CENSORING THE CENSOR

Victor P. Lazatin*

I. *Censorship in Contemporary Filipino Society*

In the Philippines today there is an apparent lack of relevant sociological data which can be utilized to trace the directions (or lack of it) of local film censorship.

The hackneyed excuse posited to qualify the continued existence of movie censorship is to safeguard the morals of our society, which, in effect, are the morals spawned by religion. Nourished with Catholic convictions, a large sector of the population regards the movie censor as a religious guardian. From a historical point of view, we can speak of the Spanish Catholic period and the American Protestant legacy as contributory factors that produced the Filipino puritan streak.

On the other hand, there is also the liberalized intelligentsia, which spearheads the now popular effort towards liberalization. The liberal middle class is the enlightenment which has, fortunately, accompanied shifts, no matter how superficial, in local income distribution. It impugns censorship as a device of mental regimentation and an undue restriction of the freedom of expression. Not to be disregarded are the radicals who view censorship in a different light. They claim that the tolerationof films with sex scenes is an insidious attempt by the administration to distract the masses from brooding over their sad plight. To them, the movie censor is a mere government tool created to cater to the purposes of the ruling clique.

No attempt is made in this paper to articulate on all the social factors bearing upon movie censorship because the writer is cognizant of the great diversity in the moral persuasion and educational background of the various segments of Filipino society. The elements of our society are so contradistinct with each other that it would not be possible to adopt a single uniform standard without creating a mass of contradictions.

The purpose of this paper is to resolve the question of movie censorship by taking a trail which is still unblazed in Philippine jurisprudence. Some articles have been written concerning movie censorship but almost all dealt on the religious and moral aspects of the problem. In the preparation

* *Member,* Student Editorial Board, Philippine Law Journal.

of the paper, rulings from U.S. courts inevitably dominate the exposition. This is on account of the fact than the issue is more extensively discussed legally in that jurisdiction that in ours. Moreover, it would not lead into fallacious analytical basis because the constitutional rights involved are almost identical. Of course, the social temper which influenced the rulings is not consonant with ours but the writer has tried to harmonize such decisions not only with what prevails in our present society but also with future developments as gleaned from present tendencies.

This paper is a short brief against censorship. Mark Twain often spoke of melons stolen from the neighbors' as always being sweeter. But take away the fences and tie up the dogs, and the melons would lose their sense of adventure. This exactly is the purpose of this paper: to show the need for censoring the censor; to show the need for trying up the dogs and pulling down the fences.

In contemporary Philippine society, the Board of Censors for Moving Pictures elicits no lavish praise. Whichever facet, the Board appears as an obtrusive and inefficient government agency. To the liberals, it is a sanctimonious body hypocritically clinging to puritanical standards, while, to the conservatives, it is an impiously inefficient body which has been derelict in its duty of safeguarding the moral values of the nation.

It is interesting to note that no serious challenge has ever been levelled against the valid existence of the Board of Movie Censors. Apparently, a majority of our populace take for granted the necessity of such a body. To them the question is not whether it should exist but whether it should be strict or lax. This attitude has been demonstrated recently when various sectors of our society howled in protest against the proliferation of "*bomba*"[1] films. Naturally, the board took the brunt of the castigation and as an off-shoot there was a surge of demands for more rigorous censorship — a situation which all the more made the issues of movie censorship moot.

However, instances are not lacking when brows were knitted as to the desirability of movie censorship. It can be recalled that when President Marcos first made a bid for the presidency he employed as one of his campaign gimmicks a film based on his life, "Iginuhit ng Tadhana." For some ostensible political reason, the Board of Censors banned its exhibition in a local theatre. There was a backlash of deprecation, condemning the Board as a political tool of the incumbent administration. The case was brought before the Court of First Instance of Manila wherein the decision of the Board of Censors was reversed and appealed to the Court of Appeals wherein the decision of the Board was sustained. Finally, the Supreme Court lifted the injunction on September 17, 1965 and the case was ultimately dismissed as being moot and

[1] A local slang for a movie fraught with sex scenes.

academic.[2] The incident brings to light a sad truth that the people realize the legal import of censorship only when there are glaring transgressions of a fundamental right. While the move to abolish movie censorship makes no headway, it remains a sword of Damocles which they complacently accept and, paradoxically, support.

II. *Development of the Controversy*

"Over the years, the movies have probably the most attractive popular — and worried about — of all media of communication. Their extraordinary power to capture reality and give it representation in the most simply understood terms has not only guaranteed them a large following, but convinced many persons that they have a special capacity for harm. In a mass society this power and popularity has aroused a strong censorship interest that has shadowed the movies since their beginning and taken a toll of free expression. No other medium has been subject to quite the intensity or variety of moral measurements and restraints as have the movies."[3]

These relatively new optical entertainments have their beginning in the technological development of the *camera obscura* of the Italian Renaissance from which Daguerre fashioned his photograph. From the study of the optical phenomenon of persistence of vision it resulted in a profusion of optical toys which led eventually to the motion pictures, commonly believed to have been fathered by Edison.[4]

Simultaneous with the technological advancement of the movie camera, the official attitude began molding and the reception grounds for the new amusement was laden with obstacles. In the United States, the first clamour for movie censorship was heard before the turn of the century when the movie industry was in its infancy. In 1887, the motion picture *Dolorita in the Passion* invited public attention and objections to its exhibition were raised. In 1907, the City of Chicago passed a Censorship Ordinance. Within the years 1909-1921 state censorship boards were created in almost all of the states. Collective efforts from the state and local board of censors, organized religious pressure groups,[5] civic organizations which mushroomed everywhere like the Legion of Decency, and the film industry's own code of regulation succeeded in curbing much of the screen's potential for offensive and threatening depiction.

