THE CONSTITUTIONALITY OF OFFICIAL CENSORSHIP OF MOTION PICTURES*

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TOWARD the turn of the century, the great English legal scholar, Sir Frederic Maitland, wrote: "Our increasing mastery over the physical world is always amplifying the province of law, for it is always complicating the relationships which exist between human beings."¹ This observation, the truth of which has become increasingly apparent with the passage of time, seems to be particularly applicable to the motion picture industry. The profound effect of this industry upon human relationships has long been recognized. As the impact of this phenomenon has become felt, the "province of law" has, in turn, reflected its development in many areas.² This paper is concerned with one such area—that of official censorship.³

I

The constitutionality of official censorship was first considered by the United States Supreme Court in 1915, when the motion picture industry

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¹ The Maitland Reader 86 (1957).

² E.g., anti-trust: *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); copyright: *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911); right of privacy: *Melvin v. Reid*, 112 Cal.App. 285, 297 Pac. 91 (1931).

³ The term "official censorship" is here used to describe censorship by legally constituted instrumentalities of state or local government, as distinguished from censorship by private groups. This paper is concerned only with the limitations imposed upon official censorship by the federal Constitution, and private censorship is therefore beyond its scope. "The first amendment obviously has nothing to do with the way persons or groups, not a part of government, influence public opinion as to what constitutes 'decency' or 'obscenity.' The Catholic Church, for example, has a constitutional right to persuade or instruct its adherents not to read designated books or kinds of books." *United States v. Roth*, 237 F.2d 796, 824 (C.A.2d, 1956). Similarly, limitations upon censorship imposed by state constitutions and local charters will not be discussed. With respect to local censorship, however, it is well to note that a municipal corporation has no inherent power relating to censorship, and derives power solely from the state legislature. *Public Welfare Pictures Corp. v. Brennan*, 100 N.J.Eq. 132, 134 Atl. 868 (1926), 126 A.L.R. 1363 (1940). Thus, if a state, by legislative enactment, intends to monopolize the field of motion picture censorship, a local municipality is thereafter without power to censor. *Ames v. Gerbracht*, 194 Iowa 267, 189 N.W. 729 (1922); *Power v. Nordstrom*, 150 Minn. 228, 184 N.W. 967 (1921); *Lynchburg v. Dominion Theatres*, 175 Va. 35, 7 S.E.2d 157 (1940); *Xydias Amusement Co. v. Houston*, 185 S.W. 415 (Tex.Civ.App., 1916).

had hardly passed beyond its nickelodeon phase. In *Mutual Film Corporation v. Industrial Commission of Ohio*,⁴ the plaintiff had sought and been denied a federal court injunction restraining enforcement of an Ohio censorship statute under which he had been denied a license to exhibit a film. In affirming this decree, the United States Supreme Court stamped motion picture censorship with its official approval, thus setting a constitutional pattern which lasted until 1952.⁵ Yet, in reaching this decision, the Court did not consider what has subsequently evolved as the prime constitutional question, i.e., whether official censorship constitutes a violation of free speech in contravention of the Fourteenth Amendment.⁶ The only federal constitutional question considered by the Court was whether the Ohio censorship statute imposed a burden on interstate commerce. It concluded that no such burden had been imposed.⁷

The Court considered the freedom of speech issue, but only within the context of the Ohio Constitution.⁸ In refusing to conclude that the censorship

⁴ 236 U.S. 230 (1915).

⁵ The following are some of the cases which affirmed motion picture censorship during this period: *Mutual Film Corp. v. Chicago*, 224 Fed. 101 (C.A.7th, 1915); *Fox Film Corp. v. Trumbull*, 7 F.2d 715 (D.Conn., 1925); *Bainbridge v. Minneapolis*, 131 Minn. 195, 154 N.W. 964 (1915); *Universal Film Manufacturing Co. v. Bell*, 100 Misc. 281, 167 N.Y.S. 124 (S.Ct., 1917), aff'd 179 App.Div. 928, 166 N.Y.S. 344 (1917); *Message Photo-Play Co. v. Bell*, 179 App.Div. 13, 166 N.Y.S. 338 (1917); *Hallmark Productions v. Department of Education*, 153 Ohio St. 596, 93 N.E.2d 13 (1950); *Epoch Producing Corp. v. Riegel*, 113 Ohio St. 697, 150 N.E. 756 (1925); *Mutual Film Corp. v. Breitinger*, 250 Pa. 225, 95 Atl. 433 (1915); *United Artists Corp. v. Board of Censors of Memphis*, 189 Tenn. 397, 225 S.W.2d 550 (1949).

⁶ It has been suggested that since the exhibition of motion pictures on television is exempt from state censorship, see note 9 *infra*, it follows that state censorship of theatrically exhibited films is unconstitutional on the additional grounds of a denial of equal protection under the Fourteenth Amendment. *Entertainment: Public Pressures and the Law*, 71 Harv. L. Rev. 326, 334 (1957).

⁷ Although the commerce clause was rejected in the *Mutual Film* case as a constitutional basis for invalidating state censorship of motion pictures, and although this ground has remained largely dormant in judicial decisions ever since, it is ironic that the commerce clause may eventually prove the basis for invalidating most state motion picture censorship. That is, if theatrical exhibition of motion pictures becomes totally or substantially supplanted by television exhibition (as may be the case in the event of so-called pay-television), then it seems clear that the federal government, having occupied the entire field of communication by radio and television, will preclude all state board censorship. This indeed was the holding in *Dumont Laboratories Inc. v. Carroll*, 184 F.2d 153 (C.A.3d, 1950). Moreover, federal censorship of television might not be subjected to the guarantees of the First and Fourteenth Amendments in the same degree as state censorship of theatrical motion picture exhibitions. This is true because, since the airwaves are limited, the cases which permit "traffic" regulation in limitation of free speech, as in the instance of streets, parks and public buildings, might likewise be held applicable to the television airways. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569 (1941). There would appear to be no grounds for holding that state censorship of a motion picture film imported from abroad is an unconstitutional interference with foreign commerce. *Eureka Productions v. Lehman*, 17 F.Supp. 259 (S.D.N.Y., 1936); *Eureka Productions v. Byrne*, 252 App. Div. 355, 300 N.Y.S. 218 (1937); cf. *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923); *Tad Screen Advertising v. Oklahoma Tax Commission*, 126 F.2d 544 (C.A.10th, 1942).

⁸ The United States Supreme Court had not yet evolved the doctrine that the guarantee of free speech in the First Amendment was binding upon the states through the Fourteenth Amendment. See discussion at 628 *infra*.

complained of constituted a violation of state constitutional rights, the Court said:

[T]here are some things which should not have pictorial representation in public places and to all audiences. . . . [N]ot only the State of Ohio but other States have considered it to be in the interest of the public morals and welfare to supervise moving 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.⁹

Thus, the Court recognized official censorship as a valid exercise of state police power.

