COMMENTS

PHILIPPINE FILM CENSORSHIP LAWS: AN APPRAISAL

The average Filipino movie-goer, who had long been used to reading at the start of every screening the familiar stamp "All Pictures Shown in this Theater Have Been Passed by the Philippine Board of Review for Moving Pictures," personified Holmes' famous aphorism that it is a tragedy that ideas become encysted in phrases and then for a long time cease to provoke further analysis. Of late, however, his interest in the study of film censorship has been renewed as a result of the conditional banning on March 15, 1955 of the "Martin Luther Story" by the local censorship body.

The Filipino movie-goer is not wholly to blame though. For even in the United States, interest in this field was stimulated only recently when the American Supreme Court finally decided to give constitutional shelter to moving picture expressions in *Joseph Burstyn, Inc. v. Wilson.*[1]

The purpose of this article is to make a survey of the system provided by law for the censoring of motion picture films and then consider its constitutional aspect against the backdrop of American constitutional law which is by no means settled.

History of Censorship

A study of this type cannot ignore the historical basis of censorship.

Censorship is the policy of restricting the public expression of ideas, opinions, conceptions and impulses which have or are believed to have the capacity to undermine the governing authority or the social and moral order which that authority considers itself bound to protect.

The most important applications of censorship have been to the spoken or written words; to action as represented in the theater, pantomime and dance; and to the plastic arts. Censorship of attire, as at public bathing beaches and on the stage, has assumed importance only in the last half century.

In classical antiquity, censorship appears to have been applied only sporadically. Sparta placed a ban on the forms of poetry, music and dancing current in the fifth century B.C. on the ground that they induced licentiousness and effeminacy. Aeschylus, Euripides

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[1] 343 U.S. 495, 75 Sup. Ct. 777 (1952).

and Aristophanes suffered under censorship because of their too free thought on religious matters. In republican Rome the theater was banned by the censor, except on the occasion of certain games, where a time honored tradition of license in speech and gesture gave a limited degree of freedom to dramatic art. No permanent theater was permitted in Rome before the time of Augustus. There is no clear evidence of a censorship of books either in Greece or Rome. The poet Ovid was indeed banished to the shores of the Black Sea by Augustus and it has often been asserted that the grounds for his banishment lay in his licentious poems. But the poet himself points out (Tristia) that other poets were circulating with impunity even more licentious verses. In the first century A.D. the Roman political writer had to be on his guard against the hostile attention of the tyrant, and according to Tacitus free expression of opinion on matters of current history virtually disappeared.

The earliest and most sweeping censorship of the Christian church is probably that contained in the Apostolic Constitutions, which purport to have been written by St. Clement of Rome at the dictation of the Apostles. These constitutions forbid Christians to read any books of the Gentile, "since the Scriptures should suffer for the believer." This general prohibition of St. Clement (circa 95 A.D.) was followed by a long series of prohibitions issued by the early church fathers. In 325 edicts were issued by the Emperor Constantine and prohibitions by the Council of Nicæa against the writings of Arius and Porphyry. The emperor prescribed the death penalty for anyone who might conceal copies of the forbidden works. In 399 the Council of Alexandria, presided over by Bishop Theophilus, issued a decree forbidding the owning or reading of the books of Origne. The Egyptian monks protested and the bishops were obliged to call in the prefects to enforce the edicts. In 446 Pope Leo I ordered the destruction of a long series of writings described as out of accord with the teachings of the synods of Nicæa and, therefore, antagonistic to the Christian religion and added further, "whoever owns or reads these books is to suffer extreme punishment." In 449 Pope Gelasius issued what was later referred to as the first papal index. It presents a catalogue of books prohibited, but the prohibitions regard not private or general but public official reading.

Writers during the Middle Ages submitted their manuscripts to their superiors as a matter of courtesy and as precaution against later censure. When the rise of printing and the growth of culture increased the numbers of authors, ecclesiastical authority demanded formal censorship. In 1501 Pope Alexander VI issued a bull against unlicensed printing and thus introduced the principle of censorship in this sphere. This policy, directed exclusively against books, was

intended to protect the church against heresy and was accepted by all countries under the jurisdiction of the church of Rome. The Scottish Estates in 1551 prohibited all printing of every description unless previewed by authorized persons. In England the privilege of printing was confined to the Stationer's Company, which was chartered in 1556.

Until religious drama began to be obsolete in England, the stage was controlled and censored by the church; since then the the Master of Revels, the Privy Council, the Star Chamber and the lord chamberlain have been successively in charge of the censoring of plays. The lord chamberlain was active by 1628, and he received statutory authorization in 1727. It was Jeremy Collier who in 1698, by his *Short View of the Immorality and Profaneness of the English Stage,* firmly established the censorship principle.

Censorship may take the form of an examination of material in advance of publication and its suppression if disapproved. This is known as *preventive censorship,* in contrast to *punitive censorship,* which inflicts penalties after the offense and seeks to destroy the offending material. The censorship of antiquity was punitive, while that of the medieval church and of early modern times was in general preventive.

In 1693 the government of England formally abandoned the preventive censorship of printing and began the punitive. No one was to be prohibited from publishing anything, but he must run the gaunlet of possible prosecution for slander, sedition, immorality and blasphemy. Blackstone states that "the liberty of the press... consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."[2] The amount of substantive freedom obviously depended upon the current conception of criminal matter.

Preventive censorship has been kept alive in England for the control of the stage. In France it has played a considerable part in the handling of political material. All cable messages from Soviet Russia must be passed by the censor; preventive censorship has been freely applied to dispatches from Fascist Italy. Even where there is no officially acknowledged censorship on material sent abroad, a foreign correspondent often finds it expedient to submit his dispatches to the foreign office for approval lest he be denied access later to important sources of information. In America, powerful religious and business organizations sometimes exercise what is virtually a preventive censorship over the press. In general, however,

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[2] 4 COMMENTARIES ON THE LAWS OF ENGLAND 151.

the volume of material coming to the printing presses has become too vast to be examined by any censorship in advance of publication. Any practicable censorship must be punitive, except in time of war, when the necessity of depriving the enemy of sources of information demands a huge expansion of censorship personnel.

While political censorship has played an important part throughout modern times, especially in periods of great political upheaval, the dominant concern of censorship has been the suppression of material and activities presumed to have a degrading effect upon public morals. This preoccupation of the censor with problems of sexual morals has as a rule appeared simultaneously with the rise of the middle class to political dominance. Autocratic and aristocratic government have seldom applied censorship to such matters as licentious books, pictures, or plays. Neither does it appear that the one existing example of a proletarian government, Soviet Russia, takes this issue very seriously. A plausible explanation lies in the fact that the middle class position can be maintained through generations only by thrift, prudence and self-control — virtues that are believed to be seriously shaken by licentious communications. In England, France, the Netherlands and Germany, the antagonism of the middle class to aristocratic licentiousness exhibited itself in diatribe and sermon long before the bourgeoise attained a position of political dominance.

Censorship of morals in the late eighteenth and early nineteenth century lacked any definite statutory basis. In any specific case the police might intervene in the interest of public order. Obscene publication or exhibition was early a crime under American common law, and statutes dealing with the matter were enacted in Vermont in 1821, Connecticut in 1834, Massachusetts in 1835. In England the principle of censorship was definitely established in 1857 by Lord Campbell's Act, under which a magistrate or the chief of police might issue a search warrant upon presentation of an affidavit that obscene publications were being sold or held for sale in certain premises. In 1868 a decision by Lord Chief Justice Cockburn gave a clearer degree of definiteness to the crime of obscene libel.

Moral censorship through the nineteenth and twentieth centuries has been notable for the prosecution of famous works of art such as Flaubert's *Madame Bovary* and Hardy's *Tess of the d'Urbervilles*. In America under one jurisdiction or another many books of outstanding literary merit have been subject to censorship. So universal has been the stupidity of censorship in dealing with works of art that even many of those who believe in the importance of sup-

pressing pornography have come to view censorship as on the whole an undesirable institution.

