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incrimination."[123] Therefore, as pointed out by Mr. Justice Harlan in dissent, "since § 903 is inoperative if even incriminating answers are given, it is apparent that it is the exercise of the privilege itself which is the basis for the discharge, quite apart from any inference of guilt."[124] Thus, though it may well be that to punish by dismissal the exercise of the privilege by a public employee in response to questions relating to his official conduct violates due process, the Supreme Court never reached this question.

Furthermore, it is not clear from the opinion what the status of Section 903, from a constitutional point of view, is today. Either the Court meant to hold the charter provision invalid in all cases, or merely where the privilege is exercised before *federal* investigative bodies. Clarification of this question and the more fundamental one of whether a state may constitutionally use the invocation of the privilege as a basis for dismissal must await future consideration by the Court. In the meantime, the *Slochower* case has created confusion in this area of the law. As pointed out previously, the Court has upheld restrictions on the exercise by government employees of rights guaranteed by the first, fifth, and fourteenth amendments.[125] While it is not denied that the exercise of the fifth amendment privilege is a right which cannot be denied any citizen, is the privilege against self-incrimination more sacred than other analogous constitutional guarantees?[126]

RECENT DEVELOPMENTS IN THE LAW OF MOTION PICTURE CENSORSHIP

The Mutual Cases

Censorship of motion pictures originated as the state's answer to an urgent need. During its infancy, the movie industry harbored many shoestring operations concerned with quick profits by means of

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[123] Daniman v. Board of Educ., 306 N.Y. 532, 538, 119 N.E.2d 373, 377 (1954), *appeal denied*, 348 U.S. 933 (1955).

[124] Slochower v. Board of Higher Educ., *supra* note 122, at 565 (dissenting opinion). See also Daniman v. Board of Educ., *supra* note 123; *cf.* Steinmetz v. State Bd. of Educ., 271 P.2d 614 (1954), *aff'd*, 44 Cal. 2d 816, 285 P.2d 617 (1955), *cert. denied*, 351 U.S. 915 (1956).

[125] See text at notes 29-37.

[126] "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." Frankfurter, J., Ullmann v. United States, 350 U.S. 422, 428 (1956). ". . . [I]t seems to us that the question [of restricting the constitutional rights of governmental employees] is practically settled in the Federal field by [the] *United Public Workers* . . . [case]. We do not see that the right not to incriminate oneself stands on any higher ground in a democracy than the right to take an active part in elections." Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772, 775 (1954).

crude and sensational pictures, heedless of the cost to society. Often, movies were made in one day at a total cost of five hundred dollars.[1] Vulgar advertising and the exploitation of the reprehensible personal activities of actors and actresses were other factors leading to governmental intervention.[2] It is small wonder then, that under these conditions stern regulatory measures were taken.

The first motion picture censorship statute was passed in Pennsylvania in 1911.[3] This was quickly followed by similar legislation in several other states.[4] The first of these statutes to come before the Supreme Court was the Ohio law in the *Mutual Film* cases.[5] In these cases, the Supreme Court rejected the contention that motion pictures were entitled to the protection accorded to speech and the press on the ground that the exhibition of motion pictures is a "business pure and simple, originated and conducted for profit." [6] The Ohio censorship statute was stated to be an appropriate method of such regulation. The statute forbade the issuance of a license for the exhibition of any films which were not of a "moral, educational or amusing and harmless character." [7] These terms were considered sufficiently clear and definite, drawing "precision from the sense and experience of men." [8] The decision technically did not hold that the exhibition of movies was not constitutionally protected against impairment by the states, since, at the time, the fourteenth amendment had not yet been held to extend the free speech guaranties of the first amendment to the states.[9] Nevertheless, the case did have the same impact.[10]

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[1] Note, 60 YALE L. REV. 696, 705 n.23 (1951).

[2] Note, 30 IND. L.J. 462, 463 n.4 (1955).

[3] See Bilgrey and Levenson, *Censorship of Motion Pictures—Recent Judicial Decisions and Legislative Action*, 1 N.Y.L. FORUM 347, 349 (1955).

