Summer 1955

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veracity is all that is necessary. As a standard for review this seems not far removed from suspicion which is only authenticated by means of injecting such doubts into the record.

CONSIDERATIONS IN DETERMINING THE LIMITATIONS ON STATE POWER TO REGULATE MOTION PICTURE CONTENT

The constitutional limitations on the power of state and local governments to protect the morals of their citizens through the regulation of the motion picture medium pose weighty problems. The Supreme Court recently placed movies within the category of matter protected by the First Amendment\(^1\) but has not yet answered the critical question whether or not any regulation of movies prior to their exhibition can be squared with constitutional guarantees.\(^2\) An attempt to determine the need, if any, for regulation of motion picture content and to appraise the validity of alternative measures of control in light of applicable Supreme Court decisions is in order. The right to disseminate ideas freely and the right of society to be free from moral degenerating forces can probably both be preserved.\(^3\)

The Need for Regulation

The need for governmental regulation and the form regulation must take are dependent upon conditions existing within the movie industry, the propensity of movies to influence human behavior, the effectiveness of unofficial pressures, and the adequacy of federal activity in the field. If the nature of the problem of film content can be understood, then perhaps the constitutional limitations on regulation can be viewed in proper perspective.


2. The question might have been decided this term had not the Court refused to review A.C.L.U. v. City of Chicago, 3 Ill.2d. 334, 121 N.E.2d. 585 (1954). See 23 U.S. L. WEEK 3242 (U.S. Apr. 5, 1955). The Illinois Supreme Court had upheld a Chicago ordinance authorizing the Police Commissioner to ban showing of any motion picture found to be "immoral or obscene." In an able opinion, Chief Justice Schaefer of the Illinois Court limited the discretion of the Commissioner and the scope of the standards of the ordinance, but held that censorship as such was not prohibited by the constitutional guarantees embodied in the First and Fourteenth Amendments. See also discussion in Boxoffice, February 19, 1955, p. 19.

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Many of the current attitudes favorable toward regulation of motion picture content stem from the early history of the film industry. In its infancy, the industry was characterized by many fly-by-night enterprises. Intense competition and a drive for quick profits left little room for concern within the industry for the effect that the new medium might have upon children, upon the mentally, emotionally, or morally retarded, and upon society as a whole. Second-rate, crude, and distasteful movies were inexpensive to produce and were sensational enough to draw large crowds. The formation of state and municipal censor boards, the threat of federal censorship and economic boycott were the outgrowth of this moral degeneracy in the new industry. It is not surprising that, in this atmosphere, the Supreme Court, in 1915, ruled the motion picture a purely commercial activity not coming within the protection afforded by the First and Fourteenth Amendments.

Fearful of the damaging economic consequences growing out of governmental censorship and group boycott, the industry gradually has effectuated measures of self-regulation which are most effective in assuring decency and good taste in the vast majority of motion pictures. In addition to this censorship within the movie industry, pressure groups of all kinds operate at every level. The Catholic Legion of Decency, the American Legion, the National Association For the Advancement of Colored People, public utility interests, Jewish organizations, and many others determine to a large extent what the public may or may not see. Often producers are discouraged from making pictures or must alter them to avoid offending one of these groups. Occasionally an exhibitor

4. Vulgar advertising and the exploitation of the reprehensible personal activities of actors and actresses were certainly also instrumental in bringing about a widespread demand for censorship. See generally Inglis, Freedom of the Movies, 62-96 (1947).

5. Mutual Film Corp. v. Industrial Commission, 236 U. S. 230 (1915). Upheld in this case was the constitutionality of the same Ohio censorship statute which was later assailed and held unconstitutional in Superior Films, Inc. v. Dept. of Education, 346 U. S. 587 (1954). It should be noted, however, that not until 1925 were First Amendment freedoms protected against state regulation by the due process clause of the Fourteenth Amendment. See Gitlow v. New York, 268 U. S. 652 (1925).

6. "The desire for self-regulation seemed inspired by fear rather than by any growth of professional consciousness or sense of responsibility for the public interest on the part of those who controlled the industry." Inglis, op. cit. supra note 4, at 96.

7. See Note, 49 Yale L. J. 87, 108 (1939). Few movie producers would consider buying the rights to a questionable novel or play without consulting the Breen Office regarding the potential acceptibility of the subject matter. In addition to preventing the filming of scenes which would certainly contravene the "don'ts" of the Motion Picture Production Code, the office points out scenes which must be filmed with care to avoid objectionable qualities. Inglis, op. cit. supra note 4, at 126-171.

through similar pressures may be convinced not to show a particular film. While this unofficial public control of motion picture content may seem undesirable in theory, there is no way to prevent these groups from forming opinions and acting accordingly; and as long as film-making is motivated primarily by the desire to obtain profits, which calls for public acceptance of the industry's products, the attitudes of these non-governmental groups will be sought in advance.