Often more effective results are secured by relying upon a "voluntary" censorship than by depending upon a compulsory one. Usually the "voluntary" arrangements have been perfected in the hope of averting greater interferences. The newspapers of the United States, England and several other countries organized "voluntary" censorships during the Great War. The moving picture industry and stage have imposed restriction upon themselves. The National Board of Moving Picture Censors was accepted by the producers, and they also took into association with them an official who was supposed to standardize productions in such a manner as to lessen the vulnerability of the enterprise to regulative attacks. Libraries and booksellers have sometimes undertaken to censor books, declaring that they would not circulate books "personally scandalous, libelous, immoral, or otherwise disagreeable," and endeavoring to secure the cooperation of publishers. Private groups have often sought to intimidate the producers, distributors and the public; such has been the technique of the vice leagues, the Ku Klux Klan and many pressure organizations.[3]

Actually then there are three types of censorship: self-restriction, moral censorship and legal censorship.[4] As to the first, movie producers, especially those in the Philippines, impose upon themselves some kind of censorship for they know only too well the economic consequences of a film being banned.[5] Then there are also various religious and civic groups, like the Legion of Decency, which publish blacklisted films. Legal censorship is provided for in Act No. 3582 of the Philippine Legislature. The ensuing discussion will be limited to this type of censorship.

THE BOARD OF REVIEW FOR MOVING PICTURES

A. *Composition and Organization.*

On November 29, 1929, the Philippine Legislature passed Act No. 3582 creating the Philippine Board of Censorship for Moving Pictures with fifteen members appointed by the Governor-General, now the President, with the advice and consent of the Senate, from among the officers of the Government or from private citizens.[6] Subsequently, in 1938, the name of the Board was changed to "Board of

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[3] 8 Lasswell, H., *Censorship* in ENCYC. OF SOC. SCI. 290-294 (1930); 2 COOLEY, CONSTITUTIONAL LIMITATION 880-883 (1927).

[4] 34 ORE. L. REV. No. 4, 250-251 (1955).

[5] Dharam, M., *Censoring Your Movie*, Saturday Mirror Magazine, July 17, 1954, p. 5 at p. 6, col. 3.

[6] §1.

Review for Moving Pictures."[7] The Board had been under the control of the office of the Secretary of Interior until the abolition of the latter when all offices under it, including the Board of Review for Moving Pictures, came under the control of the Office of the President of the Philippines.

The members of the Board do not receive any salary or compensation for the services rendered by them under the law.[8] The officers are a chairman, a vice-chairman and a secretary.[9]

B. *Jurisdiction and Powers.*

The Board has jurisdiction over pictures shown in public theaters as well as those shown in private houses throughout the Philippines. Peep pictures (those that move) fall within its jurisdiction.[10] Documentary, newsreel, educational, or commercial advertising films are subject to examination by the Board. All short documentary, newsreel, and short educational, or commercial advertising films may be previewed by only one member.[11] However, although newsreel and educational pictures are previewed, they are never cut even if they contain objectionable material. This may be because there is practically no difference between printed matter and newsreel films. In an opinion,[12] the Secretary of Justice held the view that films exhibited by television are subject to examination and regulations like films which are exhibited in movie houses. Observing that the exhibition of films by television came into vogue long after the enactment of Act No. 3582, the Secretary of Justice opined:

> "...It is a settled rule of statutory construction that legislative enactments in general and comprehensive terms and which are prospective in operation, apply alike to all persons, subjects, and businesses within their general purview coming into existence subsequent to their passage (Comm. v. Quaker City Cab Co., 134 A. 404; Newman v. Arthur, 109 U.S. 132). Television showing of movies has a wider coverage, both in number and ages of spectators than exhibition in theaters and cinema houses."

But the Board does not have the power to regulate or control advertisements, as well as the use of displays or posters, still pictures and billboards relating to motion pictures. This proceeds from the fact that the Board is vested with limited powers.

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[7] Com. Act No. 305, §1.
[8] Act No. 3582, §1.
[9] The Board is presently composed of the following: Teodoro F. Valencia, *Chairman*, Trinidad F. Legarda, *Vice-Chairman;* Alex Huntwin, Mabini Centeno, Lourdes M. Garcia, Jose L. Guevarra, Remedios O. Lim, Dolores P. Leviste, Pilar Hidalgo-Lim, Naty L. Monserrat, Narciso Pimentel, Jr., Limneo S. Platon, Felicisimo V. Reyes, Fermina B. Reyes, and Carmen Vasquez, *members;* Fernando C. Santico, *Secretary and Executive Officer* and Rosa F. Anunciacion, *Assistant Secretary.*
[10] Par. A, Rules and Regulations.
[11] Par. C, §10, *id.*
[12] Opinion No. 292, series of 1956.

> "The method of advertising...may be disgusting, offensively sensational, and even dishonest, either on billboards or in newspapers or elsewhere; but this has nothing to do with the character of the exhibition itself, and is obviously not an offense committed in the exhibition. Whether it is desirable and necessary to give the commissioner of licenses jurisdiction over methods of advertising . . . is not for the court to say. Plainly, however, no such authority has been vested in the commissioner, and he has no more legal right to revoke the license of a theater on those grounds than he would have because the moral character of the author or actors employed to produce it was bad. (Ivan Film Productions v. Bell, 167 N.Y.S. 123, 124)."

Its powers are: (1) To examine or supervise the examination of all films, spoken or silent, imported or produced in the Philippines, and prohibit the introduction and exhibition of films in this country or the removal of films locally produced from the place of production, which in its judgment are immoral or contrary to law and good customs or injurious to the prestige of the Philippines or its people; and (2) Subject to the approval of the President, to promulgate its own rules of procedures and operation in general, including the matters of quorum, organization of sub-committees and appointment of such representatives or agents as may be necessary to carry out the provisions of the Act and to keep a permanent record of all its proceedings with reference to the films examined by it, whether passed or not.[13]

Proceedings in the Board

A. *Application.*

Pursuant to Section 2(b), the Board adopted a set of rules and regulations. Under these rules, all applications for censorship of pictures should be accomplished in triplicate, accompanied by a tax clearance from the Bureau of Internal Revenue indicating that the corresponding taxes have already been paid, and sent directly to the Board. Such applications should indicate (1) name of applicant; (2) title of the film; (3) name of the producer and the country of origin; (4) whether silent, or talking; (5) place of examination; (6) scheduled date of public exhibition; (7) length of film in feet; (8) the number of pictures of the applicant previously previewed and approved by the Board which have not, as of the date of filing such application, been exhibited in local theaters. The application for the review of a picture must reach the office of the Board at least one week in advance of the date of examination.[14]

After the application is received, the Secretary and Executive Officer of the Board designates the date for the preview of the pic-

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[13] Act No. 3582, §2.
[14] Par. B, §1, Rules and Regulations.

ture, which date shall be in accordance with the date of receipt of application, observing the "first come, first served" principle, and informs the owner or the exhibitor concerned thereof. Under special circumstances, however, the chairman may authorize exceptions to the foregoing rule.[15]

B. *Manner of Approving.*

Under the rules, the Chairman is empowered to form six regular committees of three, each committee to be available every day of the week, except Sundays, to preview pictures in accordance with the schedules prepared by the Secretary and Executive Officer. However, members may make such adjustments as they may find necessary and form special committees of three among themselves to examine pictures regularly or specially scheduled for preview. Each committee may elect a chairman. After the required number of votes approving the picture is taken, the chairman may sign the permit in behalf of the committee. If a committee is without a chairman, all or at least two of the members thereof shall sign the permit.[16]

Every picture submitted for review shall be passed upon by one of these committees. The previewing members shall submit their comments on pictures from which they recommend some deletions to be made or which they recommend to be banned from public exhibition. The affirmative vote of two members shall pass the picture. The committee previewing the picture shall inform the representative of the exhibitor present in the preview of the action contemplated on the picture.[17]

If for any reason the committee of three shall fail to pass the picture under preview by reason of lack of the required majority vote, the picture shall be endorsed to the Board *en banc*. If only two members present fail to agree, the picture shall be resubmitted to a preview by another committee of three and not to the Board *en banc*. The owner of the picture, through this representative in the preview room, may elect not to go on with the preview if only two members are present. If there is no representative of the exhibitor, the two members present shall proceed with the preview.[18]

It is to be noted that a special committee is limited to approving films for exhibition. It can not disapprove films for public showing.

