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Censorship of Film, "Lady Chatterley's Lover," Struck Down

RECENT DECISIONS AND DEVELOPMENTS

Censorship of Film, "Lady Chatterley's Lover," Struck Down

Recently, the United States Supreme Court held that the state censorship of a motion picture which advocates adultery as a proper pattern of behavior, is an unconstitutional prior restraint. The First Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees the expression of ideas, even though these ideas may not be conventional, and only be shared by a minority of the people.[1]

When first presented with the question of motion picture censorship by a state, the Supreme Court, in *Mutual Film Corp. v. Industrial Cōmm'n*,[2] categorized the cinema as a business, pure and simple.[3] It was equated to a circus and other spectacles as a medium of public opinion. Due to this lack of esteem, none of the privileges accorded to the press and speech[4] could be extended to include the movies. The state was then empowered to censor the exhibition of motion pictures without constitutional objection[5] as to prior restraint.[6]

Thirty-seven years after this initial film censorship decision,[7] the Court in *Joseph Burstyn, Inc. v. Wilson*,[8] expressly overruled the *Mutual Film* case and held that expression by means of motion pictures is to be included within the area of free speech and press. The Court was cognizant that the medium had matured and that motion pictures may certainly affect public attitudes, ranging from direct espousal to the subtle shaping of thoughts.[9] This theory correlatively placed a responsibility upon their content. The Court undoubtedly realized this and questioned the extent of its newly found protection by stating that the Con-

[1] Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

[2] 236 U.S. 230 (1915).

[3] *Id.* at 244. It may be of significance that talking pictures were not produced until 1926. HAMPTON, A HISTORY OF THE MOVIES 382-83 (1931).

[4] The freedom of speech and press referred to was that which the Ohio Constitution guaranteed.

[5] It was not until Gitlow v. New York, 268 U.S. 652 (1925), that the First Amendment was protected from abridgement by a state under the due process clause. See RD-DR Corp. v. Smith, 183 F. 2d 562 n. 1 (5th Cir.), *cert. denied*, 340 U.S. 853 (1950).

[6] Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F. 2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951) held that if a film were to be shown only on television, the state could not censor it although it might be repugnant to its mores.

[7] In 1948, in a dictum statement by the Supreme Court, motion pictures were considered in the area of freedom protected by the First Amendment. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). In 1950, The Mutual Film doctrine was held still applicable. RD-DR Corp. v. Smith, *supra* note 5.

[8] 343 U.S. 495, 502 (1952).

[9] *Id.* at 501.

stitution does not require the absolute freedom to exhibit every motion picture of every kind at all times and all places.[10] The censorship problem between the extremes of the *Mutual Film* doctrine and the absolute "no censorship" theory was crystallized by the Court's refusal to answer its own question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."[11] The Court determined that the definition of "sacrilegious" in the New York statute was too ambiguous to have validity as a censorship statute, saying that "the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views. . . ."[12]

In the case of *Commercial Pictures Corp. v. Regents,*[13] the standard presented to the Supreme Court by a censorship statute was "immoral." It had been held in the state court that this was sufficiently definite to meet the requirements of due process of law.[14] The judgment was reversed in a per curiam decision which cited only the *Burstyn* case. The inference to be drawn is that, since "sacrilegious" was found in the *Burstyn* case to be too ambiguous a concept to be used as a standard, "immoral" is equally unacceptable.

Subsequently, a censorship standard which had been held valid in the state court[15] was presented, using as its criteria "obscene, indecent or immoral and such as tend to debase or corrupt morals." Again the Supreme Court honored the issues with a per curiam reversal which cited the *Burstyn* case and *Superior Films, Inc. v. Dep't of Educ.*[16] The significance of the case may lie in the fact that if a shotgun multiple standard is utilized, part of which is patently invalid, the Court cannot ascertain that only valid standards were relied upon.

Another standard to reach the Court was "obscene and immoral." It was held valid in *Times Film Corp. v. City of Chicago,*[17] but was reversed by the Supreme Court in a per curiam decision[18] which cited *Alberts v. California.*[19] The *Alberts* case held that obscenity is not within the area of constitutionally protected speech. Of more significance though, is that the *Alberts* case formulated a test[20] which should be used to determine what is in fact obscene. The choice of *Alberts* rather than the *Burstyn* and *Superior Film* cases intimated that the picture was not obscene under that specific test, not that "obscenity" was an invalid standard. It is to be noted that in the *Alberts* case the Court held that the dissemination of obscene material can be suppressed without showing that such dissemination would create a clear and present danger to society.[21]

In *Kingsley Int'l Pictures Corp. v. Re-*

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[10] *Id.* at 502.