[4] See, *e.g.*, N.Y. EDUC. LAW § 122 (Supp. 1955); FLA. STAT. §§ 521.01-.04 (1953); KAN. GEN. STAT. ANN. §§ 51-101-51-112, 74-2201-74-2209 (Supp. 1953); LA. REV. STAT. §§ 5:301-07 (1950); MD. ANN. CODE art. 66A, §§ 1-26 (1951); OHIO REV. CODE ANN. §§ 3305.01-.99 (Baldwin 1953); VA. CODE ANN. §§ 2-98-2-116 (1950). The validity of most of these statutes is at least dubious today.

[5] See Mutual Film Corp. v. Ohio Industrial Comm'n, 236 U.S. 230; Mutual Film Corp. v. Ohio Industrial Comm'n, 236 U.S. 247; Mutual Film Corp. v. Kansas, 236 U.S. 248 (1915). All three cases were decided the same day; the first decision controlled the second and third.

[6] Mutual Film Corp. v. Ohio Industrial Comm'n, 236 U.S. 230, 244 (1915).

[7] *Id.* at 240.

[8] *Id.* at 246. Probably few Supreme Court decisions have received the sustained and devastating criticism poured upon the Mutual cases. See, *e.g.*, Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L.Q. 273 (1951); Notes, 39 COLUM. L. REV. 1383, 1391-95 (1939), 60 YALE L.J. 696 (1951); Comment, 49 YALE L.J. 87 (1939).

[9] This extension was made shortly thereafter in *Gitlow v. New York*, 268 U.S. 642 (1925). See also Near v. Minnesota, 283 U.S. 697 (1931); *cf.* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922); Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[10] See RD-DR Corp. v. Smith, 183 F.2d 562 (5th Cir.), *cert. denied*, 340 U.S. 853 (1950).

Ten years later, when the extension of the free speech protection was made,[11] the Supreme Court removed one serious obstacle in the path of the seemingly inexorable assault on film censorship which has reached a pinnacle today. Added impetus was given to this movement in *Near v. Minnesota*,[12] by the strong language of the Court in reaffirming the revered common law traditions against prior restraints on freedom of expression.[13] In that case the Court reversed a state court decision permanently enjoining the publication of defamatory or scandalous magazines.[14] Of course, the Supreme Court did not completely close the door to every type of prior restraint based on content. The *Near* case did recognize the constitutionality of wartime censorship, and did not hesitate to add that "on similar grounds, the primary requirements of decency may be enforced against obscene publications." [15] A particularly applicable yardstick has been borrowed from the classic "clear and present danger" doctrine originated in *Schenck v. United States*.[16] There the test formulated was whether the words used are used in such circumstances and are of such a nature that they so immediately imperil the well being of society and warrant the state in taking repressive measures.[17] The exceptions are few, however, and prior restraints continue to be strictly limited.[18]

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[11] See note 9 *supra*.

[12] 283 U.S. 697 (1931).

[13] This doctrine can be traced as far back as Blackstone. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 BLACKSTONE, COMMENTARIES 151-52 (15th ed. 1809). See also Near v. Minnesota, *supra* note 9, at 714.

[14] See also Lovell v City of Griffin, 303 U.S. 444 (1938) (where a municipal ordinance forbidding the distribution of pamphlets without first securing a permit was held invalid); Grosjean v. American Press Co., 297 U.S. 233 (1936) (where a state statute imposing a license fee based on gross receipts for the privilege of publishing advertising was held unconstitutional). A censorship law has been held unconstitutional by a state court as a prior restraint when applied to newsreels. See State v. Smith, 48 Ohio Op. 310, 108 N.E.2d 582 (Munic. Ct. 1952). "No controlling distinction can be made between 'news reels' and 'newspapers.' . . ." *Id.* at 314, 108 N.E.2d at 587.

[15] Near v. Minnesota, 283 U.S. 697, 716 (1931). See also Feiner v. New York, 340 U.S. 315 (1951) (incitement to riot); Kovacs v. Cooper, 336 U.S. 77 (1949) (raucous speeches from sound trucks); Prince v. Massachusetts, 321 U.S. 158 (1944) (distribution of literature by minors); Cox v. New Hampshire, 312 U.S. 569 (1941) (restriction of parades because of traffic congestion).

[16] 249 U.S. 47 (1919).

[17] As originally formulated, the clear and present danger test applied to statutes punishing utterances after the fact. Schenck v. United States, 249 U.S. 47 (1919). By extension, however, it is applicable to any statute designed to prevent utterances. ". . . [F]reedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely

[18] For footnote 18, see page 96.