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[2] Galang v. Court of Appeals, G.R. No. 24980, October 7, 1968.

[3] R. S. RANDALL, CENSORSHIP OF THE MOVIES; THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM 3 (1968).

[4] Edison's first Kinetoscope parlour was opened in April 1894. . . . But the effective beginning of the Cinema is usually dated from the first public exhibition of the Cinematography by the Lumiere brothers at the Grand Cafe, Paris on Dec. 28, 1894. N. M. HUNNINGS, FILM CENSORS AND THE LAW 29 (1967).

[5] Most outstanding is the Catholic Church.

At its infancy, movies were thought of as mere spectacles and no one ever suspected that they may be within the ambit of the freedom of expression. The most representative thinking of the period was echoed by the Supreme Court in the 1915 case of *Mutual Film Corporation v. Industrial Commission of Ohio.*[6] Here, the Supreme Court refused to include the exhibition of motion pictures within the folds of constitutionally guaranteed freedom of speech — thus, relegating motion pictures for 37 years (until 1952) to the status of a side show as a medium for artistic expression.

The subject of judicial determination was the validity of a provision in the Ohio Law, to wit:

> "Only such films as are in the judgment and discretion of the board of censors of a moral, educational, or amusing and harmless character shall be passed and approved."

The appellant, Mutual Film Corporation, questioned the validity of the above-quoted provision arguing that it violated the First and Fourteenth Amendments of the Federal constitution as well as Article I of the Ohio Constitution. The appellant maintained that it restrained the firm from truly publicising ideas and sentiments contained in these movies.

In deciding against the appellants, the Supreme Court speaking through Mr. Justice McKenna refused to construe the Constitution of Ohio as to include within its protection the motion picture medium. The court noted that the appellant did not claim that movies cannot be made to conform to standard which the State has set up under its police powers, but only that prior censorship was foreign to due process of law as provided for in the Ohio Constitution. The court decided that free-speech and free-press guarantees of the constitution did not apply to movies. Apparently, as the court had it, since the American Founding Fathers have not dreamed of movies, they obviously did not intend them to be protected by the Bill of Rights. But what really made this case famous was the statement of the Supreme Court:

> "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. They are mere representation of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibitions, as it does by the act under review. . ."[7]

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[6] 236 U.S. 230, 35 S. Ct. 387, 59 L. Ed. 552 (1915).
[7] *Id.* at 244.

Tremendous criticism of the decision notwithstanding, the ratio decidendi of the case became the basis later on for refusing the protection of the First Amendment to motion pictures. Many states and federal courts have construed its meaning in such a way that it might just as well be stated that motion picture censorship was permissible under the Federal constitution. And this decision coupled with the popular indignation over scandalous conduct of movie personalities and ever-growing flood of sensationalized movie films resulted in a strong movement for greater control.

Thus, for more than three decades, movie pictures were not placed at par with newspapers and books. However, in 1948, in a movie case involving combinations in restraint of trade by the giant movie companies,[8] the Supreme Court tangentially declared, "we have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." Even then, in 1949 the *Mutual Film Corporation* case still received some endorsement in the case of *Kovacs v. Cooper*[9] when in an impeccably clear statement Mr. Justice Frankfurter stated "that movies have created problems not presented by the circulation of books, pamphlets, or newspapers and the movies have been constitutionally regulated." But this case marked the weakening of the "business pure and simple" doctrine of the *Mutual Film* case, for a powerful dissent was registered by Mr. Justice Black with Justices Douglas and Rutledge concurring. According to the dissent, the basic assumption of the right to free speech is that all forms of speech are protected by its terms and that movies are a chief carrier of ideas and beliefs. "Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems. . . . The result of today's opinion in upholding this statutory prohibition of amplifiers would surely not be reached by this Court if such channels of communication as the press, radio or moving pictures were similarly attacked."[10] This dictum sounded that death knell for the *Mutual Film* ruling and paved the way for the elevation of the moving pictures to the level of the newspaper and books.

The period of 1915-1952 has been eloquently described thus: "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

[8] U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948).

[9] 336 U.S. 77, 69 S. Ct. 448, 10 A. L. R. 2d 608, 92 L. Ed. 513 (1949).

[10] *Id.* at 102.

film censorship as unconstitutional. The film industry was preparing to conquer. The strategy was to bring a test case of 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."[11]

In this atmosphere the *Burstyn* case[12] reached the Supreme Court in 1952. This case proclaimed the emancipation of moving pictures. Here, the appellant was a distributor which owned exclusive rights to lease to American exhibitors an Italian film *The Miracle*. Thus, Edward T. McCarthy, Commissioner of Licenses for New York City, declared the film "officially and personally blasphemous" and ordered it withdrawn. When the Commissioner was declared without power to withdraw the license of the movie, the chancellor of the Board of Regents made a move to declare through the Board the movie as "sacrilegious" — a ground for revocation of a license to exhibit under the New York law which prohibits anything "obscene, indecent, immoral, sacrilegious, or is of such character that its exhibition would tend to corrupt morals or incite a crime."

