THE PUBLIC INTEREST VS. THE 'PRURIENT INTEREST': OBSCENITY IN THE MOVIES

GIZELA M. GONZALEZ*

> Men who are knaves by retail are extremely honest in the gross; they love morality.
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> —MONTESQUIEU
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> What is pornography to one man is the laughter of genius to another.
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> —D H. LAWRENCE

Of late, the issues of censorship and obscenity have again come to the fore. The revenue- (and it is claimed, consciousness-) raising exhibition of sexually explicit movies during the 1983 Manila International Film Festival (MIFF) brought jam-packed theatres in the duration and public outcry at the aftermath. The supporters of censorship cite the exigency of general welfare as justification; the opposers deem such curtailment of freedom of expression repressive and unconstitutional.

Obscenity and censorship, although closely linked in Philippine practice, are by no means inseparable by nature. The former is the material regulated; the latter merely one of the modes of regulation. Once fused, however, each derives its character from the other, and both must therefore be examined together—the method, as it were, being inextricable from the madness.

This article hopes to discuss the constitutionality of State control over obscenity and the standards therefor; the constitutionality of censorship and its nature as a procedure; the existence of an adequate definition of "obscenity"; and the practice of censorship in the Philippines, particularly the administrative issues of sufficiency of standards and availability of judicial review.

I.—*The Basis for Regulation: The Question of Constitutionality*

A. *The Regulation of Motion Pictures*

Although censorship as a rule prevailed during the Spanish regime in our country (in the realm of art the parish priest, due to the marriage of church and state, acted as censor of the various local productions),[1] the American constitutional guarantee of freedom of speech and of the press was incorporated into our jurisdiction by the Philippine Bill of 1902, and has since been included in both the 1935 and 1973 constitutions.[2]

* *Chairman,* Editorial Board, Philippine Law Journal

1 FERNANDEZ, LAW OF THE PRESS (MASS MEDIA) 1 (1968).

2 BERNAS, THE 1973 PHILIPPINE CONSTITUTION NOTES AND CASES 435 (1974).

Our Supreme Court, however, did not have occasion until the recent case of *Lagunzad v. Soto Vda. de Gonzales*,[3] to determine whether motion pictures are covered by such guarantee. Ruling in the affirmative, the Court stated that "the press . . . includes such vehicles of the mass media as radio, television and *the movies*." (emphasis supplied). The Court then reiterated the "permissible" standards for limitation of freedom or expression: the clear and present danger rule, and the balancing-of-interests test. Although saying that the former was "the prevailing doctrine," the Court, wisely, (the competing interests in this case were individuals' right to privacy and right to freedom of expression) proceeded to apply the latter.

The appropriate standards for limitation with regard to obscenity in the movies will be discussed later in this article. Meanwhile, suffice it to say that a line of Supreme Court decisions confirms that freedom of expression can be restrained by a valid exercise of the State's police power,[4] and the guarantee afforded movies therefore cannot be absolute.

B. *The Particular Problem of Obscenity — Is Regulation Justified?*

The regulation of obscenity, however, takes on a different cast from that of motion pictures. Movies, it may be said, are a *form* of speech; obscenity, a *type*. In the Philippines, numerous decisions applying the Penal Code provision on obscenity illustrate the State's power to control—in fact to punish—obscene expression. Yet where lies the actual justification for obscenity regulation?

The state can no doubt offer the catch-all 'exigency of the general welfare.'[5] *People v. Aparici*,[6] a criminal case involving an erotic dancer, cites protection of public morals. Professor Emerson compiles the following main justifications for the restriction of obscene expression:

> 1. that the expression has an adverse moral impact, apart from any effect upon overt behavior; 2. that the expression may stimulate or induce subsequent conduct in violation of law; 3. that the expression may produce

[3] G.R. No. 32066, August 6, 1979, 92 SCRA 476, 488 (1979).

The United States Supreme Court had ruled in 1915 that moving pictures did not fall within the freedom of expression guarantee because they had a great capacity for evil and their exhibition was a "business pure and simple." Mutual Film Corporation v. Industrial Commission of Ohio 236 U.S. 230, 244 (1915).

In 1952, however, the Court deemed movies within the ambit of the First Amendment because of their nature as a "significant medium for the communication of ideas," and their consequent "importance as an organ of public opinion," even if "their production, distribution, and exhibition is a large-scale business conducted for private profit," and "they are designed to entertain as well as to inform." Burstyn v. Wilson 343 U.S. 495, 501 (1952).

[4] *E.g.*, Primicias v. Fugoso, 80 Phil. 71, 75-76 (1948); Gallego v. People, G.R. No. 18247, August 31, 1963, 8 SCRA 813, 816-817 (1963).

[5] See generally BERNAS, *op. cit.*, note 2 at 35-36; FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 514-515 (1974), for discussions of the police power as it relates to public welfare.

[6] C.A.-G.R. No. 13375-R, August 30, 1955, 52 O.G. 249 (Jan., 1956).

> adverse effects on personality and attitudes which in the long run lead to illegal behavior; 4. that the expression has a shock effect, of an emotionally disturbing nature; and 5. that the expression has especially adverse effects, of the sort described in the previous categories, upon children, who are intellectually and emotionally immature.[7]

He continues, however, by dismissing the first three justifications as "incompatible with the first amendment" because (respectively):

> 1. Most expression is intended to and does influence moral beliefs and attitudes. 2. Similarly, the argument that obscene expression stimulates or induces subsequent illegal conduct, even if true, falls before the fundamental proposition that society must deal with the illegal action directly and may not use restriction of expression as a means of control. Again, many forms of expression would have a similar effect in influencing subsequent conduct. Nor is there anything in the nature of illegal conduct induced by obscene expression which would differentiate it from any other illegal conduct or require application of a different rule. 3. A fortiori, the fact that the expression influences behavior is unacceptable as a basis for restriction.

On the other hand, regulation based on the last two justifications are allowable. The "shock effect" involves the imposition of obscene material on unwilling individuals, and thus: (1) "the harm is immediate and not controllable by regulating subsequent action"; and (2) "the conduct can realistically be considered an 'assault' on the other person, and hence placed within the category of 'action.'" The immaturity of children also allows the restriction of their exposure to obscenity.[8]

2. The Search for a Standard of Limitation

With the aforementioned considerations in mind, let us turn to the standards for limitation of free expression applicable in Philippine jurisprudence. The clear and present danger rule according to the Supreme Court, "means that the evil consequence of the . . . utterance 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."[9]

The clear and present danger test, however, does not seem particularly applicable to obscenity regulation. First, the rule was developed in the area of advocacy of unlawful acts:[10] despite the harmful effects imputed to obscenity, we would be hard pressed to classify it as such "advocacy". Second, the rule was "fashioned in the course of testing legislation of a

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[7] Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 937 (1963).

[8] *Id.*, at 938-939.

[9] Cabansag v. Fernandez, 102 Phil. 152, 161 (1957), *cited with approval in* Gonzales v. Commission on Elections, G.R. No. 27833, April 18, 1969, 27 SCRA 835, 858-859 (1969).

[10] 16 AM. JUR. 2D *Constitutional Law* 362 (1979).

particular type—legislation limiting speech expected to have deleterious consequences on the *security* and *public* order of the community" (emphasis supplied).[11] Again, obscenity does not easily fall within the category of speech inimical to security and public order (at least, obscene expression would be more naturally classified as inimical to public morals). Third, the "degree of imminence" of the "evil consequence" does not seem to meet the test's requirements: although obscenity may, arguably, be reasonably presumed to cause an increase in "anti-social behavior", such a connection has not been conclusively proved.