The Burstyn Case

The first indication that the foregoing factors presaged a reversal of the Court's previous exclusion of motion pictures from the free speech protections was the dictum in *United States v. Paramount Pictures, Inc.*[19] There, the Court said, "we have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." [20] Four years later, the doctrine of the *Mutual* cases was expressly overruled in *Joseph Burstyn, Inc. v. Wilson.*[21] In this case, the New York censorship board, acting under the authority of the New York statute,[22] banned the showing of a movie called "The Miracle" on the ground that it was "sacrilegious." Although the New York Court of Appeals thought the term definable enough to comply with the requirements of procedural due process,[23] the Supreme Court reversed on the ground of vagueness, and, at the same time, emphasized the narrow area open to prior restraints.[24] Thus, the door was

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to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello v. Chicago, 337 U.S. 1, 4 (1949). See also Cantwell v. Connecticut, 310 U.S. 296, 308 (1940); Feiner v. New York, 340 U.S. 315, 320 (1951). It would seem, however, that there is no room for the application of the clear and present danger test in the narrow area open to censorship today. Justice Frankfurter pointed out that the clear and present danger test does not apply to utterances not within the area of constitutionally protected speech "certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class." Beauharais v. Illinois, 343 U.S. 250, 266 (1952).

[18] The standard of regulation must be narrowly confined to those recognized exceptional circumstances not falling under the protection of the first amendment. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[19] 334 U.S. 131 (1948).

[20] United States v. Paramount Pictures Inc., 334 U.S. 131, 166 (1948).

[21] 343 U.S. 495 (1952). "For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm'n, supra,* is out of harmony with the views here set forth, we no longer adhere to it." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[22] N.Y. EDUC. LAW § 122.

[23] ". . . [N]o religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . ." Joseph Burstyn, Inc. v. Wilson, 303 N.Y. 242, 258, 101 N.E.2d 665, 672 (1951), *rev'd,* 343 U.S. 495 (1952).

[24] ". . . [T]he state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior re-

opened and the vacuum was soon filled with decisions holding various censorship statutes unconstitutional.[25]

Though the Supreme Court attempted to make clear its rationale in the *Burstyn* case, a week later it decided *Gelling v. Texas*[26] with a terse per curiam opinion, citing the *Burstyn* decision and *Winters v. New York*.[27] Since indefiniteness is the primary basis of the holding in the *Winters* case, it seems clear that the statute in the *Gelling* decision which forbade the exhibition of a picture " 'prejudicial to the best interests of the people' " [28] was objectionable on that ground.

Following this case, however, have been a number of per curiam opinions whose basis is not so clear.[29] In *Superior Films, Inc. v. Department of Education*,[30] an Ohio court had upheld the denial of a license on the ground that the motion picture was "harmful." Counsel for Ohio argued before the Supreme Court that the term in question had been limited by the state court to mean "inciting to crime." [31] Again, in *Commercial Pictures Corp. v. Board of Regents*,[32] the New York censors refused a license on the ground that the foreign film "La Ronde," was "immoral" and would "tend to corrupt morals." [33] Specifically, they considered it a portrayal and stimulus of sexual immorality. The Court of Appeals upheld the board's ruling. The Supreme Court, however, reversed both decisions citing only the *Burstyn* case.[34] Although the conclusion is open to dispute, it would

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straints upon the expression of those views." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

[25] See, *e.g.*, Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) (per curiam); Gelling v. Texas, 343 U.S. 960 (1952) (per curiam); State v. Smith, 108 N.E.2d 582 (Toledo Munic. Ct. 1952).

[26] 343 U.S. 960 (1952) (per curiam).

[27] 333 U.S. 507 (1948) (There, a statute was held unconstitutional which made it a crime to sell a magazine in which stories of crime and bloodshed were massed in such a way as to incite crime.).

[28] Gelling v. Texas, 343 U.S. 960 (1952) (per curiam) (concurring opinions).

[29] Superior Films, Inc. v. Department of Educ., *supra* note 25; Commercial Pictures Corp. v. Board of Regents, 346 U.S. 587 (1954) (per curiam); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955) (per curiam).

[30] 159 Ohio St. 315, 112 N.E.2d 311 (1953), *rev'd per curiam*, 346 U.S. 587 (1954).