Majority of the qualified members of the Board constitutes a quorum for a preview *en banc*. Members attending previews shall

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[15] Par. B, §2, *id.*
[16] Par. C, §1, *id.*
[17] Par. C, §2, *id.*
[18] Par. C, §3, *id.*

write out their votes on the picture under consideration in a form to be provided for the purpose in which they shall indicate their approval, approval with deletions to be described in detail, or disapproval giving the reasons therefor.[19]

No affirmative vote of the majority in a preview *en banc* shall be appealed by any of the members of the board if he was absent in the preview or during the voting on the picture.[20]

The Secretary and Executive Officer of the Board notifies in writing the producer, producer's representative, importer, or the party applying for permit, of the decision of the Board banning a picture from public exhibition or shelving it temporarily. Within sixty days from the receipt of such notice, an appeal may be made to the President by the producer, his representative, importer, or party applying for permit.[21]

Scenes or portions of films recommended for elimination are required to be surrendered to the Board for proper disposition before a permit is issued. If the picture previewed and approved by the Board is a 3-D picture, the permit therefor shall contain the following condition: "This permit is valid also for flat versions provided they conform in all respects with the 3-D version approved by the Board."[22]

Trailers of pictures previewed and approved by the Board for public exhibition shall not contain any of the portion ordered deleted by the Board. If for any reason the trailer of a picture must be shown to the public before a preview by the Board of the picture itself, such trailer should be submitted to the Board for approval.[23] Trailers of pictures are now previewed because it was discovered that portions ordered deleted by the Board from the picture often occurred in the trailer.[24]

Unless the Chairman specifically authorizes, the producer, producer's representative, exhibitor, or applicant for permit may send one representative to the preview room.[25]

THE CENSORSHIP OF PICTURES

A. *Grounds for Banning of Moving Pictures.*

The Board may prohibit the showing, and even the introduction in the Philippines, or their removal (if locally produced) from

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[19] Par. C, §4, *id.*
[20] Par. C, §5, *id.*
[21] Par. C, §6, *id.*
[22] Par. C, §7, *id.*
[23] Par. C, §9, *id.*
[24] *Supra* note 5 at p. 7, col. 2.
[25] Par. C, §11, Rules and Regulations.

the place of production, films which in its judgment are (1) immoral, or (2) contrary to law and good customs or (3) injurious to the prestige of the Government of the Philippines or its people.

With the warning that it is exceedingly hard to devise any hard and fast rule as to what films should or should not be approved by the reviewer, the Board of Review for Moving Pictures adopted a "Code of Moving Pictures Censorship" defining objectionable scenes, thus:

1. *Immoral Scenes—Obscene, Indecent, Lewd and Lascivious—Tending to Corrupt Public Morals*:

a. Excessive fondling and caressing.
b. Prolonged kissing; kissing parts of the body other than the face.
c. Indecent exposure — too much nakedness.
   (1) Bosom exposed, showing cleavage between a woman's breast.
   (2) Woman exhibited in a state of undress, showing inside of thigh.
d. Vivid picturization of sadistic, lustful, and intense sexual abandon.
e. Suggestive, exaggerated, and lascivious dances.
f. Scenes of passion when so presented as to stimulate the lower and baser emotions.
g. Unwed motherhood except when the mother and/or father suffers.
h. Adultery presented when not necessary to the plot, or in such a way as to create disrespect or low regard for the sanctity of the institution of marriage.
i. Seduction or rape when not essential to the plot, or when pictured at length instead of being merely suggested.
j. Sex perversion or any inference of it.

2. *Scenes that are Vulgar—Show Poor Taste or Lack of Propriety*:

a. Bedroom scenes that are suggestive and immodest.
   (1) A double bed except when only one person is occupying it.
   (2) Scenes of undressing, except when essential to the plot.
b. Drunkeness made attractive and not followed by a hangover.
c. Scenes showing use of narcotics or traffic in drugs.
d. Obscenity in dialogue, gesture, song, or joke.
e. Vulgar, profane, and indecent language.

According to the Board "Henry V" was almost banned because the word "bastard" was used. Propriety was also endangered in the film.

f. Medical and scientific films dealing with sex and surgical subjects except when shown to scientific or educational groups.

3. *Scenes that Tend to Create Disrespect for Law and Constituted Authorities and which Incite Crime.*

a. Law defied, circumvented, or defeated successfully.
b. Juvenile crime presented in a manner that prompts imitation.
c. Crimes of all kinds and degrees presented extensively and in detail—brutal killings; robbery; safe-cracking; and dynamiting of trains, buildings, etc.
d. Gangster scenes, especially those that glorify exploits of bandits and gangsters.
e. Gambling scenes, when too long and in detail.

4. *Scenes which Offend Racial, National, or Religious Sensibilities.*

a. Scenes which are offensive to the dignity and honor of the Government and people of the Philippines or any of its law enforcement agencies.
b. Scenes that show disrespect for, or improper or unnecessary use of the Flag.
c. Scenes that are contrary to the good customs of the Filipino people — lack of respect for old people, irreligiousness, and disregard for filial love and devotion to family.
d. Scenes that ridicule any religious faith.
e. Scenes showing ministers of religion in their character as such as comic characters or as villains.

5. *Repellent Subjects*:

a. Actual hanging or electrocution as legal punishment for crime.
b. Third degree methods.
c. Excessive brutality.
d. Cruelty to children or animals.

B. *Withdrawal of Permit.*

Under the rules and regulations of the Board, a permit certificate granted by one of the committees of the Board for the public exhibition of a motion picture may be suspended or withdrawn by the chairman upon recommendation of a majority of the members of

the Board on the ground that the picture contains features which are objectionable.[26]

A permit may also be cancelled if the theater owner and/or operator or exhibitor to which it was issued violates any of the rules and regulations of the Board.[27]

According to the Secretary of Justice, permission to show motion pictures, silent or spoken, is neither a contract nor a property right nor a vested right. Hence, the revocation of such permission can not be said to be unconstitutional any more than the denial of the original application would be. He also advised the Board to state its reason or reasons for recalling a film or revoking a permission already granted, in view of the Board's restricted authority under the law.[28]

C. *Penalty.*

Act No. 3582 makes it unlawful for any person or entity to exhibit or cause to be exhibited in any theater or public places or to remove from its place of production within the Philippines any film not duly passed by the Board and to print or cause to be printed on any film exhibited in any moving picture theater or public place or on any film locally passed by said Board, knowing that said label has not been previously authorized by the same. If the violator is a corporation or association, the manager or administrator or the person who has charge of the management or administration of the business shall be criminally responsible therefor.

