluid and change with the times and public opinion. Perhaps it will not be long before the three hindrances mentioned above will have been totally eliminated.[40]

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CONSTITUTIONAL LAW—MOTION PICTURE CENSORSHIP—ARTISTIC MERIT OF FILM AS WHOLE NOT SUFFICIENT TO REDEEM OBSCENE PARTS.

Trans-Lux Distrib. Corp. v. Regents (N.Y. 1964)

The Board of Regents of the State of New York directed the elimination of two scenes from a foreign film[1] as a condition for granting a license to exhibit the picture. The scenes in question portrayed sexual relations, the second being especially offensive because it showed bodily movements and the woman's face registered "emotions concededly indicative of orgasm."[2] Both were declared obscene under the state censorship statute.[3] After the Board of Regents' determination was reversed by the Appellate Division, it was reinstated by the Court of Appeals. The Court of Appeals distinguished the case from the earlier motion picture cases which were successfully appealed to the United States Supreme Court,[4] declaring that the portrayal of sexual intercourse is conduct rather than speech and that therefore it is not protected by the free speech provisions of the first and fourteenth amendments. *Trans-Lux Distrib. Corp. v. Regents*, 14 N.Y.2d 88, 248 N.Y.S.2d 857 (1964).

39. STANG, RETTERGANGSMAATEN I STROFFESAKER, 186–196 (1956).
40. United States v. Johnson, 238 F.2d 565 (2d Cir. 1956).
For a man is free only if, among other things, 'he is not liable to be . . . imprisoned without redress under an equal and impartial law. . . . Freedom is not something which has to be safeguarded, but rather something to be extended.' Freedom confined to the status quo cannot grow; and freedom which does not grow tends to wither. Danger to democratic freedom lurks in the sentiment 'Come weal, come woe, my status is quo.' *Id.* at 574.

1. The film was a Swedish production entitled *A Stranger Knocks.*
2. Trans-Lux Distrib. Corp. v. Regents, 14 N.Y.2d 88, 90, 248 N.Y.S.2d 857, 858 (1964).
3. N.Y. Educ. Law § 122.
4. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362 (1959); Commercial Pictures Corp. v. Regents, 346 U.S. 587, 74 S.Ct. 286 (1954); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777 (1952).

Freedom of speech and of the press are rights guaranteed by the first amendment and protected against state infringement by the fourteenth amendment.[5] However, these rights are not absolute.[6] Examples of unprotected speech are criminal libel, fighting words[7] and obscenity.[8] The instant case deals with obscenity, the basic and persisting problem in the area being simply — what is obscenity. The struggle for a constitutional definition of literary obscenity culminated in *Roth v. United States*.[9] In that decision the Supreme Court defined a work as obscene if it were "utterly without redeeming social importance,"[10] and if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal[ed] to prurient interest."[11] Prior to the *Roth* case there was much confusion as to what the test should be. Many courts, proceeding from the English case of *Regina v. Hicklin*,[12] found obscenity even if an isolated passage had a prurient effect upon the most susceptible of persons. When courts were faced with the question of obscenity, there was no necessity for meeting the clear and present danger test of *Schenck*. Obscenity does not fall within the ambit of free speech at all; the *Roth* opinion informs us that since an obscene work has no redeeming social value, its mere propensity to produce lustful thoughts without any resulting action is enough to exclude such speech from constitutional protection.

Shifting into the area of motion picture censorship, the Court has in the past dealt with the problem in various ways; unfortunately, however, it has struck down the censorship schemes[13] in every case[14] but one,[15] never arriving at a test for filmed obscenity.[16] The basic problem is whether

5. Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925).

6. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919), wherein the Court first used the clear and present danger exception to what otherwise would have been constitutionally protected speech.

7. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

8. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957).

9. *Ibid.*

10. *Id.* at 484, 77 S.Ct. at 1309.

11. *Id.* at 489, 77 S.Ct. at 1311.

12. L.R. 3 Q.B. 360 (1868).

> [W]hether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall.

13. Such schemes were invalidated following the court's decision in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777 (1952). Prior to that case motion pictures were excluded from free speech protection by authority of Mutual Films Co. v. Indus. Comm'r. of Ohio, 236 U.S. 230, 35 S.Ct. 387 (1915), which was overruled by *Burstyn*.

14. See Times Film Corp. v. Chicago, 355 U.S. 35, 78 S.Ct. 115 (1957); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870, 76 S.Ct. 117 (1955); Superior Films v. Dept. of Ed. of Ohio, 346 U.S. 587, 74 S.Ct. 286 (1954); Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002 (1952).