[31] 22 U.S.L. WEEK 3182 (U.S. Jan. 12, 1954) (No. 26). The statute in question read as follows: "Only such films as are, in the judgment and discretion of the—[Board of Censors] of a moral, educational, or amusing and harmless character shall be passed and approved by such . . . [board]." OHIO REV. CODE ANN. § 3305.04 (Baldwin 1953).

[32] 305 N.Y. 336, 113 N.E.2d 502 (1953), *rev'd per curiam sub nom.*, Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954).

[33] Commercial Pictures Corp. v. Board of Regents, *supra* note 32. Another attempt was recently made to test the term "indecent" in the New York statute, but the court ruled the picture acceptable and would not allow the petitioner to stipulate that the picture was "indecent." Capitol Enterprises, Inc. v. Board of Regents, 1 A.D.2d 990, 149 N.Y.S.2d 920 (3d Dep't 1956) (mem. opinion).

[34] Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) (per curiam).

seem that the ground for the reversal was the vagueness of the statutes,[35] since the Ohio statute was concededly indefinite,[36] and even the New York Court of Appeals could not agree on a definition of "immoral." [37]

The Holmby Productions Case

The next case in the chain, and the most significant since the *Burstyn* decision, was *Holmby Productions, Inc. v. Vaughn.*[38] There, the Supreme Court of Kansas upheld the censor's disapproval of a motion picture under the Kansas statute.[39] The court declared that " 'obscene, indecent, or immoral, or such as tend to debase or corrupt morals' " were not so vague and indefinite as to offend due process, but that they had "an accepted, definite, and clear meaning." [40] The board had given as one of its reasons for disapproving the picture the fact that it was "obscene." Since this word was thought certainly definite, the court stated that it was not necessary to define the other words contained in the censorship statute. On appeal to the Supreme Court, the judgment was reversed, per curiam, citing the *Burstyn* and *Superior Films* cases.[41]

It would seem that the decision in the *Holmby* case was not completely based on the objection of excessive prior restraint, since there is voluminous authority that obscenity is unprotected by the doctrine.

As was pointed out above, the *Near* case explicitly excluded obscenity from the operation of the rule.[42] In *Lovell v. Griffin,*[43] the Court was careful to point out, while it invalidated a standardless ordinance requiring a license for the distribution of literature, that the ordinance was not limited to literature that was obscene or offensive to public morals or that advocated unlawful conduct. Similarly, in *Chaplinsky v. New Hampshire* [44] it was recognized in passing that

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[35] *But see* concurring opinion by Justice Douglas, to which Justice Black agreed, insisting that censorship could not be sanctioned under any circumstances. *Ibid.* The Court also failed to cite the *Winters* case in this decision.

[36] The Attorney General of Ohio seemed to concede this point when he argued before the Supreme Court that the term "harmful" had been limited by the state court to mean "inciting to crime." See text at note 31 *supra.*

[37] Commercial Pictures Corp. v. Board of Regents, 305 N.Y. 336, 344, 352, 113 N.E.2d 502, 506, 510 (1953), *rev'd per curiam sub nom.,* Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954).

[38] 177 Kan. 728, 282 P.2d 412, *rev'd per curiam,* 350 U.S. 870 (1955).

[39] KAN. GEN. STAT. ANN. § 51-103 (1949). The statute provided for the approval of films that are "moral and proper" and the disapproval of pictures that are "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals."

[40] Holmby Productions, Inc. v. Vaughn, 177 Kan. 728, 282 P.2d 412, 414, *rev'd per curiam,* 350 U.S. 870 (1955).

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

[42] See text at note 15 *supra.*

[43] 303 U.S. 444 (1938).

[44] 315 U.S. 568 (1942).

the prevention of lewd and obscene speech has "never been thought to raise any Constitutional problem." [45] On the other hand, it seems almost as incredible that the Supreme Court would rule a "good old common law word" [46] like "obscene" unconstitutional on the ground of vagueness. The definition of obscene which is almost traditional is "that which is offensive to chastity and modesty . . . that form of indecency which is calculated to promote the general corruption of morals." [47] The test of obscenity is whether an utterance ". . . has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires." [48] The federal courts, in cases arising under a tariff act,[49] have assumed that obscene is a sufficiently definite standard.[50] In addition, in cases involving statutes prohibiting the mailing of obscene materials,[51] courts have specifically held that obscene is sufficiently definite.[52] Even if such terms as "immoral" and "injurious to public morals" are too indefinite, which is by no means conceded,[53] the Supreme Court certainly went beyond the necessary bounds if it meant to hold "obscene" too indefinite.