The balancing-of-interests test, which "requires a court to take conscious and detailed consideration of the interplay of interests observable in a given situation or type of situation"[12] thus seems more suitable. Certainly, the test is flexible and open-ended enough to encompass obscenity regulation. Yet, the test's very open-endedness has led to its being criticized as involving questions of policy and wisdom ("[i]n wholesale disregard of the fundamental difference between legislative and judicial functions"); and as being unduly cumbersome ("the factual determinations involved are enormously difficult and time-consuming, and quite unsuitable for the judicial process") and unpredictable in its final result (neither government officials nor the public receive "adequate advance notice of the rights essential to be protected.")[13] Further, the "balancing-of-interests test" erodes the constitutional guarantee of freedom of speech. As Justice Black has said:

> ...The Court's balancing test in effect says that the First Amendment should be read to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on the balance the interest of the government in stifling these freedoms is greater than the interest of the people in having them exercised". This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is reasonable to do so.[14]

Yet, given the choice between the clear and present danger rule and the balancing of interests test, the latter still seems the more viable as regards obscenity regulation.

C. *U.S. Jurisprudence: Obscenity as Unprotected Speech*

The U.S. Supreme Court has settled the problem of obscenity differently. In the leading case of *U.S. v. Roth*,[15] the Court, ruling directly on the matter of obscenity control, deemed obscenity unprotected speech; consequently the government was not required to justify the supression of

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11 Justice Castro's separate opinion in Gonzales v. Comelec, 27 SCRA at 897.
12 Lagunzad v. Soto Vda. de Gonzales, note 3 at 488; *Id.* at 899.
13 Emerson, *op. cit.*, note 7 at 913.
14 BLACK, A CONSTITUTIONAL FAITH 49-50 (1968) *cited in* FERNANDO, *op. cit.*, note 5 at 571-572.
15 354 U.S. 476, 486-487 (1957).

obscene material in traditional constitutional terms, and the clear and present danger rule (then the judicially accepted standard for the limitation of free expression) did not apply.

The Court's rationale for its exclusion of obscenity from protected speech was that obscene matter was "utterly without redeeming social importance". Citing an earlier case, *Chaplinsky v. New Hampshire,*[16] the Court said:

> ...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 the obscene... 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 may be derived from them is clearly outweighed by the social interest in order and morality...* (emphasis by the Court)[17]

This dichotomy between protected and unprotected speech led the Court to subsequently adopt what has been been a "two-level" approach: the value of protected speech had to be weighed against its encroachment on legitimate state interests, while unprotected speech could *ipso facto* be controlled, as it had no social value that required balancing against potential harm.[18] Such an approach has been criticized as concealing the "costs and benefits of pornography regulation," which a more assiduous attention to unprotected speech—i.e., the balancing of the value and harm in fact present therein—could have brought to light.[19] In the recent case of *Paris Adult Theatre I v. Slaton*[20] three members of the Court, dissenting, opted for a departure from the two-level approach because of the Court's consistent failure to come up with a definition of obscenity (in the nature of unprotected speech) to which the problem of vagueness did not inhere.

Indeed, in some decisions, the Court seemed to move towards a standard of "variable obscenity", which:

> ...seeks to identify and articulate valid state interests in the control of obscenity and rather than categorizing speech as protected or unprotected, seeks to examine the material in the context of its presentation, and with a view to the rights, special status, and desires of the potential audience.[21]

Among the state interests identified by the Court have been the specific concern for the welfare of juveniles;[22] the right of an unwilling individual to avoid exposure to obscene material;[23] the "interest of the

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[16] 315 U.S. 568 (1952).
[17] U.S. v. Roth, note 15 at 485.
[18] *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 57, 161, 165 (1973).
[19] *Id.,* at 166.
[20] 413 U.S. 49 (1973). Justices Brennan, Stewart, and Marshall, were the three members, dissenting, at 467.
[21] HARV. L. REV., *op. cit.,* note 18 at 171.
[22] Ginsberg v. New York, 390 U.S. 622 (1951).
[23] Breard v. Alexandra, 341 U.S. 629 (1968).

public in the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself";[24] and the desire to foster respect for "a sensitive, key relationship in human existence, central to family life," which is "debased and distorted by commercial exploitation of sex."[25]

On the other hand, again interest-balancing but this time coming down on the side of obscenity, the Court recognized that the "possession or acquisition of obscene materials" could be protected by a combination of the right to receive information and the right to privacy, and guaranteed an individual the right to use and possess obscene material in his own home.[26]

In general, however, the Court has not actually discarded the two-tiered approach, as is evidenced in its classification of obscenity as unprotected speech in the recent decisions of *Miller v. California*[27] and *Paris Adult Theatre I v. Slaton,* which decisions will be further referred to later.

Yet, interestingly enough, a plurality of the Court, while not abandoning the obscenity-as-unprotected-speech theory, later sought to regulate (but not supress) a type of protected speech in a manner more stringent than is usually allowed under the First Amendment. In *Young v. American Mini Theaters, Inc.*[28] the Court upheld a zoning ordinance which restricted the location of theaters showing sexually explicit movies. The type regulated was thus non-obscene sexually explicit speech, and the justification of a plurality of the Court for such action was that "society's interest in protecting this type of expression is of a wholly different and lesser magnitude than the interest in untrammeled political debate."[29] In other words, sexually explicit speech, even if not obscene, could be regulated on the basis of content (as protected speech cannot) because of its lesser value to society.

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[24] Paris Adult Theater v. Slaton, note 20 at 58.

[25] *Id.*, at 63.

[26] Stanley v. Georgia, 394 U.S. 557 (1969).

The sufficiency of the *combination* of the abovementioned rights (to receive information and to privacy) to protect the possession or acquisition of obscene materials (each right alone being insufficient for the purpose) has been termed the "privacy plus theory" and regarded as an important limitation on ... *Roth* and the two-level theory. Goldmark, *Still More Ado About Dirty Books (and Pictures):* Stanley, Reidel *and* Thirty-seven Photographs, 81 YALE L.J. 309, 318-319, 333 (1971).

The Court, however, in subsequent cases, indicated that the zone of privacy recognized in *Stanley* did not extend to include the right of access to pornography—even if the materials were intended to be used at home—United States v. Reidel, 492 U.S. 351 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); nor to prohibit regulation of importation of obscene materials intended for private use. United States v. Twelve 200-Ft. Reels on Super 8 mm Film, 413 U.S. 123 (1973).

[27] 413 U.S. 15 (1973).

[28] 427 U.S. 50 (1973).

[29] *Id.*, at 70.

The Court's justification has been termed an "unarticulated 'lesser value' criterion," and criticized as "casting the Court in the role of judge of the societal value of expression," therefore contravening "fundamental First Amendment ideals." *The Supreme Court, 1975 Term,* 90 HARV. LAW REV. 58, 200-201 (1976).

