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Motion Picture Censorship The Memphis Blues

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MOTION PICTURE CENSORSHIP— THE MEMPHIS BLUES

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Motion picture censorship, constitutionally sustained[1] in its emergence as a panacea for economic exploitation of a deteriorating moral code, is currently being tested in the constitutional arena[2] in the area of group discrimination.[3]

Motion picture censorship started with sex[4] and was nurtured on scandal,[5] although it has expanded on racial[6] and political[7] grounds.

In the wake of the current Civil Rights trend, censorship may be interred along with the restrictive covenant,[8] for the motion picture in-

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* See Masthead, page 301, Contributors' Section, for biographical data.

1 Mutual Film Corp. v. Industrial Commission, 236 U. S. 230 (1915); Mutual Film Co. v. Industrial Commission, 236 U. S. 247 (1915); Mutual Film Corp. v. Hodges, 236 U. S. 248 (1915). See generally on censorship *Selected Materials on Censorship and Obscenity,* 3 N. Y. C. BAR ASS'N REC. 410 (1948).

2 Pryor, *Censorship Issues,* N. Y. Times, Feb. 5, 1950, § 2, p. 5, col. 7. The two current cases in this field, discussed *infra,* are RD-DR Corp. v. Smith, 183 F. 2d 562 (5th Cir. 1950), *cert. denied,* 71 Sup. Ct. 80 (1950), and United Artists Corp. v. Board of Censors, 225 S. W. 2d 550 (Tenn. 1949), *cert. denied,* 339 U. S. 952 (1950).

While the Supreme Court has refused to consider the problems raised in these cases, they are far from academic now and still present serious questions in the field of free speech. Now pending before the Texas Court of Criminal Appeals is the case of W. L. Gelling, fined for showing the motion picture "Pinky." See text *infra* p. 286.

3 For a recent general discussion on civil rights of minority groups see Berger, *The Supreme Court and Group Discrimination Since 1937,* 49 COL. L. REV. 201 (1949).

4 INGLIS, FREEDOM OF THE MOVIES 62-72 (1947). (A Report on Self-Regulation from the Commission on Freedom of the Press.) *See* United States v. Alpers, 338 U. S. 680, 684 (1950).

5 THE MOTION PICTURE INDUSTRY—A PATTERN OF CONTROL 65 (TNEC Monograph 43, 1941).

6 *E.g.,* Bainbridge v. City of Minneapolis, 131 Minn. 195, 154 N. W. 964 (1915). (Mayor would not abuse his discretion in revoking a theatre license if film "Birth of a Nation" were shown.) *Contra:* Epoch Producing Corp. v. Davis, 19 Ohio N. P. (N.S.) 465 (Common Pleas 1917). See CHAFEE, FREE SPEECH IN THE UNITED STATES 172 n. 52 (1941). Note, *Censorship of Motion Pictures,* 49 YALE L. J. 87 n. 88 (1939). The film "Birth of a Nation," which was released in 1914, was responsible for a number of municipal ordinances interdicting derision of minorities. The film was allegedly violently anti-Negro. Tex McCrary and Jinx Falkenburg, *New York Close-Up,* N. Y. Herald-Tribune, Dec. 19, 1949, p. 19, col. 1 (interview with first projectionist of this motion picture).

7 Schuman v. Pickert, 277 Mich. 225, 269 N. W. 152 (1936) (Russian film ban reversed); Thayer Amusement Co. v. Moulton, 63 R. I. 182, 7 A. 2d 682 (1939) (anti-Nazi Russian film ban upheld). See discussion, *infra* p. 296.

8 Shelley v. Kraemer, 334 U. S. 1 (1948); Hurd v. Hodge, 334 U. S. 24 (1948). Reppy, *Civil Rights,* Part VII, 123 N. Y. L. J. 322 (1950).

dustry has plunged heavily and profitably[9] into anti-racism films and thereby become enmeshed in censorship restrictions.

The United States Supreme Court sustained motion picture censorship in *Mutual Film Corp. v. Industrial Commission*[10] in 1915 where an Ohio statute providing for a board of censors for motion pictures was held to be constitutional. The last decade has seen increasing attacks on the desirability as well as the rationale of the decision.[11]

The Supreme Court in an anti-trust suit brought by the United States against the major motion picture companies, has recently stated:

> We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.[12]

The purpose of this article is to examine the bases of the *Mutual Film* decision in the light of subsequent law and of fuller appreciation of the role of the motion picture and the censor in the community, and to determine how the issue may again be raised in order to give due weight to the intellectual menopause.[13]

THE "CURLEY" CASE

The defenders of censorship when driven to the wall in any logical argument reduce the matter to the childish level—*puerili modo scribere* —the apologia of protecting our young[14] by pasteurizing passion and

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9 An amusement industry trade paper had the headline "$20,000,000 Boxoffice Payoff for H'wood Negro Tolerance Pix." Variety, Nov. 30, 1949, p. 1, col. 5.

10 236 U. S. 230 (1915). Decided the same day was Mutual Film Corp. v. Hodges, 236 U. S. 248 (1915), in which a similar Kansas statute was upheld.

11 CHAFEE, FREE SPEECH IN THE UNITED STATES 540-8 n. 6 (1941); CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 235-241 (1947); ERNST, THE FIRST FREEDOM, 182, 268 (1946); Kadin, *Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting,* 19 B. U. L. REV. 533, 548-61 (1939); Note, *Censorship of Motion Pictures,* 49 YALE L. J. 87, 97 (1939); Note, *Film Censorship: An Administrative Analysis,* 39 COL. L. REV. 1383 (1939).

12 United States v. Paramount Pictures, Inc. 334 U. S. 131, 166 (1948) (opinion by Douglas, J.). This statement was made as a part of the answer of the Court to the contention that the alleged monopoly of the defendants in the motion picture field raised a problem under the first amendment. However, the Court was satisfied that the main issue was as to which exhibitors would get the profitable first-run business and that there was no problem as to restraints on "*what* the public will see or *if* the public will be permitted to see certain features" (*Id.* at 167), which latter is the censorship problem.

13 See Note, *Constitutionality, Construction, and Effect of Censorship Laws,* 64 A. L. R. 505 (1929) where it is stated " . . . it has been practically uniformly held, and it may now be said to be beyond question, that such [censorship] statutes and ordinances are constitutional." The current viewpoint, although without a holding to that effect, is strongly to the contrary; see note 11 *supra.*

14 CHAFEE, FREE SPEECH IN THE UNITED STATES, 543 (1941). The State's authority over

denicotinizing crime on the screen. It is appropriate, therefore, to use, as a reference point in our discussion, the feature[15] talking motion picture "Curley" produced by Hal Roach Studies, Inc. and distributed by United Artists Corporation.

The picture is a variation upon the structure and theme of the "Our Gang" comedies. A young and pretty girl is the new school teacher. The pupils expect her to be stern and are apprehensive at the prospect of the new relationship. She gradually wins the affection of the children by her athletic prowess. The picture was approved without a single deletion by the censorship boards of the States of New York,[16] Kansas,[17] Ohio,[18] Maryland,[19] Pennsylvania,[20] and Virginia[21] and of the Cities of Boston[22] and Chicago,[23] among others.[24]

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children's activities is broader than over like action of adults. Prince v. Massachusetts, 321 U. S. 158 (1944) (State may protect child's welfare and deny it freedom to hawk religious tracts at night). *But cf.* West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943). See Mendelson, *Mr. Justice Rutledge's Mark Upon the Bill of Rights,* 50 COL. L. REV. 48, 51 (1950). The French Censorship Commission finds that "the average United States film is not produced for a mentally adult audience." Film Daily, Aug. 30, 1950, p. 3, col. 3.

15 "A feature is any motion picture, regardless of topic, the length of film of which is in excess of 4,000 feet." *See* United States v. Paramount Pictures, Inc., 334 U. S. 131, 149 n. 8 (1948).

16 N. Y. EDUC. LAW §§ 120-132. Newsreels are exempt. *Id.* at § 123(1). For a discussion of its administrative procedure see Note, *Film Censorship: An Administrative Analysis,* 39 COL. L. REV. 1383, 1395-98 (1939).

17 KAN. GEN. STAT. ANN. §§ 51-101 to 51-112, 74-2201 to 74-2209 (1935). See Mutual Film Corp. v. Hodges, 236 U. S. 248 (1915). Newsreels are exempt. *Id.* at § 51-103.

18 OHIO GEN. CODE ANN. §§ 154-47 to 154-47i (Supp. 1949).

19 MD. ANN. CODE GEN. LAWS art. 66A (Cum. Supp. 1947). Legis. *The Legal Aspect of Motion Picture Censorship,* 44 HARV. L. REV. 113, 114-5 (1930). See notes 149 and 153 *infra.*

20 PA. STAT. tit. 4, §§ 41-58 (1930), PA. STAT. tit. 71, § 119 (Supp. 1949), PA. STAT. tit. 71, § 356 1942). See Buffalo Branch, Mutual Film Corp. v. Breitinger, 250 Pa. 225, 95 Atl. 433 (1915); In re Fox Film Corp., 295 Pa. 461, 145 Atl. 514 (1929). Newsreels are exempt. PA. STAT. tit. 4, § 43.

21 VA. CODE ANN. §§ 2-98 to 2-116 (1950). See Lynchburg v. Dominion Theatres, 175 Va. 35, 7 S. E. 2d 157 (1940). The Division of Motion Picture Censorship "may" exempt newsreels. § 2-106.

22 Chapter 494 of Mass. Acts of 1908 as amended by Chapter 348 of the Special Acts of 1915 as amended by Chapter 340 of the Acts of 1936 provides for licensing with a board consisting of Boston's mayor, police commissioner and a member of the Art Commission designated annually by the members of the commission, to suspend or revoke any license after a hearing.