While it must be doubted that the Court was fully cognizant of the impact that the motion picture was to make upon our culture, the opinion does reveal a distinct awareness that a potent medium of communication was involved. The very fact of its potency, however, instead of raising the medium to the dignity of speech and press and thus providing it protection against abridgment, seems to have been considered grounds for invoking the police power of the state.¹⁰

The Court also considered the question of whether the censorship statute was unconstitutional by reason of its vagueness, but, here again the investigation was limited to the State Constitution. The statute required that films be "moral, educational, or amusing and harmless." In upholding these standards against the attack of vagueness, the Court expressed its opinion that a precise determination as to the application of the statute to particular films could be made

from the sense and experience of men and [thus these terms could] become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.¹¹

In the interim between the *Mutual Film* decision and *Burstyn v. Wilson*,¹² a 1952 case, in which the Supreme Court dealt a major blow to many of the principles enunciated in its earlier decision, motion picture censorship became increasingly prevalent.¹³ However, this increase in the popularity of official censorship occurred in a constitutional climate which was itself undergoing certain changes, the inevitable result of which was the erosion of the grounds of the *Mutual Film* decision. Thus, some four years after the *Mutual Film* case,¹⁴ the Supreme Court enunciated the so-called "clear and present danger"

⁹ 236 U.S. 230, 242 (1915).

¹⁰ *Id.*, at 244.

¹¹ *Id.*, at 246.

¹² 343 U.S. 495 (1952).

¹³ At the time the Supreme Court dealt its first major blow to official censorship in *Burstyn v. Wilson*, nine states (Florida, Kansas, Louisiana, Maryland, Massachusetts, New York, Ohio, Pennsylvania and Virginia), and perhaps as many as ninety municipalities, had motion picture censorship statutes. See Velie, *You Can't See That Movie: Censorship in Action*, 125 *Collier's* 11 (May 6, 1950).

¹⁴ See *Schenck v. United States*, 249 U.S. 47 (1919).

test,¹⁵ a concept destined to be of tremendous importance in the area of free speech, including that of motion picture censorship. Subsequently, in *Gillow v. New York*,¹⁶ another constitutional principle of importance in this area evolved, when it was held that the guarantees of the First Amendment were applicable to the states as a part of the due process limitations of the Fourteenth Amendment. Next, in *Near v. Minnesota*,¹⁷ the Court laid down the distinction between prior restraints and subsequent punishment, holding that the First Amendment prohibits prior restraints even in those cases in which it would permit subsequent punishment. Finally, in *United States v. Paramount Pictures*,¹⁸ the Court first recognized that motion pictures were a form of speech as contemplated by the First Amendment. It is in the light of these changes in constitutional doctrine that the decision in the *Burstyn* case must be considered.¹⁹

II

The *Burstyn* case involved the rescission of a license granted for the exhibition of an Italian motion picture in New York on the grounds that the picture was "sacrilegious." The New York censorship statute²⁰ under which this action was taken was upheld by the New York Court of Appeals,²¹ whereupon the United States Supreme Court granted certiorari. Three possible grounds upon which the statute could be held unconstitutional were argued before that Court: first, that the statute, insofar as it proscribed the "sacrilegious," constituted a violation of the principle of separation of church and state; secondly, that the statute was in violation of freedom of speech, and particularly so in that it permitted a prior restraint; and, thirdly, the statute was so vague that it offended due process.

The Court chose to hold the statute unconstitutional as a prior restraint upon free speech, thus rendering it unnecessary to consider the alternative arguments which had been offered. In premising its decision upon this ground, the Court recognized an inconsistency with its reasoning in the *Mutual Film* case.²² This inconsistency lay primarily in the attitude which the Court adopted

¹⁵ "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.*, at 52.

¹⁶ 268 U.S. 652 (1925).

¹⁷ 283 U.S. 697 (1931).

¹⁸ 334 U.S. 131, 166 (1948).

¹⁹ It could also be argued that the delegation of censorship authority as occurs, for instance, in Chicago where the Municipal Code, Chapter 155, grants censorship authority to the police commissioner, who, in turn, delegates this authority to an assistant, who, in turn, delegates the authority to a board of censors, may constitute an invalid infringement of constitutional rights by reason of such delegation. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Such an argument is, however, outside the scope of this article.

²⁰ N.Y. Education Law (McKinney, 1953) §122.

²¹ 303 N.Y. 242, 101 N.E.2d 665 (1951).

²² However, the recent opinion in *Roth v. United States*, 354 U.S. 476 (1957) (see discussion at 645 *infra*), cites the *Mutual Film* case on the issue of prurency in motion pictures. It would appear therefore that this decision has not been completely vitiated.

toward the motion picture as a means of communication. Thus, in contrast with its earlier attitude of distrust for a medium with such enormous potentialities for power, the Court said here:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.²³

The Court went on to discuss the issue of vagueness, saying, by way of dictum:

In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies.²⁴

It seems important to note, however, that this was no part of the holding of the case. Rather, the Court preferred to restrict the effect of its decision to the narrow issue with which it was presented.²⁵ Thus, the Court pointed out that a state has no legitimate interest in protecting any religion from distasteful views²⁶ and concluded by making explicit that it held "only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'"²⁷

III

Since the *Burstyn* case, the Supreme Court has been confronted with the question of the constitutionality of motion picture censorship on four separate

²³ 343 U.S. 495, 501 (1952).

²⁴ *Id.*, at 504-5.

²⁵ Mr. Justice Frankfurter, on the other hand, in a concurring opinion of some length, analyzed and traced the origin of the term "sacrilegious." Because he thought that the statute was unconstitutionally vague, Justice Frankfurter felt that it was unnecessary for the Court to determine that there had been a violation of free speech or press. However, he then continued to point out that the very fact of vagueness may in practice result in a prior restraint contrary to the First Amendment. "It is this impossibility of knowing how far the form of words by which the New York Court of Appeals explained 'sacrilegious' carries the proscription of religious subjects that makes the term unconstitutionally vague. To stop short of proscribing all subjects that might conceivably be interpreted to be religious, inevitably creates a situation whereby the censor bans only that against which there is a substantial outcry from a religious group. . . . Consequently the film industry, normally not guided by creative artists, and cautious in putting large capital to the hazards of courage, would be governed by its notions of the feelings likely to be aroused by diverse religious sects, certainly the powerful ones. . . . Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is vested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative." *Id.*, at 531-32.

²⁶ *Id.*, at 505.