II. *Censorship*

A. *The Constitutionality of Censorship*

Although the absence of previous restraint is necessary to freedom of speech, censorship may be allowed when essential to the public interest. The constitutionality of movie censorship has not been tested in Philippine courts. In the United States, however, the Supreme Court has held that "the ambit of Constitutional protection" does not include "complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[30] In *Times Film v. Chicago,* the Court upheld an ordinance requiring the submission and licensing of films before their exhibition as not being void on its face. The Court stated that although protection from previous restraint was not absolutely unlimited, it would be recognized only in "exceptional cases." The regulation of obscene films was thus deemed to constitute an "exceptional case."[31]

Four Justices dissented, opining that a licensing system "casts the net of control too broadly," in contravention of the principle that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[32]

B. *The Pros and Cons of Censorship*

If we accept therefore, the premise that censorship is constitutional, the question remains as to whether it is the best alternative. The dissenting opinion in *Times Film* lists various disadvantages to the censorship system:

> [a.] The censor's ... decisions are insulated from the pressures that might be brought to bear by public sentiment if the public were given an opportunity to see that which the censor has curbed.
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> [b.] The censor performs free from all of the procedural safeguards afforded litigants in a court of law.... The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge.
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> [c.] [If the censor denies the exhibitor his right to free expression, and the exhibitor should decide to pursue judicial remedies,] the delays in adjudication may well result in irreparable damage, both to the litigants and to the public.
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> [d.] Moreover, as more likely than not, the exhibitor will not pursue judicial remedies [because of the costs and time of litigation.] "In such case ... the liberty of speech and press ... are, in effect, at the mercy of a censor's whim."
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> [e.] [The] cut of [the censor's] scissors will be a less contemplated decision than will be the prosecutor's decision to prepare a criminal indictment. The standards of proof, the judicial safeguards afforded a

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[30] Times Film v. Chicago, 365 U.S. 43 (1961).
[31] *Id.*, at 47-48 (citing Near v. Minnesota, 283 U.S. 697, 715-716 (1931)).
[32] *Id.*, at 52, 56 (citing Shelton v. Tucker, 369 U.S. 479, 488 (1960)).

> criminal 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.
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> [f.] [T]he exhibitor's belief that his film is constitutionally protected is irrelevant. Once the censor has made his estimation that the film is "bad" and has refused to issue a permit, there is ordinarily no defense to a prosecution for showing the film without a license.
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> [g.] [T]he fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts.[33]

In *Freedman v. Maryland,* the Court said:

> The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres a danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression.

Conversely, in *Miller,* Justice Douglas (who is in fact against any regulation of sexually oriented matter on the ground of obscenity, whether by censorship or otherwise) states that censorship is still preferable to the control of obscenity by criminal prosecution. Because of the Court's failure to come up with a definition of obscenity that is not "void-for-vagueness," and because of changes in obscenity standards, the exhibitor (in *Miller,* specifically, the publisher, but Justice Douglas' contentions certainly apply to exhibitors of films as well as publishers of literature) does not know whether or not the material is obscene and therefore whether or not he is subject to criminal liability until a case against him should be brought and decided. Furthermore, should new standards be "improvised by the courts after the publication" (exhibition), the publisher (exhibitor) would in fact be victim to an *ex post facto* law.[35]

Implicit in the majority of the above arguments is the assumption that some method of control is to be imposed on obscene material, the issue therefore being what that method should be. In the end, the adoption of censorship is a question of policy, dependent on whether the State deems it in its interest to adopt a system of prior-restraint—in other words whether the State deems it essential to prevent *any* exposure of the public to obscenity, or at least minimize such exposure to the greatest possible degree. Again, thus, we come to a juncture of interest balancing. As held in *Times,* film censorship is not *per se* unconstitutional, the only limit to the State's selection of methods being that it does not give rise to "unreasonable strictures on individual liberties resulting from its application in particular circumstances."[36]

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[33] *Id.,* at 68-75.
[34] 380 U.S. 51, 57 (1965).
[35] Miller v. California, note 27 at 41.
[36] Times Film v. Chicago, note 31 at 47.

C. *Censorship in the Philippines: The Board of Review for Motion Pictures*

Censorship in the Philippines is primarily undertaken by the Board of Review of Motion Pictures and Television (formerly the Board of Censors for Motion Pictures, and soon to have been the Board of Review for Motion Pictures, Television and Live Entertainment). Lately, this body has found itself forced into a schizophrenic role. At times, devoid of jurisdiction, the Board must stand by and do nothing (during the recent Manila International Film Festival, for example, or as regards the Experimental Cinema which in its charter is decreed free from censorship);[37] almost simultaneously, a new Executive Order gives the Board greatly expanded powers (Executive Order No. 868 as Amended by Executive Order No. 876, to be discussed later).

A recent event provides an example of the difficulties engendered by the Board's ambivalent position. Immediately after this year's MIFF, the President, due to numerous complaints from the public, ordered the seizure of three sex films—"The Victim," "Virgin People," and "Naiibang Hayop"—and turned them over to the Board of Review for "rescreening." In fact, however, the Board had had no jurisdiction over the films as they were shown at the festival. (The Board had totally disapproved "The Victim" and approved the two other films with cuts, but all three films were released in their entirety by Board of Review Chairman Maria Kalaw Katigbak on the written request of MIFF Director Johnny Litton.) Rather, a "committee composed of theater owners, critics, and booking agency executives" had screened the films for the MIFF, rating such films according to American standards.[38]

This section of the article attempts an overview of the Board's history, a listing of the provisions applicable to the Board's functioning, and a discussion of the problems and considerations related to the Board of Review.

1. *History*

a. *The Early Boards*

The first Board of Censors in this country was created by Act No. 3582 in 1929. Called the "Philippine Board of Censorship for Motion Pictures," it included among its duties the examination of all films, spoken or silent, imported or produced in the Philippine Islands.[39] Decisions of the Board could be appealed to the Secretary of the Interior, and thereafter to the Governor General.

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[37] Exec. Order No. 770 (1982).

[38] Daily Express, February 15, 1983, p. 1, col. 2; Times Journal, Feb. 15, 1983, p. 1, col. 6.

[39] Sec. 1; Sec. 2 (a).

Perhaps in the interest of administrative facility, a 1936 amendment, Commonwealth Act No. 167, gave the Board the discretion to either itself examine the films, or to supervise the examination thereof.[40]

Two years later, in 1938, the Board's name was changed by Commonwealth Act No. 305 to the "Board of *Review* for Motion Pictures" (emphasis supplied) probably to exorcise the stigma that may have even then adhered to the term 'censorship'. In fact, however, the powers of the Board had been increased.[41]

b. *Republic Act No. 3060*

The current law is Republic Act No. 3060, penned in 1961 and subsequently amended by a series of Executive Orders. R.A. 3060 created "The Board of Censors for Motion Pictures," whose expanded jurisdiction included "motion pictures . . . for non-theatrical, theatrical and television distribution," as well as "all publicity materials in connection with any motion picture."[42]

c. *The Interim Board of Censors*

In 1976, due to public outcry over the pornographic "Mga Uhaw na Bulaklak Part II" which was approved by the Board with cuts and shown in public theaters with unapproved insertions, the President issued a memorandum relieving the majority of the Board of Censors from their duties. The President then ordered the Board's Appeal Committee (consisting at the time of the Undersecretaries of Justice, Defense and Education) to sit as an Interim Board of Censors. Unsurprisingly, given their other obligations, these officials found themselves unable to cope with the job of censorship. The Interim Board was therefore subsequently organized into four autonomous divisions, composed of officials from the Departments of Justice, Education, Defense (particularly from the Department of Defense's "Committee on Films") and Public Information, as well as from the National Intelligence and Security Authority. The undersecretaries of Justice, Defense and Education and a Major General from National Intelligence Security Agency (NISA), headed one division each.

d. *Amendments to Republic Act No. 3060*

i) Executive Order No. 858: Reconstitution and the Vesting of final decision with the President.