23 Pursuant to ILL. REV. STAT. c. 24, §§ 23-54 and 23-57 (1949), Chicago Municipal Code, Chapter 155-1 to 7 (1939) is in force. The Censor division is in the police department. See Block v. Chicago, 239 Ill. 251, 87 N. E. 1011 (1909) discussed *infra* p. 292. Chicago has the oldest United States movie censorship statute, in effect in 1907. Velie, *You Can't See That Movie,* Collier's, May 6, 1950, p. 11, col. 3.

24 Brief for Plaintiffs in Error, p. 3, United Artists Corp. v. Board of Censors, 225 S. W.

The Memphis censors[25] following a private exhibition notified the distributor as follows:[26]

> The Memphis Board of Censors . . . is unable to approve your "Curley" picture with the little negroes as the south does not permit negroes in white schools nor recognize social equality between the races even in children.[27]
>
> Yours truly,
> /s/ Lloyd T. Binford, Chairman.[28]

2d 550 (Tenn. 1949). In addition to the censorship statutes in the six states mentioned, there are several others to which reference should be made. In Florida, it is unlawful to exhibit a film which has not been passed by the national board of review or the "state censorship board of the State of New York." FLA. STAT. ANN. § 521.01 (1943). This provision is discussed in Notes, 39 COL. L. REV. 1383, 1385 n. 15 and 16 (1939), and 49 YALE L. J. 87, 93 n. 43 (1939). In Louisiana, the functions of the State Board of Censors were transferred to the Department of Education in 1940. LA. GEN. STAT. § 7789.52 (Supp. 1949). Neither the State Board of Censors nor the Department of Education have been active in enforcing the censorship law. LA. GEN. STAT. § 9594.11-17 (1939). There is a specific provision eliminating local censorship power while the state provision is in effect. *Id.* at § 9594.13. Massachusetts has a "Lord's Day" statute permitting local licensing of public entertainment on Sundays provided such entertainment has been approved by the State Commissioner of Public Safety. The effect of this statute is to allow the Commissioner to censor movies for Sunday showing, which in practical terms with reference to positive prints of a motion picture means for all showings. MASS. ANN. LAWS c. 136, § 4 (Supp. 1948). A Connecticut censorship statute, which provided for a license for revenue for motion pictures delivered in the state of Connecticut, with the tax commissioner authorized to revoke the license if any film registered was immoral or offended racial and religious sensibilities, was sustained in Fox Film v. Trumbull, 7 F. 2d 715 (D. C. Conn. 1925) (3 judge court), *appeal dismissed by stipulation sub. nom.* American Feature Film v. Trumbull, 269 U. S. 597 (1925). The statute was thereafter repealed. CONN. PUB. ACTS 1927, c. 318.

The estimates on the number of local censor boards vary. "50" Time, Oct. 31, 1949, p. 76, col. 2; "Over 50" Note, 49 YALE L. J. 87, 97 (1939): "70" Business Week, Dec. 3, 1949, p. 23, col. 3; N. Y. Times, Feb. 5, 1950, § 2, p. 5, col. 7; "79" Note, 39 COL. L. REV. 1383, 1385, n. 17. Some municipal censor boards are quiescent.

The Detroit Police Censor announced that for 1949, out of a film footage of 5,601,000, of which 4,579,000 was English language product, only 39,950 feet were cut as compared to 59,300 feet cut out of 5,076,000 in 1948. The Film Daily, Jan. 10, 1950, p. 1, col. 2.

[25] The City of Memphis has a three man censor board, with broad censorship powers, appointed by the Mayor. City Charter § 406-409a, and Memphis ordinances § 1131-1139, in accordance with Chapter 54 of the Private Acts of 1921. Lloyd T. Binford, Chairman, Mrs. Sid A. Law and Mr. H. H. Honnoll, the Memphis censors are also the censors for the rest of Shelby County outside the City of Memphis. Resolution of the County of Shelby pursuant to Chapter 403 of the Private Acts of 1947. Kahn, *Memphis Censor Board Goes on a Spree,* N. Y. Times, May 4, 1947, § II, p. 5, col. 5. This censorship power includes much more than motion pictures. See Life, June 6, 1949, p. 143, for picture of a male Memphis Censor at a "Gypsy Rose Lee" carnival strip tease.

[26] United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 551-2 (Tenn. 1949).

[27] This is a factual statement of the state law of Tennessee. TENN. CONST., Art. 11, § 12; TENN. CODE ANN. §§ 11395-11397 (Williams, 1934). *But cf.* note 51 *infra.*

[28] The bases stated for his approval or rejection of a film show rare perspicacity. Lost Boundaries "couldn't play in the South. It deals with social equality between whites

The producer and distributor of the motion picture filed a petition for a writ of certiorari to review the action of the Board of Censors on the ground that censorship was an abridgment of freedom of speech in violation of the First and Fourteenth Amendments, and that the action of the Board was arbitrary, capricious and in violation of the due process and equal protection clauses of the Constitutions of Tennessee and the United States.[29]

The trial judge avoided the problem[30] of whether censorship is constitutional *per se* and dismissed the petition on the grounds: (1) the censorship statutes and ordinances apply only to local exhibitions;[31] the petitioners were the producer and distributor and therefore had no standing to challenge the ruling; (2) the letter to them was merely advisory; therefore, no justiciable controversy was presented; (3) that if the Censorship Acts apply to the petitioners, it must be because they are "doing business" in Tennessee; not having qualified to do so, petitioners had no standing to sue; and (4) the action of the Board of Censors was not arbitrary or capricious.

The Supreme Court of Tennessee affirmed primarily on the third ground. Equivocating on whether the ordinance applied to producers and distributors, it was held to do so only if they were "doing business" in Tennessee, which dilemma places them back on the "failure to qualify" horn.

The Tennessee court, by way of dictum, also stated:

> . . . counsel for the appellants have cited many cases in which the courts have dealt with the propositions relating to freedom of speech and of the press. We are in no wise in disagreement with the appellants as to the fundamental principles announced in these decisions, and especially with

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and Negroes in a way that we do not have in the South. We banned it for that reason. On the other hand, 'Home of the Brave' deals with a Negro associating with white soldiers. It's a military picture and that could happen." See The Film Daily, Aug. 23, 1949, p. 7, col. 4. For a biographical sketch of Mr. Binford, see Velie, *You Can't See That Movie*, Collier's, May 6, 1950, pp. 12 and 66.

29 United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 552 (Tenn. 1949). In the Tennessee Constitution, these provisions are in the equivalent "law of the land" clause. TENN. CONST., Art. I, § 8.

30 United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 553 (Tenn. 1949).

31 Memphis ordinance § 1137 provides as follows:

> The board of censors is hereby vested with the authority to require all moving picture operators, and any person, firm or corporation engaged in exhibiting motion pictures of any character within the City of Memphis, to furnish to said Board of Censors, as far in advance of the intended exhibition as possible, a list of pictures or plays intended for public presentation; and said board is authorized to call for a preview of any such pictures, plays or exhibitions, if they so desire.

However, § 1133 empowers the Board "to censor . . . motion pictures . . . in the City of Memphis. . . . " The exercise of this power is not restricted to exhibitors.

the insistence that there is no authority in the law "To use race or color as the sole legal basis for censorship of talking motion pictures."[32]

With this pronouncement in view, the Memphis Censor decided to modify the racial approach,[33] but changed his mind again on the next motion picture which raised the problem.[34]

The producer and the distributor of "Curley" and the Motion Picture Association of America announced they would take the matter to the United States Supreme Court. Eric Johnston, President of the M.P.A.A. stated: " . . . we intend to meet the issue of political censorship head-on in the highest court in the land. We're after a clear-cut decision that will give the screen the full protection and freedom guaranteed by our American Bill of Rights."[35] However, certiorari was denied by the United States Supreme Court.[36]

Avoidance of the Constitutional Issue

The tendency to avoid decision on the constitutional issue, the real heart of the case as exemplified by the Tennessee Court's attitude, is not without respectable authority to substantiate it. The United States Supreme Court has only recently stated:

> The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.[37]

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[32] United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 553 (Tenn. 1949). This is an implied condonation of censorship in general.

[33] "We'll just have to pass these pictures," Mr. Binford said. "Frankly, it is what I was looking for, judging from President Truman's recent actions." "We still would ban 'Lost Boundaries' on the ground that the leading character, a Negro passing as white, was an imposter and a liar," Binford added. "The people of his New Hampshire home town resented him until the minister in the film smoothed it over."
See The Film Daily, Dec. 21, 1949, p. 3, col. 3.

[34] "Imitation of Life," a revival of an old motion picture, was presented for censorship in Memphis. Mr. Binford stated that " 'Imitation of Life' pictures the worst case of racial equality he ever saw." Motion Picture Daily, Jan. 20, 1950, p. 1, col. 4, p. 3, col. 4. He finally approved the picture with changes. Variety, Feb. 8, 1950, p. 19, col. 3. Mr. Binford has not replied to letters from United Artists Corporation inquiring as to the present status of the submission of the motion picture "Curley," and the print of the picture has not been returned. Letter of June 26, 1950 to Motion Picture Association from the St. Louis exchange of United Artists Corporation.

[35] Film Daily, Jan. 18, 1950, p. 6, col. 2.

[36] 339 U. S. 952 (1950).

[37] "It will be time enough for the petitioners to urge denial of a Federal right after the State courts have definitely denied their claims under State law." See Parker v. Los Angeles, 338 U. S. 327, 333 (1949). In this case, the Supreme Court deemed itself precluded from reaching constitutional issues regarding the Los Angeles County "Loyalty Check" program for civil servants, while there was pending in the State Court litigation, which might terminate in a favorable result for petitioner and which might clarify the question of the sanction involved.