²⁷ *Id.*, at 505-6.

occasions.²⁸ On each of these occasions the Court, acting through a per curiam memorandum opinion, has held the challenged censorship unconstitutional. An analysis of these decisions would seem to be a necessary prerequisite to any evaluation of the current constitutional doctrine in the area. More precisely, it seems necessary to determine the extent to which these decisions have obliterated the narrow limits which the Court imposed upon its holding in the *Burstyn* case and extended the constitutionally protected area beyond the "sacrilegious."

*Gelling v. Texas*²⁹ was the first case involving motion picture censorship to come before the Supreme Court subsequent to the *Burstyn* decision. In this case the appellant was convicted under an ordinance of the City of Marshall, Texas, for exhibiting a motion picture after having been denied a license by the local board of censors. The ordinance in question authorized the board of censors to deny a license if a motion picture was found to be "of such character as to be prejudicial to the best interests of the people of said city." The Texas appellate court affirmed the trial court in upholding the action of the board of censors.³⁰ In doing so the court relied on the *Mutual Film* decision, concluding: We cannot concede that the motion picture industry has emerged from the business of amusement and become propagator of ideas entitling it to freedom of speech.³¹

This opinion by the Texas court was rendered several months prior to the Supreme Court's *Burstyn* decision.

Upon grant of certiorari, the Supreme Court reversed the Texas court in a per curiam decision, without opinion, which cited, as authority, only the *Burstyn* case and *Winters v. New York*.³² In the absence of an opinion, the meaning and effect of the *Gelling* decision can only be ascertained from its citation of authority. Yet, it is not easy to reconcile the citation of *Burstyn* in *Gelling* with the statement in the *Burstyn* opinion that "the term 'sacrilegious' is the sole standard under attack here,"³³ and the further caveat: "We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'"³⁴ Since the statute in the *Gelling* case did not purport to proscribe the sacrilegious, the citation of *Burstyn* may perhaps be regarded as a reference to the dicta contained therein, rather than to the explicit holding. Although the Court in *Burstyn* declined to rule on whether the term "sacrilegious" is so vague and indefinite as to offend due process, Mr. Justice Clark's suggestion that in applying this term "the censor is set adrift upon a boundless sea amid a myriad of

²⁸ *Gelling v. Texas*, 343 U.S. 960 (1952); *Superior Films v. Dept. of Education and Commercial Pictures Corp. v. Regents of the University of the State of New York*, 346 U.S. 587 (1954); *Holmby Productions Inc. v. Vaughn*, 350 U.S. 870 (1955); *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957).

²⁹ 343 U.S. 960 (1952).

³² 333 U.S. 507 (1948).

³⁰ 157 Tex.Crim. 516, 247 S.W.2d 95 (1952).

³³ 343 U.S. 495, 505 (1952).

³¹ *Id.*, at 520 and 97.

³⁴ *Id.*, at 506.

conflicting currents of religious views"³⁵ might (by deleting only the word "religious") be applied with equal force to the even more vague and indefinite standard of the *Gelling* statute, i.e., that which is prejudicial to the best interests of the people.

This explanation of the *Gelling* decision seems clearly preferable to any attempt to explain the decision in terms of the actual holding in the *Burstyn* case. There, the Court had held:

[F]rom the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. *It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine.* . . . [Emphasis added.]³⁶

The difficulty with applying this reasoning to the *Gelling* case is that it is precisely the business of state government to protect people from that which is prejudicial to their best interests. Unlike the statute involved in the *Burstyn* case, the constitutional infirmity of the statute in the *Gelling* case would seem to lie not in the objective of the statute, but rather in the vague and indefinite means of obtaining that objective.

The conclusion that the citation of the *Burstyn* case in the *Gelling* decision refers to the issue of indefiniteness is reinforced by the fact that the Court also cited *Winters v. New York*.³⁷ In the *Winters* case the Supreme Court struck down a New York statute making it an offense to publish or distribute publications principally made up of criminal news, police reports or accounts of criminal deeds, deeds of bloodshed or of lust or crime. The Court held the statute to be unconstitutional on grounds of vagueness and indefiniteness.

There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the . . . scope of the act . . . , or in regard to the applicable tests to ascertain guilt.³⁸

The two concurring opinions in the *Gelling* case shed little light upon the reasoning of the majority. It has been suggested that an inference may be drawn that the grounds stated in these concurring opinions are not the grounds accepted by the majority, since otherwise the concurring judge would have no reason to give separate voice to his views.³⁹ This reasoning, however, is not persuasive, since the concurring judge may well have deemed it advisable to state expressly the very reasons which moved the majority *sub silentio*. Moreover, Justice Frankfurter's concurring opinion in the *Gelling* case may very well be understood as not inconsistent with the majority view. In the *Burstyn* case, Frankfurter had concurred specially on the grounds that the

³⁵ *Id.*, at 504.

³⁷ 333 U.S. 507 (1948).

³⁶ *Id.*, at 505.

³⁸ *Id.*, at 515-16.

³⁹ *American Civil Liberties Union v. Chicago*, 3 Ill.2d 334, 341, 121 N.E.2d 585, 589 (1954).

term "sacrilegious" is so vague and indefinite as to offend due process. His concurring opinion in the *Gelling* case reaches an identical conclusion, relying explicitly upon his earlier opinion.⁴⁰ It seems quite possible, therefore, that his concurring opinion in the *Gelling* case represents, not a divergence from the majority, but rather the restatement of a view which, though somewhat divergent in the *Burstyn* case, had since been found acceptable to the majority.

In contrast, Justice Douglas' concurring opinion in the *Gelling* case probably does reflect some divergence from the majority view. The majority decision, apparently, and Justice Frankfurter's opinion, expressly, turned upon a denial of due process because of vagueness, thus avoiding the necessity of invoking First Amendment principles of freedom of expression. Douglas, on the other hand, preferred to premise the decision squarely upon the First Amendment, saying:

If a Board of Censors can tell the American people what it is in their best interests to see or to read or to hear . . . , then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.⁴¹

The Supreme Court next ruled on motion picture censorship in two cases which, although they originated in different states, were based upon different statutes and involved different motion pictures, were nevertheless decided in a single memorandum per curiam opinion. These cases were *Superior Films, Inc. v. Department of Education* and *Commercial Pictures Corp. v. Regents of University of the State of New York*.⁴² Since these two cases involved different factual situations and statutes of somewhat different wording, it seems preferable to analyze them separately.

In the *Commercial Pictures* case, the Motion Picture Division of the Department of Education refused to issue a license to the French motion picture *La Ronde*, on the grounds that it violated the state censorship statute, in that it was "immoral" and would "tend to corrupt morals." The Appellate Division of the Supreme Court affirmed this administrative ruling in a three-to-two decision, which held only that there was evidence to support the administrative ruling.⁴³ Presiding Justice Foster, in a dissent, raised the constitutional issue.