Action and Reaction

As witnessed by the aforementioned string of reversals since the *Burstyn* decision, many state courts have refused to follow the mood of the Supreme Court.[54] Several states, however, have succumbed

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[45] *Id.* at 571-72.

[46] Desmond, *Censoring the Movies*, 29 NOTRE DAME LAW. 27, 31 (1953).

[47] Burstein v. United States, 178 F.2d 665, 667 (9th Cir. 1950). The definition has been narrowed to sexually impure language or conduct. Swearingen v. United States, 161 U.S. 446 (1895).

[48] Burstein v. United States, *supra* note 47.

[49] "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure or image on or of paper or other material. . . ." 46 STAT. 688 (1930), 19 U.S.C. § 1305(a) (1952).

[50] United States v. Two Obscene Books, 97 F. Supp. 760 (N.D. 1951), *aff'd sub nom.*, Besig v. United States, 208 F.2d 142 (8th Cir. 1953).

[51] 18 U.S.C. § 1461 (1952).

[52] Tyomies Publishing Co. v. United States, 211 Fed. 385 (6th Cir. 1914); Rebhuhn v. Cahill, 31 F. Supp. 47 (S.D.N.Y. 1939). *Cf.* Glanzman v. Schaeffer, 143 F. Supp. 243 (S.D.N.Y. 1956).

[53] The Supreme Court has sustained several convictions for the importation or transportation in interstate commerce of women "for immoral purposes." See Caminetti v. United States, 242 U.S. 470 (1917); United States v. Bitty, 208 U.S. 393 (1908). In *Musser v. Utah*, 333 U.S. 95 (1942), the defendants were convicted of conspiring to commit acts "injurious to . . . public morals." *Id.* at 96-97.

[54] See note 25 *supra*. See also American Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954), *cert. denied*, 348 U.S. 979 (1955), where the same picture involved in the *Burstyn* case was successfully censored on the

to the increased pressure brought to bear by the unswerving consistency of the Court. In Ohio, the censorship board attempted to continue its work after the Supreme Court reversed the board's ban on the motion picture "M." [55] In *R.K.O. Radio Pictures, Inc. v. Department of Education,* the Ohio Supreme Court construed the *Superior Films* decision as an invalidation of the entire Ohio statute and held that no censorship could be sustained under the act.[56]

In Pennsylvania, the board of censors banned a picture dealing with narcotics called "She Should'a Said No!" on the ground that it was "indecent and immoral." The Supreme Court of Pennsylvania held in *Hallmark Productions v. Carroll* [57] that ". . . these terms must be held subject to the same fatal objections as those which invalidated the statutes held unconstitutional by that [Supreme] Court." [58]

In Kansas, prior to the *Holmby* case, the highest court upheld the state censorship statute and the board, which had withheld a license from the film "The Moon is Blue." [59] In an unusual move, the legislature passed a statute repealing the censorship law.[60] The act, however, was subsequently declared unconstitutional for procedural reasons, thereby reviving the old law.[61]

In the Massachusetts case of *Brattle Films, Inc. v. Commissioner,*[62] the court held unconstitutional a three hundred year old "blue law" [63] which though it did not expressly authorize the censor-

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ground that it was obscene. It would seem, however, that the *Holmby* case overruled this decision.

[55] Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954). The Ohio statute permitted the board to license "only such films as are, in the judgment and discretion of the Department of Education, of a moral, educational, or amusing and harmless character. . . ." OHIO REV. CODE ANN. § 3305.04 (Baldwin 1953).

[56] 162 Ohio St. 263, 122 N.E.2d 769 (1954). In a forceful dissent, however, Justice Weygandt declared, "the basic difference of opinion among the members of this court is whether the federal Supreme Court has in fact held the Ohio statutes unconstitutional. The conclusion of the majority seems to be that this has been done inferentially. It is the view of the minority that if, at a time when delinquency—both juvenile and adult—is a problem of unprecedented concern, the federal Supreme Court intends to hold that every film no matter how obscene, profane, inflammatory or subversive can be shown, this is too serious a matter to be left to mere inference alone." *Id.* at 269, 122 N.E.2d at 772.

[57] 384 Pa. 348, 121 A.2d 584 (1956).