Among the claims advanced by the appellants were that the statute violated the Fourteenth Amendment as a prior restraint upon the freedom of speech and of the press; that it is invalid under the same amendment as a violation of the guarantee of separation of Church and State and as a prohibition of the free exercise of religion, and that the term "sacrilegious" is so vague and indefinite as to offend due process clause.

Mr. Justice Clark speaking for a unanimous court agreed with the dictum in another case that movies are a significant medium for the dissemination of ideas. The court did not stop in declaring that movies are included in speech which is constitutionally guaranteed, but it went further to refute the conclusions of Justice McKenna in the *Mutual Film* case promulgated some 37 years earlier.

> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behaviour in a variety of ways, ranging from the 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.
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> 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.

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[11] Brychta, *Ohio Film Censorship Law*, 13 OHIO ST. L. J. 350, 368-369 (1952).
[12] Burstyn, Inc. v. Wilson, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952).

> It is argued 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."[13]

Thus ended the 37-year old *Mutual Film* doctrine of movies as a "business pure and simple."

Thus, it is now settled jurisprudence that motion pictures are as much part and parcel of constitutionally protected freedom of expression as are newspapers and books. It took almost four decades to clear the mist, but only to start new and more complex questions in its new found status.

III. *Present American Jurisprudence on Censorship*

Although it was settled in *Burstyn, Inc. v. Wilson* that motion pictures are included "within the free speech and free press guaranty" of the Constitution, the ticklish issue remained whether the government may require all motion picture exhibitors to submit all films to an administrative officer or agency for licensing and censorship prior to public exhibition. This question could have been definitely settled in the case of *Times Film Corporation v. City of Chicago.*[14]

Unfortunately, the Federal Supreme Court formulated and ruled on a different issue from the pleadings presented.

In this case petitioner, Times Film Corporation owned the exclusive right to publicly exhibit in Chicago the film known as "Don Juan." It applied for a permit, as Chicago's ordinance required, and tendered the license fee but refused to submit the film for examination. The appropriate city official refused to issue the permit and his order was made final on appeal to the Mayor. The sole ground for denial was petitioner's refusal to submit the film for examination as required. Petitioner then brought suit for injunctive relief. Its sole ground was that the provision of the ordinance requiring submission of the film constituted, on its face, a prior restraint within the prohibition of the First and Fourteenth Amendments. The company claimed that the city, if it wished to act against objectionable films, could do so through the criminal process after exhibition.

Five out of the nine members of the court — Justices Frankfurter, Clark, Harlan, Whittaker, and Stewart — voted to uphold the city's power to license films. In an opinion written by Clark, they noted Times Film's argument as

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[13] *Id.* at 501.
[14] 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (1961).

foisting the issue that constitutional protection "includes complete and obsolute freedom to exhibit, as least once, any and every kind of motion picture." Against such a claim, the court held that the city's ordinance requiring submission of films before their public exhibition was not void on its face.

The majority interpreted the doctrine in *Near v. Minnesota*[15] to allow a licensing system. A method of control requiring systematic examination of all films was permissible for the purpose of discovering as well as for suppressing obscenity and other types of "exceptional" speech. The majority would not require the state to show that licensing was the only effective way to control such speech. On the contrary, a state would be limited in its choice of method only upon a "showing of unreasonable strictures on individual liberties resulting from its application in particular circumstances." In effect, this seemed to say that as long as the state's intention was to control or discover "exceptional" speech, the method it chose would have the presumption of constitutionality.

The minority on the other hand, saw the *Near* rule as allowing prior restraint only where an utterance had already been shown to be "exceptional" speech. Thus a licensing system which required submission of all films — only a few of which would ever be shown to be "exceptional" — and at the same time penalized exhibition of unsubmitted films, would never be a permissible prior restraint.

Central to the majority's position was the idea that movies may have a special capacity for harm. This fear, which can be traced back through Justice Mckenna's opinion in *Mutual Film* to the first prior censorship case, *Black v. Chicago*,[16] made a state's resort to licensing reasonable. Such a fear also implied a possible rationalization for constitutionally distinguishing movies from other media of speech.

Yet, as Chief Justice Warren pointed out in his dissent, nowhere in the opinion of the majority is there any attempt to state why or how films have a greater impact than say, newspapers, magazines, or television. For the minority, there was no problem on this point at all. For the purposes of controlling content, one medium within the First Amendment could not be constitutionally distinguished from another. Greater impact, even assuming such could be proven, could not mean greater suppression.

An attempt to strike a compromise between the majority and minority views expressed in the *Times* case was made four years later in the case of *Freedman v. Maryland*.[17] The case involved the conviction and $25.00 fine

[15] 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).
[16] 239 Ill. 251, 87 N.E. 1011 (1909).
[17] 380 U.S. 51, 81 S. Ct. 734, 13 L. Ed. 2d 649 (1965).

of a Baltimore theatre manager for showing a film without first obtaining a license from the Maryland Board of Censors. With the backing of the Times Film Corporation, the distributor, Freedman had notified the board of his intention to exhibit without a permit. He was arrested after the first performance. The film itself, a story of the Irish Revolution, presented no question of obscenity. The litigation was thus carefully designed to challenge the submission requirement of prior censorship in a concrete statutory context, and thereby to overcome not only the abstract quality which marked Times Film but the holding in that case as well. The right claimed was freedom from criminal prosecution for showing a constitutionally protected film — that is, a film free of obscenity. The real aim, of course, was nothing less than the elimination of licensing as a practical matter.