And

> . . . our sound general policy is against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds.[38]

This self-abnegation traces back to the "strict necessity" principle on constitutional determinations and the classic seven specific maxims with respect thereto as formulated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*.[39]

In the opinion of the Tennessee Court (although without specific reference thereto) two of these Brandeis bases were used to avoid reaching the constitutional question, his fourth and fifth maxims, i.e., some other adequate state ground upon which to decide the case,[40] and failure of the complaining party to show injury to it by the operation of the statute.[41]

This general hesitancy to meet the problem directly is generally less apparent in civil rights cases,[42] unless the matter arises on the pleadings with a paucity of background information so that the Court might be reluctant to act hastily[43] on issues not yet ripe.[44]

The reason given by the Supreme Court in denying review where an adequate state ground exists is that the Court does not give advisory opinions; if the state ground would be adequate despite any correction on the determination of the federal question, the review would amount to nothing more than an advisory opinion.[45] Of course, a state court cannot discriminate against a federal cause of action.[46] If the non-federal grounds are plainly untenable, unfair, or unsubstantial, the

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[38] District of Columbia v. Little, 339 U. S. 1, 3-4 (1950) citing Rescue Army v. Municipal Court, 331 U. S. 549, 568-75 (1947). The Court in the *Little* case held that a private dwelling owner's refusal to unlock her door for a health department inspector didn't constitute unlawful interference with the officer's duties within the meaning of the District of Columbia regulation, the Court thus avoiding consideration of the question of violation of the Fourth Amendment's search and seizure clause.

[39] 297 U. S. 288, 346 (1936).

[40] *See* Siler v. Louisville & N. R.R. Co., 213 U. S. 175, 191 (1909); Berea College v. Kentucky, 211 U. S. 45, 53 (1908).

[41] *See* Hendrick v. Maryland, 235 U. S. 610, 621 (1915); Tyler v. Judges of Ct. of Registration, 179 U. S. 405, 406-8 (1900).

[42] Note, *Avoidance of Constitutional Issues in Civil Rights Cases*, 48 COL. L. REV. 427, 430 (1948). *But cf.* Sweatt v. Painter, 339 U. S. 629 (1950).

[43] 48 COL. L. REV. 427, 433 (1948).

[44] Parker v. Los Angeles, 338 U. S. 327 (1949). The issue in Memphis, however, would seem to be "ripe" in the constitutional sense.

[45] *See* Herb v. Pitcairn, 324 U. S. 117, 126 (1945).

[46] *Id.* at 123.

Supreme Court will not allow its power to review to be avoided.[47]

On the issue of adequate state ground, Mr. Justice Brandeis cited the case of *Berea College v. Kentucky*,[48] which is the only case which might roughly be classified as dealing with civil rights.[49] There, a state statute made it unlawful for any person or corporation to maintain a non-segregated school. A conviction for violation thereof was sustained in the state courts and appealed to the United States Supreme Court. It was held there that, considering only the direct question involved, i.e., the applicability of the statute to corporations, the statute was valid, as a corporation can be restricted in its activities. Since there was an adequate non-federal ground for the decision, there was no need to consider the federal question, namely, the alleged conflict with the Fourteenth Amendment.

While the *Berea* case has been favorably cited for the avoidance problem recently,[50] it is submitted that its basic holding is no longer good law in view of the recent cases affecting segregation in education and other group discrimination cases.[51] Furthermore, corporations have been held to be included within the protection which the Constitution grants against restrictions on their media of expression.[52]

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47 Davis v. Wechsler, 263 U. S. 22 (1923); *see* Lawrence v. State Tax Commission, 286 U. S. 276, 282 (1932); Ward v. Love County, 253 U. S. 17, 22 (1920); Union Pacific R. Co. v. Public Service Commission, 248 U. S. 67, 69 (1918); Terre Haute v. I. R. Co. of Indiana, 194 U. S. 579, 589 (1904). "Otherwise a state court could foreclose our protection of the Constitutional right aspect of the federal question." See Mr. Justice Frankfurter, concurring in Pennekamp v. Florida, 328 U. S. 331, 368 (1946).

48 211 U. S. 45 (1908).

49 Note, *Avoidance of Constitutional Issues in Civil Rights Cases,* 48 COL. L. REV. 427 n. 26 (1948).

50 *See* Flournoy v. Wiener, 321 U. S. 253, 262 (1944).

51 Sweatt v. Painter, 339 U. S. 629 (1950), *rehearing denied,* 71 Sup. Ct. 13 (1950); McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950). While not re-examining the "separate but equal" doctrine, the Court in these two decisions ruled that segregation for graduate students prevented complete and effective instruction. The Attorney-General in Tennessee thereupon ruled that Negro students could not be denied admittance to Tennessee University "solely on account of color." N. Y. Herald-Tribune, Sept. 28, 1950, p. 8, col. 7. *Cf.* Henderson v. United States, 339 U. S. 816 (1950) (segregation in dining car facilities found unreasonable under Interstate Commerce Act). Note, *Is Racial Segregation Consistent with Equal Protection of the Laws? Plessy v. Ferguson Reexamined,* 49 COL. L. REV. 629 (1949). See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws",* 50 COL. L. REV. 131, 162, 168 (1950) on the lack of historical basis for segregation under the Fourteenth Amendment.

52 Grosjean v. American Press Co., 297 U. S. 233 (1936); *see* United States v. C.I.O., 335 U. S. 106, 155 (1948) (concurring opinion).

ADEQUATE STATE GROUND OR CAMOUFLAGE?

The Memphis Censors argued that their decision was advisory only, because the ordinance required an *exhibitor* to submit the picture, and, in this case,[53] the *distributor* had made the submission. The argument, of course, is related to the standing of the petitioners to sue. While not quite clear in its determination, the Supreme Court of Tennessee seemed to hold that the decision was not merely advisory.

> We think in all fairness to the Board of Censors the appellants should have asked for a final hearing and made a request for a reply as to whether their action was a finality before resorting to legal proceedings. We do not mean to say that this was a prerequisite to their right to institute this suit, but it indicates an indifference to whether it was final or "advisory".[54]

Perhaps the Court was confused as to the meaning of "advisory". On the one hand, "advisory" can imply being without authoritative basis and therefore, a nullity and non-reviewable[54a] (the problem here). On the other hand, "advisory" may mean being not a final order, and therefore non-reviewable.[55]

The method of avoidance is most ingenious, since in practical effect, it is the distributor who handles the censorship clearance, as otherwise each exhibitor in the area in turn would have the problem.[56] However, it is doubtful whether, from the wording thereof, the statute may be interpreted in so narrow a fashion.[57]

(*a*) *Standing to Sue*

The Supreme Court of Tennessee postulated that objections to censorship could not be raised "except by someone who has the right to speak

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[53] The Board of Censors did not deny that it was customary for the Board to pass upon the picture on submission of the distributor and prior to license to the exhibitor. Brief of the Defendants in Error, p. 41, United Artists Corp. v. Board of Censors, 225 S. W. 2d 550 (Tenn. 1949).

[54] *See* United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 554 (Tenn. 1949).

[54a] See Davis, *Administrative Powers,* 63 HARV. L. REV. 193, 198 (1949).

[55] It is a "well-established rule that only *final orders* of administrative agencies will be reviewed by the courts." 42 COL. L. REV. 1197, 1198 (1942).

[56] The Supreme Court in the early test of censorship rejected the argument that it was more convenient for a distributor to handle censorship clearance. Mutual Film Corp. v. Hodges, 236 U. S. 248 (1915).

[57] See note 31 *supra. Cf.* Yick Wo v. Hopkins, 118 U. S. 356, 373-4 (1886) where the Supreme Court said:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

and is denied the privilege of speaking."[58] In other words, a distributor could not question an ordinance which supposedly applies only to an exhibitor.[59] This argument is based on the statement in *Mutual Film Corp. v. Hodges*,[60] although not cited by the Tennessee Court, that the distributor "cannot enlarge the character of the statute, or give to it an operation which it does not have."[61] In that case a distributor attempted to enjoin the enforcement of the Kansas Censorship statute, where the penalties of the statute were directed only against exhibitors.

In cases in which fundamental rights and privileges are involved, the "operation and effect" of the ordinance, not "mere details of procedure"[62] is decisive. This is shown in cases subsequent to the *Hodges* case which are directly in point on this problem.

In *Truax v. Raich*,[63] an employee was granted an injunction restraining an employer and state officials from enforcing a state statute which required the employer, who alone was subject to the penalties of the act, to employ a certain percentage of native-born citizens. In *Pierce v. Society of Sisters*,[64] the Court permitted private schools, not mentioned in the statute, to vindicate the rights of parents who were compelled to send their children to public schools.

To determine that there is lack of standing to sue where the petitioner has definite and direct interest is a metaphysical distinction[65] which should have no place where fundamental rights are involved. At the very least, the petitioners in the "Curley" case, although private litigants, should have standing as representatives of the public interest.[66]

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58 United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 554 (Tenn. 1949).

59 Exhibition is theatre operation, and distribution is sales. See Nizer, *Duty to Bargain in the Motion Picture Industry*, 43 COL. L. REV. 705, 707 (1943). There is no actual sale by a distributor, rather the right to exhibit is licensed by the distributor to the exhibitor under the copyright of the motion picture. *See* United States v. Paramount Pictures, Inc., 334 U. S. 131, 141 (1948).

60 236 U. S. 248 (1915). This case was argued with and decided the same day that Mutual Film Corp. v. Industrial Commission, 236 U. S. 230 (1915) was decided. The additional factor in this case being the question of "standing to attack the statute."

61 236 U. S. 248, 258 (1915).

62 *See* Near v. Minnesota, 283 U. S. 697, 713 (1931).

63 239 U. S. 33 (1915).

64 268 U. S. 510 (1925).

65 Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 COL. L. REV. 759 (1949). In Columbia Broadcasting System v. United States, 316 U. S. 407 (1942) it was held that the fact the regulations were not directed to the appellant did not preclude it inasmuch as appellant was affected thereby. This is discussed in Emerson and Helfeld, *Loyalty Among Government Employees*, 58 YALE L. J. 1, 118-19 (1948).

66 *Cf.* F.C.C. v. Sanders Brothers, 309 U. S. 470 (1940); Scripps-Howard Radio v. F.C.C., 316 U. S. 4 (1942).