Activities of pressure groups and the industry's self-regulators enjoy only limited success. These groups do not necessarily hold themselves out as protectors of public morals but may be primarily interested in advancing their own causes; the industry may seek only to avoid controversy. Furthermore, unofficial censorship does not affect the foreign production which may be either of a cheap unprofessional quality or of high artistic merit, nor can it discourage the small time domestic producer who, eager to make a quick dollar, will exploit the unlawful, the bawdy, and the lewd. Disapproval often becomes an advertising tool for the indiscreet who publicize violation of the Code, flaunt the appeals of the


10. Both self-regulation and pressure group influence are remote from public control. There is no outside review of determinations of either, though decisions as to what the public may not see are left very often in the hands of a few people. In fact, the average American moviegoer probably does not realize that vast numbers of films are completely suppressed at the idea-stage or subsequently "watered down" in response to demands of either the Breen Office or group pressure. See INGLIS, op. cit. supra note 4, at 174, 175. "This [unofficial censorship] works deviously and far more effectively, than the easily assailable acts of public officials." Rice, supra note 8, at 112. The code under which the industry operates is full of unrealistic taboos, and much, though not all, of the unbridled influence exerted by each minority group springs from a fear that the group will be stigmatized by uncomplimentary portrayals in the films. As a result, controversy has been kept out of the movies while display for the sake of display and violence for the sake of violence have often been unopposed. Goodman, supra note 8, at 114.

But compliance by the producers, distributors, and exhibitors with the wishes of the unofficial censors is essentially voluntary, and even if the activities appear to be an infringement upon freedom of the screen, there is no legal remedy by which they may be obviated. See CHAFFEE, FREE SPEECH IN THE UNITED STATES, 522 (1946). The business of making movies is expensive. A large market is an absolute necessity to its success. Like the producers, wholesalers, and distributors of tangible goods, the movie industry wants to be assured in advance of the acceptibility of its product.

11. Some writers suggest that the residuum of a film which has run the gauntlet of the movie industry's process of self-regulation and the pressure groups' action is so pure and refined that little reason is left for any governmental control. See e.g., Note, 49 YALE L. J. 87, 110 (1939); Rice, supra note 8, at 112-115. In a 1938 report, it was estimated that 96 percent of all pictures exhibited on the screens of America in 1937 were submitted to and approved by the Production Code Administration of the industry. It is doubtful that there has been much change in percentage since that date. INGLIS, op. cit. supra note 4, at 143.

12. See note 10 supra.

religious groups, and deliberately portray the sensational.14 The films produced and exhibited by each of these contribute little to art or science, but are rather the objects of attention of those who would be inclined to be abnormal, depraved, and immoral or who because of their youth would be uncritical, curious, and impressionable.15 It is the irresponsible producer that creates the greatest need for regulation. Even those who usually conform to high standards have on occasion defied the pleas for decency and good taste,16 but it is doubtful that indiscretion on the part of the established or far-sighted producer, distributor, or exhibitor would occur often enough to produce lasting evil effects.

The Federal Government’s activity in the field of movie control should be considered as having a possible bearing on the need for state and local regulation. The Tariff Act,17 prohibiting importation of obscene pictures, ought to diminish materially the number of low quality foreign films. Other federal legislation,18 aimed at preventing obscene films from being shipped in interstate commerce or through the mails could minimize the threat posed by irresponsible domestic producers. The federal statutes have, on the whole, been seldom enforced,19 however, and have also been held not to supersede the police power of the state to regulate in the same area.20

Much of the difficulty underlying the question of how far a state or local government may go in the regulation of movie content arises out of the effect of the medium on the audiences. Little is known about the overall nature of audience reactions, but there is impressive evidence of the influence of the film on manner, fashion, and habits of patrons. The vast national audience, one-third of it children,21 views the movies during