[58] Hallmark Productions Inc. v. Carroll, 384 Pa. 348, 121 A.2d 584, 589 (1956). *But see* also vigorous and fiery dissent by Justice Musmanno. *Id.,* 121 A.2d at 590.

[59] See Bilgrey and Levenson, *Censorship of Motion Pictures—Recent Judicial Decisions and Legislative Action,* 1 N.Y.L. FORUM 347, 349-50 (1955).

[60] Kan. Sess. Laws 1955, c. 349, § 1, repealing KAN. GEN. STAT. ANN. §§ 51-101–51-112 (1949).

[61] See State *ex rel.* Fatzer v. Shanahan, 178 Kan. 400, 286 P.2d 742 (1955).

[62] 127 N.E.2d 891 (Mass. 1955).

[63] MASS. ANN. LAWS c. 136, § 4 (1949).

ship of films, did authorize such action by implication. Under its terms, the mayor could grant a license for entertainment on Sunday, but the approval of the entertainment by the Commissioner of Public Safety was required.[64] The court considered the act in question void on its face as a prior restraint on the freedom of speech and press guaranteed by the first and fourteenth amendments.

Several states, however, have taken steps to comply with the somewhat obscure standard marked by the Supreme Court decisions. The New York legislature amended the statute [65] held too indefinite in the *Burstyn* and *Commercial Films* cases by defining the terms "immoral" and "incite to crime." [66] In the face of a series of Baltimore City Court decisions which reversed the Maryland censors, and on the advice of the Attorney General, Maryland also revised its statute.[67] In addition, in Pennsylvania, after the *Hallmark Productions* case and in Massachusetts after the *Brattle Films* case movements toward the enactment of new and more definite statutes were instituted.[68]

Conflict of Views

The vast majority of writers since the *Burstyn* decision claim that censorship is unnecessary; and, for the most part, an unconstitutional prior restraint.[69] The uncompromising attitude taken by the Supreme Court in holding statutes using such previously acceptable standards as "immoral" and "obscene" unconstitutional, lends considerable support to this latter view. It has been said that the censorship

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[64] ". . . [T]he mayor of a city . . . may, upon written application . . . grant upon such terms *and* conditions as . . . he may prescribe, a license to hold on the Lord's Day a public entertainment . . . approved in writing by the commissioner of public safety. . . ." MASS. ANN. LAWS c. 136, § 4 (1949).

[65] N.Y. EDUC. LAW § 122.

[66] The amendment section 122-a reads as follows: "1. For the purpose of section one hundred twenty-two of this chapter, the 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.

2. For the purpose of section one hundred twenty-two of this chapter, the term 'incite to crime' shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs." *Id.* § 122-a (Supp. 1956).

[67] See Bilgrey and Levenson, *Censorship of Motion Pictures—Recent Judicial Decisions and Legislative Action,* 1 N.Y.L. FORUM 347, 349-51 (1955).

[68] See note 67 *supra.*

[69] See, *e.g.,* Brychta, *The Ohio Film Censorship Law,* 13 OHIO ST. L.J. 350, 374-75 (1952); Notes, 30 IND. L.J. 462, 473-74 (1955), 31 N. DAK. L. REV. 62, 67 (1955), 34 ORE. L. REV. 250, 256 (1955).

of the Breen Office, self imposed by the American movie industry,[70] public opinion mobilized by the numerous pressure groups,[71] and the *subsequent* restraints of the federal and state obscenity statutes [72] wield great force as a deterrent to abuse. It is clear, however, that self-regulation and pressure groups are not sufficient protection against foreign and domestic independent, fly-by-night producers who are not bound by the Breen Office, and irresponsible Hollywood producers who ignore it and thrive on the furor and notoriety thereby created.[73] It is apparent also that after-the-fact prosecutions under the state and federal statutes, in most cases, fall short of being effective.[74] Furthermore, if, as it seems, the terms "immoral" and "obscene" were ruled too indefinite as a basis for prior restraint, the same objection might hold against their use in these statutes. It should be observed that there are two types of detrimental movies, and the after-the-fact obscenity statute would be effective against only one. That type is the film which is obscene per se or stimulates inclinations to commit a specific unlawful act. The second category includes the film that does not immediately give rise to a particular frame of mind, though it helps bring about a gradual change of attitude, clouding the viewer's sense of right and wrong. For instance, the subtle portrayal of loose or adulterous conduct may fall short of instantaneous stimulation, but could give the viewer the impression that such conduct is acceptable. It has been pointed out that motion pictures play an important part in shaping conduct and secure a higher degree of attention and retention than any other medium.[75] When it is remembered that a huge percentage of our national movie audience consists of especially impressionable children these arguments take on increased meaning.[76] Admittedly, there have been abuses by scrupulous, prejudiced and tyrannical censors.[77] The imperfections, however, have been more than counterbalanced by the important job performed. Movies are peculiarly adapted to censorship [78] and history has taught that this is a fortunate and useful feature.