[11] *Id.* at 506.

[12] *Id.* at 504.

[13] 346 U.S. 587 (1954). This case was decided together with Superior Films, Inc. v. Dep't of Educ. in a per curiam decision.

[14] Matter of Commercial Pictures Corp. v. Regents, 305 N.Y. 336, 113 N.E. 2d 502 (1953).

[15] Holmby Productions, Inc. v. Vaughn, 177 Kan. 728, 282 P. 2d 412 (1955).

[16] Holmby Prods., Inc. v. Vaughn, 350 U.S. 870 (1955). For Superior Film case, see note 13 *supra.*

[17] 244 F. 2d 432 (7th Cir. 1957).

[18] Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957).

[19] 354 U.S. 476 (1957).

[20] For discussion of this test, see text accompanying note 58 *infra.*

[21] *Supra* note 19, at 486-87.

gents,[22] the New York Court of Appeals stated that the basis for the refusal of a license to "Lady Chatterley's Lover," was that Sections 122[23] and 122(a)[24] of the New York Education Law require the denial of a license to motion pictures which are immoral in that they portray "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior."[25] Only this part of the statute was involved.[26] The New York Court said that the picture in this case involves ". . . the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature."[27] The Court held that when a motion picture depicts sexually immoral acts as proper behavior the "clear and present danger of substantive evil" standard need not be applied. This was not the obscenity referred to in the *Alberts* case. Nevertheless, the Court reasoned that one cannot fail to see that there is ". . . evil and danger to society which *inheres* in expressions which debase fundamental sexual morality by portraying its converse to the people as alluring and desirable."[28] The court symmetrized obscenity with its definition of immorality by saying "obscenity is only one word which among others, signifies 'that form of immorality which has relation to sexual impurity'."[29] The court equated the dangerous effect of obscene material with the effect produced by the methodology involved in "Lady Chatterley's Lover." Where is the logic to proscribe obscenity and protect this picture since "*[T]he law is concerned with effect, not merely with but one means of producing it.*"?[30] The crucial point was that the picture was not being censored for obscenity but for the representation of an idea (that adultery under certain circumstances may be proper behavior) and its concomitant effects. The statute[31] contained the standard "obscene" but it was not used by the primary censoring body. The court intimated a reason why it had not been chosen when it stated that only several scenes, rather than the film as a whole, were obscene.

In reversing the New York decision, the United States Supreme Court[32] struck down as unconstitutional the statutory provision dealing with immorality. The Court dealt with the problem by showing that the statute contained the standard "obscene" but

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[22] 4 N.Y. 2d 349, 151 N.E. 2d 197, 175 N.Y.S. 2d 39 (1958).

[23] "The director of the division . . . shall cause to be promptly examined every motion picture . . . and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt or incite to crime, shall issue a license therefore." N.Y. EDUC. LAW §122.

[24] "[T]he term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior." N.Y. EDUC. LAW §122(a) (1) (Supp. 1958). This section was enacted to give §122 more precision to make it conform to the tenor of previous court decisions. See Governor's Mem. on approval of N.Y. Sess. Laws 1954, ch. 620 at 1404.

[25] Kingsley Int'l Pictures Corp. v. Regents, 4 N.Y. 2d 349, 351, 151 N.E. 2d 197, 175 N.Y.S. 2d 39, 40 (1958).

[26] *Ibid.*

[27] *Id.* at 356, 151 N.E. 2d at 200, 175 N.Y.S. 2d at 44.

[28] *Ibid.*

[29] *Id.* at 357, 151 N.E. 2d at 201, 175 N.Y.S. 2d at 45.

[30] *Id.* at 358, 151 N.E. 2d at 201, 175 N.Y.S. 2d at 46.

[31] See note 23 *supra*.

[32] Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

that it was not chosen as a basis of censorship.[33] It emphatically denied that the term "sexual immorality" is interchangeable with the concept of obscenity,[34] hence obscenity is in no way involved in the decision. After this distinction, the Court held that the mere advocacy of conduct proscribed by law is not a justification for denying free speech when there is not a clear and present danger. Therefore the presentation of adultery as acceptable conduct may not be censored.