14. INGLIS, op. cit. supra note 4, at 143.
15. Maybe this is the type of movie the New York Court of Appeals really had in mind, when it said: "That a motion picture which panders to base human emotions is a breeding ground for sensuality, depravity, licentiousness, and sexual immorality can hardly be doubted. That these vices represent a 'clear and present danger' to the body social seems manifestly clear. The danger to youth is self-evident. And so adults, who may react with limited concern to the portrayal of larceny, will tend to react quite differently to a presentation wholly devoted to promiscuity, seductively portrayed in such manner as to invite concupiscence and condone its promiscuous satisfaction, with its evil social consequences." Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336, 342, 113 N.E.2d 502, 504 (1953).
16. This was done in the case of "The Outlaw," "The Moon is Blue," and "The French Line," all three of which were denied the Production Code Administration’s seal of approval. See discussion in Comment, 42 CAL. L. REv. 122, 123-124 (1954).
19. INGLIS, op. cit. supra note 4, at 68; Note, 60 YALE L. J. 696 (1951).
20. A decision by federal officers to admit a film into the United States did not preclude state officers from refusing a license for exhibition of the film within the state. Eureka Productions v. Lehman, 302 U. S. 634 (1936).
21. See Note, 60 YALE L. J. 696, 709, n.31 (1951).
relaxed moments and in a generally uncritical frame of mind. Though perhaps overt conduct cannot be traced directly to what has been seen on the screen, it must be admitted that movies share in molding the attitudes and convictions upon which, in part, viewers base their behavior.\footnote{INGLIS, \textit{op. cit. supra} note 4, at 23. A discussion of studies made of the impression on the individual through the motion picture media may be found in Note, 60 \textit{Yale L. J.} 696, 707-708 \& n.28-30 (1951).} If a possible consequence of motion pictures is the fostering of behavior incompatible with our cultural institutions, it would seem that legislatures have a legitimate interest for regulation. This factor along with the possibility that unofficial censorship will, in some instances, be ignored, and the general laxness of control on the federal level, seems to point up a need for state regulation of movie content.

\textit{The Permissible Legal Machinery}

The law now puts a high premium on freedom of the motion picture medium. Regulation of content requires a step by step analysis of the legal machinery employed to carry out the desired legislative purpose.\footnote{“[T]he constitutional definition of a given liberty is less important than the legal machinery which determines the scope of the liberty in a particular case, that is, which demarcates the line between permissible and forbidden governmental action and which forces the government not to cross that line.” CHAFEE, \textit{op. cit. supra} note 10, at 519.} Previous to the decision in \textit{Burstyn v. Wilson},\footnote{Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952).} it might have been sufficient that the means employed to regulate were reasonably related to the purpose.\footnote{In \textit{Mutual Film Corp. v. Industrial Commission}, 236 U. S. 230 (1915), the Court asserted “. . . it to be in the interest of the public morals and welfare to supervise motion picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty.” \textit{Id.} at 242. “[T]he exhibition of motion pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country, or as organs of public opinion.” \textit{Id.} at 244. The censorship of films was found analagous to the “. . . granting or withholding of licenses for theatrical performances as a means of their regulation.” \textit{Ibid.} \footnote{Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 502-504 (1952); See as to printed matter, \textit{Near v. Minnesota}, 283 U. S. 697 (1931).}} Now that movies come under the broad protection of the First Amendment, the state has a heavier burden to justify its action by showing the exceptional circumstances of the case.\footnote{\footnote{22. INGLIS, \textit{op. cit. supra} note 4, at 23. A discussion of studies made of the impression on the individual through the motion picture media may be found in Note, 60 \textit{Yale L. J.} 696, 707-708 \& n.28-30 (1951).} \footnote{23. “[T]he constitutional definition of a given liberty is less important than the legal machinery which determines the scope of the liberty in a particular case, that is, which demarcates the line between permissible and forbidden governmental action and which forces the government not to cross that line.” CHAFEE, \textit{op. cit. supra} note 10, at 519.} \footnote{24. Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952).} \footnote{25. In \textit{Mutual Film Corp. v. Industrial Commission}, 236 U. S. 230 (1915), the Court asserted “. . . it to be in the interest of the public morals and welfare to supervise motion picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty.” \textit{Id.} at 242. “[T]he exhibition of motion pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country, or as organs of public opinion.” \textit{Id.} at 244. The censorship of films was found analagous to the “. . . granting or withholding of licenses for theatrical performances as a means of their regulation.” \textit{Ibid.}} Any limitations on form of expression amount to a prior restraint. No matter when the attempt is made to regulate, the ultimate effect upon freedom of expression is the same: It is a restraint upon the free dissemination of others' ideas.
and views before the public has an opportunity to see or hear them. In the case of censoring films, licensing theaters, and enjoining continued exhibitions, the restraint necessarily proscribes future showing. In the case of post exhibition prosecution of those responsible for showing objectionable pictures, it could be said that the fear of prosecution with its attendant bad publicity is a factual prior restraint. In applying any of these modes of regulation, there must be an assurance that the restraint will not unduly restrict protected material. It is imperative that the nature of the process of regulation, the time it attaches, the administrative personnel, and the delay, expense, and risks to the persons affected all be taken into account.