The Interim Board of Censors ceased operating in 1980, when the President through Executive Order No. 585 "reconstituted" the Board

40 Sec. 2 (a).

41 Sec. 2. The Board could now prohibit not only the "introduction and exhibition" of objectionable films, but also the "removal of such films ... from their local place of production." Further, it was given the discretion to either itself examine the films, or to "supervise the examination" thereof (Sec. 2, (a)).

42 Sec. 3 (a); Sec. 7.

in order to provide a "multi-sectoral and broader perspective for review of motion pictures." The new Board consisted of a Chairman, three Vice Chairmen, and twenty-five members—all but five members to be appointed by the President. These five were to be senior officials of the Departments (Ministries) whose officials constituted the Interim Board, and were to be designated by their respective Ministers. One senior official was also to come from the NISA.[43] The Executive Order amended Republic Act No. 3060, under which the Board consisted of a Chairman and twenty-four members, to be appointed by the President with the consent of the Commission on Appointments.[44]

A more significant provision of Executive Order No. 585, however, is that creating a screening committee in the Office of the President. Henceforth, furthermore: "Decisions of the Board are to be appealable to the President of the Philippines, whose decisions are final."[45] Republic Act No. 3060, on the other hand, provided for an Appeals Committee (of the Undersecretaries of Justice, National Defense and Education—earlier mentioned) to make the final administrative decision.[46] Neither of the afore-mentioned laws mention judicial review. Republic Act No. 3060, however, did not stipulate that decisions of the Appeal Committee were "final."

ii) Executive Order No. 745—An Interesting Expression of Policy.

The second amendment to Republic Act No. 3060 is Executive Order No. 745 (November 1981), a particularly interesting piece of legislation in that it prescribes the "purpose of censorship," to wit: "not primarily to restrict or curtail the freedom of expression of persons engaged in the film industry, but to provide a standard by which films could be effectively used as an instrument of progress." The Order continues: "Whereas, the function of the Board of Censors actually involves the *review* of films to see to it that they comply with the standards set forth by law" (emphasis supplied) the name of the 'Board of Censors for Motion Pictures' is changed to the 'Board of Review for Motion Pictures and Television'."

Two things seem striking about this order: first, as an expression of policy, it is at best largely meaningless, and may even contravene the freedom of expression guarantee. Except for the extremely cynical, probably very few people have concluded that the *purpose* of censorship is curtailment of freedom of expression. Certainly, such curtailment is an incident of censorship, and inherent thereto regardless of any general statement of 'purpose'. Further, the stated objective that "films be . . . used as an instrument of progress" smacks of government inter-

[43] Preamble, Sec. 1.
[44] Sec. 2.
[45] Sec. 4.
[46] Sec. 5.

meddling, contravening the neutrality the government should observe towards all speech, unless the particular speech if found unallowable under the judicially interpreted constitutional standards of limitation.

Second, and merely as a historical tidbit, the change of name echoes that made by Commonwealth Act No. 305 in 1938.

iii) Executive Order No. 757

Essentially an amendment of Executive Order No. 585, Executive Order No. 757 (December 1981) again "reconstituted" the Board, increasing its membership by six, all members to be appointed by the President.

iv) Executive Order No. 868 as amended by Executive Order No. 876

Executive Order No. 868, amended before its effectivity by Executive Order No. 876,[47] grants the Board of Review expanded powers, which originally included (before deletion by the President in Executive Order

[47] Executive Order 868, dated February 1, 1983, was to take effect 15 days after publication in a newspaper of general circulation (Sec. 17). The Executive Order, however, was not so published until after it had been amended, and therefore never became effective before amendment. Executive Order 868 as amended by 876 took effect on March 11, 1983, having been published in the Daily Express, Feb. 24, 1983, p. 3, cols. 1-3.

The powers and duties of the Board under the current law (R.A. 3060 as amended by Executive Orders 585, 745, 757, 868, and 876) are as follows:

Sec. 3....

a) To promulgate such rules and regulations as are necessary or proper for the implementation of Republic Act No. 3060, as amended, and the accomplishment of its purposes and objectives...;

b) To screen, review and examine all motion pictures as herein defined, including publicity materials such as advertisements, trailers and still...;

c) To approve or disapprove, delete objectionable portions from and/or prohibit the importation, exportation, production, copying, distribution, sale, lease, exhibition and/or television broadcast of the motion pictures and publicity materials subject of the preceding paragraph, which in the judgment of the Board ... are objectionable. [The Board is provided standards for review, which will be enumerated and discussed later.]

d) To supervise, regulate and grant, deny or cancel, permits for the importation, exportation, production, copying, distribution, sale, lease, exhibition, and/or television broadcast of all motion pictures and publicity materials, to the end that no such pictures and materials as are determined by the BOARD to be objectionable in accordance with [the prescribed standards] shall be imported, exported, produced, copied, distributed, sold, leased, exhibited and/or broadcast by television. Towards this end, no foreign individual, corporation or group, whether singly or in joint venture with another local and/or foreign individual, corporation or group, may produce in whole or in part any motion picture, television program or publicity material in the Philippines, without first obtaining the necessary permit from the Board upon proof that the proposed picture is not objectable in accordance with [the prescribed standards];

e) To classify motion pictures, television programs and similar shows into categories such as "For General Patronage," "For Adults Only," or such other categories as the BOARD may determine for the public interest;

f) To regulate, supervise, and grant, deny or cancel, permits for the operation of cinema houses, theaters and other establishments engaged in the public exhibition of motion pictures.

g) To levy, assess and collect, and periodically adjust and revise the rates of the licenses and permits which the BOARD is authorized to grant ...;

h) To deputize representatives from the government and private sectors.... The

No. 876, due to widespread protest by artists, other professionals, and the public) the licensing of actors and actresses and the regulation of live entertainment. Also similarly bestowed and revoked was the power to regulate the video-taping of motion pictures, television programs, and publicity materials.

The added powers of the Board of Review granted by 868 and left intact by 876 are therefore: the discretionary grant of permits to cinema

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Board may also call on any law-enforcement agency for assistance in the implementation and enforcement of its decisions, orders or awards.

i) To cause the prosecution, on behalf of the People of the Philippines, of violators of this Act, of anti-trust, obscenity and other laws pertinent to the movie and/or television industries.

j) To prescribe international and operational procedures ...; and

k) To exercise such other powers and functions as may be necessary or incidental to the attainment of the purposes and objectives of this Act, and to perform such other related duties and responsibilities as may be directed by the President of the Philippines.

SECTION 13. ...[T]o inspect all public exhibitions of any motion picture or publicity material in cinema houses, theaters and other public establishments and in any case, upon discovery of any motion picture or publicity material which, although previously approved by the BOARD has been tampered with to introduce any unapproved matter, to immediately seize such unapproved matter and to cause the prosecution of the person(s) responsible for the violation of this Act and/or the Revised Penal Code, as amended.

As a corollary the following acts are declared "unlawful" by Executive Order 876:

a) SECTION 7...For any person or entity to exhibit or cause to be exhibited in any motion picture theater 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 theater, or public place or 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.