The violation of the above provision is punished by imprisonment for not more than one year, or by a fine of not more than one thousand pesos, or both, in the discretion of the court.[29]

D. *Review of the Decisions of the Board.*

The decisions of the Board, according to Act No. 3582, take effect immediately unless an appeal is taken to the President within sixty days.[30] Although the law is silent as to the availability of judicial review of the decisions of the Board, this should not be understood as denying judicial relief to any aggrieved party. As the United States Supreme Court stated in *St. Joseph Stockyards Co. v. United States*,[31] the supremacy of the law demands that there be

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[26] Par. H, §1, *id.*
[27] Par. H, §2, *id.*
[28] Opinion No. 176, series of 1956.
[29] §8, Act No. 3582.
[30] §2, *id.*
[31] 298 U.S. 38, 84, 56 Sup. Ct. 720 (1936).

opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceedings in which the facts were adjudicated was conducted regularly. However, as our Supreme Court has time and again ruled, the administrative remedies prescribed in the law must first be exhausted before resort can be had to the courts in order to comply with rule of exhaustion of administrative remedies.[32] Once this is satisfied, judicial review may be availed of by means of the provisional remedies of certiorari,[33] injunction,[34] prohibition[35] or even declaratory relief.[36]

The accepted rationalization is to categorize a particular issue as one of fact or of law. Whether or not the court will substitute its judgment for that of the administrative tribunal will depend, according to this theory, upon the presence of a question of law or a question of fact. That is, the courts will review administrative adjudication of law while respecting administrative findings of fact if supported by evidence.[37] In the exercise of its duties, the censor does not perform a mere ministerial act, but a function in a quasi-judicial capacity and is bound to a fair, sound, and reasonable discretion.[38]

CONSTITUTIONAL ASPECT OF FILM CENSORSHIP

The system of movie censorship has been with us since 1929, and yet not a single case regarding the constitutionality of the system as a prior restraint has been brought to the consideration of our courts. It is pertinent, therefore, for our purposes to examine the case law in the United States.

A. *Case Law in the United States.*

In the United States the prevailing doctrine for 37 years was that moving pictures did not come under the freedom of speech and press protection of the American Constitution on the ground that the exhibition of movies was a business pure and simple originated

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[32] Coloso v. Board of Accountancy, G.R. No. L-5750, April 20, 1953; Miguel v. Vda. de Reyes, G.R. No. L-4851, July 31, 1953; Lo Po v. McCoy, 8 Phil. 343 (1907); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 Sup. Ct. 459 (1938).

[33] Rule 67, §1, Rules of Court.

[34] Rule 60, §1, *id.*

[35] Rule 67, §2, *id.*

[36] Rule 66, §1, *id.*

[37] FERNANDO, *et al.*, ADMINISTRATIVE LAW 187-88 (1953).

[38] Thayer v. Moulton, 63, R.I. 182 7 A.2d 682 (1939); *In re* Fox Film Corp., 295 Pa. 461, 145 A. 514 (1929). This should not be confused with the attitude of leniency, however, because, as well observed, "the view which sustains administrative determinations based on some evidence has helped to drive deeper the censorship nail." Kupferman and O'Brien, Jr., *Motion Picture Censorship—The Memphis Blue*, 36 CORN. L.Q. 278, 292 (1951).

and conducted for profit. This view, announced in *Mutual Film Corp. v. Industrial Commission of Ohio*,[39] persisted for sometime until 1947 when the same Court held that moving pictures, like newspapers, are included in the press whose freedom is guaranteed by the First Amendment. This was but the portent of a later one, *Joseph Burstyn, Inc. v. Wilson*,[40] in which the American high tribunal, categorically repudiated the 37-year old *Mutual Film* decision in so far as the latter was inconsistent with it.

Describing the period of 1915-1952, Ivan Brychta, of Ohio State University, wrote:

> "Yet under the surface of events, time was working to change both the law and the fact. The federal Constitution began to protect the individual's free expression against the states, and motion picture films developed from the rudimentary stage of 1914 into an accomplished form of thought medium. No one could fail to see that film was a powerful vehicle for the transmission of ideas. Around 1939 and thereafter, legal periodicals began to denounce film censorship as unconstitutional. The film industry was preparing to conquer. The strategy was to bring a test case by violating the law through the showing of an unapproved newsreel, because it was believed that newsreels, if no other films, would be certainly recognized by the courts as a part of the press of the land.
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> "Combining courage with civil wisdom, the film industry then took thirteen more years for deliberation and at last brought a case not by violation of the law but on appeal. It was a civil case which overthrew the existing form of film censorship. Just when this litigation was arising on the state judicial levels, one of the more bitter attacks against film censorship was published in a leading periodical which did not remain unnoticed by the courts dealing with the *Burstyn* case. Moreover, the court observed that the tendency to reverse the 1915 decision manifested itself in the case of *United States v. Paramount Pictures*, but it also observed that a reversal and a return to the 1915 position was implicit in a denial of certiorari in another case, *Rd. Dr. Corp. v. Smith*. Considering it improper for itself as an intermediate court to reverse what appeared to be a still valid precedent, the Supreme Court of New York upheld the censorship statute of the state.
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> "The mood of the courts was also indicated when in another case arising from the same train of events the court said that against films considered undesirable the public could protect itself primarily by ignoring the films.
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> "In this atmosphere the *Burstyn* case, . . . reached the Supreme Court of the United States and was decided on May 26, 1952." [41]

Joseph Burstyn, Inc. v. Wilson [42] involved the constitutionality of a New York statute which permitted the banning of motion pic-

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[39] 236 U.S. 230, 244, 35 Sup. Ct. 387, 391 (1915); Mutual Film Corporation v. Hodges, 236 U.S. 284, 35 Sup. Ct. 393 (1915).
[40] 343 U.S. 495, 72 Sup. Ct. 777 (1952).
[41] *The Ohio Film Censorship Law*, 13 OHIO ST. L.J. 350, 368-369 (1952).
[42] *Supra* note 40.

ture films on the ground that they were "sacrilegious."[43] That law made it unlawful "to exhibit, or sell, lease or lend for exhibition at any place any motion picture film or reel unless there is at the time in full force and effect a valid license or permit therefor of the education department. The statute further provided that the director of the motion picture division of the education department should examine every motion picture film and unless such film or a part thereof is "obscene, indecent, immoral, inhuman, sacrilegious or is of such a character that its exhibition would tend to corrupt morals or incite to crime," should issue a license therefor. The appellant brought this action claiming: "(1) that the statute violates the Fourteenth Amendment as a prior restrain from freedom of speech and of the press; (2) that it is invalid under the same Amendment as a violation of the guaranty of separate church and state and as a prohibition of the free exercise of religion; (3) that the term 'sacrilegious' is so vague and indefinite as to offend due process."

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[43] The film banned in this case was "The Miracle." This is the story of a poor, simple-minded girl who while tending a herd of goats on a mountainside one day, came across a bearded stranger. Suddenly it strikes her fancy that he is St. Joseph, her favorite saint, and that he has come to take her to heaven, where she will be happy and free. While she pleads with him to transport her, the stranger gently plies the girl with wine, and when she is in a state of tumult, he apparently ravishes her. (This incident in the story is only briefly and discreetly implied.)

The girl awakens later, finds the stranger gone, and climbs the mountain not knowing whether he was real or a dream. She meets an old priest who tells her that it is quite possible that she did see a saint, but a younger priest scoffs at the motion. "Materialist," the old priest says.

There follows now a brief sequence—intended to be symbolic, obviously—in which the girl is reverently sitting with other villagers in church. Moved by a whim of appetite, she snatches an apple from the basket of a woman next to her. When she leaves the church, a cackling beggar tries to make her share the apple with him, but she chases him away as by habit and munches the fruit contentedly.

Then, one day, while tending the village youngsters as their mothers work at the vines, the girl faints and the women discover that she is going to have a child. Frightened and bewildered, she suddenly murmurs, "It is the grace of God!" and she runs to the church in great excitement, looks for the statue of St. Joseph, and then prostrates herself on the floor.

Thereafter she meekly refuses to do any menial work and the housewives humor her gently but the young people are not so kind. In a scene of brutal torment, they first flatter and laughingly mock her head. Even abused by the beggars, the poor girl gathers together her pitiful rags and sadly departs from the village to live alone in a cave.