A. The Statutory Standard

The due process clause requires that the statute which is to regulate movie content be clearly drawn. The statutory standards must perform a dual function. They must be a guide to the adjudication by officials administering the statute, thus assuring consistency of application and minimizing the danger of arbitrary and capricious decisions. At the same time, they must provide a guide to future conduct of the producers, distributors, and exhibitors. Since the First Amendment makes freedom the rule, the prior restraint principle comes into play whenever limitation is made on forms of expression. Even if the standard of regulation meets the requirement of definiteness, it must be narrowly confined to those recognized exceptional circumstances not falling under the protection of the First Amendment. It would seem that a statute curtailing certain movie content will be upheld only if the standards are confined to precise

27. Long ago Blackstone indicated a hostility for prior restraint when he said: "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. . . . 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 * 151-152.

28. Admittedly, this is not prior restraint in its traditional sense. See note 27 supra; 102 U. Pa. L. Rev. 671, 673 (1954). But this fear of prosecution and bad publicity could feasibly be a greater restriction upon freedom of the movies than is the risk that a censor board might delete certain portions of films which are objectionable.


31. See generally Note, 62 Harv. L. Rev. 77 (1948).

32. Near v. Minnesota, 283 U. S. 697, 716 (1931). "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).
acts, such as pictures inciting others to a specific crime,\textsuperscript{33} or those standards which have a restricted, well established and acceptable common law meaning. A standard that is too broad and all-inclusive is a restriction or impediment on that which is intended to be incapable of control. "Sacrilegious," for example, as defined by the New York Court of Appeals,\textsuperscript{34} was held to be too inclusive, giving the persons administering the statute too much discretion and allowing them to proscribe protected as well as unprotected conduct.\textsuperscript{35}

Since the \textit{Burstyn} case, the courts and legislatures are seeking to improve upon the definiteness of statutes regulating movies.\textsuperscript{36} Such efforts are apparently consistent with the \textit{Burstyn} attitude,\textsuperscript{37} but the requirements for a definite standard to limit First Amendment freedoms are unusually high. The dicta of the case implies that "obscenity" as a

\textsuperscript{33} See Note, 62 Harv. L. Rev. 77, 86 (1948).

\textsuperscript{34} The term had been construed to include any act of "treating any religion with contempt, mockery, scorn, and ridicule" or any "visual caricature of religious beliefs held sacred by one sect or another." Joseph Burstyn, Inc. v. Wilson, 303 N. Y. 242, 258, 101 N.E.2d 665, 672 (1952).

\textsuperscript{35} Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 504-506 (1952). As indicated by Mr. Justice Frankfurter in a concurring opinion to the principal case, in which Justices Jackson and Burton joined: "We not only do not know but cannot know what is condemned by 'sacriligious.' And if we cannot tell, how are those to be governed by the statute to tell?" \textit{Id.} at 531.

\textsuperscript{36} This was not true, however, in the case of the irreparably vague standard—"prejudicial to the best interests" of the community—involved in \textit{Gelling v. Texas}, 343 U. S. 960 (1952). But the New York Court of Appeals tried to restrict the meaning of the words "immoral" and "tends to corrupt morals" to sexual immorality as used in its Penal Law. See Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336, 112 N.E.2d 502 (1953). The Ohio Supreme Court's definition of the term "harmful" was that "the effect of the picture on unstable persons of any age level could lead to a serious increase in immorality and crime." Superior Films, Inc. v. Dept. of Education, 159 Ohio St. 315, 328, 112 N.E.2d 311, 318 (1953). Both decisions were reversed in a memorandum opinion citing the \textit{Burstyn} case. Superior Films, Inc. v. Dept. of Education, 346 U. S. 587 (1954). The Ohio legislators are now seeking to enact a statute which has the required definiteness. Under one bill, a film may be found to be obscene "if it portrays explicitly or in detail an act of adultery, fornication, rape, sodomy, or seduction or if either theme or manner of presentation, or both, present sex relation as desirable, acceptable, or proper patterns of behavior between persons not married to each other or the dominant purpose of which is erotic or pornographic, or if it portrays nudity or a simulation thereof, partial nudity offensive to public decency, sexual relations of any kind, sex organs, abortion, or methods of contraception or if it contains vile or profane language.

"A film may be found to incite crime . . . if the theme or manner of presentation is of such character as to present the commission of criminal acts or contempt for law as constitutional, profitable, desirable, or acceptable behavior or it teaches the use of or methods of narcotics or habit forming drugs or it presents explicit methods for the commission of crime." Boxoffice, January 29, 1955, p. 14. The New York Legislature has already passed an amendment defining "immoral," "of such a character that its exhibition would tend to corrupt morals," and "incite to crime." See N. Y. \textit{Education Law} § 122a (1954 Supp.).