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[70] See Note, 31 N. DAK. L. REV. 62, 66 (1955).

[71] See Comment, 42 CALIF. L. REV. 122, 124 n.17 (1954); Note, 60 YALE L.J. 696, 713-14 (1951).

[72] See Note, 30 IND. L.J. 462, 475 (1955).

[73] See Note, 30 IND. L.J. 462, 464-65 (1955).

[74] See Note, 49 NW. L. REV. 390, 397 (1954). The federal statutes have seldom been enforced, and have also been held not to supersede the police power of the state in the same area. Note, 30 IND. L. REV. 462, 465 (1955).

[75] See Notes, 30 IND. L.J. 462, 466 (1955), 60 YALE L.J. 696, 707 n.28 (1951).

[76] See Notes, 30 IND. L.J. 462, 465-66 (1955), 60 YALE L.J. 696, 710 n.31 (1951).

[77] See Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L.Q. 273 (1951); Note, 60 YALE L.J. 696, 698 n.6, 699 nn.7 & 8, 700 n.9 (1951).

[78] See Desmond, *Censoring the Movies*, 29 NOTRE DAME LAW. 27, 31 (1953).

Conclusion

Despite some authority to the contrary, it would seem that limited censorship is still constitutional in the view of the Supreme Court. The Court has historically adverted to the existence of morality,[79] and a traditional theory of harmony between the law and public morals.[80] It is true that the recent decisions of the Supreme Court have sharply limited the scope of the power, and the *Holmby Productions* case in particular dealt a near death blow to censorship as known prior to the *Burstyn* decision. It is apparent, however, that a narrow though indefinite area is still open to prior restraint in this field. The Court indicated in the *Burstyn* case that censorship is not unconstitutional per se[81] and the arguments before the Court in the *Superior Films* decision show that the Court had not changed its opinion at that date.[82]

In view of the present status of censorship, therefore, it is contended that the decisions of the Pennsylvania and Ohio courts holding their statutes invalid were unfortunate. Even if these statutes came within the prohibitions of the Supreme Court decisions, which is at least debatable,[83] the alternative still remained to limit the indefinite terms by judicial construction.[84] In the alternative it is recommended that the legislatures of states whose statutes come within the constitutional ban, follow the lead taken by New York, in passing definitive amendments.[85]

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[79] See Whelan, *Censorship and the Constitutional Concept of Morality,* 43 GEO. L.J. 547 (1955). "What is immoral within the meaning of this concept may be prohibited precisely because it is immoral; indeed—what is more—the stimuli and occasions of public immorality may be stifled and suppressed." *Id.* at 549.

[80] See Whelan, *supra* note 79, at 549 n.7. "No legislature can bargain away . . . the public morals. The people themselves cannot do it, much less their servants." Stone v. Mississippi, 101 U.S. 814, 819 (1879). See Douglas v. Kentucky, 168 U.S. 488, 505 (1897) (lottery); Crowley v. Christensen, 137 U.S. 86, 90-91 (1890) (liquor); Mugler v. Kansas, 123 U.S. 623, 662 (1887) (liquor).

[81] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." *Id.* at 502.

[82] 22 U.S.L. WEEK 3181 (U.S. Jan. 12, 1954) (No. 26).

[83] See R.K.O. Radio Pictures, Inc. v. Department of Educ., 162 Ohio St. 263, 122 N.E.2d 769, 772 (1954) (dissenting opinion); Hallmark Productions, Inc. v. Carroll, 384 Pa. 348, 121 A.2d 584, 590 (1956) (dissenting opinion).

[84] Where vagueness of a statute is cured by an opinion of the state court or removed by legislation, the Supreme Court will not interfere. Winters v. New York, 333 U.S. 507, 510, 514, 519 (1948); Note, 62 HARV. L. REV. 77, 82 (1948).

[85] N.Y. EDUC. LAW § 122-a (Supp. 1956).