In deciding for Freedman, the Supreme Court was unanimous. Yet the theory of seven Justices, in an opinion written by Justice Brennan, was not that criminal punishment for showing an unlicensed-yet-innocent film was itself invalid. Rather, the state's requirement that all exhibited films first be licensed failed because it operated as part of a larger statutory scheme that did not "provide adequate safeguards against undue inhibition of expression."

The Maryland censorship apparatus failed because of three deficiencies: first, it failed to provide for prompt judicial review of the censor's ruling; second, it failed to provide that the censors must either license a film or take the matter into court where they, themselves, would carry the burden of proving the film unprotected expression; and third, it failed to provide for prompt judicial determination on the merits.

The *Freedman* decision represents a kind of reconciliation of the majority and minority positions in the *Times* case. The court dealt with some of the procedural questions the *Times* minority had raised and which the majority in that case had left unanswered.

Nevertheless, the court made its decision within the framework of a licensing system and, in doing so, recognized the exercise of licensing power. The court's aim was reform rather than liquidation. Freedman had based his attack on the submission requirement in the Maryland law. This requirement, when coupled with the criminal sanction for exhibiting without a permit, is the essence of a licensing system. Yet the court refused to consider the submission requirements at all, except to acknowledge that procedural deficiencies in the licensing apparatus could be challenged by ignoring them. The court went no further than this, even though eliminating the criminal penalty for showing an unlicensed film would not necessarily have meant an overruling of *Times Film.*[18]

[18] Cf. RANDALL, *supra*, note 3 at 44-48.

IV. *Philippine Censorship Laws*

The first Philippine movie censors law dates back to November 29, 1929 when the Philippine Legislature enacted Act No. 3582 creating the Philippine Board of Censorship for Moving Pictures. The name of the Board was later amended to "Board of Review for Motion Pictures" by Commonwealth Act No. 305 in 1938.[19] Then Republic Act No. 3060 superseded the 1929 Board of Review for Motion Pictures on June 17, 1961 creating our present "Board of Censors for Motion Pictures." Aside from the nominal amendment, the new law was a virtual replica of the old law with notable enlargement of its powers. The membership was increased from fifteen to twenty-five with a specific designation of organizations from which the members are to be selected.[20] The appeal of a decision is now to a Committee composed of the Undersecretaries of Justice, National Defense, and Education within 15 days and no longer to the President within 60 days. Section 3 of the Act enumerates the Board's powers and duties.[21]

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[19] V. V. Mendoza, *Philippine Film Censorship Laws: An Appraisal*, 31 PHIL. L. J. 669-670 (1956).

[20] Rep. Act No. 3060 (1961), sec. 2... That the President shall appoint as members of the Board at least three nominees from each of the following: (a) Professional organizations (b) Religious Organizations (c) Educational associations (d) Child and/or Welfare Organizations (e) Civil Organizations (f) Cultural Organizations (g) Association of Newspapermen.

[21] A) To screen, censor, examine and supervise the examination or approve or disapprove or delete portions from, and/or prohibit the introduction and exhibition of all motion pictures, imported or produced in the Philippines for non-theatrical, theatrical or television which in its judgment are immoral, indecent, contrary to law, and/or good customs or injurious to the prestige of the Republic of the Philippines or its people;

B) To classify the motion pictures approved for exhibition into those for general patronage and those for adults only;

C) To screen, review, delete portions from, approve or disapprove and censor all publicity materials in connection with any motion pictures including trailers, stills, and other advertising materials which in their judgment are immoral, indecent, contrary to law and/or good customs, or injurious to the prestige of the Republic of the Philippines or its people;

D) Subject to the Civil Service Rules and Law, to appoint personnel and a technical staff when necessary for the effective execution and implementation of the provisions of this Act. The Board shall have a permanent Secretary who shall be appointed by the President of the Philippines upon recommendation of the Board. The Secretary shall keep the records of the Board; take charge of its office; see to it that the orders and permits of the Board are followed and perform such other duties as may be assigned him by the Board. The Board shall have the power to fix the compensation of the Secretary, technical staff and personnel of the Board; prescribe their duties; and specify their qualifications to the end that only competent persons may be employed;

E) To promulgate its own rules of procedures and operation in general, including matters of quorum and of organization and appointment of sub-committees for censoring motion pictures and motion picture advertisements throughout the Philippines, and to keep a record of its proceedings with reference to the motion pictures examined by it, whether passed or not, and if passed the classification thereof; and,

F) To charge a fee to be fixed by the Board for each film and other materials presented to it for review or examination, all such fees to be used for the operational expenses of the Board.

True to the tradition of ancient censors, secrecy is still the favored work atmosphere.[22]

To make more effective the censors' job, the Act contains the penal sanctions.[23]

Perhaps, realizing that the standards[24] set forth by the statute are too general and ambiguous the Board of Censors had from time to time issued official criteria for censorship. Reproduced below is the latest criteria for censorship, series 1969:

I. *Objectionable Films*

"As a general rule therefore the following norms should be followed:

1. Films which serve no other purpose but to satisfy a market for sex or violence.

2. Films presented in such a way as to glorify criminals or condone crimes.

3. Films which on the whole tend to incite subversion or rebellion against the state.

4. Films the total effect of which is offensive to any race or religion.

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[22] "Except members of the Board, members of its duly appointed staff, and two representatives each of the distributor and/or producer and exhibitor of the motion picture under examination and review, no person shall be allowed, or authorized by the Board inside the screening room during the examination and review of any motion pictures."