⁴⁰ It is interesting to note that in one of the two cases cited by the *Gelling* majority, that of *Winters v. New York*, Justice Frankfurter dissented from the view that the statute there in question was so vague and indefinite as to offend due process. He there stated, in dissent: "Legislation must put people on notice as to the kind of conduct from which to refrain. Legislation must also avoid so tight a phrasing as to leave the area for evasion ampler than that which is condemned. How to escape, on the one hand, having a law rendered futile because no standard is afforded by which conduct is to be judged, and, on the other, a law so particularized as to defeat itself . . . calls for the accommodation of delicate factors. But this accommodation is for the legislature to make and for us to respect, when it concerns a subject so clearly within the scope of the police power as the control of crime." 333 U.S. 507, 532-33 (1948). Cf. Frankfurter, J., writing for the majority in *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁴¹ 343 U.S. 960, 961 (1952).

⁴² 346 U.S. 587 (1954).

⁴³ 280 App.Div. 260, 114 N.Y.S.2d 561 (1952).

Citing *Burstyn v. Wilson* and *Near v. Minnesota*, he argued that "[e]ither motion pictures may be censored or they cannot be. I can see no practical middle ground."⁴⁴ Subsequently, the New York Court of Appeals likewise affirmed the action of the Department of Education in an opinion which squarely faced up to the constitutional issues involved.⁴⁵ With respect to the First Amendment issue, as raised in *Burstyn*, the New York court seized upon the following passage in *Burstyn*:

Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.⁴⁶

Taking its text from this passage, the New York court stated:

Insofar, then, as motion pictures tend to present their "own peculiar problems," we think they may properly become the subject of special measures of control. If, as we believe, motion pictures may present a "clear and present danger" of substantive evil to the community (*Schenck v. United States*, 249 U.S. 47, 52), then the Legislature may act to guard against such evil, though in so doing it overrides to a degree the right of free expression. . . .⁴⁷

The New York court then went on to contend that *La Ronde* did constitute such a "clear and present danger" by suggesting that it is "a motion picture which panders to base human emotions" and that it consequently "is a breeding ground for sensuality, depravity, licentiousness and sexual immorality. . . . That these vices represent a 'clear and present danger' to the body social seems manifestly clear."⁴⁸

On the issue of indefiniteness, that court found that the statutory standards of "moral" and "tend to corrupt morals" related to standards of sexual morality and "[a]s such they are not vague or indefinite."⁴⁹

In the *Superior Films* case, the Division of Film Censorship of the Department of Education of Ohio issued certificates forbidding the distribution of the films *M* and *Native Son*. The grounds stated for the rejection of *M* were simply "on account of [its] being harmful."⁵⁰ The grounds stated in the case of *Native Son* were somewhat more specific:

. . . harmful: because [it] contributes to racial misunderstanding, presenting situations undesirable to the mutual interests of both races; against public interest in undermining confidence that justice can be carried out; presents racial frictions at a time when all groups should be united against everything that is subversive.⁵¹

In a five-to-two decision, the Ohio Supreme Court upheld the actions of the Division of Film Censorship.⁵² The court reasoned that the rule in *Burstyn*

⁴⁴ *Id.*, at 265 and 565.

⁴⁷ 305 N.Y. 336, 340, 113 N.E.2d 502, 503 (1953).

⁴⁵ 305 N.Y. 336, 113 N.E.2d 502 (1953).

⁴⁸ *Id.*, at 342 and 504.

⁴⁶ 343 U.S. 495, 503 (1952).

⁴⁹ *Id.*, at 346 and 507.

⁵⁰ 159 Ohio St. 315, 316, 112 N.E.2d 311, 312 (1953).

⁵¹ *Id.*, at 317 and 313.

⁵² 159 Ohio St. 315, 112 N.E.2d 311 (1953).

is not absolute, but that

... there still remains a limited field in which decency and morals may be protected from the impact of an offending motion picture film by prior restraint under proper criteria.⁵³

The court concluded that since the Ohio statute established ascertainable criteria, it constituted the type of "clearly drawn" statute permitted under the *Burstyn* decision.

The United States Supreme Court issued a per curiam memorandum opinion reversing both the *Commerical Pictures* case and the *Superior Films* case. The *Burstyn* case was the sole authority set forth to support this decision. Since neither case involved the standard of the "sacrilegious," the problem again arises of reconciling the expressly limited holding in the *Burstyn* case with the Court's reliance upon that case as authority for the decision of cases clearly outside that holding as so limited.

The standard applied in the *Superior Films* case was that of being "harmful," while the standard applied in the *Commerical Films* case was that of not being "moral" and "tend[ing] to corrupt morals." The standard of "harmful" would appear to be as broad and as indefinite as the standard rejected in the *Gelling* case of "prejudicial to the best interests of the people." Yet in its per curiam decision the Court did not cite the *Gelling* case, nor *Winters v. New York*, which was cited in the *Gelling* decision. The standard applied in the *Commerical Films* case of "moral" and "tends to corrupt morals" would appear to be somewhat more definite than the standards of either the *Superior Films* case or the *Gelling* case. Yet, the fact that the Court ruled on both the *Commercial Pictures* and *Superior Films* cases in a single per curiam memorandum opinion suggests that the same rationale was applied to both cases. Despite the fact the Court cited neither the *Gelling* case nor the *Winters* case, it seems likely that this rationale was that of constitutional indefiniteness as a violation of due process, rather than abridgement of freedom of speech. This conclusion is indicated by those same considerations which necessitated a similar interpretation of the *Gelling* decision, i.e., the total inapplicability of the explicit holding of the *Burstyn* case to the facts involved in the cases before the Court.

However, the concurring opinion of Justice Douglas, joined by Justice Black, expressly invokes the freedom of speech guaranty.

... the First Amendment draws no distinction between the various methods of communicating ideas. ... Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case. ...

In this nation every writer, actor, or producer, no matter what the medium of expression he may use, should be freed from the censor.⁵⁴

The next motion picture censorship case passed upon by the Supreme Court was that of *Holmby Productions, Inc. v. Vaughn*.⁵⁵ In the *Holmby* case, the

⁵³ Id., at 327 and 318

⁵⁴ 346 U.S. 587, 589 (1954).

⁵⁵ 350 U.S. 870 (1955).