It has well been said that

> The principle of a free press covers distribution as well as publication.[67]
>
> Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value.[68]

To deny to the distributor the right to challenge the action of the censor board on the ground that the ordinance is supposedly aimed only at the exhibitor is to ignore the substance and effect of the result,[69] for an order prohibiting the showing of a picture is *quasi in rem* in nature.[70]

(*b*) *Doing Business*

In *James v. United Artists Corp.*,[71] involving the same corporate petitioner which distributed the motion picture "Curley", and whose method of doing business, therefore, is exactly the same as described above, the State of West Virginia endeavored to collect from the company a gross receipts tax levied on those engaging within the state in the business of collecting incomes from property. The company was held not to be doing business within the state within the meaning of the taxing statute;[71a] the United States Supreme Court sustained the determination.

Motion picture distribution for exhibition purposes is interstate commerce.[72] If the petitioners are engaged in interstate commerce, they are exempt[73] under Tennessee law from the requirement of qualification.[74] There is therefore no question of whether Tennessee law imposes an undue burden on interstate commerce.[75] The question rather

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67 Winters v. New York, 333 U. S. 507, 509 (1948); *accord,* Grosjean v. American Press Co., 297 U. S. 233 (1936).

68 Lovell v. Griffin, 303 U. S. 444, 452 (1938); Ex parte Jackson, 96 U. S. 727, 733 (1878). *Cf.* Follett v. Town of McCormick, 321 U. S. 573 (1944); Murdock v. Pennsylvania, 319 U. S. 105 (1943).

69 *See* Oyama v. California, 332 U. S. 633, 636 (1948).

70 *Cf.* United States v. One Book Entitled Ulysses, 72 F. 2d 705 (2d Cir. 1934) (importing a book alleged to be obscene). See note 137 *infra.* The analogy to the book field is an apt one. As Professor Chafee points out, the law in most states on obscene literature is directed against booksellers and the bookseller is not in a financial position to fight censorship. CHAFEE, FREE SPEECH IN THE UNITED STATES 536-7, 538 (1941).

71 305 U. S. 410 (1939). *But cf.* General Trading Co. v. Tax Commission, 322 U. S. 335 (1944).

71a 23 F. Supp. 353 (S. D. W. Va. 1938) (3 judge court). The lower court in the *James* case discussed the business of motion picture distribution in detail.

72 Binderup v. Pathe Exchange, 263 U. S. 291 (1923) (anti-trust case).

73 TENN. CODE ANN. § 4129 (Williams, 1942).

74 *Id.* at § 4128.

75 *Cf.* International Textbook Co. v. Pigg, 217 U. S. 91 (1910).

is whether petitioners' activities actually constitute interstate commerce. The Tennessee Court determined they did not, ignoring the *James* case.[76] The United States Supreme Court rejected the opportunity to examine the question of the Tennessee Court's application of the statute to the facts of this case,[77] and in view of the nature of the general question involved, it might well have determined that this finding on the part of the Tennessee Court was incorrect. Even if it be correct, the result of such a finding might constitute an "undue burden" on the right of free speech.[78] Tennessee should not thus have been allowed to avoid its obligation to furnish a tribunal in which to enforce a federal constitutional right.[79]

LOST BOUNDARIES

The motion picture "Lost Boundaries" was produced by RD-DR Corporation[80] and is being distributed by Film Classics, Inc. It is the story of a Negro physician and his family who "passed" for White. It presents serious ideas on the subject of inter-group relationships.

The Board of Censors of Atlanta, Georgia, while admitting that it

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[76] The Tennessee Court relied, among others in this phase of the case, on Interstate Amusement Co. v. Albert, 239 U. S. 560 (1916), *affirming* 128 Tenn. 417 (1913), where a foreign corporation booked actors into various theatres in Tennessee and elsewhere and where the corporation was denied access to the State Court in a suit on a contract arising from these booking transactions on the ground of doing business without having qualified. A possible distinction is that the contract sued on there was entered into in Tennessee and the plaintiff foreign corporation was the agent of the resident Tennessee defendant. The Tennessee Court in the "Curley" case recognized that whether interstate commerce was involved is a federal question. United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 554 (Tenn. 1949).

The Supreme Court in the *Interstate* case found adequate support in the record for the finding that business was being done in Tennessee. It recognized, however, that such findings by the state court unsupported by evidence would not be binding if a Federal right were denied as a result. The quantum of doing business within the state in the "Curley" case is the sending by the distributor of the film into the state for censorship and exhibitor showings and the fact that the distributor might share, by contract, in a percentage of the exhibitor's receipts. United Artists Corp. v. Board of Censors, 225 S. W. 2d 550, 554-55 (Tenn. 1949).

[77] Dahnke-Walker Co. v. Bondurant, 257 U. S. 282 (1921); Truax v. Corrigan, 257 U. S. 312 (1921).

[78] *Cf.* Murdock v. Pennsylvania, 319 U. S. 105 (1943); Jones v. Opelika, 319 U. S. 103 (1943).

[79] *Cf.* Testa v. Katt, 330 U. S. 386 (1947); McKnett v. St. Louis and San Francisco Railway, 292 U. S. 230 (1934). *But cf.* Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373 (1903). See note 47 *supra*. As is stated in a Comment, *Foreign Corporations-State Boundaries for National Business*, 59 YALE L. J. 737, 746 (1950).

> The State's interest in registration lies in the receipt of taxes and the protection of its citizens against irresponsible acts. To deny a noncomplying firm the right to enforce its claims does not satisfy either of these interests. . . .

[80] Reader's Digest and Louis De Rochemont. Business Week, Dec. 3, 1949, p. 23, col. 3.

was not obscene or licentious, banned the picture on the ground that "the exhibition of said picture will adversely affect the peace, morals and good order" in said city.[81] It was their contention that a showing of the picture would create dissention and strife between the White and Colored races. The producer and distributor brought an action in the Federal Court to enjoin the enforcement of the city censorship ordidance.[82]

"Lost Boundaries" had played Jackson, Mississippi and Birmingham, Alabama; "Pinky", another Negro-problem film, has been shown in Atlanta with no noticeable effect on the city's peace, morals or good order.[83]

The District Court, without considering any of the other problems in the case, and recognizing that the question of the constitutionality of censorship under the *Mutual Film* case "appears to need reexamination", in dismissing the complaint and upholding the ordinance stated:

> Furthermore thirty-five years of progress and development have resulted in the re-admeasurement against constitutional guaranties of many regulatory statutes, particularly those which impose any sort of "gag rule" and their consequent interment in the attic which contains the ghosts of those, who arrayed in the robe of Bigotry, armed with the spear of Intolerance and mounted on the steed of Hatred have through all the ages sought to patrol the highways of the mind.
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> In essence that part of the ordinance presently under scrutiny empowers the censor to determine what is good and what is bad for the community and that without any standard other than the Censor's personal opinion. As here applied it attempts a degree of thought control

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81 N. Y. Times, Feb. 5, 1950, § 2, p. 5, col. 7. Also see note 28 *supra*. Atlanta's chief censor Christine Smith is extremely careful in her review of motion pictures. She recently banned the Universal-International motion picture, "I Am a Shoplifter" because:

> The picture seems to me to give too much information which might influence amateur shoplifters and also reveals the tricks detectives employ to catch them.

Motion Picture Daily, April 26, 1950.

82 Atlanta Charter, Art. 3 ¶475, Code § 5-305 is the enabling provision, authorizing the Mayor and the General Council

> . . . to establish rules and regulations . . . governing the matter of pictures displayed and to prevent the display of obscene or licentious pictures or other pictures that may affect the peace, health, morals and good order of said city; . . .

Pursuant to this authority, a comprehensive ordinance relating to censorship of motion pictures was adopted by the Mayor and General Council of the City and approved Dec. 5, 1944.

The action was undoubtedly commenced in the federal court, because in Atlanta v. Universal Film Exchange, 201 Ga. 463, 39 S. E. 2d 882 (1946), it was held, in a state court test of censorship, that equity would not enjoin a possible criminal prosecution for violation of censorship provisions and that, inasmuch as equity had no jurisdiction, the constitutional question could not be considered.

83 Time, Nov. 28, 1949, p. 82, col. 2. "Pinky" is now the subject matter of a new test in Marshall, Texas. See note 2 *supra*.

> but unless motion pictures can be afforded the coverage extended the press it is clear that the police power of the State has not been exceeded.[84]

The Court of Appeals in affirming the dismissal[85] made it clear that it felt the original Supreme Court censorship decision was not only correct, but that any attempt to overrule it would be a usurpation of power. It treated the appellant's appeal against censorship as an argument "for converting the Fourteenth Amendment into an instrument for the complete paralysis of the supervisory and regulatory powers of the states over the showing of motion pictures."[86] Certiorari was denied, but appended thereto was the statement "Mr. Justice Douglas is of the opinion the petition should be granted."[87]

The Motion Picture Association, speaking through Eric Johnston, its President, to a Chicago audience, compared the fight for a free film with the fight of John Peter Zenger for a free press, about which story a film had been made and passed by the Chicago censor,[88] and announced that the issue would continue to be fought, this time in the case of W. L. Gelling, a theatre manager in Texas fined for showing the motion picture "Pinky," after a hastily formed censor board banned it.[88a]

The problem of the "hostile audience"[89] that might be incited to violence, because of its hostility toward the subject matter or because

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[84] RD-DR Corp. v. Smith, 89 F. Supp. 596, 598 (N. D. Ga. 1950). The district judge here lacked the strength of a seeming conviction. He could have followed the precedent set in Barnette v. West Virginia State Board of Education, 47 F. Supp. 251 (S. D. W. Va. 1942) where a three judge court refused to be bound by a Supreme Court authority [Minersville School District v. Gobitis, 310 U. S. 586 (1940)] which they correctly anticipated would be overruled, as it was in West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943). *See* Gardella v. Chandler, 172 F. 2d 402, 409 n. 1 (2d Cir. 1949). The Circuit Court, however, in refusing to reverse stated:

> . . . if . . . we must decide this appeal, not by determining for ourselves whether the Mutual Film case was correctly decided and, therefore, is still the law, but by shrewd guessing whether it will be able to muster a majority in the Supreme Court this would not avail them. For we think it plain that if anything can be said to have clearly emerged from the struggle to extend the Fourteenth Amendment as an instrument of nationalism by striking down all state regulatory power, it is, that whatever individual judges may say in dissent, the court, as now constituted, will not overrule, or in any manner depart from, the holding in the Mutual Film Corporation case but will fully affrm it.