When she feels her time coming upon her, she starts back towards the village. But then she sees the crowds in the streets; dark memories haunt her; so she turns towards a church on a high hill and instinctively struggles towards it, crying desperately to God. A goat is her sole companion. She drinks water dripping from a rock. And when she comes to the church and finds the doors locked, the goat attracts her to a small side door. Inside the church, the poor girl braces herself for her labor pains. There is the cry of an unseen baby. The girl reaches towards it and murmurs, "My son! My love! My flesh!" (Crowther, *The Strange Case of "The Miracle,"* Atlantic Monthly, April 1951, pp. 36-37). See concurring opinion of Justice Frankfurter at 783-784.

From adverse decisions of the Appellate Division and the New York Court of Appeals, Joseph Burstyn, Inc. appealed to the Supreme Court of the United States.

In holding that movies come under the aegis of the free speech and free press guaranty of the First Amendment, the Supreme Court said:

> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. People of State of New York*, 1948, 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840: 'The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine'.
>
> 'It is urged that motion pictures do not fall within the first Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.
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> "It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hyphothesis, it does not follow that motion pictures should be disqualified from the First Amendment's protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.
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> "For the foregoing reasons, we conclude that expression by means of motions pictures is included in the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm.*, *supra*, is out of harmony with the views herein set forth, we no longer adhere to it."

But the Court did not stop there. It held:

> " . . . It does not follow that the Constitution requires absolute freedom to exhibit every motion pictures of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing other methods of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment command, do not vary Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.
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> " . . . This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be

> especially condemned. Near v. State of Minnesota ex rel. Olson, 1931, 283 U.S. 697, 51 S. Ct. 625, 75, 75 L. Ed. 1357. The Court there recounted the history which indicated that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraint upon publications, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' *Id.*, 283 U.S. at page 716, 51 S.Ct. at page 631. In the light of the First Amendment's history and of the Near decision, the state has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case."

Then, referring to the term "sacrilegious," the Court said that it was too broad and all-inclusive such that the "censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York can not vest such unlimited restraining control over motion pictures in a censor. Cf. Kunz v. People of State of New York, 1951, 340 U.S. 290, 71 S. Ct. 312, 328, 95 L. ed. 267, 280. Under such a standard, the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority."

Accordingly, we may summarize the doctrine of this case thus: Expression by means of motion pictures comes within, and is protected by, the free speech and press clause of the Constitution against previous restraint. In "exceptional" cases, however, previous restraint may be validly imposed.

A week after, the Supreme Court was again presented with a censorship measure. In *Gelling v. Texas*,[44] an ordinance of Marshall, Texas empowered the city board of censors to refuse a license to exhibit a movie if such exhibition would be "prejudicial to the best interests" of the city. The appellant was convicted of a misdemeanor under this ordinance for showing a picture without a license. In reversing the judgment of conviction, the Supreme Court laconically stated: "The judgment is reversed. See Burstyn, Inc. v. Wilson, 343 U.S. 493, 72 S.Ct. 777, and Winters v. New York, 333 U.S. 507, 68 S. Ct. 665."

Under these decisions, is the system of censorship, which consists in the obligation to submit films for prior examination, constitutional? What did the Court mean when it held that in exceptional cases, censorship may be validly upheld?

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[44] 343 U.S. 960, 72 Sup. Ct. 1002 (1952).

Like Brychta, one would ordinarily consider the concept in terms of situation-utterance relation.[45] But the courts of Chicago and New York (formerly of Ohio also) give a different interpretation to the concept of exception as used by the Federal Supreme Court in *Burstyn, Inc. v. Wilson.*[46]

The first case after the promulgation of the *Burstyn* decision is *Superior Films v. Department of Education.*[47] The Ohio Code provided that "only such films as are in the judgment and discretion of the board of censors of moral, educational or amusing and harmless character shall be passed." The film "M" was rejected for the following reasons: "(1) There is a conviction that the effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime. (2) Presentation of actions and emotions of child killer emphasizing complete perversion without serving any valid educational purpose. Treatment of perversion creates sympathy rather than a constructive plan for dealing with perversion."

Relying on the *Burstyn* decision, plaintiff film company contended that motion pictures were a mode of expression entitled to the same protection as speech and the press and as such, violation of this guaranty is protected from infringement by the state by the Fourteenth Amendment to the American Constitution.

The Ohio Supreme Court was not sympathetic to this claim. It interpreted the *Burstyn* case to mean that although a motion picture may not be rejected because of "sacrilegious" expression, there still remained a limited field in which decency and morals may be protected from the impact of an offending motion picture film by prior restraint under proper criteria. Said the Court:

> ". . . There can be no inherent right to publicity which tends to destroy the very social fabric of the community, and consequently in such in-

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[45] "Under this language, the present writer would consider it indubitable that censorship as a routine practice consisting in the obligation to submit all films intended for public exhibition to any governmental organ for previous approval, is absolutely rejected by the Court. And that only in situations threatening an acute and actual danger to vital interest of an individual or of the nation, the utterance of some idea or emotion may be enjoined just as any preparation of serious criminal act may be enjoined. In this sense, the concept of exception which is the central concept of the Court's theory of limitations on freedom to speak in its various forms, would be understood in terms of a relationship between situations and utterances . . . .

"Obviously, then, the precision of standards of a censorship law has nothing to do with the problem. ...Previous restraint as an exception would exist if the mechanism of prevention operated just as it operates in all other criminal cases. The government must, through the police, establish a probable cause that an unlawful action is contemplated...." *Supra* note 41 at 871-870. See also Judge Desmond, concurring in Commercial Pictures Corp. v. Board of Regents, *infra* note 48 at 508-512.

[46] *Supra* note 40.

[47] 159 Ohio St. 315, 112 N.E.2d 311 (1953).

> stances there is no right of free speech or free press to be infringed. In these times of alarming rise in juvenile delinquency and of increasing criminality in this country, attributed by social agencies, at least in part, to the character of the exhibitions put on in the show houses of the country, criminal prosecution after the fact is a weak and ineffective remedy to meet the problem at hand. In the war against crime and delinquency there must be some effective defensive weapons against immoral publicity, whereby the social fabric may be protected as it is by law from other methods of attack...."
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> "As we view it, the United States Supreme Court has not *ipso facto* taken away all community control of moving pictures by censorship, and this court will not do so under the claim of complete unconstitutionality of censorship laws."

As to whether the standards of the statute met the requirement of definiteness, the Court said that they did. The Court observed that such view, as held in the *Mutual Film* case, was not overruled in the *Burstyn* case. In fact, said the Court, in his concurring opinion, Justice Frankfurter even contrasted the indefinite term "sacrilegious" with the standards of the Ohio Act in this wise:

> " . . . Even in Mutual Film Corp. v. Industrial Comm. of Ohio, . . . it was deemed necessary to find that the terms 'educational, moral, amusing or harmless' do not leave 'decision to arbitrary judgment.' Such general words were found to 'get precision from the sense and experience of men.' . . . This cannot be said of 'sacrilegious . . . ' "

Less than a month later, the case of *Commercial Pictures v. Board of Regents*[48] came up before the New York Court of Appeals. The censorship body banned the picture "La Ronde" on the ground that it was "immoral" and would "tend to corrupt morals within the meaning of the state law. The Court summarized the picture thus;

> "The film from beginning to end deals with promiscuity, adultery, fornication and seduction. It portrays ten episodes, with a narrator. Except for the husband and wife episode, each deals with an illicit amorous adventure between two persons, one of the two partners becoming the principal in the next . . . . At the the very end, the narrator reminds the audience of the author's thesis: 'It's the story of everyone.' "

The issues involved were: (1) Are motion pictures, as part of the press, altogether exempt from prior restraint or censorship? (2) Do the words "immoral" and "tends to corrupt morals," in Section 122 of the Education Law, viewed in the perspective of their legislative setting, fail to provide a standard adequate to satify the requirements of due process? (3) Has the statute been properly applied here?