SECTION 8. The motion picture exhibitors shall post and/or display the said certificate or label at conspicuous places near the entrances to the theaters or places of exhibition, and shall include in all their cinema advertisements announcements stating the classification as provided in Section 3(e) hereof, of the motion pictures being exhibited or advertised.

b) SECTION 9.... [F]or any person below eighteen 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 or the showing of a motion picture classified for adults only by the BOARD.

c) ...[F]or any employee of a moviehouse or theater to sell to, or receive from another person known to the former to be below eighteen 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 other proof of age.

SECTION 11. Any violation of Section seven of this Act shall be punished by imprisonment of not less than six months but not more than two years, or by a fine of not less than six hundred nor more than two thousand pesos, 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 also be revoked. Any other kind of violation shall be punished by imprisonment of not less than one month nor more than three months or a fine of not less than one hundred pesos nor more than three hundred pesos, 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 vioaltion.

houses, and to foreigners seeking to produce a movie or television program in the Philippines, as well as permits for the "importation, exportation, production, copying, distribution, sale, lease, exhibition, and/or television broadcast of all motion pictures and publicity materials";[48] the deputization of representatives from the government and private sectors to assist the Board in its functions;[49] and the ability to prosecute violators of laws pertinent to the movie and/or television industries.[50]

Members of the Board may be removed by the President "for any cause."[51] The Board is thus explicitly divested of security of tenure.

III. *The Standards of Obscenity: A Problem of Vagueness*

One writer notes:

> The etymology of "obscene" is obscure ... Webster suggests a derivation from the Latin *ob*, meaning "to," "before," "against," or the Latin *caenum*, meaning "filth." Other commentators suggest alternative derivations from the Latin *obscurus* meaning "concealed," or ... a corruption of the Latin *scena* meaning "what takes place off stage." In the latter sense, blinding Gloucester in *King Lear* would have been an obscenity for a Greek playwright like Sophocles (thus, Oedipus is blinded off stage), but it was not for an Elizabethan playwright like Shakespeare who was imbued with the bloodthirstiness of Senecan tragedy.[52]

Difficulty with the etymology of "obscene" extends to difficulty with the judicial and legislative definitions of "obscenity."

A. The Penal Law

Well-known is the dictum that a penal law so vague that the public and the courts must guess as its meaning violates the constitutional requirements of due process. As to film and obscenity, our Penal Code (Article 201, as amended by Presidential Decree No. 969) provides:

> *Immoral doctrines, obscene publications and exhibitions, and indecent shows—*
>
> The penalty of prision mayor or a fine ranging from six thousand to twelve thousand pesos (₱6,000.00 to ₱12,000.00), or both such imprisonment and fine, shall be imposed upon:
>
> > 2...b. Those who in theaters, fairs, cinematographs or any other place, exhibit indecent or immoral plays, scenes, acts or shows, it being understood that the obscene literature or indecent or immoral plays, scenes, acts or shows, whether live or *in film*, which are proscribed by virtue hereof, shall include those which .... (2) serve no other purpose but to

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48 Sec. 3, (g), (d.)
49 Sec. 3, (h).
50 Sec. 3, (i).
51 Sec. 2.
52 Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 47-48 (1974).

> satisfy the market for violence, lust, or pornography .... and (5) are contrary to law, public order, morals, good customs, established policies, lawful orders, decrees and edicts.
>
> 3. Those who shall sell, give away, or exhibit *films*, prints, engravings, sculpture or literature which are offensive to morals. (emphasis supplied)

Arguably, the standards embodied above are unconstitutionally vague. Article 201 employs the terms "immoral," "indecent," and "obscene," without further elaboration. A test of purpose ("those which . . . serve no other purpose but to satisfy the market for violence, lust, or pornography") is included, but is not meant to mandatorily apply to every spectacle judged obscene, and is therefore not exclusive. (Such test seems remarkably similar to the "utterly without redeeming importance" basis in *Roth*, except that the former seems to emphasize motive rather than content).

Indeed, the Court has found itself obliged to define these standards as found in our criminal law. In *People v. Kottinger*, the Court ruled that "obscenity" means "something offensive to chastity, decency, delicacy". The test of obscenity, the Court said, is the tendency to "deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication or other article charged with being obscene may fall. Another test of obscenity is that which shocks the ordinary and common sense of man as an indecency."[53]

Other tests employed by the Court to determine obscenity have been the reaction of the public to the spectacle,[54] the motive of the material charged as obscene (whether such motive is "pure or impure", whether the material is "naturally calculated to excite impure imaginations"[55]), and whether the material was displayed not for the "cause of art" but for commercial purposes.[56]

The Penal Code provision on obscenity, however, has never been judicially challenged on the ground of unconstitutional vagueness. If so taken to task, an available defense might be that it finds precision in the "ordinary and common sense of man," as held in *Kottinger*. Similarly, the U.S. Supreme Court has relied on the "sense and experience of men" as "certain and useful guides" to determine what was "moral, educational, or amusing, and harmless."[57]

In practice, however, our Penal Code provisions have not affected free expression in the movies, primarily because of the filtering function

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[53] 45 Phil. 352, 356, 358 (1923).
[54] People v. Aparici, note 6 at 251.
[55] People v. Serrano, C.A.-G.R. No. 5566-R, Nov. 24, 1950.
[56] People v. Go Pin, 97 Phil. 418, 419 (1955).
[57] Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915).

of the Board of Review for Motion Pictures and Television, which successfully cuts out obscenity before the films reach the public. Criminal prosecutions relating to sexually explicit matter have thus been based on violations of Section 7 of Republic Act No. 3060, a penal provision regarding the prohibited exhibition of films, or portions thereof, that have not been duly passed by the Board. Furthermore, even definitions of "obscenity" (as put forth by the Court) pertaining to the Penal Code may not be entirely pertinent to "obscenity" as used in the Board of Review law. The question of motive, for example, certainly affects criminal guilt, but may be irrelevant to the determination of whether a particular movie should be censored. The converse, however, is not necessarily true; the determination by the Board that a film is obscene will (in the event the film is shown) no doubt increase the likelihood of prosecution under the Penal Code.

The standards most pertinent to motion pictures in the Philippines are thus those found in the Board of Review's charter.

B. Administrative Standards

Administrative in nature, the Board of Review's standards are subject to the requirements of the doctrine of non-delegation. In essence, this doctrine states that in order for a delegation of powers to be valid, at least three criteria must be met: the policy must be clearly declared in the statute and not left to the discretion of the delegate; the statute must provide sufficient standards to guide the delegate and to allow the courts meaningful judicial review; the delegate must specify the facts and circumstances that impelled him to act as he did, given the standards provided by law.[58]

Republic Act No. 3060 empowered and commanded the Board to prohibit the exhibition of motion pictures, that "in its judgment are immoral, indecent, contrary to law, and/or good customs, or injurious to the prestige of the Republic of the Philippines and its people."[59]

Executive Order 868 provides somewhat more definite standards for review. It gives the Board the power and duty to prohibit and delete materials which:

> in the judgment of the Board applying contemporary Filipino cultural values as standard, are objectionable for being immoral, indecent, contrary to law and/or good customs, injurious to the prestige of the Republic of the Philippines or its people, or with a dangerous tendency to encourage the commission of violence or of a wrong or crime, such as but not limited to:
>
> (i) Those which tend to incite subversion, insurrection or rebellion against the State;

[58] GONZALES, ADMINISTRATIVE LAW 31, 32 (1979).
[59] (1961), Sec. 3.