\textsuperscript{37} 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 \textit{v. New York}, 333 U. S. 507, 510, 514, 519 (1948); \textit{Note}, 62 Harv. L. Rev. 77, 82 (1948).
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statutory standard might meet the requirement of definiteness when applied in the regulation of filmed material. But even “obscenity” as a standard is very elusive and has undergone much criticism. The most recent definition of the obscenity test as applied to movies is that “... when considered as a whole the calculated purpose or dominant effect is substantially to arouse sexual desires and ... the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person.” With this limited interpretation isolated scenes or lines should not condemn the entire movie. The fact that part of the audience might be particularly susceptible to influence should not mean that everyone would be denied the opportunity to see the picture. Officials administering a limited standard of this sort would be less likely to make an arbitrary or wholly subjective determination.

The narrow “obscenity” standard may leave conduct unregulated which the states would be interested in controlling. This is evidenced by the fact that most deletions made by the regulating boards and officials are founded on the broad categories of indecency and immorality. Yet “immorality,” standing alone or restricted to “sexual” immorality, is clearly an unconstitutional standard. Recent decisions have not neces-

38. “[I]t is not necessary for us to decide ... whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films.” Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 506 (1952). The Court could be inferring that such regulation would be permissible. On the other hand, the Court might have meant only to leave the question open. If the latter interpretation is correct, why should obscenity have been mentioned when sacrilegious was the standard in issue?

39. See, e.g., United States v. Kennerly, 209 Fed. 119, 120, 121 (S.D. N. Y. 1913) ; Comment, 42 CAL. L. REV. 122, 137 (1954). The traditional test for obscenity as laid down in Regina v. Hicklin, L. R. 3 Q.B. 360, 371 (1868) was “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall.” This seems much too broad for First Amendment purposes as it would mean that everyone would be denied the opportunity to view a picture because of its effect upon those particularly susceptible to immoral influence.

40. A.C.L.U. v. City of Chicago, 3 Ill.2d 334, 347, 121 N.E.2d 585, 592 (1954). Even under this standard there is danger that attempts will be made to expand its application or meaning beyond that which was originally intended to be proscribed as obscene. See in this connection the Ohio proposal in note 36 supra. Officials ought not to be allowed to succeed in making arbitrary determinations by labeling matter obscene.


42. See Note, 13 supra, at 52.

43. Alpert, note 13 supra, at 52.

44. Superior Films, Inc. v. Dept. of Education, 346 U. S. 587 (1954). “Harmful” and “inciting to crime” were also held unconstitutional as standards for banning films in this case.
necessarily precluded the possibility that standards other than "obscenity" may be acceptable if sufficiently restricted by legislative and judicial definition. It is significant, however, that all three decisions of the Court since the inclusion of movies within the protection of the First Amendment, have declared some standard of regulation unfit.

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

B. Time and Method of Regulation

Of tremendous import is the question of how and when the content of movies may be controlled. Seven states have statutory provisions for a censorship board to which must be submitted every commercial film proposed to be shown in that state. The board is generally empowered

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45. See discussion on pp. 465-466 supra.

46. "We agree that the determination that a film or book is obscene must rest on something more than speculation, and that the tendency toward sexual stimulation must be probable and substantial. But we do not agree that the State is limited to the prevention of overt sexual conduct produced by films to the exclusion of consideration of the stimulating tendency which they may have." A.C.L.U. v. City of Chicago, 3 Ill.2d 334, 347-348, 121 N.E.2d 585, 592 (1954). (emphasis added.)

47. A clear instance of such a standard is "prejudicial to the best interests" of the community. See Gelling v. Texas, 343 U.S. 960 (1952).

to disapprove or ban as a whole those films which according to certain statutory standards are found to be objectionable. The board may delete portions of films not conforming with the standards. Some municipalities have ordinances providing for a similar process of inspection. In other municipalities, an exhibitor is required to have a license to operate a motion picture theater, and whether or not the license is issued may depend in part upon the likelihood that the exhibitor will show objectionable pictures. In each of these instances, the regulation of motion picture content occurs prior to a public showing. Other states and cities rely chiefly on prosecution of exhibitors or distributors under obscenity statutes which impose criminal sanctions for the showing of objectionable pictures. It is possible in these jurisdictions that movies may be removed from exhibition through injunction after one showing.

Since the Supreme Court has not yet held censorship unconstitutional

30 of this year. See The N. Y. Times, Apr. 8, 1955, p. 16, col. 4, 5. Ironically, the Kansas Supreme Court had upheld its censorship statute as constitutional a short time before the repealer was to become effective. See Holmby Productions, Inc. v. Vaughn, 23 U.S.L. Week 2599 (U.S. May 24, 1955).