183 F. 2d 562, 563 (5th Cir. 1950) (Hutcheson, C.J.).

[85] 183 F. 2d 562 (5th Cir., 1950), *cert. denied,* 71 Sup. Ct. 80 (1950).

[86] 183 F. 2d 562, 565 (5th Cir. 1950).

[87] 71 Sup. Ct. 80 (1950). The rumor was that the Supreme Court did not feel it wanted to pass on another discrimination case at this time and used the excuse of the challenge to the legal status of the RD-DR Corporation to deny review. Motion Picture Herald, Nov. 11, 1950, p. 38, col. 1.

[88] Motion Picture Herald, Oct. 28, 1950, p. 14, col. 1.

[88a] Daily Variety, Oct. 25, 1950, p. 1, col. 4. See Note 2 *supra.*

[89] See generally Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience,* 49 COL. L. REV. 1118 (1949).

of prejudice inflamed, was present also many years ago in connection with the banning of the motion picture "Birth of a Nation" in some sections of the country,[90] and again just recently in connection with the motion picture "No Way Out." The latter is a melodrama dealing with the prejudices met by a Negro doctor in practicing his profession and "the ever-present tensions between whites and Negroes in the slums of a big city, which can explode into a race riot."[91] Chicago's Police censor board refused a permit for the motion picture because it would "create unrest among the colored people", did not "show a true picturization of the white-colored situation" in Chicago, and offered no solution to the problem.[92] When the National Association for the Advancement of Colored People and other groups protested the ban,[93] the Mayor appointed a special committee to view the picture.[94] They recommended that the scene showing the population arming for the race riot be deleted,[95] and with that change the picture was approved by the censor division of the Police Department.[96]

In the *Terminiello* case,[97] the United States Supreme Court recently reversed a conviction for breach of the peace based on a trial court's charge authorizing a verdict of guilty for stirring the public to anger and bringing about a condition of unrest. There the defendant had been making violent anti-Semitic speeches, but the Court held his right to make the speech not affected by the fact that it caused an unruly assembly. Said Mr. Justice Jackson in his dissent:

> I do not think that the Constitution of the United States denies to the states and the municipalities power to solve that problem in the light of local conditions, at least so long as danger to public order is not invoked in bad faith, as a cover for censorship or suppression.[98]

It is submitted that under either view, censorship of the film "Lost

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[90] See note 6 *supra.*

[91] *Movie of the Week,* Life, Sept. 4, 1950, p. 44.

[92] Motion Picture Herald, Aug. 26, 1950, p. 14, col. 2. See note 23, *supra.* Massachusetts prohibited Sunday showings. Motion Picture Daily, Aug. 28, 1950, p. 1, col. 3. See note 24 *supra.* Pennsylvania required deletions in the riot scene. Motion Picture Daily, Sept. 5, 1950, p. 4, col. 3.

[93] N. Y. Herald-Tribune, Aug. 25, 1950, p. 11, col. 5.

[94] Film Daily, Aug. 28, 1950, p. 1, col. 4. CHAFEE, FREE SPEECH IN THE UNITED STATES 533-40 (1941) suggests something similar to this method in the choice of a jury to pass on books and plays.

[95] Daily Variety, Aug. 31, 1950, p. 1, col. 1.

[96] Motion Picture Daily, Aug. 31, 1950, p. 1, col. 2.

[97] Terminiello v. Chicago, 337 U. S. 1 (1949), *rehearing denied,* 337 U. S. 934 (1949). *But cf.* Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) where a state statute narrowly punishing "fighting words" in a public place was upheld.

[98] 337 U. S. 1, 34 (1949).

Boundaries" on the ground stated by the Atlanta Board of Censors is invalid.

CENSORSHIP IS UNCONSTITUTIONAL

Constitutional law has come a long way since the original decisions of the Supreme Court sustaining censorship. Those decisions no longer find support in law or in fact for their result.

McKenna, J., in *Mutual Film Corp. v. Industrial Commission* stated:

> It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion.[99]

The Supreme Court only recently expressed itself to the contrary and included motion pictures in the press category.[100] It is now accepted that the principle of freedom of speech and press includes communications which entertain, such as lurid crime stories,[101] as well as those which inform. Moreover, it applies to business or economic activities such as soliciting union membership[102] as well. It is difficult to see how the motion picture can be distinguished from other means of communication in terms of use or benefit to be derived therefrom, although one field in which a distinction seems to have survived is that of "Right of Privacy."[103] In that area, a motion picture which presents a fictionalized version of a real life character and the happenings in which he is involved, is held to violate the person's right of privacy[104] while a comic book which proceeds in similar fashion is not a violation.[105]

The Ohio censorship apparatus was sustained in the *Mutual* case against the attack that it violated the Ohio Constitution's guarantees of

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99 236 U. S. 230, 244 (1915).

100 *See* United States v. Paramount Pictures, Inc., 334 U. S. 131, 166 (1948). *Supra* p. 274. It would seem that if interstate commerce can include new devices, so can freedom of speech and press. CHAFEE, FREE SPEECH IN THE UNITED STATES 545 (1941). *Cf.* Gardella v. Chandler, 172 F. 2d 402 (2d Cir. 1949) (interstate commerce and baseball); Ring v. Spina, 148 F. 2d 647 (2d Cir. 1945), *cert. denied* 335 U. S. 813 (1948) (interstate commerce and stage plays).

101 Winters v. New York, 333 U. S. 507 (1948); *cf.* Hannegan v. Esquire, 327 U. S. 146 (1946) ("Magazine for Men" and postal privileges).

102 Thomas v. Collins, 323 U. S. 516 (1945). See note 52 *supra.*

103 For a review of the cases on Right of Privacy, see Lahiri v. Daily Mirror, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. N. Y. County 1937) (Shientag, J.); Nizer, *The Right of Privacy,* 39 MICH. L. REV. 526 (1941); Notes 138 A. L. R. 22 (1942), 168 A. L. R. 446 (1947).

104 Binns v. Vitagraph Co., 210 N. Y. 51, 103 N. E. 1108 (1913).

105 Molony v. Boy Comic Publishers, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1st Dept. 1950).

free speech and press. Although the complaint averred that the First and Fourteenth Amendments of the United States Constitution were being violated,[106] the Court in its opinion directed itself solely to freedom of speech and press as those liberties were embodied in the Ohio Constitution. The federal rights were not considered. It was not until some years later that the United States Supreme Court unequivocally stated that freedom of speech and press of the First Amendment were among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states.[107]

It would seem that talking motion pictures are among the competitive means available[108] for the "power of the thought to get itself accepted in the . . . market",[109] and therefore protected by the Fourteenth Amendment against State abridgment of fundamental freedoms.[110] If this be so, then previous restraint[111] as embodied in any form of censor-

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106 236 U. S. 230, 231 (1915). See Kadin, *Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting,* 19 B. U. L. REV. 533, 552 (1939).

107 Not until 1925, with the decision in Gitlow v. New York, 268 U. S. 652, . . . did the Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government.

Bridges v. California, 314 U. S. 252, 267-8 (1941).

108 Mr. Justice Black in his dissent in Kovacs v. Cooper, 336 U. S. 77 (1949) comments on the fact that barring the streets to loudspeakers gives a "preference in the dissemination of ideas" to "those who have money enough to buy advertising from newspapers, radios or moving pictures." 336 U. S. 77, 103, similarly at 102.

109 See Mr. Justice Holmes dissenting in Abrams v. United States, 250 U. S. 616, 630 (1919).

It is possible that a motion picture which is based on the facts of a criminal prosecution *sub judice* might be considered as prejudicial to the fair administration of criminal justice and proceedings to suppress same not violative of the Fourteenth Amendment. *Cf.* State of Maryland v. Baltimore Radio Show, 67 A. 2d 497 (Md. 1949), *cert. denied,* 338 U. S. 912 (1950), 63 HARV. L. REV. 840, where the Maryland Court of Appeals determined that a radio broadcast, for which the lower court held defendants in contempt for violation of a court rule, did not present a clear and present danger to accused's right to fair trial, and reversed convictions. Mr. Justice Frankfurter, in a special opinion explaining that the denial of certiorari should not carry the implication of agreement or disagreement with the decision of the Maryland high court, stated: "Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge." 338 U. S. 912, 920 (1950).

110 Thomas v. Collins, 323 U. S. 516 (1945); Bridges v. California, 314 U. S. 252 (1941) Lovell v. City of Griffin, 303 U. S. 444 (1938); De Jonge v. Oregon, 299 U. S. 353 (1937); Grosjean v. American Press Co., 297 U. S. 233 (1936); Near v. Minnesota, 283 U. S. 697 (1931).

111 It has been suggested that a more appropriate test than "prior restraint" as to the invalidity under the Constitution is "the risk of excessive interference with the dissemination of ideas and the opportunity for discriminatory enforcement." Note, *Prior Restraint —A Test of Invalidity in Free Speech Cases,* 49 COL. L. REV. 1001, 1005 (1949). It is submitted that under any test censorship is unconstitutional.

ship is unconstitutional. Accordingly, the Memphis and Atlanta ordinances and all other censorship statutes are void on their face.

The recent *Kovacs* case,[112] a 5-4 (Supreme Court) decision, with two concurring and two dissenting opinions, sustaining a conviction for using a sound truck emitting loud and raucous noises in violation of a municipal ordinance, made several references to motion pictures:

> Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, *moving pictures,* and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition.[113] (Black, J. dissenting) (Italics added).

> I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of "communication of ideas." The *moving picture screen,* the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself. . . .[114] (Jackson, J., concurring) (Italics added).