Through Judge Frossel, the Court answered the first question in the negative, stating that while the *Burstyn* decision extended the constitutional protection of free expression to motion pictures,

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[48] 305 N.Y. 336, 113 N.E.2d 502 (1953).

that decision nevertheless emphasized that the Constitution does not require absolute freedom to show every motion picture of every kind at all times and in all places nor that motion pictures are necessarily subject to the precise rules governing any other method of expression. In justifying censorship of motion pictures, Judge Frossel wrote:

> " . . . the State may not impose upon its inhabitants the moral code of saints, but, if it is to survive, it must be free to take such reasonable and appropriate measures as may be deemed necessary to preserve the institution of marriage and the home, and the health and welfare of its inhabitants. History bears witness to the fate of peoples who have become indifferent to the vice of indiscriminate sexual immorality — a most serious threat to the family, the home and the state. An attempt to combat such threat is embodied in the sections of the Education Law here challenged. It should not be thwarted by any doctrinaire approach to the problems of free speech raised thereby.
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> "That a motion picture which panders to base human emotion is a breeding ground for sensuality, depravity, licentiousness and sexual immorality can harly be doubted. That these vices represent a 'clear and present danger' to the body social seems manifestly clear. The danger to youth is self-evident. And so adults, who may react with limited concern to portrayal of larceny, will tend to react quite differently to a presentation wholly devoted to promiscuity, seductively portrayed in such manner as to invite concupiscence and condone its promiscuous satisfaction, with its evil social consequences. A single motion picture may be seen simultaneously in theaters throughtout the State. May nothing be done to prevent countless individuals from being exposed to its vicious effects? To us the answer seems obvious especially in the light of recent technical developments which render the problem more acute than ever. Now we have commercially feasible three dimensional projection, some forms of which are said to bring the audience 'right into the picture.' There can be no doubt that attempts will be made to bring the audience right into the bedchamber if it be held that the State is impotent to apply preventive measures."

Neither did the Court find offensive the standards of the New York statute on the score of indefiniteness. The Court said that the words "immoral" and "morals" must be taken to refer to the moral standards of the community so that the standards of any given segment of the whole population are not controlling. According to it, "immorality" means "sexual immorality" — "a moral concept about which our people do not widely differ; sexual immorality is condemned throughout our land." A gradation of language in the law proceeding from "obscene" to "indecent" to "immoral" was also pointed out, the Court seemingly implying that a lesser degree of evil is necessary for the censorship of the last than of the first.

> "It is not a valid criticism that such general moral standards may vary slightly from generation to generation. Such variations are inevitable and do not affect the application of the principle at a particular

> period in time. . . . Neither may a standard be criticized on the ground that individual opinions may differ as to a particular application thereof. There is no principle or standard not subject to that infirmity. . . ."

The Supreme Court of the United States did not see eye to eye, as it were, with the state courts in the *Commercial Pictures* and the *Superior Films* cases. It reversed these rulings in a laconic, per curiam decision "Judgments are reversed. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 493, S. Ct. 777."[49] In a concurring opinion, Justice Douglas, with whom Justice Black concurred, stated that the spoken word is as freely protected against prior restraints as the printed one. To him, the freedom of the movie admits of no exception. He wrote:

> "The first and the fourteenth amendments say that Congress and the states shall make 'no law' which abridges freedom of speech or of the press. In order to sanction a system of censorship, I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take the step. In this nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."

Seven months after this decision, the Illinois Supreme Court decided *American Civil Liberties Union v. Chicago*[50] in which it stated that it did not regard the *Superior Films* decision "as automatically compelling us to overrule our prior approval of the Chicago censorship ordinance." In that case, an ordinance of the City of Chicago authorized the police commissioner to refuse a license to exhibit any motion picture which he finds to be "immoral or obscene." Applying these norms, the commissioner refused to permit the showing of "The Miracle" in Chicago. The trial court enjoined the prevention of the exhibition but the Supreme Court of Illinois reversed the decision and upheld the power of the city to censor films on the basis of the above criteria. The case was sent back to the trial court, however, for a determination of whether or not the film was in fact obscene. It may be stated in passing that this is the very film involved in the *Burstyn* case. The difference, however, is that while the film was banned in the *Burstyn* case on the ground of being "sacrilegious," in this case it was banned on the ground of being "obscene," a term which the Illinois court deemed to be sufficiently clear and definite. It held that a motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of effect is so great as to outweight whatever artistic or other merit

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[49] Superior Films, Inc. v. Department of Education, 346 U.S. 587, 74 Sup. Ct. 286 (1954).

[50] 3 Ill.2d 334, 121 N.E.2d 169 (1954).

the film may possess. A film, according to the Court, must be tested with reference to its effect upon the normal, average person.

Like the closing scene of a great drama, the fight against film censorship shifted once more to Ohio, the state that gave American jurisprudence *Mutual Film, Inc. v. Industrial Commission of Ohio*[51] and *Superior Films v. Department of Education of Ohio.*[52] In this case, *R.K.O. Picture v. Department of Education,*[53] the latest case at the time of writing, the division of film censorship of the department of education issued an order requiring the plaintiff to eliminate certain parts of a motion picture film prior to its distribution and exhibition in the state. Plaintiff instituted the present suit in the Supreme Court of Ohio, praying that the court set aside the order of the division on the ground that censorship act was repugnant to the First and Fourteenth Amendments of the Constitution as well as similar provisions of the Constitution of Ohio. The Ohio censorship law provides that only pictures which are "moral, educational, amusing and harmless" shall be approved for public exhibition.

In granting relief, the Court held:

> " . . . the Supreme Court of the United States in the Superior Films case reversed the decision of this court in clear and unmistakable language without qualification. Since this court had held that the Ohio act is constitutional and is sufficiently clear, definite and comprehensive, the conclusion is inescapable that the Supreme Court of the United States disagreed completely with the decision of this Court. The decision of the Supreme Court of the United States in the Superior Films case, together with the expressions in other decisions of the court, is equivalent to a declaration of unconstitutionality of the Ohio act."

This statement notwithstanding, the censorship statute of Ohio was saved from being struck down as unconstitutional by a lack of the required six votes. This was a 5 to 2 decision.

Is censorship, which consists in the obligation to submit films to previous examination, constitutional in the light of the *Burstyn* case?

The question has yet to be faced squarely by the Supreme Court of the United States. It is submitted, however, that censorship *per se* is valid and constitutional.

Let it be recalled that one of the claims of the appellant in the *Burstyn* case was "(1) that the statute violates the Fourteenth Amendment as a prior restraint upon the freedom of speech and of

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[51] *Supra* note 39.
[52] *Supra* note 47.
[53] 162 Ohio St. 263, 122 N.E.2d 169 (1954).

the press." If the Court accepted without qualification this contention in allowing the showing of "The Miracle," it would have stopped then and there after saying that expression by means of motion pictures is protected by the First and Fourteenth Amendments. But no, the Court added that that was no the "end of the problem." "It does not follow," said the Court, "that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and place. . . . *Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other method of expression. Each method tends to present its own peculiar problems. . . .*"[54]

Secondly, only that part of the New York statute dealing with the banning of motion pictures on the ground of being "sacrilegious" was involved in this case. If it was the intention of the Court to abolish altogether the system of censorship as something offensive, why did it have to say: "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide . . . whether a state may censor a motion picture under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us."[55]

Thirdly, the majority in the *Burstyn* case said: "If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here."[56] The implication is that in exceptional cases, censorship is valid. As Mr. Justice Frankfurter explained in his concurring opinion, the choice cannot be between two mutually exclusive alternatives: either that motion pictures are subject to *unrestricted* censorship or that they must be allowed to be shown shown *under any circumstances.* To him only only the "tyranny of absolutes" would rely on such alternatives to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact communities. "It would startle Madison and Jefferson and George Mason," he said, "could they adjust themselves to our day to be told that the freedom of speech which they espoused in the Bill of Rights authorized a showing of the 'Miracle' from windows facing St. Patrick's Cathedral in the forenoon of Easter Sunday, just as it would startle them to be told that any picture, whatever its form and its expression, could be banned from being commercially exhibited. The general principle of free speech, expressed in the First Amendment, binding on the States, must be placed in its historical and legal con-

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[54] 343 U.S. 495, 72 Sup. Ct. 777 at 781 (1952).
[55] *Id.*, at 782-783.
[56] *Id.*, at 780-781.

text. The Constitution, we cannot recall to often, is an organism, not merely a literary composition."[57]

The feeling then is not so much against censorship *per se*, i.e., the system of requiring prior examination of films, as it is against censorship *which results in arbitrary banning of a picture because the standards intended to guide the discretion of the censor are vague and indefinite.* Thus in *Saia v. New York*,[58] in declaring unconstitutional an ordinance penalizing the use of loud speakers without a previous permit, the Supreme Court held among other things that because the statute was not narrowly drawn to regulate the hour or places of use of loud speakers, or the volume of sound (the decibels) to which they must be adjusted, "the right of speech was placed in the uncontrolled discretion of the chief of police."