49. See, e.g., DETROIT Comp. Ord. c. 63, §§ 20-22 (1945). It has been estimated that there are from 50 to 80 local censorship boards in the country. Not all of them regularly preview all films to be shown. Some are only spurred into action when there is group pressure aroused in the locality. Comment, 42 CAL. L. REV. 122, 125, 126 (1954). The acts of local censors are apt to be more capricious than the state censors, as the boards are infinitely more susceptible to any locally powerful religious, social, or patriotic groups. Note, 49 YALE L. J. 87, 98 (1939).

50. See, e.g., MILWAUKEE Code of Ords., §§ 83.2, 83.7 (1941).

51. This latter method of control was attempted recently in Indiana by the Marion County prosecutor in a move to stifle the showing of “The French Line” in Indianapolis theaters. First, the prosecutor requested that the picture not be shown as scheduled “because it is not something which should be shown in our community.” The request had followed a special preview by representatives of the P-TA, the Police Department Juvenile Aid Division, and the prosecutor's office. The Indianapolis Star, May 29, 1954, p. 1, col. 7, 8. The exhibitors won a restraining order against the prosecutor, however, to cease “threatening criminal action” against the theater owners planning to show the film. The Indianapolis Star, June 2, 1954, p. 10, col. 4. Then, the prosecutor sought the aid of ten or twelve persons who had seen the film and requested that the persons swear out affidavits for search warrants pursuant to action under IND. ANN. STAT. §§ 9-601, 602, 605 (Burns 1946). Under the statute, a judge may issue warrants to search any house or place “... for obscene, lewd or indecent or lascivious ... pictures ... whenever such articles are kept for distribution, exhibition, sale or use, for hire or gain” and upon a showing of probable cause (by affidavit) can order the property destroyed as contraband. By having the assistance of ten or twelve persons, the prosecutor reasoned that he would be able to acquire all the films in the exhibitors' and distributors' possession and thereby stop presentation of the movie. The plan failed because but one person was willing to cooperate. The Indianapolis Star, June 7, 1954, p. 1, col. 5, 6, 7.

Laws providing criminal punishment for the showing or possession of certain motion pictures vary in specificity and purpose from state to state. Compare CAL. PEN. Code § 311 (1953) and OKLA. STAT. tit. 21, § 1021 (1951) with N. C. GEN. STAT. § 14-93 (1953); ILL. ANN. STAT. c. 37, §§ 418, 419 (1936); MONT. REV. CODES ANN. § 94-3573 (1947); TEX. STAT., PEN. CODE ANN. art. 612 (1948).
per se," a discussion of what censorship procedure meets due process requirements is in order. One of the inherent faults of the censorship process is the doubtful objectivity of the administrative personnel. When a censor board consists simply of three citizens "well qualified by education and experience," appointed by a governor, and given the sole duty of inspecting and passing on films, there is particular danger that censors may become so preoccupied with objectionable movies that they will lose their capacity to make objective determinations under the most clearly drawn statute. If the regulating is done by a mayor or police commissioner in addition to his other duties, it is manifest that his official position hardly qualifies him to be a movie critic. Nor is a trial judge qualified to determine what movies should or should not be seen by a given community. Logically, as one writer points out, the best tribunal to pass on movies prior to their showing is a jury of twelve men, but burdensome trial procedure and prohibitive costs make the latter unsuitable for the purpose of inspecting all movies prior to their showing.

Since there is a question as to the competency of censors to make objective determinations, additional safeguards must be provided. Cases were virtually unanimous, prior to Burstyn, in holding the censors' decisions presumptively correct except in case of a determination that the

52. See note 38 supra. The grounds for declaring unconstitutional the New York statute involved in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) were: (1) that "sacrilegious" as a standard for regulation breaches the constitutional wall between church and state, (2) that unlimited restraining power cannot be vested by a state in a censor, or (3) that "sacrilegious" is unconstitutional because of vagueness. Id. at 504, 505. See Comment, 1 U.C.L.A. L. Rev. 582, 583 (1954).

It is the stock argument of those who favor censorship of the movies that they are distinguishable from other vehicles of expression because they are essentially fictional in content, not criticizing or exposing public men, acts, or omissions, and can be easily cut without putting a producer out of business. It is also asserted that obscene movies are an unusual threat to the public morals, especially when such a large part of the audience consists of children. See C. S. Desmond, Censoring the Movies, 29 Notre Dame Law. 27-36 (1953).

The Court long has held that no prior restraint can be made in the case of publications except under exceptional circumstances. In Near v. Minnesota, 283 U.S. 697 (1931), the Court used strong language in reversing a decision of a state court which permanently enjoined defendant from publishing defamatory or scandalous magazines. A municipal ordinance forbidding the distribution of pamphlets without first securing a permit was held invalid as a restraint on freedom of the press in Lovell v. City of Griffin, 303 U.S. 444 (1938). See also Grosjean v. American Press, 297 U.S. 233 (1935) holding unconstitutional for the same reason a state statute imposing a license fee based on gross receipts for the privilege of publishing advertising. Already a censorship law has been held unconstitutional by a state court as a prior restraint when applied to newsreels. State v. Smith, 48 Ohio Op. 310, 108 N.E.2d 582 (Munic. Ct. 1952). "No controlling distinction can be made between newsreels and newspapers...." Id. at 314, 108 N.E.2d at 587.