[23] Sec. 7. It shall be unlawful for any person or entity to exhibit or cause to be exhibited in any motion picture theatre or public place, or by television within the Philippines any motion picture including trailers, stills, and other pictorial advertisements in connection with motion pictures, not duly passed by the Board; or to print or cause to be printed on any motion picture to be exhibited in any theatre, or public place or by television, a label or notice showing the same to have been officially passed by the said Board when the same has not been previously authorized, except motion pictures imprinted or exhibited by the Philippine Government and/or its departments and agencies, and newsreels.

Sec. 9. It shall be unlawful for any person below 18 years of age to enter, to make use of any misrepresentation or false evidence about his or her age in order to gain admission into, a moviehouse or theater for the showing of a motion picture classified for "Adults Only" by the Board. And it shall be also unlawful for any employee of a moviehouse or theater to sell to, or receive from, another person known to the former to be below 18 years of age any admission ticket to the exhibition of motion pictures classified as for "Adults Only." In case of doubt as to the age of the person seeking admission, the latter shall be required to exhibit his or her residence certificate or another proof of age.

Sec. 11. Any violation of Sec. 7 of this act shall be punished by imprisonment of not less than 6 months but not more than 2 years, or by a fine of not less than ₱600.00 or not more than ₱2,000.00, or both, at the discretion of the court. If the offender is an alien, he shall be deported immediately. The license to operate the movie theater or television shall be revoked. Any other kind of violation shall be punished by imprisonment of not less than 1 month nor more than 3 months or a fine of not less than ₱100.00 nor more than ₱3,000.00 or both, at the discretion of the court. In case the violation is committed by a corporation, partnership or association, the criminal liability shall devolve upon the president, manager, administrator, or any official thereof responsible for the violation.

[24] "Immoral, indecent, contrary to law, and/or good customs or injurious to the prestige of the Republic of the Philippines or its people."

II. *Objectionable Scenes*

1. Scenes which show sex acts, excessive and lustful kissing, lustful embraces, suggestive postures and gestures.

2. Scenes which show adulterous or unmarried sex relations unless necessary to the plot in which case they must be merely hinted at.

3. Seduction or rape scenes should never be more than suggested and only when essential to the plot.

4. Treatment of bedroom scenes should be governed by good taste and delicacy.

5. Excessive profanity of expressions, songs, jokes, references and gestures.

6. Dances with indecent and excessive movements should not be shown in full.

7. Partial or complete nudity of couple with an independent aspect of indecency.

8. Brutal killings and excessive cruelty to men, women, children, as well as animals are not to be presented in detail.

9. Methods of crime, theft, robbery, safe cracking, dynamiting of trains, and other similar acts of crime should not be detailed in method.

10. Traffic in drugs must not be portrayed in such a way as to stimulate curiosity concerning the use of such.

The test in each case is the effect of the film not upon any particular class, but upon all those it is likely to reach. In other words, you determine the impact upon the average person in the community. The picture must be judged as a whole, in its entire context, and you are not to consider detached or separate portions in reaching a conclusion. The emphasis must be on the treatment of a subject rather than on the subject itself. You judge it by present-day standards in the community. Ask yourself if it offends the common conscience of the community by present-day standards.

This official criteria for censorship may be revised or modified anytime as developments or circumstances in the local or international scene may demand."

It would be interesting, undoubtedly entertaining, to compare the criteria issued by the Board of Review for Moving Pictures under similar standards[25]

[25] Sec. 2. (A) To examine or supervise the examinations of all films, spoken or silent, imported or produced in the Philippines, and prohibit the introduction and exhibition in this country of films which in their judgment are immoral or contrary to law and good customs or injurious to the prestige of the Government or People of the Philippines.

of Act 3582 as that of Republic Act No. 3060. Of 1956 vintage is the "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 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 base 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) Drunkenness 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.

(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, building, 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. Repellant Subjects:

(a) Actual hanging or electrocution as legal punishment for crime.

(b) Third degree methods.

(c) Excessive brutality.

(d) Cruelty to children or animals.[26]

The criteria of the Board in 1956 is conspicuously more detailed and and arbitrary. Gauged by the present moral thermometer, it can easily be dubbed as "prudish" in character and tenor. A comparison with the latest criteria shows that after a little more than a decade, the moral outlook of Philippine society underwent a considerable change. This fact indicates persuasively the proposition that morality fluctuates with the times and that banning films on the ground of sexual immorality is nothing more than an imposition by the older set of its values.

[26] Mendoza, *supra*, note 19 at 674-675.

V. *Legality of the Philippine Censorship Law*

We now examine the provisions of Republic Act No. 3060 in order to determine if it can stand on constitutional grounds.