Kansas State Board of Review had disapproved the motion picture *The Moon Is Blue* on the grounds of "[s]ex theme throughout, too frank bedroom dialogue: many sexy words; both dialogue and action have sex as their theme."⁵⁶ Upon a subsequent re-examination the Board more closely confined its findings to the words of the censorship statute by finding that the film was "obscene, indecent and immoral, and such as tend[s] to debase or corrupt morals."⁵⁷ The trial court found that the Kansas statute was invalid as a violation of the First and Fourteenth Amendments.⁵⁸ The Kansas Supreme Court reversed the trial court and ordered the reinstatement of the order of the Kansas State Board of Review.⁵⁹ In so doing, the court held that the words "obscene, indecent, or immoral, or such as tend to debase or corrupt morals," have accepted, definite and clear meanings, and are not so vague and indefinite as to offend due process.

The United States Supreme Court in a per curiam memorandum opinion reversed the judgment of the Kansas Supreme Court. The only indication of the grounds for the reversal is the citation of the *Burstyn* and *Superior Films* cases, neither the *Gelling* case nor the *Winters* case receiving any mention. Since the *Superior Films* decision was premised entirely upon the *Burstyn* case, its citation fails to shed any additional light. Thus, the problem of interpretation presented by the *Holmby* case is precisely identical with that presented by the *Superior Films* case itself and, for the same reasons, must be resolved in favor of the conclusion that the decision was based upon a violation of due process because of vagueness.

*Times Film Corporation v. City of Chicago*⁶⁰ represents the most recent instance in which the Supreme Court has considered the constitutionality of motion picture censorship. In that case, Chicago authorities had censored the motion picture *Game of Love* on the grounds of its being "immoral and obscene." The Court of Appeals for the Seventh Circuit held⁶¹ that the words "immoral and obscene," as construed by the Illinois Supreme Court,⁶² were not so vague as to be constitutionally invalid, saying:

The First and Fourteenth Amendments of the Federal Constitution do not, and were never intended to, shield public peddlers of obscenity and immorality.⁶³

The court then proceeded to dispose of the problem of vagueness in the following terms:

The ordinary person knows what is obscene and immoral. That knowledge is a workable basis for regulation of such matters and it may be utilized by the chosen represent-

⁵⁶ 177 Kan. 728, 729, 282 P.2d 412, 413 (1955).

⁵⁷ Ibid.

⁵⁸ 177 Kan. 728, 282 P.2d 412 (1955).

⁵⁹ Id., at 730 and 413-14.

⁶⁰ 355 U.S. 35 (1957).

⁶¹ 244 F.2d 432 (C.A. 7th, 1957).

⁶² American Civil Liberties Union v. Chicago, 3 Ill.2d 334, 337, 121 N.E.2d 585, 587 (1954), appeal dismissed 348 U.S. 979 (1955).

⁶³ 244 F.2d 432, 436 (C.A.7th, 1957).

atives of the people, in a state or political subdivision thereof, as a basis for legislative action aimed at the suppression of public obscenity and immorality. The public exhibition of moving pictures falls within the ambit of such regulations.⁶⁴

The Supreme Court, in reversing the Seventh Circuit decision, rendered no opinion and cited only *Alberts v. California*, the companion case to *Roth v. United States*.⁶⁵

Again the reasoning of the Court must be deduced from the citation of authority. In this instance the fact that neither *Burstyn* nor any of the earlier motion picture cases were cited would appear to be significant. The Court *may* be indicating that it does not find the Chicago ordinance invalid on grounds of vagueness.⁶⁶

It may be further concluded from the lone citation of the *Alberts* case that the Court found the *Game of Love* not to fall within the definition of obscenity suggested in the *Roth* and *Alberts* cases, and that therefore the film constituted an expression protectible under the First and Fourteenth Amendments. The problems attendant to defining obscenity are discussed below.⁶⁷

Thus, it would appear that only the *Times Film Corporation* case was decided on the basis of the First Amendment. The *Gelling*, *Superior Films* and *Commercial Pictures*, and *Holmby* cases, on the other hand, were decided on grounds of vagueness and uncertainty in violation of due process. However, it must be admitted that until the Supreme Court renders another opinion in a motion picture censorship case, the above rationalization of the per curiam decisions is at best a reasoned conjecture.⁶⁸

⁶⁴ *Id.*, at 435.

⁶⁵ 354 U.S. 476 (1957). See discussion at 645 *infra*.

⁶⁶ This perhaps suggests that the Court accepts the Illinois Supreme Court definition of obscenity as stated in *American Civil Liberties Union v. Chicago*: "[A] motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if 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." As will be seen below, the foregoing definition largely conforms to the definition accepted by the United States Supreme Court in the *Roth* case. 3 Ill.2d 334, 347, 121 N.E.2d 585, 592 (1954).

⁶⁷ See discussion at 646 *infra*.

⁶⁸ Mr. Justice Jackson's comments on the Court's per curiam memorandum practice in another context would seem peculiarly appropriate to these decisions. "The Court's one-word decision reverses concurring judgments of three highly respected courts. . . . It cites a single case, the implication being that the cited authority settled the question so fully and plainly that a contrary result could have been reached by the three lower courts only by failure to read or heed it. I think this Court owed those courts and the legal profession something more than a reference to an inapplicable decision. The facts of this case present novel questions that this Court should face and on which it should render a reasoned decision." *Brownell v. Singer*, 347 U.S. 403, 403-4 (1954) (dissenting opinion).

IV

The foregoing decisions clearly indicate that the area within which motion picture censorship will be allowed is constantly diminishing. The explicitly limited nature of the holding in the *Burstyn* case, coupled with the subsequent resort to the per curiam memorandum, seem to suggest a lack of eagerness on the part of the Court to make clear the outlines of the new doctrine. In view of such a total absence of statements of principle, the most fruitful line of analysis would seem to lie in terms of a piecemeal consideration of the various standards under which censorship has been, and continues to be, imposed.

In view of the *Burstyn* case, it is now certain that it is a violation of the First and Fourteenth Amendments to censor a motion picture on the grounds that it is sacrilegious. This includes, of course, not merely the original legal concept "sacrilegious," which referred only to stealing from a church or doing damage to church property, but, more generally, to the proscription of any religious subject as such. Moreover, it is important to recall that the standard "sacrilegious" is unconstitutional, not because it is vague and indefinite,⁶⁹ but, rather, because "the State has no legitimate interest in protecting any or all religions from views distasteful to them," which is sufficient to justify a prior restraint in violation of freedom of speech and press.⁷⁰ This constitutional prohibition undoubtedly prevents censorship of a motion picture either because it favors one religious creed or doctrine over another⁷¹ or because it condemns religion as such.⁷² No state censorship statute, other than New York's, presently includes the standard "sacrilegious" for censorship. Nevertheless, there was at least one recent instance of motion picture censorship where the actual, although not the ostensible, grounds for censorship may have been that of being "sacrilegious." During 1957 the Chicago Censorship Board censored the motion picture *Letters from My Windmill*, based upon the work by Alfonse Daudet. The film depicted a Catholic priest in an undignified and perhaps somewhat derogatory manner. The Chicago censors banned⁷³ the film reportedly on the ground of its tending to exhibit lack of virtue in a class of citizens.⁷⁴

⁶⁹ Contra: *Hallmark Productions v. Carroll*, 384 Pa. 348, 121 A.2d 584 (1956).