53. Most state statutes have set up the censor board in this manner. See note 48 supra.

54. CHAFEE, op. cit. supra note 10, at 532-533.

55. Ibid.
officials acted in bad faith, arbitrarily, or capriciously. Under the First Amendment, the action of any official censors must be closely reviewable whenever a determination is made that a particular movie shall be banned or great portions of it expunged, and the burden should be upon the censors to show that the film in controversy falls fairly within the proscriptive terms of the statute.

Fairness and procedural due process dictate that the producer, distributor, or exhibitor whose film is being censored be given notice of the reasons for the anticipated action and also an opportunity to refute in a hearing before the censors the charges made as to the movie's objectionable character. Equally desirable is that the officials be required to report their adverse findings based on evidence. This would be advantageous not only as a record for future litigation or review, but as a measure to inform the public. Actually deletion and banning seldom occur, and if all the other safeguards required by the Constitution are adhered to, it is unlikely that there would be an undue amount of litigation growing out of this procedure.

Even if these procedural safeguards were set up and the statute clearly drawn, it would seem that there is ample reason why the majority of the Court should eventually take the position of Mr. Justice Black and Mr. Justice Douglas that all forms of censorship, that the very process of inspecting films and charging fees therefor, are unconstitutional. To be sure, the process of inspecting every film prior to exhibition causes little delay, expense, or inconvenience to the distributor or exhibitor. As the commercial picture is essentially fictional in content, the slight delay previous to approval by the censor does not substantially affect the value or marketability of the film as it might a newsreel, newspaper, or magazine. Yet it is manifest that failure to submit any film to inspection prior to exhibition makes it impossible for the film to be legally shown.

56. For cases, see A.C.L.U. v. City of Chicago, 3 Ill.2d 334, 350, 121 N.E.2d 585, 593-594 (1954).

57. Ibid.


59. One writer fears, however, that "to require close judicial review of the censorship process would impose a substantial burden on the courts, and might mean only the substitution of judicial for administrative prejudices." See Comment, 42 Cal. L. Rev. 122, 138 (1954).

60. See Superior Films, Inc. v. Dept. of Education, 346 U.S. 587, 588-589 (1954) (concurring opinion). The pronouncement of the two justices may herald a further extension which will grant to the motion picture industry absolute freedom from prior restraint. 7 Ala. L. Rev. 141, 145 (1954). See also 5 Syracuse L. Rev. 269 (1954); 14 Md. L. Rev. 284, 286-290 (1954). Such an extension seems particularly timely now that the movie industry has shown itself capable of the moral responsibility total freedom demands. Note, 49 Yale L.J. 87 (1939).

61. See note 52 supra.
This is an unconstitutional prior restraint on protected material.\textsuperscript{62}

It is doubtful, moreover, that this much machinery to police a media protected under the First Amendment can be squared with the due process clause of the Fourteenth Amendment. Because the need for regulation is found to exist in only a small percentage of the films and because constitutional requirements of definiteness and narrowness of statutory standards leave but a paucity of films which can be restricted by the state, it is submitted that the censorship-inspection-approval process is now an unreasonable means of regulation as well as an unjustifiable prior restraint. Review of every motion picture in order to achieve protection against showing of the few films that might contravene the limited standard amounts to excessive governmental interference.\textsuperscript{63} The inspection-approval process cannot be justified in view of the possible alternative means of reducing the likelihood of the evil.\textsuperscript{64}

\textsuperscript{62} Cf. Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. Irvington, 308 U.S. 147 (1939). "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty." Thomas v. Collins, 323 U.S. 516, 543 (1945).

\textsuperscript{63} Compare this regulatory process to that condemned in Schneider v. Irvington, 308 U.S. 147 (1939). This case involved an ordinance of Irvington, New Jersey, requiring every person who canvassed, solicited, or distributed circulars or other matter to report to, and receive a written permit from, the Chief of Police. Each person was fingerprinted, photographed, and interrogated on matters relating to character. The purpose of the ordinance was to prevent fraud. In invalidating the ordinance, the Court said: "The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. . . . It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it." \textit{Id.} at 163.

"Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

"Doubtless there are other features of such activities [passing out pamphlets] which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty." \textit{Id.} at 164, 165.