(ii) Those which tend to undermine the faith and confidence of the people in their government and/or the duly constituted authorities;

(iii) Those which glorify criminals or condone crimes;

(iv) Those which serve no other purpose but to satisfy the market for violence or pornograhy;

(v) Those which offend any race or religion; and

(vi) Those which tend to abet the traffic in and use of prohibited drugs.[60]

Like the Penal Code provision on obscenity, neither Republic Act No. 3060 nor Executive Order No. 868 have been challenged on grounds of unconstitutionality. If we turn to the U.S. Supreme Court, however, we find that the following standards have been held (in *per curiam*[61] decisions) as unconstitutional for being violative of the free speech and press guarantee: "of such character as to be prejudicial to the best interest of the people";[62] "harmful";[63] "immoral"; and "would tend to corrupt morals";[64] "obscene, *indecent,* and *immoral.*"[65] (emphasis supplied).

The Board of Review has in fact found need to promulgate guidelines interpreting the law (then Republic Act No. 3060), in order to aid itself in its censorship task. These guidelines are themselves reasonably specific. As to sexually explicit material, they provide:

> The Board disfavors or disapproves the following topics, themes, and subjects:
>
> *Perverted or abnormal personalities.* Homosexuals, prostitutes and the like as central figures in films.
>
> ... *Erotic and sex exploitation subjects and themes.* Depiction of sex catering to the baser instincts of filmgoers.
>
> ... *Incest and adultery.* Portrayal of abnormal and illegal sex relations.
>
> The following are specific scenes or elements to be avoided or totally excluded from film scripts:
>
> Scenes portraying rape, seduction, the sex act and lustful kissing, embraces, postures and gestures.
>
> ... Scenes exposing or showing the reproductive organs, the hair or the naked anatomy, whether male or female.
>
> ... Scenes featuring profane or indecent language not normally heard in polite conversation, and irrelevant to the plot or character uttering it; as well as scenes containing dirty or obscene songs, references, gestures and dancing with indecent movements.

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[60] Sec. 3, (c).

[61] In the sense of brief announcements not accompanied by written opinions.

[62] Gelling v. Texas, 343 U.S. 960 (1952).

[63] Superior Films, Inc. v. Department of Education of Ohio, 346 U.S. 870 (1953).

[64] Commercial Pictures Corp. v. Regents of University of New York, 346 U.S. 587 (1953).

[65] Holmby Productions Inc. v. Vaughn, 350 U.S. 870 (1955).

> ... Scenes of exaggerated grossness and private habits and biological necessities such as urination or excretion, or raising of dirty feet on benches while eating, whether for purposes of realism or comic effect or the characterization of a role considered indecent.[66]

Happily, the guidelines have evolved with the times, thus showing a responsiveness to community mores. Previously for example, "a double bed, except when only one person is occupying it," was considered vulgar and objectionable.[67] Currently, as evinced by the guidelines quoted above, only much more explicit scenes are deemed fit for censorship. The Board, furthermore, probably due to Executive Orders No. 868 and 876, is in the process of creating new guidelines. Hopefully, these will even more accurately reflect community standards.

Interpretative administrative pronouncements, however, do not cure the vagueness of the Board of Review law.[68] Indeed, because censorship is a question of policy that requires the careful balancing of State interests against the right of the individual to free expression, the legislature should be more than ordinarily watchful in its setting of standards.

Indeed, as earlier mentioned, the standards provided by Executive Order No. 868 are more detailed than those of Republic Act No. 3060. The new standards, however, do not in fact cure whatever insufficiency may have afflicted the old; rather, they present a new ground for unconstitutionality.

The changes in the law are:

1. The addition of the dangerous tendency rule as a criterion for disapproval or deletion ("with a dangerous tendency to encourage the commission of violence or a wrong or crime");

2. The listing of examples of objectionable material (i to vi, above).

First, the dangerous tendency rule (which "permitted the application of restrictions once a rational connection between the speech restrained and the danger apprehended . . . was shown")[69] has been abandoned by our Supreme Court in favor of the clear and present danger and balancing of interests tests. (Speaking of obscenity in particular, the fact that the clear and present danger rule may not be applicable, as discussed earlier, does not justify the relaxation of standards in favor of State control).

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[66] BOARD OF CENSORS FOR MOTION PICTURES GUIDELINES ON FILM AND TELEVISION PRODUCTION AND EXHIBITION 2-5 (1975).

[67] Sanchez, *Film Censorship Law Revisited*, 37 PHIL. L. J. 784, 787 (1962). (citing the "Code of Motion Pictures" of the Board of Review for Motion Pictuses under Com. Act No. 305).

[68] Lazatin, *Censoring the Censor*, 45 PHIL. L. J. 601, 616 (1970).

[69] Justice Castro's separate opinion in Gonzales v. Comelec, note 11 at 897.

As regards the second change, the listing is specified as not exclusive, thus leaving the Board's discretion as unimpaired as it was under the earlier law.

C. U.S. Jurisprudence

As a matter of interest, let us turn to the standards for obscenity adopted by the U.S. Supreme Court. More detailed than our own penal, judicial, and administrative standards, the American criteria are also more reflective of the philosophy underlying the classification of a work as obscene.

The first significant definition of obscenity was made in *Roth*: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest".[70] The same case defined "prurient interest" as relating to "material having a tendency to excite lustful thoughts . . . a shameful or morbid interest in nudity, sex, or excretion."[71]

Roth's standard, however, turned out problematic for two reasons. First, the elevation of a definition of obscenity to constitutional doctrine forced the court to thereafter "adjudicate almost every new development in pornographic creativity."[72] The consequent institutional burden was tremendous.

Second, the *Roth* definition failed to maintain the assent of the Court's members, leading to the Court's issuance of *per curiam*[73] reversals of obscenity convictions whenever "at least five members of the Court, applying their separate tests" deemed the charged material as not obscene.[74]

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[70] U.S. v. Roth, note 15 at 487.

[71] *Ibid.* (citing the American Law Institute Model Penal Code).

[72] Goldmark, *op. cit.*, note 26 at 310.

[73] Again, in the sense of brief announcements not accompanied by written opinions. Compare with note 59, *supra.*

[74] Justice Brennan dissenting in *Paris Adult Theater I v. Slaton,* note 10 at 84. As one writer, illustrating the variety of standards of the Justices of the U.S. Supreme Court, says:

> There can never be objective standards of obscenity. Obscenity is in the eye of the beholder, or—as Justice Douglas once quipped—"in the crotch of the beholder." One person's obscenity is another's art, and yet another's comedy.
>
> Former Justice Potter Stewart of the United States Supreme Court once admitted that he could not define obscenity, but he assured us that "I know it when I see it." But other judges, who also claim to know it, see it quite differently. Each Justice has his or her own personal definition of obscenity, which is rarely written into opinions .... The late Chief Justice Earl Warren used to regard portrayal of "normal" sex—no matter how graphic—as constitutionally protected; but when "abnormal" sex—was even hinted at, he would fly into a rage. "Would my daughters be offended?" was his personal test. The late Justice Hugo Black believed that dirty words—such as "Fuck the Draft"— were not. Justice John Paul Stevens, on the other hand, believes that dirty words deserve more protection than dirty pictures. Every Justice has his own standards, and they are just

Because such reversals included no reasoned decision, the confused Court offered no guidance to the confused lower courts and public.

The second significant definition was contained in *Memoirs v. Massachusetts*.[75] An elaboration of the Roth decision as developed in various cases, the *Memoirs* standard demanded that three elements coalesce:

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[76]

Each element had to be present for the material to be classified as obscene.