> The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. . . . *Movies* have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated. Mutual Film Corp. v. Industrial Commission, 236 U. S. 230. . . .[115] (Frankfurter, J. concurring) (Italics added).

It requires little analysis[116] to determine that by virtue of their previous statements in the *Kovacs* and *Paramount* cases, Black and Douglas, JJ. would undoubtedly consider motion picture censorship a violation of the First and Fourteenth Amendments.

In *United States v. Alpers,*[117] on the question of whether the Criminal Code, which made the shipment of specified obscene articles in interstate commerce illegal included within its stated criminal conduct a phonograph record even though not specifically enumerated, the minority opinion by Black, J. stated "I cannot agree to any departure from the

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112 Kovacs v. Cooper, 336 U. S. 77 (1949), 62 HARV. L. REV. 1228. See Note, 10 A. L. R. 2d 627 (1950).

113 336 U. S. 77, 101 (1949). Mr. Justice Black was joined by Douglas and Rutledge, JJ. Mr. Justice Rutledge also wrote a separate dissent, 336 U. S. 77, 104. Mr. Justice Black made other references to motion pictures. Note 108 *supra.*

114 336 U. S. 77, 97 (1949).

115 *Id.* at 96.

116 *The Justices and the Numbers Game,* an Editorial in the American Bar Ass'n Journal deplores the tendency to "compute the 'box scores' of the votes of justices of the Supreme Court." 36 A. B. A. J. 41 (1950).

117 338 U. S. 680 (1950), 50 COL. L. REV. 540 (1950). See note 137 *infra.*

sound practice of narrowly construing statutes which by censorship restrict liberty of communication."[118] Because motion pictures had been added to the specified list in 1920, it was argued that under a proper application of the rule of *ejusdem generis*, an indecent phonograph record did not come within the catch-all "or other matter of indecent character." The majority rejected this argument on the basis that the statute proscribes "dissemination of matter which, in its essential nature, communicates obscene ideas."[119] Previous restraint in the sense of motion picture censorship was, of course, not here involved.

In *National Broadcasting Co. v. United States*,[120] the Court stated, in answer to the contention that the First Amendment prevented F.C.C. regulations from prohibiting station licenses to those with anti-trust proclivities, that:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. . . . The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.[121]

The Supreme Court in *United States v. Paramount* with a similar anti-trust background did not there have the occasion to restrict the statement for motion pictures of a broad Constitutional guarantee.[122]

Delegation of Power

It was argued and rejected in the *Mutual Film* case that there was

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[118] 338 U. S. 680, 688 (1950). At 687: "Censorship in any field may so readily encroach on constitutionally protected liberties that courts should not add to the lists of items banned by Congress." Frankfurter and Jackson, JJ. concurred in this opinion; Douglas, J. took no part.

[119] *Id.* at 685. It has been suggested that there should be no difference in treatment of such media and that the minority opinion reflected "a personal dislike of censorship laws. . . . " 50 Col. L. Rev. 540, 542 (1950).

[120] 319 U. S. 190 (1943).

[121] *Id.* at 226-7. Referred to by Frankfurter, J. in his concurring opinion in Kovacs v. Cooper, 336 U. S. 77, 96 (1949) immediately following his statement regarding motion pictures quoted *supra*, p. 290.

Broadcasting in turn has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech. See National Broadcasting Co. v. United States, 319 U. S. 190.

[122] *Supra* p. 274.

an invalid delegation of legislative power to the censorship board.[123] It has been suggested that

> . . . another possible line of attack would be to argue that under the criteria required of administrative bodies by recent decisions of the Supreme Court, the censor boards can no longer be upheld as a proper delegation of power in the absence of proper statutory standards and of the safeguards of notice, hearing and findings.[124]

However, recently the Supreme Court has cited the *Mutual* case for the proposition that "The entire text of the statute on the subjects dealt with may furnish an adequate standard."[125] This would seem to indicate that the vague standard of censorship might still be deemed sufficient under the circumstances.

Delegation of legislative power in this field seems not to have given our courts pause. In Illinois, for example, it was held that authorizing chiefs of police to refuse licenses to exhibit "obscene and immoral" motion pictures was not improper,[126] because "the average person of healthy and wholesome mind knows what the words mean."[127] But later other delegations of power in other fields with seemingly more definite standards were held by the Illinois Courts to be arbitrary and without a proper standard.[128]

In the "Curley" case, the Tennessee Supreme Court in a dictum acknowledged that the Memphis censor had "no authority in law" to use race or color as the basis for censorship.[129]

As a general matter it is very difficult to reverse a determination of a censorship board, because usually the only question before the court on appeal is whether the censors have abused their discretion.[130] Thus, the modern view, which sustains administrative determinations based on some evidence[131] has helped to drive deeper the censorship nail.

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123 236 U. S. 230, 245 (1915).

124 Note, *Censorship of Motion Pictures,* 49 YALE L. J. 87, 111 (1939).

125 Winters v. New York, 333 U. S. 507, 518 (1948) (statute making it a crime to possess with intent to sell publications devoted to deeds of bloodshed, lust or crime, held indefinite 6-3).

126 Block v. Chicago, 239 Ill. 251, 87 N. E. 1011 (1909).

127 People v. Sholem, 294 Ill. 204, 211, 128 N. E. 377, 380 (1920). See also Winters v. New York, 333 U. S. 507, 515, 519 (1948). Note, *Due Process Requirements of Definiteness in Statutes,* 62 HARV. L. REV. 77, 79 n. 16 (1948).

128 *See* II Jaffe, *An Essay on Delegation of Legislative Power,* 47 COL. L. REV. 561, 583-4 (1947).

129 See text to note 32 *supra.*

130 *See* Note, *Film Censorship: An Administrative Analysis,* 39 COL. L. REV. 1383, 1397 (1939).

131 Miller, *A. Judge Looks at Judicial Review of Administrative Determination,* 26 A.B.A.J. 5 (1940). Reprinted with footnotes added in 5 PIKE & FISCHER, ADM. LAW (Art. & Rep.) 223 (1945).

Merely as one example of this is the treatment by the New York Censor Board of the French film "Amok" based on a story by Stefan Zweig. A license was refused the film, hereinafter summarized, because it was "indecent, immoral, tends to corrupt morals, tends to incite to crime."

In a jungle setting, a woman is dying from an illegal abortion performed by a native herb doctor so that her husband returning after a prolonged absence would not discover her situation. A medical doctor who was not her lover, but had hoped to be, agrees to keep the actual cause of her death secret from her husband. The husband refuses to believe that her death was due to a heart attack as stated by the physician and has the body taken to a boat for Europe for postmortem. As the casket is being lifted aboard the boat the doctor cuts the rope and plunges into the sea with the casket. The Court stated:

> Petitioner argues that the theme in this film is no more sordid or gross than in many which have been approved. A standard in matters of this kind is flexible. Stories of clandestine affection and even illicit intercourse are circulated and filmed, and after we pass the stage of believing in the stork, it is generally understood that conception might follow illicit intercourse and if the wronged husband was beyond the seven seas, abortion would be necessary to prevent disclosure through the birth of a child. It is understandable though, that some reviewing bodies would think this film offended, thus there doubtless is some evidence to sustain the finding, and under Section 1296, Civil Practice Act the determination should be confirmed.[132]

This was a New York Censor Board matter. The problems of the generally puerile determinations of censor boards and their sometimes political approach have been well set forth elsewhere.[133] Yet it must be emphasized that it is not just Memphis and Atlanta that are benighted. New York State, despite Civil Service examinations for its censors,[134] is not known for its advanced views on censorship.

It was recently there held that the fact that the State Censor Board had passed a film for screening would not prevent the New York City Commissioner of Licenses from threatening to revoke the license of a theatre showing such film[135] on the ground that the film was obscene

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132 Distinguished Films, Inc. v. Stoddard, 271 App. Div. 715, 717, 68 N. Y. S. 2d 737, 739 (3rd Dept. 1947), *appeal denied,* 272 App. Div. 842, 71 N. Y. S. 2d 728 (1947).

133 See Notes, *Censorship of Motion Pictures,* 49 YALE L. J. 87; *Film Censorship: An Administrative Analysis,* 39 COL. L. REV. 1383 (1939) *passim.*

134 N. Y. Herald-Tribune, Feb. 24, 1946, § 2, p. 4, col. 1.

135 Hughes Tool Co. v. Fielding, 188 Misc. 947, 73 N. Y. S. 2d 98 (Sup. Ct. N. Y. County 1947), *aff'd without opinion,* 272 App. Div. 1048, 75 N. Y. S. 2d 287 (1st Dept. 1947), *aff'd without opinion,* 297 N. Y. 1024, 80 N. E. 2d 540 (1948); United Artists Corp. v. Amity Amusement Corp., 188 Misc. 146, 66 N. Y. S. 2d 299 (Sup. Ct. N. Y. County 1946), *aff'd without opinion,* 271 App. Div. 825, 66 N. Y. S. 2d 621 (1st Dept. 1946).

and indecent. This is contrary to the majority rule to the effect that state occupation of the field precludes local censorship.[136] The above example means that in New York State censorship can jab in three possible ways at the same subject matter. A foreign film, though it pass the customs officials,[137] must still pass the State Censor Board,[138] and then contend with local regulation.

During the recent furor[139] over *l'affaire* Bergman-Rossellini, the superintendent of Public Instruction of Ohio asked for an interpretation

Edward T. McCaffrey, New York City License Commissioner, threatened to revoke the license of the Paris Theatre if the operators thereof continued to show a picture ("The Miracle", starring Anna Magnani, directed by Roberto Rosselini) which he "personally and officially" regarded as "blasphemous". In the course of a decision announcing his intention to grant a temporary restraining order, Mr. Justice Greenberg said:

> Now, here is a case where a License Commissioner has seen a film; he finds that it is 'personally and officially' obnoxious to him, and he closes the picture house down, and after he closes it down, in effect, offers it a hearing to determine whether or not what he has done was right or wrong. That is the same as convicting a man and then asking him what he has to say, why sentence should not be passed upon him without giving him a hearing in the first instance.