NOTES

One alternative means of regulating motion picture content may be subject to the same constitutional objections. It has never been doubted that the state has power to license motion picture theaters in furtherance of its zoning, sanitary, and fire laws. This licensing power has been used on occasion as a cloak for censorship. But since the Burstyn decision that a state cannot arbitrarily prohibit the showing of one picture, a governmental unit should not be able arbitrarily to prohibit showing of many by denying a license to the theater in which they are to be shown.

In no case ought previously objectionable exhibitions by a theater operator be a consideration in the refusal to issue him the license.

Post exhibition prosecution, supplemented by the decree to enjoin, can be the means by which the public is protected from the effects of undesirable movies. While a picture which may later be found objectionable under a limited standard will have to be shown once before the machinery is put into motion, it is doubtful that the one showing will materially affect the behavior of the community. If the prosecutions are vigorous, it is likely that the habitual offenders of public decency shall be driven out of business. It can be argued that post exhibition prosecution as a means of regulating movie content is not as convenient nor as effective as the censorship process since the censors may delete portions of the films and prevent public exposure to objectionable matter without cumbersome court procedure. But considerations of this sort

65. See Note, 60 YALE L.J. 696, 713 (1951).

66. See Central States Theatre Corp. v. Sar, 66 N.W.2d 450, 456 (Iowa 1954) holding unconstitutional a statute which gave township trustees discretionary control over licensing drive-in theaters. But see Marrone v. City Mgr. of Worcester, 329 Mass. 378, 801, 108 N.E.2d 553, 554 (1952) where, under similar circumstances and a similar statute, the Massachusetts Court said: "It is not the function of this court to determine how that discretion should be exercised. Unless we can say—as we cannot on this record—that the respondent acted capriciously, the revocation cannot be set aside." Revocation of a license in the latter case had been based on public opposition to the establishment of the theater, danger to the morals of the neighborhood, and danger to increased traffic hazards.

67. State court decisions subsequent to the Burstyn case have generally taken that stand. In one case, a theater operator, who had been refused a license for a burlesque theater by a board of commissioners on the grounds, inter alia, that he had shown two lewd movies during the previous five years, was able to compel the issuance of the license notwithstanding. D.B.M. Amusement Corp. v. Thurot, 29 N.J. Super. 462, 102 A.2d 774 (1954). The New Jersey Court insisted that there had to be proof of such a persistency in showing lewd movies that it established a present intent to exhibit lewd burlesque. Id. at 466, 102 A.2d 774, 776. See also Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953). Query: would the showing of present intent be enough to justify denial of a license? See Near v. Minnesota, 283 U.S. 697 (1931).

68. As the movie industry continues to mature and face its professional responsibilities and as the public taste is gradually educated to reject the bad and demand the good without recourse to official censors, the indiscretion of the producers, distributors, and exhibitors should subside. See generally INGLIS, op. cit. supra note 4; Patterson, The Censors and the Public, The Saturday Review, Sept. 6, 1952, p. 22.
are far outweighed by the necessity for a reasonable regulation, particularly in the First Amendment area.\(^69\) In the case of post-exhibition prosecution, the prior restraint operates only on unprotected material condemned under the limited standard. The vast amount of material entitled to First Amendment protection remains unrestrained. Since the legal machinery attacks only material which has a clear causal connection to the evil that the state is seeking to prevent, post-exhibition prosecution is a reasonable means of regulation. Accused producers, distributors, or exhibitors have the added assurance against subjective determinations in the presumption of innocence and the trial by jury. While this form of regulation may not be a panacea, it is the only type of legal machinery which can realistically be squared with the constitutional guarantees.

**Conclusion**

Constitutional protection for motion picture content does not mean there can be no control whatever. The inclusion of movies within the protection of the First Amendment has forced governmental units to place greater stress upon the interests in freedom of expression. The recent decisions in this area call for expert legislative and judicial craftsmanship and responsible determinations on the administrative levels when attempt is made to prevent showing of movies deemed harmful to the public morals. With the imposition of greater responsibility on governments seeking to control movie content, the movie-goer will become more and more the deciding factor of what is or is not to be viewed.

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**THE-UNSOLVED PROBLEMS IN PRIORITY FOR FEDERAL TAX CLAIMS**

As the Federal Government's tax program has increased in scope the status of the Government's claim for taxes has taken on greater importance. The right of the United States to priority does not arise from the common law but depends entirely on three statutes:\(^1\) The Bank-

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69. See note 63 *supra*.

1. "The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law. . . . The claim of the United States, however, does not stand upon any sovereign prerogative but is exclusively founded upon the actual provisions of their own statutes." United States v. State Bank of North Carolina, 31 U.S. (6 Pet.) 308, 310 (1832). See 9 MERTENS, FEDERAL INCOME TAXATION § 54.20 (1943) questioning this view.