According to Section 3(A) thereof, the Board shall have the duty of prohibiting the exhibition of all motion pictures which in its judgment are immoral, indecent, contrary to law, and/or good customs or injurious to the prestige of the Republic of the Philippines or its people. A cursory reading of the terms used would immediately reveal their vagueness. Take the words "immoral" and "indecent" as the chairman of the Board of Censors for Motion Pictures once stated: "The words 'immoral' and 'indecent', are obvious sources of fallibility. Both words do not involve aesthetic judgment but are concerned with moral conviction."[27] As everyone is apt to agree, moral convictions are to a large degree relative. What may be immoral to one may be moral to another. An American author has this to say:

> "Not all law is as untidy as the law of the obscene. Lawyers and jurists have always had trouble defining in a courtroom words such as 'negligence' or 'reckless' or drawing a picture of the 'reasonable man.' But even 'reckless,' for example, has some objective definable outlines. 'Reckless' driving can be described in terms of the speedometer reading, condition of the roads, density of population in the area and traffic on the road, infirmities of the driver, condition of the vehicle, and hundreds of factors on which factual testimony might be taken.
>
> Not so with censorship of the obscene. When the men of the black robes review materials aimed at the glands as well as the mind, theirs is a subjective reaction in which their own sexual temperament, as well as eye and ear, may be involved. The same is true for most if not all of us. Where deep-seated taboos are involved — and sex is certainly enclosed within one — reaction will characteristically be emotional rather than rational, impetuous rather than considered."[28]

The phrase "injurious to the prestige of the Republic" is so vague that no effort to argue is necessary.

Republic Act No. 3060 is a penal law in that it prescribes penalties for violations of its provisions. Such being the case, it suffers from an infirmity in view of the fact that it punishes acts without adequate notice. It is so vague that it violates due process.

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."[29]

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[27] De Vega, *Censorship in A Changing Society*, PHIL. FREE PRESS 3 (August 1, 1970).

[28] M. L. ERNST & A. U. SCHWARTZ, CENSORSHIP; THE SEARCH FOR THE OBSCENE 244-245 (1964).

[29] Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939).

Although the Supreme Court in several cases found such standards as "adequate and efficient instruction,"[30] "public welfare",[31] "public interest"[32] and "justice and equity"[33] sufficient, a perusal of these cases discloses that a penal law was not involved. There being a criminal imposition in the case of Republic Act No. 3060, there is justifiable ground to believe that a more strict attitude should be adopted. Moreover, the freedom of speech is involved and the state should not be given the arbitrary power to curtail it based on vague grounds.

Notwithstanding the fact that the Board has released a set of criteria which attempts to construe the vague terms, it is questionable whether an administrative interpretation can cure a defect of the law. Furthermore, the list of criteria is in itself doubtful because it employs the same vague terms as "lewd" and "indecent" and enumerate examples which may not be immoral at all. In fact, there is a feeling that the Board has unduly stretched the import of the word "immoral."

Another cogent reason for disputing the authority of the Board to construe the words of the law is that it would be tantamount to undue delegation of legislative powers. The law itself has failed to fix a sufficient standard for the exercise of the Board's discretion. It has left to the Board an unrestricted power to determine what is immoral and what is prejudicial to the prestige of the Republic.

On the premise that movies are included within the sphere of free speech, there is no clear and present danger to justify the enactment of the Censorship Law. The right of free speech is fundamental, although it is not in its nature absolute. The necessity which is essential to a valid restriction of free speech does not exist unless speech would produce or is intended to produce a clear and imminent danger of some substantive evil which the state constitutionally may seek to protect.[34] To justify suppression of free speech, there must be a reasonable ground to fear that serious evil will result if free speech is practiced, that the danger apprehended is imminent and that the evil to be prevented is a serious one.

The clear and present danger rule means that the evil consequence of the speech must be extremely serious and the degree of imminence extremely high before the utterance can be punished. The danger to be guarded against is the substantive evil sought to be prevented. This test then as a limitation

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[30] Philippine Association of Colleges & Universities v. Secretary of Education, 97 Phil. 806 (1955).

[31] Municipality of Cardona v. Municipality of Binangonan, 36 Phil. 547 (1917).

[32] Pangasinan Transportation Co., Inc. v. Public Service Commission, 70 Phil. 221 (1940).

[33] International Hardwood & Veneer Co. v. The Pañqil Federation of Labor, 70 Phil. 602 (1940).

[34] Whitney v. California, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927).

on freedom of expression is justified by the danger or evil of a substantive character that the state has a right to prevent. Unlike the dangerous tendency doctrine, the danger must not only be clear but also present. The term "clear" seems to point to a causal connection with the danger of the substantive evil arising from the utterance questioned. "Present" refers to the time element. It is used to be identified with imminent and immediate danger. The danger must not only be probable but very likely inevitable. The word "present" has been defined by jurisprudence as meaning imminent,[35] urgent[36] and impending.[37]

The question that may now be poised is whether the grounds enumerated in Republic Act No. 3060 pose a clear and present danger to justify prior restraint of movies. The reason frequently given for the retention of censorship is to prevent the proliferation of sex and violence. With respect to sex movies, the experience of Scandinavian countries belies such a fear. A sociological study reported that "of the sex offenders, whose offenses included violence of duress, between one eighth and one fifth reported arousal from sadomasochistic non-contract stimuli. While it is probable that in a few case, such stimuli triggered an offense, it seems reasonable to believe that they do not play an important role in the precipitation of sex offenses in general, and at most only a minor role in sex offenses involving violence." Moreover, "the common presumption is that depiction of sexual activity is a strong stimulus of sexual arousal, and one which not infrequently engenders sexual activity of one sort or another. This presumption is shaken by the discovery that rather large proportions of the men reported little or no sexual arousal from pornography."[38]

With respect to violence, movies should be banned only when they incite the movie audience to adopt an anti-social conduct repulsive to our criminal laws. Just because a movie depicts something contrary to our "mores" should not be a sufficient ground for its prohibition. The value of freedom of speech is that it tests truth in the market place of ideas. We must not conclude that ours are the better customs. No persuasive reason exists why a distinction should be made between expression of ideas through films and through verbal or written means. It is only in this light that the statement of the U.S. Supreme Court in the case of *Times Corporation* can be properly construed: "The protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." Exceptional cases should refer only to those instances when there is a clear and present danger.