⁷⁰ *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952).

⁷¹ The relatively recent film, *Martin Luther*, might be cited as an example of such a motion picture.

⁷² Cf. *Everson v. Board of Education*, 330 U.S. 1 (1946).

⁷³ In 1958, after the movie was rescreened, the Chicago censor issued a permit for it to be shown. Communication to University of Chicago Law Review from Chicago Censorship Board.

⁷⁴ Directly related to the standard "sacrilegious" are the so-called blue laws—those statutes and ordinances which permit regulation of Sunday showings of motion pictures. At the present time, such restrictions are permitted in the following states, either by state statutes or by local ordinances: Alabama, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and

A number of statutes provide for censorship of the "cruel,"⁷⁶ while others contain similar provisions in regard to the "inhuman."⁷⁶ It seems unlikely that either of these standards would be recognized as sufficiently precise to satisfy the requirements of due process.⁷⁷ Moreover, both seem vulnerable to attack as infringing upon the area of free speech guaranteed by the First Amendment. Since it is now clear that motion pictures may claim the protections afforded by this Amendment, censorship would seem permissible only within the confines of the "clear and present danger" test.⁷⁸ Under this test, a "cruel" or "inhuman" standard could be defended only if the motion picture seemed calculated to incite its viewers to perform such acts.⁷⁹

West Virginia. The only such statute thus far tested in the courts is that of Massachusetts, which was held by the Massachusetts Supreme Judicial Court to be void as a restraint on the First and Fourteenth Amendment guarantees of freedom of speech and press. *Brattle Films, Inc. v. Commissioner of Public Safety*, 333 Mass. 58, 127 N.E.2d 891 (1955). In that case, the Massachusetts statute authorized the mayor or city manager of municipalities to license and prescribe terms and conditions regulating public entertainment held on "the Lord's day" to assure that it will be "in keeping with the character of the day and not inconsistent with its due observance." Although the statute might well have been struck down on the grounds of its vagueness and indefiniteness, the Massachusetts court preferred to premise its decision upon the concept of freedom of speech and press, thus discouraging any thought that the statute was amenable to amendment such as would bring it within the constitutional orbit. The decision in the *Brattle Films* case would seem necessarily to follow from the *Burstyn* decision. It would seem, then, that the many statutes prohibiting or regulating Sunday showings may no longer be enforceable.

⁷⁶ E.g., Kan. Stat. Ann. (1949) c. 51-103.

⁷⁶ E.g., N.Y. Education Law (McKinney, 1953) §122.

⁷⁷ *Winters v. New York*, 333 U.S. 507 (1948).

⁷⁸ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁷⁹ The "clear and present danger" test has had a somewhat checkered career in subsequent Supreme Court opinions and, at least in the political area, was substantially modified by the Court in *Dennis v. United States*, 341 U.S. 494 (1951). In that case, the Court adopted the formulation of Judge Learned Hand to the effect that "[i]n each case [the court] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d 201, 212 (C.A.2d, 1950). However, in the recent case of *Yates v. United States*, 354 U.S. 298 (1957), the Supreme Court has by implication restored much of the vigor of the "clear and present danger" test. The *Yates* case purportedly restricts itself to an interpretation of the statute in question, rather than the First Amendment. Nevertheless, the Court indicates that it is construing the statute in such a manner as to avoid a "constitutional danger zone," and, consequently, it seems fair to conclude that the ruling of the Court has significance, not only as to the meaning of the Smith Act, but also as to the meaning and scope of the First Amendment. In the *Yates* case the Court offered the following line of demarcation between privileged and prohibited speech: "The essential distinction is that [for advocacy to be punishable] those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something. . . . [A]dvocacy must be of action and not merely [of] abstract doctrine." 354 U.S. 298, 324-25 (1957). Since it is now clear that motion pictures may claim the freedoms guaranteed by the First Amendment (see discussion note 18 *supra*), it is necessary to apply the above distinction of the *Yates* case to standards of motion picture censorship. Specifically with reference to the standards of the "cruel" and "inhuman," it may well be argued that unless a film urges and incites cruel and inhuman acts by the audience it may in no event be censored on these grounds

Some statutes⁸⁰ provide for censorship of a film if it depicts "criminality"⁸¹ or if it "incites to crime."⁸² It seems clear that these standards cannot be upheld under the Constitution. In *Winters v. New York*,⁸³ the Supreme Court struck down as vague and indefinite a New York statute which made it an offense to publish or distribute publications principally made up of criminal news, police reports, accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime. The New York Court of Appeals had previously construed the statute as prohibiting only articles which incited violent or depraved crimes.⁸⁴

It may well be if a motion picture is found as a matter of fact to incite its audience to crime and criminality, its producer and exhibitor can constitutionally be punished for its exhibition. This would amount to advocacy "which is directed to stirring people to action" and therefore punishable under the ruling of *Yates v. United States*.⁸⁵ However, such subsequent punishment must be clearly distinguished from prior restraint of a film under the necessarily vague standard of "inciting to crime."⁸⁶

Those film censorship statutes which are couched in such obviously vague terms as prohibiting the showing of films having a "harmful influence upon

without violating the First Amendment. Moreover, since in order to justify censorship of speech the possible substantive evil must be one that the legislature has a right to prevent, there may be no censorship of films which depict acts of cruelty or inhumanity which are not crimes, and which the legislature could not properly make criminal. Thus, acts of psychological cruelty could not in most instances be censored even if the standard were not regarded as unduly vague, and even if the presentation were such as to amount to an inciting of the audience to perform such acts of cruelty.

⁸⁰ It has been held that statutory language which permits censorship of the immoral and that which tends to corrupt morals relates exclusively to standards of sexual morality and not to films dealing with criminality. *Broadway Angels v. Wilson*, 282 App.Div. 643, 125 N.Y.S.2d 546 (1953). For an early case contra, see *Fox Film Corp. v. Collins*, 236 Ill.App. 281 (1925).

⁸¹ E.g., Chicago Mun. Code, c. 155-4.

⁸² E.g., Maryland L. (1922) c. 390.

⁸³ 333 U.S. 507 (1948).