New York Times, Dec. 30, 1950, p. 1, col. 2.

136 Lynchburg v. Dominion Theatres, 175 Va. 35, 7 S. E. 2d 157 (1940); Epoch Producing Corp. v. Davis, 19 Ohio N. P. (N.S.) 465 (Common Pleas 1917); American Committee on Maternal Welfare, Inc. v. Cincinnati, 11 Ohio Ops. 366 (Common Pleas 1938); *see* Xydias Amusement Corp. v. Houston, 185 S. W. 415, 420 (Tex. Civ. App. 1916), *writ of error refused,* 188 S. W. xvii (1916). See Note, 126 A. L. R. 1363 (1940).

137 The importation of matter obscene or immoral or urging treason of insurrection is prohibited, 19 U. S. C. A. § 1305, 18 U. S. C. A. § 1462. See United States v. Alpers, 338 U. S. 680 (1950).

Prize-fight films lose their interstate or foreign commerce character and are subject to state law once they enter the state. 15 U. S. C. A. § 1001.

138 Eureka Productions v. Lehman, 17 F. Supp. 259 (S. D. N. Y. 1936), *aff'd per curiam,* 302 U. S. 634 (1937), 304 U. S. 541 (1938) (motion picture "Ecstasy").

139 The film had been passed by various censor boards with little difficulty. *E.g.,* the Massachusetts Bureau of Sunday Censorship. Motion Picture Daily, Feb. 15, 1950, p. 6, col. 3. However, when the private indiscretions of its principals became public knowledge, the hue and cry was not long in forthcoming. The Mayors of Lawrence and Holyoke, and the city manager of Lowell, Mass., forbade the showing of the motion picture in their respective cities. *Ibid.* Likewise, the Mayor of Seattle banned the picture. Daily Variety, Feb. 15, 1950, p. 1, col. 1. However, the Seattle ban was declared illegal and a temporary injunction issued, and the city authorities announced they would not contest the matter further. Motion Picture Daily, Feb. 27, 1950, p. 4, col. 1. Opposition to the picture was strong in the South. Nashville, Tenn., created a film censorship board because of this picture. Variety, March 1, 1950, p. 7, col. 2. The censorship ordinance was adopted Feb. 11, 1950, in accordance with § 33 of Art. XIII of the Nashville Charter. It provides that if the Board finds that a motion picture's producer or actor or actress has a reputation for laxity in morals, it can "suppress" the picture. It should be noted that these various prohibitions were in response to the organized demands of various civic and religious groups, *e.g.,* Presbytery of Philadelphia (Motion Picture Herald, March 4, 1950, p. 30, col. 1); the Albany Catholic Diocese (Motion Picture Daily, March 6, 1950, p. 2, col. 3); and the Memphis Baptist Ministerial Assn. which adopted a resolution endorsing censor Binford for his stand against the film. Variety, Feb. 8, 1950, p. 19, col. 2.

from the State Attorney-General of the state censorship law with respect to whether he (the Department of Education) could revoke the certificate of approval granted for the motion picture "Stromboli" starring Ingrid Bergman and produced and directed by Roberto Rossellini, on the basis that subsequent developments in the private lives of the principals affected the original conclusion with respect to the motion picture.[140] The Attorney-General replied that such revocation would be an abuse of discretion and further contrary to the provision of the applicable law, because even as an original matter this new catalytic agent could not be a determinative factor on the question of whether the film was of a harmful character.[141]

The opinion of the Ohio Attorney-General shows a perspicacity rare in this field.[142] Senator Edwin C. Johnson of Colorado, with Stromboli and Bergman primarily in mind,[143] introduced a Bill in the Senate[144] entitled "Motion Picture Licensing Act" to license motion picture producers, actors, and actresses and motion pictures themselves and, in effect, instituting federal censorship and making the Secretary of Commerce a "morals commissar."[145] As a legal basis for his proposed

140 N. Y. Herald Tribune, Feb. 7, 1950, p. 18, col. 5.

141 Opinion No. 1463, Feb. 8, 1950, Herbert S. Duffy, Att'y-General, State of Ohio. 22 OHIO STATE BAR ASSN. (1950).

142 Cleveland Plain Dealer, Feb. 9, 1950, p. 8, col. 2, Editorial.

The Maryland Censor Board also stated that the "private lives of performers" don't come within the scope of the Maryland law, (Variety, Feb. 8, 1950, p. 19, col. 2), as did the Police Captain who heads the Chicago Censor Board. Motion Picture Daily, Feb. 7, 1950, p. 1, col. 1. Representative Rankin of Mississippi inserted in the Congressional Record the opinion of Memphis Censor Binford refusing permission for the showing of "Stromboli", described as a "sordid tale of marriage" featuring "the mother of an illegitimate son by a roue." 81 CONG. REC. 2375-6 (March 27, 1950).

Judge Igoe in the Chicago Federal District Court denied RKO's request for longer than a two week run for "Stromboli", but granted it a longer run for "Cinderella" for which it made no request. Motion Picture Daily, Feb. 14, 1950, p. 1, col. 2. Pursuant to an anti-trust decree restraining first run showings of motion pictures in Chicago, Bigelow v. RKO Pictures, 162 F. 2d 520 (7th Cir. 1947) *cert. denied* 332 U. S. 251 (1946), Igoe, J. is an unofficial censor. He recently granted an extended run to "Samson and Delilah". Ostensibly the determining factors were the investment in and the quality of the production. C.C.H. TRADE REG. SERV. (9th ed.) § 62587 (N. D. Ill., 1950). When he granted an extended run for "Come to the Stable", "a story conveying a message of religious significance", the plaintiffs who had secured the original restrictive anti-trust decree, appealed on the ground the court was without jurisdiction or power to modify its decree. The Court of Appeals affirmed on the technical question and no point of censorship was raised or decided. Bigelow v. Twentieth Century-Fox Film Corp., 183 F. 2d 60 (7th Cir. 1950).

143 Motion Picture Herald, March 18, 1950, p. 16, col. 1.

144 S. 3237, 81st Cong. 2d Sess. (1950). Hearings on the Bill have been indefinitely postponed. Film Daily, April 28, 1950, p. 1, col. 4. The first such attempt at federal licensing seems to have been made in 1914. 81 CONG. REC. 3003, (April 20, 1950).

145 Film Daily, March 16, 1950, p. 1, col. 4.

statute, he relied[146] on the quotation from Frankfurter, J. in the *Kovacs* case to the effect that "movies have been constitutionally regulated."[147]

Maryland's censors banned a 50 minute Polish documentary without English subtitles, because they "did not believe it presents a true picture of the present-day Poland" and instead "appears to be Communist propaganda." The censors contended that a film "based upon deceit and misrepresentation" was a "moral breach,"[148] and therefore within the statutory censorship provision. From its description, the film was undoubtedly a propaganda film,[149] but restrictions on free speech become all the more obvious[150] in the arrogation by the Maryland censors of the right to determine whether the public may view a partisan presentation of events, albeit false.

CENSORSHIP AND TELEVISION[151]

Pennsylvania, in 1911 in the fore with motion picture censorship, is now the pioneer in the field of television censorship.[152] The State Board of Censors required that all motion picture film intended to be broadcast by television in Pennsylvania be submitted for censorship purposes.[153]

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146 Motion Picture Daily, March 29, 1950, p. 1, col. 3.

147 See the text to note 115 *supra*. Senator Wiley contends that S. 3237 is unconstitutional. 81 CONG. REC. 3003-3005 (April 20, 1950).

148 Time, Oct. 31, 1949, p. 76, col. 2.

149 33 ANN. REP. 2-3 (1948-49), Md. State Bd. of Motion Picture Censors. Annual report is rendered pursuant to MD. ANN. CODE GEN. art. 66A, § 9 (1947). With a similar approach, the Russian-made anti-Nazi film "Professor Mamlock" was banned in Rhode Island as communistic propaganda. Thayer Amusement Co. v. Moulton, 63 R. I. 182, 7 A. 2d 682 (1939). *But cf.* Schuman v. Pickert, 277 Mich. 225, 269 N. W. 152 (1936). In a Note discussing a recent Massachusetts criminal statute covering obscene books, Legis, 59 HARV. L. REV. 813, 814 (1946) it is stated: "But it would appear that while the constitutional guaranty applies to writings of a polemic or propagandist character, it may not apply to obscene writings."

150 Statement of Elmer Rice, Chairman, American Civil Liberties Union's National Council on Freedom from Censorship. Time, Oct. 31, 1949, p. 76, col. 2. See also Communications Assn. v. Douds, 339 U. S. 382, *rehearing denied* 339 U. S. 990 (1950) where it was said: "We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas." 339 U. S. 382, 399 (1950).

151 "The motion picture is subject to censorship. What will happen if censorable film is televised and comes into conflict with the freedom of the air doctrine?" Note, 39 COL. L. REV. 1383, 1395 (1939).

152 Business Week, Dec. 3, 1949, p. 23, col. 3. Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153 (3rd Cir. 1950). Petition for writ of certiorari to the 3rd Circuit filed, Dec. 12th, 1950 (CCH Supreme Court Bulletin). 19 U. S. L. Week 3171.

153 See note 20 *supra*. It is doubtful if Maryland will presently attempt television film censorship. According to Motion Picture Daily, "a ruling was asked of Attorney-General Hall Hammond. After frequent queries the subject became pidgeon-holed and now . . . the Attorney-General's office admits that it will not take any action to censor TV films."