Miller v. California embodies the current definition:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest (citations omitted); (b) whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[77]

The *Miller* definition is the first since *Roth's* that a majority of the Court agreed upon. The Court rejected the "utterly without redeeming social importance test of *Memoirs*" as being an improper break from *Roth*. While *Roth presumed* obscenity (as defined in the case, which definition is adopted as *Miller's* first criterion) to be without redeeming social importance, *Memoirs* required the prosecution "to prove a negative, i.e., that the material was utterly without redeeming social value—a burden virtually impossible to discharge under our criminal standards of proof."[78] The Court in *Miller* thus substituted the *Memoirs* test with the less rigorous "lack of serious value" test. The *Miller* test, however, is still stricter than that of *Roth*, requiring—aside from *Roth's* criterion—patent offensiveness, specific definition by state law, and lack of value.

Notably, therefore, the *Miller* standard requires that a particular state law set standards far more specific than those of the Court. As "examples of what a state statute could define for regulation," the Court lists: "a) Patently offensive representations or descriptions of ultimate

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as likely to reflect individual tastes, hang-ups, and upbringing as they do constitutional doctrine or precedent.

The bottom line is what five Justices of the Supreme Court say it is at any given time.

DERSHOWITZ, THE BEST DEFENSE 163-164 (1982).

Is there any assurance that the Justices of our Supreme Court or the members of our Board of Review can come to a better consensus? Even if they can, could such consensus possibly be extended to even a mere majority of Filipinos?

[75] 383 U.S. 413 (1966).

[76] *Id.* at 418.

[77] Miller v. California, note 27 at 24.

[78] *Id.*, at 22.

sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[79]

It should be stated, parenthetically, that the Court's obscenity definitions are not totally comprehensive. For example, a background of "pandering," or the purveying of erotic (but not necessarily obscene *per se*) material "with sole emphasis on the sexually provocative aspects" thereof, has been held decisive in determining the obscenity of the material and thus the legitimacy of regulation.[80]

The current obscenity doctrines have been criticized as allowing the Court "to determine what communications or forms of expression are of value to the individual", thus impairing the right of "individual self-realization" (in particular, the right of an individual to choose how to develop his own faculties), which right is that sought to be protected by the constitutional guarantee of free speech.[81]

IV. *The Safeguards of Procedure: Judicial Review*

The Board of Censors/Review has had few court cases. None of significance have reached the Supreme Court,[82] nor have any touched upon the constitutionality of the various laws relating to the Board. Neither has there been any judicial review of the Board's decisions.

We may ask, nevertheless, whether the Board's decisions are reviewable. The law provides for an initial review by five members of the Board, and upon a written motion of reconsideration, a second review by a majority of the Board. Further:

> The second decision of the Board shall be final, with the exception of a decision disapproving or prohibiting a motion picture in its entirety which shall be appealable to the President of the Philippines, who may himself decide the appeal, or be assisted either by an *ad hoc* committee he may create or by the Appeals Committee ... An Appeals Committee in the Office of President ... is hereby created composed of a chairman and four (4) members to be appointed by the President ... ; which shall submit its recommendation to the President ... The decision of the President ... on any appealed matter shall be final.[83]

Perhaps, however, these stipulations on the finality of the decisions of the Board or the President, as the case may be, should be taken to refer purely to administrative remedies, in the absence of mention of the

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[79] *Id.*, at 25.

[80] Ginzburg v. United States, 383 U.S. 463 (1966).

[81] Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593, 637 (1982).

[82] Only one Board decision—that suspending the permit of "Iginuhit ng Tadhana," allegedly for political expediency—has been contested in the Supreme Court, and that action was dismissed for being moot. Galang v. Court of Appeals, G.R. No. 24980, October 7, 1968 *cited in* Lazatin, note 68 at 602-603. (The film was based on the life of then first-time presidential candidate Ferdinand E. Marcos, and used by him during his campaign).

[83] Exec. Order No. 868, Sec. 4.

Courts by the statute and in view of the judiciary's role as the supreme interpreter of the law. As our Supreme Court has held: "It is generally understood that as to administrative agencies exercising judicial or quasi-judicial or legislative power, there is an underlying power in the courts to scrutinize the acts of such agencies on questions of law and jurisdiction though no right of review is given by statute."[84]

Ordinarily, the Courts will not interfere with proceedings of administrative bodies in the exercise of administrative functions. Presumably, such agencies are better equipped technically to decide the administrative questions before them. Besides, policy is often involved in administrative decisions. The Court, however, will exercise its power of review when: the Board or official has acted beyond statutory authority, exercised unconstitutional powers, clearly acted without regard to duty or with grave abuse of discretion, or when the decision is vitiated by fraud, imposition, or mistake.[85]

It should be safe to assume that these doctrines apply to the Board of Review.

An American case, *Freedman v. Maryland,*[86] states that censorship procedures must meet three requirements in order to "avoid constitutional infirmity":

> First, the burden of proving that the film is unprotected expression must rest on the censor.
>
> Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression :... because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final resrtaint.
>
> Third, the procedure must ... assure a prompt final judicial decision.

Our current censorship law meets none of these requirements.

The statute voided in *Freedman* was held as inadequately protecting freedom of expression on the following grounds:

> First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression.
>
> Second, once the board has acted against a film, exhiibtion is prohibited pending judicial review, however protracted.

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[84] San Miguel Corporation v. Secretary of Labor, G.R. No. 39195, May 16, 1975, 64 SCRA 56 (1975); Uy v. Palomar, G.R. No. 23248, February 28, 1969, 27 SCRA 287, 294-295 (1969).

[85] Manuel v. Villena, G.R. No. 28218, February 27, 1971, 37 SCRA 745 (1971).

[86] Freedman v. Maryland, note 34 at 58, 59.

> Third, it is abundantly clear that the ... statute provides no assurance of prompt judicial determination.[87]

Our current censorship law possesses all of these infirmities.

The judicial review required in *Freedman* indeed seems to differ essentially from that generally granted by our jurisprudence. As mentioned, our courts are given the power to review administrative decisions only on what may be classified as grounds of law or jurisdiction. Yet the determination of whether a particular movie (or other form of speech) is obscene has continually been regarded by the U.S. courts as a question of fact.[88]

It has been suggested that in countries with administrative systems of censorship, judicial review should take the nature of determining whether the censored film falls within the "censorable categories set out in the statute." "This would provide a double control: the categories in the statute . . . [as well as] the actual classification of films by the censors would be tested."[89] This type of review thus incorporates both questions of fact and law, and is the same as *Freedman* requires.

An additional consideration would seem to be the potential efficacy of judicial review in any case. The Board of Review is in an extraordinary position in that although it may be said to be performing quasi-judicial powers in its review of films, 'hearing' merely consists of viewing the film in question. The courts, in the exercise of their power of review may not be required to do more. (In *Paris* it was held that expert testimony as to obscenity is not required if the material charged with being obscene is itself introduced into evidence).[90] Yet a judicial hearing of such kind can hardly be termed adversary. Indeed, if the courts should conduct hearings similar in nature to those of the Board, the judiciary would merely be sitting as a Super Board of Censors.

The problem is compounded in the Philippines because of the aforementioned insufficiency of both legislative and judicial standards for obscenity. Given the subjective character of censorship, our Courts may be all too ready to presume the validity of the Board's decision. On the other hand, if the courts were urged to review censorship decisions, they may be prodded into closer examination of the issues of freedom of expression and State interests inherent in pornography regulation. Perhaps, enlightened and enlightening jurisprudence may develop. Otherwise, the requirement of judicial review may merely clog the dockets.