⁸⁴ See cases cited in 294 N.Y. 545, 63 N.E.2d 98 (1945).

⁸⁵ The case of *United Artists Corporation v. Maryland State Board of Censors*, 210 Md. 586, 124 A.2d 292 (1956), points up the distinction between mere teaching and advocacy. In that case, the Maryland Board of Censors had found the film *The Man with the Golden Arm* unacceptable under the Maryland censorship laws in that it "advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs." The particular passage which was found objectionable showed one of the characters in the film taking a narcotic. The actual injection was not shown, but the viewer could see the needle being removed from his arm. The Chairman of the State Board of Censors informed the court that the Board had ordered the elimination of the scene on the grounds that it "teaches" the use of, or the methods of use of, narcotics or habit-forming drugs. He admitted that the Board did not consider whether the scene "advocates" such use. Notwithstanding the use of the disjunctive "advocates or teaches" the court construed the statute to mean "advocacy and teaching with the purpose of inducing or encouraging." (Emphasis added.) The court then concluded that the film did not advocate use of narcotics. The court declined to decide whether the statute would be constitutional if it prohibited mere teaching without accompanying advocacy.

⁸⁶ See *Near v. Minnesota*, 283 U.S. 697 (1931).

the public"⁸⁷ or those which are "inimical to the public welfare"⁸⁸ would seem to constitute clear violations of the Fourteenth Amendment. Such loose standards are particularly dangerous in that they permit a censorship board to impose their own standards of political⁸⁹ or racial⁹⁰ orthodoxy upon a community or state.

In light of the foregoing discussion, the conclusion seems almost inevitable that any censorship based upon grounds other than the "obscene" would be held unconstitutional under the First and Fourteenth Amendments.⁹¹ Censorship under the banner of obscenity, however, presents a more difficult problem. In the *Burstyn* case, the Supreme Court expressly reserved the question as to "whether a State may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."⁹² It is in this area that the legal battle lines are forming, looking toward a Supreme Court opinion which will either deal a mortal blow to all motion picture censorship, or, in the alternative, permanently legitimize the censor in the limited but important area of the "obscene."

The prospect of a definitive Supreme Court decision as to motion picture censorship of the "obscene" has stimulated a movement in those states currently maintaining censorship under that standard to limit the scope of their obscenity

⁸⁷ E.g., Spokane City Ordinances #C2095, §3.

⁸⁸ E.g., Memphis City Ordinances, c. 33, §945.

⁸⁹ See *United States v. Motion Picture Film "The Spirit of '76,"* 252 Fed. 946 (S.D.Cal., 1917).

⁹⁰ Memphis City Ordinances, c. 33, §944 provides that the Board of Censors may declare unlawful the exhibition of any motion picture found to be "inimical to the public safety, health, morals, or welfare. . . ." Pursuant thereto, the Memphis censors have not hesitated to proscribe motion pictures which, in their view, presented unacceptable relationships between Negroes and whites. Thus, most recently the motion picture *Island in the Sun* was banned by the Memphis censors for the reason that it was "inflammatory, too frank a depiction of miscegenation, offensive to moral standards, and no good for either white or Negro." *Variety* 8 (July 10, 1957). See *United Artists Corp. v. Board of Censors*, 189 Tenn. 397, 225 S.W.2d 550 (1949), cert. denied 339 U.S. 952 (1950). However, other southern communities with motion picture censorship boards have approved the showing of *Island in the Sun*. For example, the Fort Worth board did so, notwithstanding the provision in their enabling ordinance which permits censorship of that which tends to promote "racial or sectional prejudices." In fact, the Fort Worth board has never rejected a film on racial grounds.

⁹¹ See e.g., *Excelsior Pictures Corp. v. Regents of the University of the State of New York*, 3 N.Y.2d 237, 144 N.E.2d 31 (1957). Moreover, although in the past it was quite common for some motion pictures to be censored for their political content on the professed grounds of obscenity (e.g., *Spain in Flames* and *Professor Mamlock*,—Ernst and Lindey, *The Censor Marches On* 265 [1940]), it is now clear that legally the "immoral," "indecent" or "obscene" must refer to sexual content. E.g., *Schuman v. Pickert*, 277 Mich. 225, 269 N.W. 152 (1936). Nevertheless, some censorship boards have not as yet recognized this distinction. Thus, the author was informed in an interview with the Chairman of the Fort Worth Censorship Board that, in interpreting its statutory mandate to censor that which is "indecent or injurious to the morals of the citizens," the board regards morals as applying to nonsexual as well as sexual matters.

⁹² 343 U.S. 495, 506 (1952).

statutes in an attempt to strengthen them for the crucial constitutional test. Recent developments in New York provide an excellent example of this trend. Following the *Commercial Pictures* decision in the United States Supreme Court, the New York legislature amended its censorship law so as to provide somewhat more precise definitions of the terms "immoral" and "of such character that its exhibition would tend to corrupt morals."⁹³ Since this amendment, the New York courts have avoided ruling on the constitutionality of motion picture censorship by adopting a construction of the statute sufficiently narrow as to render it inapplicable to the fact situations with which they have been confronted. Thus in *Capitol Enterprises v. Regents*,⁹⁴ the court overruled the Regents' determination that the motion picture *Mom and Dad* was obscene and indecent.⁹⁵ The court found that the film contained a sequence, comprising only a small part of a long narrative film, which was a biological demonstration, scientific in level and tone, portraying human birth under restrained and controlled conditions. Leaving open the constitutional issue, the court stated:

If the words "obscene" or "indecent" can serve at all as constitutionally valid standards for prior restraint, the words must be given a narrow and restricted interpretation and, so interpreted, the words are clearly not applicable to the film before us.⁹⁶

The full extent of the change in judicial attitude toward censorship in New York became apparent in *Excelsior Pictures Corp. v. Regents*.⁹⁷ This case involved the film *Garden of Eden* which depicted the activities of a nudist group in a secluded private camp. The opinion of the Appellate Division⁹⁸ (rendered before the United States Supreme Court decision in the *Roth* case) found the film unobjectionable since there was no full exposure of any adult nude body. The court thus approved the film and yet expressly declined to rule the entire statute unconstitutional "in view of the decisions of the Court of Appeals in this area."⁹⁹ The Court of Appeals thereafter affirmed the Appellate Division but again without ruling the statute unconstitutional. In its opinion (rendered after the *Roth* decision) the Court of Appeals noted

⁹³ "For the purpose of Section 122 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." N.Y. Education Law (McKinney, 1953) §122-a 1.

⁹⁴ 1 App.Div.2d 990, 149 N.Y.S.2d 920 (1956).