15. Times Film Corp. v. Chicago, 365 U.S. 43, 81 S.Ct. 391 (1961).

16. The Court has not always dealt with the problem of obscenity. *Burstyn*, one of the landmark cases which restricted the extent of movie censorship, also dealt with the New York statute, but struck down censorship on the basis of sacrilege rather than obscenity. It is interesting to note that the Court did not preclude censorship completely in this case or any other case:

> To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem.

the *Roth* standard for literature should be extended to motion pictures or whether a different test is necessary because of their diverse natures. Several cases have employed a *Roth*-like test including *Amer. Civ. Lib. Union v. Chicago*,[17] which was decided before the *Roth* decision; *Excelsior Pictures Corp. v. Chicago*,[18] and *Columbia Pictures Corp. v. Chicago*,[19] which came after *Roth*. The first case was based on the similarity between films and books while the graphic differences of the two were ignored; the latter two depend on the first.[20] Thus these cases probably will not have a conclusive effect on the Court when it finally does decide the issue. Even in the famous *Times Film Corp. v. Chicago*[21] case the Court gave no indication of what standard will be used for films. *Times* merely held that a Chicago ordinance, requiring submission of films for examination by city officials as prerequisite to the granting of an exhibition license was not void on its face as a prior restraint. The case was significant in its own right since it held that the need for prior approval is not an unconstitutional prior restraint.[22] Even if licensing is of questionable constitutionality, however, that does not answer the obscenity standard question. For although *Trans-Lux* deals with such a licensing scheme, the problem would still exist in the case of restrictions which occurred after general release.

Motion pictures are of such a different nature from books that it is submitted that the *Roth* test should not be extended to films. Even the *Burstyn* case states that ". . . it [does not] follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems."[23] The test outlined in the instant case should be accepted by the Supreme Court. In an incisive opinion it shows why a film need not have a dominant theme of obscenity in order to be obscene. The opinion stresses the fact that motion pictures can be characterized as conduct rather

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It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 72 S.Ct. 777, 781 (1952).

The problem as always is that the Court is reluctant to give more than broad hints as to what the line of constitutionality will be. There are of course the persistent challenges of Justices Black and Douglas to any censorship at all. They argue for absolute freedom in this area. See Superior Films v. Dept. of Educ. of Ohio, 346 U.S. 587, 74 S.Ct. 286 (1954), concurring opinion.

17. 3 Ill. 2d 334, 121 N.E.2d 585 (1954), *dismissed in Supreme Court for want of final judgment below*, 348 U.S. 979, 75 S.Ct. 572 (1955).

18. 182 F. Supp. 400 (N.D. Ill. 1960).

19. 184 F. Supp. 817 (N.D. Ill. 1959).

20. They are distinguishable from the instant case. One deals with nudism and the other merely with the use of the words "rape" and "contraceptive."

21. 365 U.S. 43, 81 S.Ct. 391 (1961).

22. This is attested to by the serious tenor of Chief Justice Warren's dissent in which he charged that licensing and censorship before exhibition are not among the very exceptional restrictions on free speech which are allowable, *e.g.*, criminal libel and fighting words. See Near v. Minnesota, 283 U.S. 697, 716, 51 S.Ct. 625, 631 (1931), ". . . the protection even as to previous restraints [is] not absolutely unlimited. But the limitation has been recognized only in exceptional cases." See also 6 VILL. L. REV. 567 (1961); 33 ROCKY MT. L. REV. 421 (1961); 1961 WIS. L. REV. 659.

23. 343 U.S. 495, 503, 72 S.Ct. 777, 781 (1952).

than speech. The opinion extends the reasoning of *Kingsley Internat. Pictures Corp. v. Regents*[24] by stressing the manner of portrayal rather than the communication of ideas. Actual conduct and filmed portrayal are not identical and a

> . . . meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done if shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.[25]

This statement highlights the central problem; it brings force to the subsequent conclusion that the free speech protection does not include filmed obscenity. A filmed simulation of intercourse, for example, cannot realistically be called speech; it is more analogous to conduct, and therefore need not meet the requirements of *Roth*.[26] Hence one or two or more particular scenes may be deleted by the censor even if the picture as a whole could not be considered obscene.

The effect of a sensational scene upon a motion picture audience can not be overemphasized. A few sensational descriptions in a book which otherwise has artistic value will generally not have nearly as wide or as strong an effect on the reading public. Pointedly put, an artistic work of literature will generally have a smaller and a more mature audience than a movie.

An argument is also made that movies should be treated differently on the basis of a "clear and present danger." The graphic sensationalism of filmed obscenity could well be very effective in stimulating unlawful sexual behavior, which effect could provide the state with a lawful excuse for censorship.

There have been alternative suggestions to deletion by censorship such as restricting admission to objectionable movies to adults. The answer to the problem may eventually be found in such an alternative; however,

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24. 360 U.S. 684, 702, 79 S.Ct. 1362, 1372 (1959). That part of the New York statute which provided that a movie may be denied a license on the ground that it portrays certain acts of sexual immorality as acceptable or as a proper pattern of behavior was declared unconstitutional as a violation of the first and fourteenth amendments, because such was a restraint on the advocacy of ideas and that advocacy cannot be restricted unless there is, for example, clear and present danger of incitement to legally proscribed conduct.

25. Trans-Lux Distrib. Corp. v. Regents, 14 N.Y.2d 88, 93, 248 N.Y.S.2d 857, 861 (1964).

26. *Id.* at 96, 248 N.Y.S.2d at 863.