Summary and Considerations:

1. Philippine jurisprudence is sorely lacking in the areas of censorship and obscenity. Consequently, the perimeters of the constitutional guaran-

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[87] *Id.*, at 59-60.
[88] *See, e.g.*, Miller v. California, note 27 at 24.
[89] HUMMINGS, FILM CENSORS AND THE LAW 390 (1967).
[90] Paris Adult Theater I v. Slaton, note 20 at 56.

tee of freedom of speech and press have not been explored with regard to sexually explicit speech.

In the United States, the concept of obscenity essentially means such sexually related speech as falls outside First Amendment protection. The initial basis for exemption was that the speech was "utterly without redeeming social importance." The U.S. Supreme Court then proceeded to define what kind of speech would be considered obscene—the current definition is that embodied in *Miller*: the work, taken as a whole must appeal to the prurient interest; the measure is that of contemporary community standards; the work must be patently offensive; the sexual conduct must be specifically defined by State law; and the work must lack value. The standard for obscenity is thus relative, being bound by individual taste, time, and place.

The evolution of the U.S. Court's definitions of obscenity show an increase in refinement as well as an eventual increase in rigorousness in favor of freedom of expression. Where *Roth assumed* obscene speech to be utterly without redeeming social importance", *Miller* requires *proof* that the speech lacks "serious . . . value." The presumption and polarity of *Roth* have thus been replaced by the more factual moderation of *Miller*.

The change in standards thus seems a corollary to the movement of the Court from an absolutist "two-level" (protected v. unprotected speech) position, to a "balancing-of-interests" stance. The latter may create a salutary increase in awareness of conflicting interests (the right of an individual to give and receive information v. the welfare of the state), but it as well increases judicial discretion and perhaps consequently the employment of subjective value-judgments.

Philippine jurisprudence has not relegated obscenity to the category of "unprotected speech." We have therefore avoided the pitfalls to the U.S. Supreme Court's "two-tiered" approach. Under existing jurisprudence, obscenity regulation must thus be based on the general standards of limitation applied to free expression: the clear and present danger rule and the balancing-of-interests test. The latter, as previously discussed, being the more apt, we find ourselves already at the position towards which the U.S. Court seems to be evolving. Nothing is easily won, however: although we seek to balance interests, we sorely lack guidelines to help us with the task.

Sex and obscenity, after all, are not synonymous. In *Roth,* for example, sexual but not obscene speech was deemed protected by the constitution: "Sex, a great and mysterious force in human life has indisputably been a subject of absorbing iterest to mankind throughout the ages; one of the vital problems of public concern."[91]

[91] U.S. v. Roth, note 15 at 487.

It has been suggested that only two interests are sufficient to justify the supression of obscenity, particularly given the absence of conclusive proof that obscene material is detrimental to society: the protection of juveniles, and that of adults who do not wish to be exposed to obscene matter but are subjected thereto against their will.[92] Children and minors, therefore, can be excluded from viewing films classified by the State (or by a State delegated authority) as obscene. As well, public display of obscene material — on billboards, at moviehouse entrances, and even through movie trailers viewed by general audiences—can be prohibited. Fair warning, by means of a classification system, must be given prospective audiences that films are obscene. This proposal would seem to solve a number of problems: the Board of Review/Court would not be cast into the role of subjective arbiter of values; institutional burdens (both administrative and judicial) would be eased; government officials and the public would not be confused as to what was disallowed.

2. The importance a society accords freedom of expression determines the mode it chooses to regulate such expression, for the mode chosen is determinative of the extent to which speech shall be free. Our government has opted for censorship, perhaps among the most stringent methods of control, in that it embodies prior restraint. Further, the Board of Review is given the discretion to either disapprove objectionable films in their entirety, or to cut out portions thereof. While such cutting of films would on the surface seem more benevolent towards free speech than the banning of whole works, such 'weeding' is in fact insidious. First, the censorship of parts implies the potential mutilation of artistic works. Second, it placates the exhibitor from appealing the Board's decision to the Courts—witness the lack of censorship litigation in the Philippines. Consequently, the issues of free expression, obscenity, and legitimacy of censorship procedures are not sufficiently examined. As well, administrative considerations such as the sufficiency of standards and the availability of judicial review are not brought to the fore.

At present, judicial review of the Board's decisions is available on questions of law or lack of jurisdiction. Yet, because of the subjectivity inherent in censorship, and the afore-mentioned dearth of concrete legal standards, the courts are not likely to find the Board guilty of grave abuse of discretion. Furthermore, the determination of whether material is obscene or not is arguably a question of fact, as judgment is passed relative to "contemporary Filipino cultural values" or (in the U.S.) "contemporary community standards." The courts themselves, at any rate, will have vast discretion in their decisions, which will finally depend on judicial attitudes towards the guarantee of freedom of speech and press.

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92 Paris Adult Theater I v. Slaton, note 20 at 113. (Justice Brennan, joined by Justices Stewart and Marshall, dissenting.)

The requirement that every decision of the Board be made by a minimum of five members thereof is at least an internal check on arbitrary action. Perhaps, however, a measure of public participation in the Board of Review would be desirable. Members of the Board could screen films with an equal number of members of the public (the latter chosen at random, similar to a jury), both groups having an equal number of votes. In this way, contemporary values would be more accurately reflected and review more impartial, as the censors would not all be hand-picked by the State.

3. Admittedly, the question of obscenity is not simple, as evidenced by the problems faced by the U.S. Supreme Court. The vagueness of the Court's definitions of obscenity has led to the problems of lack of fair warning; a "chilling effect" on—i.e., an inhibition of—constitutionally protected speech; and the institutional burden of an excessive number of obscenity cases.[93] Indeed, given the shifts in public mores, the innumerable situations to which standards must be applied, and the necessity of reliance on the censor's personal perspective, concrete standards for censorship are not easy to set.

Due to misgivings regarding its obscenity definitions, which it described as "offering only an illusion of certainty," the U.S. Supreme Court ruled in *Memoirs* that state laws need merely "apply criteria rationally related to the accepted notion of obscenity and . . . reach results not wholly out of step with current American standards."[94] In *Miller,* while emphasizing that it was not its function to "propose regulatory schemes for the States," the Court, primarily in the interest of specificity of standards, volunteered "a few plain examples [listed earlier in this article] of what a state statute could define for regulation."[95]

Likewise conceding latitude to state legislatures, the Court, on the controversial matter of the existence of an empirical basis for obscenity control, said in *Kaplan v. California*[96] that "a state need not wait until behavioral experts or educators could provide empirical data" before enacting regulatory laws on obscene material. The Court stated that the adoption of such laws "on the basis of unprovable assumptions" was within the power of the state.

4. The mores of a society necessarily determine the existence (if not the wisdom) of censorship. Although the average Filipino could conceivably be said to be less nonchalant about sex than the average Westerner, I cease to speculate further. Suffice it to say that the recent uproar about

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93 *Id.*, at 74.
94 Memoirs v. Massachusetts, note 75 at 458.
95 Miller v. California, note 79.
96 413 U.S. 115, 119 (1973).

sex in the movies and about the functions of censorship, clearly show that our ways of thinking are in flux.

A last observation: because deprivation causes desire, and secretiveness breeds malice, the irony of censorship is that it may well be self-perpetrating.