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[35] Craig v. Harney, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947).
[36] Abrams v. U.S., 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).
[37] Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. E. 430 (1945).
[38] P. H. GEBILARD, et al., SEX OFFENDER 669 (1965).

VI. *Procedural Infirmities*

The bulk of the Board of Censors' work is done by the so-called Preview Committees. The whole Board has divided itself into Four Preview Committees composed of seven members. It is this committee that screens, censors, examines, supervises, classifies, approves, disapproves, deletes or prohibits the introduction and exhibition of all motion pictures, trailers, and stills assigned to it by the chairman. The presence of any four members of the committee shall constitute a quorum that may proceed to do its business. The decision of at least four members of a committee shall be final unless an appeal is made to the committee of the Undersecretaries of Justice, National Defense, and Education whose decision is final. In case of a tie in the voting in a committee, the chairman of the Board may at his discretion, break the tie or refer the same for re-preview and/or examination by another committee or by the Board *en banc*. The Board *en banc* needs a majority of all members including the chairman excluding members on leave of absence to constitute a quorum to do business and any decision of the Board *en banc* shall be by a plurality of the members present. All decisions of the committee shall be in writing, each members stating clearly his comment, observations and/or recommendations in the event of disapproval.[89] The operations of a Preview Committee may be more appreciated with a specific illustration.

Based on the members' voting slips, here is how and why the Board banned "Climax of Love", an allegedly local *bomba* quickie but claimed as a sex educational movie by the producer. In the Preview Committee, the voting went thus:

1. Nick Joaquin ..... *For Adults Only*

2. Maximo Agustin ..... *Disapproval* — Indecent.

3. Narciso Angeles ..... *Disapproval* — the picture is full of sex act, immoral and vulgar.

4. Eugenia Bañez ..... *Disapproval* — too many bedroom scenes and love scenes which should not be allowed to the public. Very immoral.

5. Josefa Bautista ..... *Disapproval* — this picture will be imitated by the youth; bad pattern.

6. Felicidad Cruz ..... *Disapproval* — clearly naught but pornography. I want to come out as against pornography for public consumption. If this is being narrow-minded, then I must be narrow-minded.

[89] Rules & Regulations, Board of Censors for Motion Pictures, Resolution Nos. 9-10, promulgated August 22, 1970.

7. Julita Sta. Romana ..... *Disapproval* — This is an educational film? My foot! This is one picture which can be utilized to insert "bombas." The film as previewed is already filled with "bombas."

Result of voting:

For Adults Only	1
Disapproval	6
TOTAL	7

Decision: *Disapproval*

From the foregoing delineation of the procedure provided by Republic Act No. 3060 for the review of films submitted to the Board, one is apt to note that it contains all deficiencies which constrained the U.S. Federal Court in the case of *Freedman v. Maryland*[40] to strike down the Maryland censorship apparatus as unconstitutional. "First, it failed to provide for prompt judicial review of the censor's ruling; second, it failed to provide that the censors must either license a film or take the matter into court where they, themselves, would carry the burden of proving the film unprotected expression; and third, it failed to provide for prompt judicial determination on the merits."

Perhaps, Chief Justice Warren was contemplating of a licensing law similar to ours when he made the following significant assertions:

> "The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence; the fact is that there is usually no evidence at all as the system at bar vividly illustrates. How different from a judicial proceeding where a full case is presented by the litigants."
>
> "It is axiomatic that the stroke of the censor's pen or the cut of his scissors will be a less contemplated decision than will be the prosecutor's determination to prepare a criminal indictment. The standards of proof, the judicial safeguards afforded a crminal defendant and the consequences of bringing such charges will all provoke the mature deliberation of the prosecutor. None of these hinder the quick judgment of the censor, the speedy determination to suppress. Finally, the fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts. This is especially true of motion pictures due to the large financial burden that must be assumed by their producers. The censor's sword pierces deeply into the heart of free expression."[41]

It is relevant to note here that there are at least three points in time at which a restraint on sale, display, or distribution to the public might be re-

[40] Freedman v. Maryland, *supra*, note 17.
[41] Dissenting opinion of Chief Justice Warren in Times Film Corporation v. City of Chicago, *supra*, note 13.

garded as being prior. First, a restraint might be imposed at a time prior to either production of the work or its dissemination; second, a restraint might be imposed after production, but prior to initial distribution; and third, a restraint might be imposed after production and after initial distribution, but prior to continued distribution.[42]

From the tenor of Chief Justice Warren's opinion in the *Times Film Corporation* case, restraint on movies is not constitutionally objectionable if it applies to the third type for complete protection would be afforded to the film distribution's rights through judicial adjudication. The *Freedman* case, however, upheld the second type of restraint provided that due process and prompt judicial assistance is made available to the distributor to safeguard his rights. Republic Act No. 3060 falls within the second type but unhappily, it fails to meet the requirements of due process outlined by the U.S. Federal Supreme Court.