Instead of repeating the statement that it would not now decide whether a state may censor the obscene,[35] the Court went further and refused to decide whether a state may legally censor motion pictures.[36] Instead of formulating a definite rule in this area, the Court saw fit to limit its holding by saying that it is enough for the present to reaffirm that movies are within the basic protection of the First and Fourteenth Amendments.[37]

Justice Frankfurter declared that the real problem is the formulation of constitutionally allowable safeguards without impinging on free expression.[38]

Justices Douglas and Black were of the opinion that prior censorship is unconstitutional.[39] Justice Douglas, however, somewhat qualifies this premise with the admission of some extremely limited exceptions.[40]

Justice Clark stated, ". . . the obscurity of the standard presents such a choice of difficulties that even the most experienced find themselves at dagger's point."[41] He is referring to the present case and the avoidance of a clear-cut decision on state censorship by the Court. Justice Clark believes that the New York court placed more emphasis on what the film teaches than on what it depicts.

Justice Harlan thought that it was an unconstitutional application of the statute to this particular film, but not an unconstitutional statute.[42] Two other Justices agreed with him.[43]

The Catholic's viewpoint of censorship may be formulated with the premise that "[r]estrictions merely for the sake of restrictions are never proper or valid, either morally or politically."[44] Such restrictions are valid only if they are for the sake of a greater good, a greater liberty.[45] The Church's function in society is to hold, pass on, and defend the morals of the Catholic body. The Church has within its society all that is necessary to preserve, propagate and defend itself. Therefore, it not only has the right, but the duty, of safeguarding the morals of its subjects.

The Church, speaking in its official capacity has no opinion on the *operation* of civil censorship, but the whole tradition and spirit of the Church would proclaim the

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33 *Id.* at 685-89.

34 *Id.* at 688.

35 See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952).

36 *Supra* note 31, at 689.

37 Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959).

38 *Id.* at 694 (concurring in result).

39 It is interesting to note that Justice Black is the only member of the Court who did not see the picture. U.S. News & World Report, July 13, 1959, p. 51.

40 *Supra* note 37, at 698 (concurring opinion).

41 *Supra* note 37, at 702 (concurring in result).

42 *Ibid.*

43 Justice Frankfurter and Justice Whittaker.

44 GARDINER, CATHOLIC VIEWPOINT ON CENSORSHIP 23 (1958).

45 *Ibid.*

right and assert the duty of the state to censor for the common good.[46]

Most Catholics since the early days of the Legion of Decency have exhibited an indifferent attitude toward civil censorship.[47] One reason is that in our pluralistic society, the Catholic's view on certain social as well as moral problems, such as divorce and birth control, is not always accepted as the American moralistic common denominator. It may be inadvisable that the Catholic should ask the political society to impose, through civil censorship, moral standards which very many citizens do not understand or acknowledge. St. Thomas forewarned that the civil law cannot be the knight-errant of the morals of the people; it can give only minimal protection in certain areas.[48]

However, the condemnation of adultery is a doctrine not limited to the Catholic. Adultery is universally held by all Judaeo-Christian faiths to be a course of conduct prohibited by the moral law. Therefore, the *prohibition* of movies which set forth adultery as being the desirable or acceptable pattern of behavior is a proper function of the state legislatures. Their purpose is to protect the citizen of the state from moral danger. It is submitted that the Supreme Court erred when it overruled the well reasoned decision of the New York Court of Appeals. Indeed, remedial legislation has been proposed in the United States Congress to correct this very decision.

Nevertheless, there is still another weapon to combat this "filth for money's sake" type of picture, a means which would protect the common good from erroneous teachings dramatized by the cinema. This formidable weapon is public opinion which, although less effective, does not contain the difficulties inherent in general political censorship. In the latter, it can be argued, one law may lead to another and if protracted, could conceivably lead to a final court of morals.[49] Of course, a Catholic appraises freedom of speech and of the press too highly to dispense with it in such an imprudent manner. The Church would never desire unchecked government censorship.

Government should not arrogate to itself functions which can be accomplished by smaller organizations of the people. "The state should leave to these smaller groups the settlement of business of minor importance. It will thus carry out with greater freedom, power and success the tasks belonging to it; because it alone can effectively accomplish these, directing, watching, stimulating and restraining, as circumstances suggest or necessity demands. Let those in power, therefore, be convinced that the more faithfully this principle be followed, and a graded hierarchal order exist between the various subsidiary organizations, the more excellent will be both the authority and the efficiency of the social organizations as a whole and the happier and more prosperous the condition of the state."[50]

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[46] *Ibid.*

[47] *Id.* at 61.