A suit for a declaratory judgment was brought by several television stations contending: a) that the regulation of the Censor Board was invalid because in conflict with the Federal Communications Act of 1934[154] which established a comprehensive scheme for the regulation of communication facilities and b) that the regulation imposed an undue burden on interstate commerce. The District Court held the regulation invalid because in conflict with the federal statute and further, that in any event, even if Congress had not occupied the field, it was an unreasonable burden on interstate commerce.[155] The Court did not specifically discuss a third argument to the effect that the attempted regulation infringed the guaranteed freedom of speech and press.[156] The Court of Appeals for the Third Circuit in affirming on the ground that Congress had occupied the field stated:

> Congress thus set up a species of 'program control' far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case.[157]

As a practical matter, censorship of television film would create a difficult situation for the user, because of the time and cost factors involved. Labor contracts restrict use of kinescope film (motion pictures made of live action scenes as they appear on the television receiving tube) for a definite period after the live action broadcast. Kinescope and the more usual form of motion picture film are used on several stations in different territories. To keep costs down, the number of prints is limited.[158] To allow for censorship time might well be a serious

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Jan. 19, 1950, p. 2, col. 4. A 1941 Amendment to the Maryland censorship law was to the effect that the word "film" should include "any film shown with or by new devices of any kind whatsoever, such as slot or coin machines, showing motion pictures." MD. ANN. CODE GEN. LAWS art. 66A, § 1 (Cum. Supp. 1947). A bill providing for censorship of television films died in committee in the Ohio legislature. Variety, July 5, 1950, p. 27, col. 1.

The Toronto, Canada, Chairman of the Department of Motion Picture Censorship in his annual report pointed out the problem in motion pictures being televised nationally despite different local censorship standards. Variety, July 19, 1950, p. 7, col. 4.

[154] 48 STAT. 1064 (1934), 47 U. S. C. A. § 151 *et seq.*

[155] Du Mont v. Carroll, 86 F. Supp. 813 (E. D. Pa. 1949). *Aff'd* 184 F. 2d 153 (3rd Cir. 1950). Petition for writ of certiorari to the 3rd Circuit filed, Dec. 12th, 1950 (CCH Supreme Court Bulletin). 19 U. S. L. Week 3171.

[156] Harrison, *Television and Censorship,* 21 PA. BAR ASSN. Q. 128, 133 (1950). The Court did refer to "the danger, always present in a system of censorship, of whittling away the constitutional guarantees of freedom of speech and press." 86 F. Supp. 313, 316. The Court also adopted conclusions of law requested by plaintiffs that "Television, like newspapers and radio, is included in the press whose freedom is guaranteed by the First and Fourteenth Amendments. . . ." 10 FED. COM. B. J. 193, 194 (1949).

[157] Dumont Laboratories v. Carroll, 184 F. 2d 153, 156 (3rd Cir. 1950).

[158] Bergson, *State Censorship of Television,* 19 FED. B. J. 151, 155 (1949). Economic convenience was given short shrift in the *Hodges* case. See *supra* note 56.

business interference. Further, the amount of film necessary to fill a television broadcast schedule is so large as to make it exceedingly difficult to keep up the mere physical aspect of screening.

The Communications Act specifically denies censorship powers to the Federal Communications Commission.[159] However, it may suspend the license of anyone transmitting "profane or obscene words, language or meaning. . . ."[160] The latter provision would seem to be similar to subsequent punishment rather than prior restraint. Despite this lack of censorship power, the F.C.C. has been receiving complaints as to television program content reminiscent of an earlier day with respect to motion pictures.[161] In addition, TV broadcasters have been discussing a code of behavior for self-regulation.[162]

CONCLUSION

Censorship is more than merely a nuisance, with many state and city boards[163] of varying views continually exorcising in the manner of the witch doctor.

The Supreme Court in *Thornhill v. Alabama*,[164] held that a prohibition against picketing was invalid and was required to be judged on its face and not as though limited to a prohibition of the petitioner's particular conduct. Said the Court regarding censorship:

> The power of the licensor against which John Milton directed his assault

159 48 STAT. 1091 (1934), 47 U. S. C. A. § 326 (1949).

160 48 STAT. 1091 (1934), 47 U. S. C. A. § 326 (1949).

161 N. Y. Herald Tribune, Dec. 7, 1949, p. 6, col. 3.

162 Individual stations have been conforming to the National Association of Broadcaster's radio code. Time, March 7, 1949, p. 66, col. 3. WOR-TV has adopted the principles of the Motion Picture Production Code for both live and film programs, Variety, March 29, 1950, p. 33, col. 4. One of these problems in connection with a code being considered by California telecasters is editing wrestling matches to eliminate "suggestive poses". Time, *supra*, at p. 69, col. 1.

163 Business Week, Dec. 3, 1949, p. 23, col. 3. The first national Canadian conference of censor boards meeting in Toronto decided in favor of joint action by the various censor groups. Motion Picture Daily, Oct. 6, 1950, p. 1, col. 2. Joint film censorship with the United States was there suggested. Motion Picture Daily, Oct. 10, 1950, p. 16, col. 2. The first meeting of the six state censor boards of the United States is scheduled to be held in New York City on December 6, 1950 with the Chairman of the Ontario Board of Censors also in attendance. Motion Picture Herald, Oct. 28, 1950, p. 36, col. 3.

Censorship is a form of taxation. INGLIS, FREEDOM OF THE MOVIES 178 (1947). *E.g.*, the Maryland State Board of Motion Picture Censors in its last annual report, discussed *supra* note 149, boasted that since 1916, it "has delivered to the State approximately $440,000 over and above operating expenses. . . ." 33 ANN. REP. 2 (1948-49). Joseph I. Breen of the Production Code Administration (see note 171 *infra*) estimated that the total annual cost to the movie industry of state and municipal censorship is some $3,000,000. Daily Variety, April 21, 1950, p. 1, col. 4.

164 310 U. S. 88 (1940).

> by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.[165]

Censorship of motion pictures was sustained at a time when this medium of expression was a novelty in its infancy. It was treated as a form of amusement to be allowed to titillate but not to arouse. A Victorian attitude toward this new instrumentality is obvious in the words of the Supreme Court in the *Mutual* case:

> Their power of amusement, and, it may be, education, the audience they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose.[166]

The motion picture has been succeeded as a mechanical plaything by the radio, television, and the sound truck, and, by and large, has matured into an effective and intelligent form for the presentation of ideas. It should be considered and dealt with as such.[167]

Eliminating censorship will not leave a void to be filled by iniquity. It is still well established law that the "primary requirement of decency may be enforced against obscene publications."[168] Obscenity statutes will still be available.[169] There will still be self-regulation in the motion picture industry[170] with its Production Code Administration.[171] Various unofficial but representative groups[172] such as the National Board of

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165 *Id.* at 97-8. *See* Lovell v. Griffin, 303 U. S. 444, 451 (1938); Grosjean v. American Press Co., 297 U. S. 233, 245 (1936).

166 Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 242 (1915).

167 The possible educational aspects of the motion picture were foreseen even in the *Mutual* case, which specifically refrained from passing on the question of whether the statute covers the use of movies in churches and public schools. *Id.* at 245. Pictures are part of the world cultural change. Shuster, *Our Era of Pictures,* N. Y. Herald Tribune, May 14, 1950, Magazine Section, p. 5.

168 *See* Near v. Minnesota, 283 U. S. 697, 716 (1931).

169 See Winters v. New York, 333 U. S. 507, 511 (1948). *Cf.* United States v. Alpers, 338 U. S. 680 (1950), discussed *supra* p. 290. Obscenity statutes have an *ex post facto* effect and you act at your peril with reference thereto. Legis., 44 HARV. L. REV. 113 (1930).

170 See Notes, 49 YALE L. J. 87, 102 (1939); 39 COL. L. R. 1383, 1388 (1939).

171 THE MOTION PICTURE INDUSTRY—A PATTERN OF CONTROL 66 (TNEC Monograph 43, 1941); Note, 49 YALE L. J. 87, 104-107 (1939). The Production Code Administration, a department of the Motion Picture Association of America, Inc., administers "A Code to Govern the Making of Motion and Talking Pictures." The Code, the "Reasons supporting it and the Resolution for Uniform Interpretation" are set out in full in the MOTION PICTURE ALMANAC 646-655 (1949-50).

172 Life, Oct. 25, 1948, pp. 57-60. "All over the world movie-makers find themselves in sudden trouble with church, state and plain citizen."

Review,[173] and the Legion of Decency[174] will continue to exercise surveillance. As an added sanction, the protection of the copyright law can be denied to immoral motion pictures.[175]

Coppage v. Kansas[176] appearing in the same volume of the United States Reports as the *Mutual*[177] case was overruled not so long ago.[178] The Supreme Court in overruling a large number of cases since 1937 has been said to be "removing from constitutional doctrine excrescences produced early in the century.[179] Here, there is still another fertile field for removing one more protuberance, for as was said in the last Flag Salute case:[180]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .[181]

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173 INGLIS, FREEDOM OF THE MOVIES 74-82 (1947); MOTION PICTURE ALMANAC 662 (1949-50); Note, 49 YALE L. J. 87, 108-9 (1939). The National Board of Review charges the submitter $6.25 a reel for reviewing purposes. The organization has been criticized recently for selecting four foreign films among its best ten for the year 1949. Motion Picture Herald, Dec. 24, 1949, p. 7, col. 2.

The National Board of Review opposes censorship. See Note, 39 COL. L. R. 1383, 1385 note 16 (1939), whose author professed to be a member thereof. See Velie, *You Can't See That Movie,* Collier's, May 6, 1950, p. 66, col. 2.

174 MOTION PICTURE ALMANAC 662-63 (1949-50); Note, 49 YALE L. J. 87, 104-108 (1939).

Not only does it classify and condemn motion pictures, but theatres that show pictures condemned by the Legion of Decency also go on the condemned list. Daily Variety, Feb. 14, 1950, p. 1, col. 1. The Legion has been criticized as being more concerned with Catholic dogma than with decency. BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 198-210 (1949).

175 See Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1018 (S. D. Calif. 1942) and cases therein cited.

176 236 U. S. 1 (1914).

177 See note 1 *supra.*

178 Lincoln Union v. Northwestern Co., 335 U. S. 525 (1948).

179 See Mr. Justice Douglas, *Stare Decisis,* 49 COL. L. REV. 735, 750 (1949).

180 West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943) (opinion by Jackson, J.).

181 *Id.* at 642.

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