It is reasonable to believe, therefore, that if the state can draw a statute with definite standards to control the discretion of the censor the same may not be objectionable.

As has been observed, basically, the difficulty in devising a suitable standard stems from the nature of the harm which the state is attempting to prevent. The harm is a state of mind which is believed unhealthy to the best interests of society. It can be found on at least two levels, and regulation to prevent its occurence may be constitutional on one level but not on the other. On the one level, films stimulating obscene thought or inclinations to commit specific unlawful acts, are specially to be condemned and may be capable of being regulated without proscribing protected material. Other films may not stimulate any specific frame of mind, but may be directly instrumental in bringing about a gradual change of attitude—a deterioration of the viewer's sense of rightness and wrongness. For instance, the portrayal of loose or adulterous conduct may be presented in such a manner as to give the viewer the impression that such conduct is acceptable. Any standard reaching the evil at this level would be so inclusive as to operate as a prior restraint on expression. The likelihood that any standard will be valid, however, may depend on other factors in the regulatory process.[59]

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[57] *Id.*, at 788-789. Justice Jackson joined in this opinion.

[58] 334 U.S. 558, 68 Sup. Ct. 1148 (1948).

[59] 30 IND. L.J. No. 4, 462, 470 (1955). The Ohio legislators are now seeking to enact a statute which has the required definiteness. Under one bill, a film may be found to be obscene "if it portrays explicitly or in detail an act of adultery, fornication, rape, sodomy, or seduction or if either theme or manner of presentation, or both, present sex relation as desirable, acceptable, or proper patterns of behaviour between persons not married to each other or the dominant purpose of which is erotic or pornographic, or if it portrays nudity or a simulation thereof, partial nudity offensive to public decency, sexual relations of any kind, sex organs, abortion, or methods of contraception or if it contains vile or profane language."

In this connection, we do not share the view that because the requirement of definiteness and clearness of standard is high, censorship laws will ultimately be written off as unconstitutional for failure of states to meet this requirement.[60] We believe that although the task is difficult, it is not impossible. We believe, too, that the standard "obscene" is clear enough or the Court would not have said towards the end of its opinion: "It is not necessary for us to decide . . . whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." In *Chaplinsky v. New Hampshire*,[61] the Court recognized that

> " . . . There are certain well *defined and narrowly limited classes of speech*, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that maybe derived from them is clearly outweighed by the social interest in order and morality." (Italics supplied).

The rationale of this requirement is that if the criteria of a statute are vague both constitutionally protected and unprotected conduct is at the mercy of the censor in violation of due process.[62] As Justice Frankfurter observed, one does not and cannot know what is condemned by a statute with an indefinite standard like "sacrilegious." Definite standards then keep administrative discretion within narrow bounds and check arbitrary or wholly subjective determinations.

Aside from the requirement of definiteness one other requirement is that a censor should not ban a picture unless it presents a "clear and present danger" that it will bring about the substantive evils that Congress has a right to prevent. This test was first announced in the case of *Schenck v. United States*[63] where Justice Holmes said that the question in every case was whether the words used were used in such circumstances and were of such a nature as

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A film may be found "to incite crime" "if the theme or manner of presentation is of such character as to present the commission of criminal acts or contempt for law as constitutional, profitable, desirable, or acceptable behavior or if it teaches the use of any methods of narcotics or habit-forming drugs or it presents explicit methods for the commission of crime." The New York Legislature has already passed an amendment defining "immoral," "of such character that its exhibition would tend to corrupt morals," and "incite to crime." *Id.*, at 468, n. 35.

[60] Brychta, I., *op. cit. supra note* 41, at 375-376.

[61] 315 U.S. 568, 62 Sup. Ct. 766 (1941).

[62] See Ang Tibay v. Court of Industrial Relations, 69 Phil. 635, for the "cardinal primary rights" which must be respected by administrative bodies.

[63] 249 U.S. 47 (1919).

to create a clear and present danger that they would bring about the substantive evils that Congress had a right to prevent.

So stringent, indeed, is this test as limitation of freedom of expression that, as Justice Jackson said, he would consider whether a leaflet, or a movie for that matter, is so emotionally exciting to immediate action as the spoken word, especially the incendiary speech. He would inquire whether this publication was obviously so foul and extreme as to defeat its own ends, whether its appeal for money—which has a cooling effect on many persons—would not impress the passer-by as the work of an irresponsible who needed mental examination. Said Mr. Justice Jackson, "One of the merits of the clear and present danger test is that the triers of fact would take into account the realities of race relations and any smouldering fires to be fanned into holocausts. Such consideration might well warrant a conviction here when it would not in another and different environment."[64]

The application of this principle to moving pictures is implicit in the statement in the *Burstyn* case that expression by means of motion pictures is within the ambit of protection which the First Amendment secures to any form of speech. This protection consists in not suppressing expression unless there is a clear and present danger of a substantive evil which Congress has a right to prevent. Among the evils which Congress has a right to prevent are those created by lewd and obscene, profane, libelous and insulting words—words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

For the foregoing reasons, it is submitted that under the ruling in *Burstyn, Inc. v. Wilson*, supra, censorship *per se* is a valid police power measure provided (1) the statute is clearly drawn and limited in order to insure that no picture that is not against the interests which Congress has a right to protect will be capriciously banned; and (2) there must be a clear and present danger that the motion picture will bring about the evils which Congress has a right to prevent.

By citing the *Burtsyn* case in its memorandum opinions in *Gelling v. Texas*[65] and *Superior Films v. Department of Education*,[66] the United States Supreme Court in effect held that the states concerned failed to justify the "heavy burden to demonstrate that the limitations challenged here presents such an exceptional case."

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[64] Beuharnais v. Illinois, 343 U.S. 250, 72 Sup. Ct. 725, 96 L. Ed. 620 (dissenting opinion).
[65] *Supra* note 44.
[66] *Supra* note 47.

Consequently, it is submitted that consistently with the above analysis of the *Burstyn* decision, the basis of the reversal could be either indefiniteness of standards or absence of clear and present danger of substantive evils.

It is possible that in the opinion of the Court, the standards "prejudicial to the best interest of the said city," "immoral," and "tends to corrupt morals," and "moral, educational, or amusing and harmless character" are so vague as to give the censor unlimited discretion. In the concurring opinion of Justice Frankfurter in *Gelling v. Texas*,[67] there is this significant statement: "This (referring to the standard 'of such a character as to be prejudicial to the best interest of said city') offends the Due Process Clause of the Fourteenth Amendment on the score of indefiniteness."

A second possible reason for the reversal decisions could be the lack of a clear and present danger to the interests which Congress has a right to protect. The clear and present danger test was mentioned by the New York Court of Appeals in the *Commercial Pictures* case and it is possible that the Supreme Court held a different view as to its application. As a matter of fact the dissenting opinion in the *Commercial Pictures* case could quote some favorable review of the picture "La Ronde" from the *Los Angeles Daily News*. It may be that in the opinion of the Court this just showed that there was no clear and present danger in exhibiting the film.