[48] "Hence human law was unable to forbid all that is contrary to nature; and it suffices for it to prohibit whatever is destructive of human intercourse, while it treats other matters as though they were lawful, not by approving of them, but by not punishing them." Summa Theologica II-II, q. 77, art. 1, ad 1.

[49] GARDINER, *op. cit. supra* note 44, at 88.

[50] PIUS XI, *Quadragesimo Anno,* para. 80 (1931), *quoted in* NELL-BREUNING, REORGANIZATION OF SOCIAL ECONOMY ch. X (Eng. ed. 1936).

Though the protection of the laws may in some areas be minimal, *ipso facto,* this minimal protection must prevail. "The foundation of a republic is the virtue of its citizens. . . . As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history."[51] The government then must protect itself from indirect decay. Publications which are injurious to public morals are not within the area of free speech and press.[52] Various articles have been excluded from the mails because the distribution of such matter has been deemed injurious to public morals and the facility of the mail must not lend itself to actively effectuate this end.[53] Obscene utterances are of such slight social value that any benefit that may be derived is clearly outweighed by the social interest in morality.[54] Obscenity of the written word is not within the area of constitutionally protected speech or press.[55]

However, these controls are not yet applicable to motion pictures, since the Supreme Court has placed moving pictures in a domain by themselves. The Court left explicitly unanswered the question of whether controls for other media are coextensive with those allowable for movies.[56] They have not mentioned ". . . the primary requirements of decency may be enforced against obscene publications" concept stated in *Near v. Minnesota.*[57]

Excluding movies, the constitutionally allowable test to be used in classifying the subject matter as obscene is ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[58] This test parallels the definition set down by canonists.[59] For example, Vermeersch states, "Not every nude can be called obscene; in common estimate, an obscene nude is a nude that allures and obscenity may be defined as a 'degrading manifestation of the mind . . . or a degrading solicitation of the mind . . . in and through the nudity'."[60] The degrading element as explained "consists in the intrinsic tendency or bent of the work to arouse sexual passion."[61]

When a state prohibits a motion picture from public exhibition, a censorship standard must be utilized that is not ambiguous. If the statute defines the standard, it must be extremely careful not to transcend the constitutional safeguards of free speech and free press. A censorship norm which will be approved by the Supreme Court is "obscenity." The Court has been very careful not to exclude such a standard as being equivocal.

When the Court was presented with this standard in the *Times Film* case,[62] it

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51 Trist v. Child, 88 U.S. (21 Wall.) 441, 450 (1874).

52 Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

53 Ex parte Jackson, 96 U.S. 727, 736 (1877).

54 Beauharnais v. Illinois, 343 U.S. 250, 257 (1952).

55 Alberts v. California, 354 U.S. 476, 485 (1957).

56 Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689-90 (1959).

57 283 U.S. 697, 716 (1931).

58 Alberts v. California, 354 U.S. 476, 489 (1957).

59 GARDINER, CATHOLIC VIEWPOINT ON CENSORSHIP 71-80 (1958).

60 *Id.* at 64.

61 *Ibid.*

62 Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957).

reversed on the authority of the *Alberts* decision. The statutory test was not held ambiguous or unconstitutional. The choice of *Alberts,* which held that the suppression of "obscenity" of the written word did not invade the freedoms of speech and press, clearly showed that while this particular picture may not have been "obscene," "obscenity" is censorable.

If the state bans a movie because, to its average citizen, applying contemporary community standards, the dominant theme of the movie taken as a whole appeals to prurient interest, that ban will be upheld. The other criteria, *i.e.,* "inhuman," "cruel," "indecent," are too equivocal to be placed within the power of the administrative censoring body.

It must be remembered that a motion picture may indeed be vulgar, disgusting or constitute an unconscionable attack upon a fundamental tenet of Judaeo-Christian morality, and still not be obscene. However, this is not a justification for its presence, and people are quite within their rights to protest against such films being shown. But under the present state of the law their *modus operandi* can only be public opinion, unless the Congress of the United States passes legislation which would enable a state to preclude the exhibition of a motion picture on grounds other than "obscenity."