VII. *Conclusion*

Motion pictures are within the pale of constitutionally protected free speech and the principles applicable to free speech should operate in full force for the protection of motion pictures.

Justice William O. Douglas vividly points out the evils of prior restraint:

> "Once the censor enters the scene, he becomes by virtue of his power the dictator. . . The practical exigencies of a system of censorship mean the author writes to the standard of the censor. The censor becomes the great leveller of thought."[43]

Another writer has noted that the Motion Picture Production Code institutionalized the juvenile and the mediocre in the United States, so that the motion picture industry has not been a constructive force in American culture. It presented a false sense of values and thus made life and adjustments to reality more difficult for those who take synthetic values for true. "A thorough efficient ban on objectionable comics, magazines and paperbound books will endanger the young in another way; it will overprotect them. Reality has many faces, and many of them are grotesque."[44]

Furthermore, why ban sex? "The idea of using obscenity to ban thoughts of sex is dangerous. A person without sex thoughts is abnormal. Sex thoughts may induce sex practices that make for better marital relations. Sex thoughts that make love attractive certainly should not be outlawed.

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[42] Comment, *Constitutional Law — Freedom of Speech not all Prior Restraints are Invalid*, 30 U. CIN. L. REV. 386-390 (1961).

[43] DOUGLAS, THE RIGHT OF THE PEOPLE 66 (1958) as cited in R. DOWNS (Ed.) THE FIRST FREEDOM, Chicago 42 (1960).

[44] P. BLANSHARD, THE RIGHT TO READ 53 (1955).

If the illicit is included that should make no constitutional difference For education concerning the illicit may well stimulate people to seek their experiences in wedlock rather than out of it."[45]

Assuming that censorship is constitutionally tolerable, Republic Act No. 3060 is of doubtful validity on account of three infirmities previously expounded. First, the grounds for prosecution are vague; second, the law cannot stand the clear and present danger test; third, the procedural safeguards of due process have not been observed, in accordance with the *Freedman v. Maryland*[46] ruling.

This is not to say however, that the state should completely keep its hands off. A tendency towards greater freedom can be seen in a comparatively new development—a greater emphasis on the protection of children as the main purpose of censorship. This was recognized in Denmark quite early and consequently the practice of the censors has been very largely one of classifying films for children, rather than of banning them for adults. In Belgium this has been the position from the very beginning: no censorship of films for adults has ever existed in any form. Under the Law of September 1, 1920, children under sixteen years of age are simply forbidden admission to all cinemas, except when films are being shown which have been approved for children by a special commission. Since the law is not strictly a censorship law, the commission is not concerned with the political, philosophic, or religious tendencies of the films submitted to it. It should exclusively consider the protection of children. The grounds for refusing to pass a film age, however, within their limits, fairly wide and show an approach strongly influenced by the "pere de famille" attitude. Films may be distributed in two versions, one for children (passed by the commission) and one for adults (completely uncontrolled by the commission or any other body). There is here a well-tested prototype for a completely liberal approach to the screen.[47]

Perhaps, it would do well for the Philippines to adopt the system prevailing in Belgium rather cling tenaciously to the present set-up which is constitutionally suspect. The alternative proposed would be free from the evils of censorship and still be within constitutional bounds. Ample precedent exists for the proposition that the state may exercise its police power to deny children privileges granted to adults—for example driving automobiles, gambling, or purchasing alcoholic beverages and cigarettes.[48] The U.S. Supreme Court explicitly recognized "the legitimate interest and indeed exigent interest of states and localities throughout the nation in preventing the dissemination of material deemed harmful to children."[49]

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[45] *Ibid.*
[46] Freedman v. Maryland, *supra*, note 17.
[47] Randall, *supra*, note 3 at 70.
[48] *Ibid.*
[49] Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

Perhaps an implicit assumption of the cases upholding a state's broader censorship powers over children is that the state has a responsibility in *loco parentis* for the education of children as to the moral standards of society. The state has an interest in maintaining those moral standards, and it may therefore regulate access by children to materials which it deems dangerous to this interest.[50]

A more cogent reason for upholding the validity of the proposed system is advanced by Hunnings:[51]

> "Freedom of speech does not at present affect children as a moral or political principle, for children by definition do not enjoy freedoms; at least until they are past puberty they are under tutelage, both physicial and moral. Freedom for adults, however, is a concept with meaning, and a governing principle in those countries which claim to be 'democratic.'"

Although under the Belgian set-up there is no ban with respect to the adult audiences, this is not to countenance hard-core pornography. Our penal laws still prohibit obscenity, and as long as they are retained in our statute books, exhibitors are liable for violating them. While there would be no licensing, criminal prosecutions can still be made through the ordinary judicial process. It is further preferred that, in this aspect, the commission created for classifying films for children can be authorized to act as a special agency for hounding those who would be defiant of the penal law.

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[50] Bates, *Private Censorship of Movies*, 22 STAN. L. REV. 631-632 February 1970.
[51] HUNNINGS, *supra*, note 4 at 395.