B. *The Philippine Law.*

That the Philippine Supreme Court will adhere to the *Burstyn* case seems certain in view of its decision in *Santiago v. Far Eastern Broadcasting Co.*[68] that the radio comes within the free expression clause of the Constitution.

Does our censorship law meet the above requirements?

As previously indicated, the criteria used in Act No. 3582 are: "immoral," "contrary to law and good customs" and "injurious to the prestige of the Government of the Philippines or its people."

There is no decision yet as to whether the standards used in the law satisfy the requirement of definiteness. However, in *Rubi v. Prov. Board*,[69] the Court sustained the constitutionality of a law empowering the provincial governor, upon prior approval of the Department head, "in the interest of law and order" to direct non-Christian inhabitants to live in certain parts of Mindoro. It may not

[67] *Supra* note 44.
[68] 73 Phil. 408 (1941).
[69] 39 Phil. 660 (1919).

be amiss to state, however, that the basis for that decision was that there was no undue delegation of legislative power. In the American cases we have considered, the basis was violation of the due process clause. Other standards found sufficient by our Court are: "adequate and efficient instruction,"[70] "public welfare,"[71] "public interest,"[72] and "justice and equity and substantial merits of the case."[73]

It is possible that the Supreme Court of the Philippines will find no objection to the above standards of Act No. 3582 in view of its observation that with the multiplicity of the subjects of governmental regulation and the increased difficulty of administering laws, there is a tendency toward the delegation of greater powers by the legislature and the approval of the practice by the courts.[74]

The Board of Review for Moving Pictures interprets the term "immoral" to mean "obscene, indecent and lewd and lascivious, tending to corrupt public morals," as shown by its "Code of Moving Pictures Censorship."

As to the application of the clear and present danger rule, Professors Tañada and Fernando believe that the doctrine has been adopted in this jurisdiction, albeit only tacitly, in the Supreme Court case of *Primicias v. Fugoso*.[75]

C. *The Case of the "Martin Luther Story."*

Early last year a furor appeared in the local papers when the Board of Review for Moving Pictures imposed a conditional ban on a picture entitled "Martin Luther Story" allowing its showing only within the confines of Protestant churches. This decision (permit no. 4281) was the result of a compromise obtained by an appeal to the President when eleven against three of the members of the Board voted to ban the picture completely. In his memorandum to the President, Teodoro F. Valencia, Chairman, declared that because

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[70] Philippine Ass'n. of Colleges and Universities v. Sec. of Education, *et al.*, G.R. No. L-5279, Oct. 31, 1955.

[71] Mun. of Cardona v. Binangonan, 36 Phil. 547 (1917).

[72] Pangasinan Trans. Co. v. Public Service Commission, 70 Phil. 221 (1940); People v. Rosenthal, 68 Phil. 328 (1939).

[73] International Hardwood and Veneer Co. v. Pangil Fed. of Labor, 70 Phil. 602 (1940).

[74] Pangasinan Trans. Co. v. Public Service Commission, *supra* note 72.

[75] 80 Phil. 71. I TAÑADA AND FERNANDO, CONSTITUTION OF THE PHILIPPINES 323 (1952). Considered significant by the authors is a quotation from the American case of Whitney v. California, 274 U.S. 357, in which Justice Brandeis, concuring, said: "...To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practised. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."

Prof. Padilla holds the same view. I CIVIL LAW 63 (1956).

the picture was allegedly derogatory to the Catholic religion, its showing might provoke a breach of peace and order.

> "...In this case, 'Martin Luther Story,' while pretending to be a biography of Martin Luther, tears apart the very foundation of Catholic religion and puts in ridicule the sanctity of Catholic institutions. Singled out for attack is the papacy, which is the unifying force of the Catholic religion.
>
> "...
>
> "In passing, we might say that the picture is a forceful biography. The incidents, which have been the basis of a direct attack against the church, were historically correct and the undersigned is of the belief that the makers of this motion picture did not deliberately intend to put the Catholic church in ridicule. However, considering the piety of our people and their traditional customs of worship, it will be working difficulties on the conscience of the majority of the inhabitants of the nation to allow the exhibition of this picture under the guise of entertainment."

The Federation of Christian Churches hit the action of the Board and charged the members with bigotry and violation of religious liberty. Quick to come to the defense of the Board, the Catholic Action of the Philippines claimed that the picture puts the Pope in bad light and glorified the Protestant religion at the expense of the Catholics. The picture was shown in Manila on October 22-31, 1956.[76]

Applying the conditions as to the valid operation of the censorship system, does the "Martin Luther Story" present such a clear and present danger to public peace and order as to justify its suppression?

We submit that it does not. For once it is admitted that the incidents (attacks on the papacy) in the picture "were historically correct and...that the makers of this motion picture did not deliberately intend to put the Catholic Church in ridicule," it is pointless to argue that just the same there is danger of a "religious controversy." Indeed, one can no more absurdly argue on this basis than to argue that history books should not be put in the schools and libraries or elsewhere lest the story of Martin Luther provoke Catholics and Protestants into a holy war! One cannot obliterate the facts of history for the simple reason that, as the old song goes, one "cannot turn back the hands of time" to rewrite history. What curiously the Board did not foresee was that in so doing, they accomplished exactly the thing they claimed to avoid—religious controversy. For as soon as the decision became known publicly, the daily newspapers and weekly magazines were swarmed with indignant letters and press releases which assumed the shape of a truly religious debate.[77]

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[76] Manila Daily Bulletin, Oct. 20, 1956, p. 2, col. 2.

[77] See for instance, Manila Daily Bulletin, April 15, 1955, p. 2, April 18, 1955, p. 4; Philippines Free Press, May 21, 1955, p. 28.

There was no violence, though, such as the overly zealous Board timorously feared.

Another curious thing about this decision of the censors was that they feared that a religious controversy might be stirred up and yet it allowed the picture to be shown within the confines of Protestant churches. What is to prevent, it may be asked, the Catholics from viewing the picture and just the same make them uncomfortable? Is there really a significant distinction between allowing the showing of the picture within Protestant premises and allowing its exhibition in downtown movie houses if the object is really to prevent public disorder? If the picture hurts the Catholics, would it not hurt them too as long as the same is offered for public consumption within the premises of Protestant churches? Good if the decision said the film should be for the Protestants alone.

In a case like this, the thing to do is to encourage free discussion in order to unmask the false and not to enforce silence. Among free men, as Justice Brandeis said, the safeguards against crime are education and punishment for violation of the law.[78]

Significantly, even as it was still being filmed in 1952, Justice Frankfurter already anticipated the cold reception which the "Martin Luther Story" would receive in the hands of a biased censor. He said, "The press recently reported that plans are being made to film a 'Life of Martin Luther.' N.Y. Times, April 27, 1952, §2, p. 5, col. 7. Could Luther be sympathetically portrayed and not appear 'sacrilegious' to some, or unsympathetically, and not to others?"[79]

SUMMARY

(1) Expression by means of motion pictures comes within, and is protected by, the free speech and press guaranty of our Constitution against previous restraint.

(2) Censorship *per se*, *i.e.*, the system of requiring examination of films previous to their showing, is constitutional provided (a) the statute is clearly drawn and limited; and (b) a motion picture may be banned only where there is a clear showing that it will bring about the substantive evils which Congress has the right to prevent.

(3) The banning of the "Martin Luther Story" was unjustified.

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[78] Whitney v. California, 274 U.S. 357, 47 Sup. Ct. 641, 649 (1927) (concurring opinion).

[79] *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 Sup. Ct. 777, 795-796, n. 56 (1952) (concurring opinion).

(4) It will serve the cause of constitutional liberty if the censorship board is made up of persons of different religious, let alone, of different political, persuasion. Accordingly, an amendment of Act No. 3582 is in order.

VICENTE V. MENDOZA*

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