⁹⁵ Cf. *Hallmark Productions v. Mosley*, 190 F.2d 904 (C.A.8th, 1951), upholding censorship of the film *Mom and Dad*.

⁹⁶ 1 App.Div.2d 990, 991, 149 N.Y.S.2d 920, 922 (1956).

⁹⁷ 3 N.Y.2d 237, 144 N.E.2d 31 (1957).

⁹⁸ 2 App.Div.2d 941, 156 N.Y.S.2d 800 (1956).

⁹⁹ Presiding Justice Foster in a concurring opinion expressed the opinion that the New York statute is a "dead letter."

that the New York censors had found the film to be "indecent" but not "obscene." The court felt, in view of the *Roth* decision and the previous motion picture decisions by the United States Supreme Court, that the term "indecent" was "too broad and vague to make a valid censorship standard." The court went on to say:

Since the Constitution forbids any prior restraint of a motion picture which is not obscene and since this film has not been found to be obscene or rejected because of obscenity and since it is not obscene by any standard we ever heard of, we could end this opinion right here. Nudity in itself and without lewdness or dirtiness is not obscenity in law or in common sense.¹⁰⁰

Most recently, in *Kingsley International Pictures Corp. v. Regents*,¹⁰¹ the Appellate Division ruled upon that portion of the amended New York censorship statute which prohibits the presentation of acts of sexual immorality as "desirable, acceptable or proper patterns of behavior."¹⁰² In this case the Regents had condemned the film *Lady Chatterley's Lover* on the grounds that it presented adultery "as a desirable, acceptable and proper pattern of behavior." The court held that such a standard was not permissible under the United States Constitution since

a statute which leaves any field open to the opinion, discretion or individual point of view of a censor in banning a moving picture violates the Fourteenth Amendment. If any field of prior restraint is left open it would seem clear that the Supreme Court decisions forbid a statute as broad as the one under consideration.¹⁰³

The court then concluded that the film was not obscene as that term has been judicially defined. It seems clear, then, that the New York courts, for the present at least,¹⁰⁴ are determined to construe statutes purporting to censor the obscene in the narrowest possible manner, thus providing the maximum

¹⁰⁰ 3 N.Y.2d 237, 242, 141 N.E.2d 31, 34 (1957).

¹⁰¹ 4 App.Div.2d 348, 165 N.Y.S.2d 681 (1957).

¹⁰² *Id.*, at 350 and 683.

¹⁰³ 4 App.Div.2d 348, 350, 165 N.Y.S.2d 681, 683 (1957).

¹⁰⁴ Since this article was written, the New York Court of Appeals in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 4 N.Y.2d 349, 175 N.Y.S.2d 39 (1958), reversed the Appellate Division and upheld the censorship of *Lady Chatterley's Lover*. The Court of Appeals tacitly acknowledged that the film was not obscene, but nevertheless held it properly subject to censorship because of its "corrosive effect upon the public sense of sexual morality." The court argued that to limit the constitutional right of censorship to that which is obscene "is to extend an invitation to corrupt the public morals by methods of presentation which craft will insure do not fall squarely within the definition of that term." Thus, the New York court (with three separate and emphatic dissents) now relies upon the doubtful thesis that not only obscene, but even non-obscene material may be immune from the guarantees of the First and Fourteenth Amendments provided such non-obscene material suggests or recommends a change in currently accepted moral standards. Under this reasoning a serious sociological study of the morals of other communities, if presented in motion picture form, might be subjected to censorship. The arguments presented elsewhere in this article against constitutional immunity for the obscene, as promulgated in *United States v. Roth*, are a fortiori applicable against the wider immunity claimed by the New York Court of Appeals in the *Kingsley* opinion.

possibility of an eventual Supreme Court decision favorable to at least limited censorship of the obscene.¹⁰⁵

The recent decision of the Maryland Court of Appeals in *Maryland State Board of Censors v. Times Film Corporation*,¹⁰⁶ indicates the presence of a similar trend in that state. In that case, the court reversed the findings of the Board of Censors, holding that a film depicting the life of a tribe of Brazilian Indians was not obscene or pornographic, even though it contained scenes showing the Indians entirely unclothed. This holding was expressly premised upon the court's finding that "[n]one of the scenes portray[ed] any action which is even suggestive of sexual activity."¹⁰⁷ The court dismissed the constitutional problem with the following dictum:

We assume, without deciding, that prior restraint of motion pictures is constitutional and that the Maryland statute is aimed at an evil grave, imminent and pervasive enough to justify whatever invasions it makes of rights protected against State action by the First and Fourteenth Amendments, and that it is not so vague that it is without sufficiently definite standards, although such an assumption may be unwarranted, if not legally naive.¹⁰⁸

V

In assessing the probabilities with regard to an eventual determination as to the constitutionality of motion picture censorship under an obscenity standard, the problem of the relationship between obscenity and the guarantees of the First and Fourteenth Amendments is of utmost importance. Until recently, opponents of censorship had argued that these guarantees immunize the obscene no less than other forms of expression. This position was most persuasively expressed by Judge Bok in *Pennsylvania v. Gordon*,¹⁰⁹ where the court held that the Constitution permits suppression of the obscene

only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question. . . . The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt.¹¹⁰

Application of the "clear and present danger" test was likewise suggested by Judge Frank in his concurring opinion in *United States v. Roth*.¹¹¹ However,

¹⁰⁵ In accord with this restricted view, the New York Division of Motion Pictures for the first time recently passed a nudist film entitled *Elysia*. The New York censors concluded that they had no choice but to approve the film in view of the Court of Appeals' decision in the *Excelsior Pictures* case.

¹⁰⁶ 212 Md. 454, 129 A.2d 833 (1957).

¹⁰⁷ See also *American Museum of Natural History v. Keenan*, 20 N.J. Super. 111, 89 A.2d 98 (1952).

¹⁰⁸ 212 Md. 454, 457, 129 A.2d 833, 835 (1957).

¹⁰⁹ 66 D. and C. 101 (Pa. C. P., 1949).

¹¹⁰ *Id.*, at 156. In affirming this decision, the Pennsylvania Supreme Court expressly declined to approve the "clear and present danger" test as applied to obscene literature. See 166 Pa. Sup. 120, 70 A.2d 389 (1950), Reporter's Note.

¹¹¹ 237 F.2d 796, 801 (C.A.2d, 1956), *aff'd* 354 U.S. 476 (1957).

since the Supreme Court's modification of this test in the *Dennis* case was enunciated after the *Gordon* case, Judge Frank felt it necessary to modify Judge Bok's position. Therefore, instead of requiring a causal connection "beyond a reasonable doubt," Judge Frank stressed "the element of probability in speaking of a 'clear danger.'"¹¹² Furthermore, Judge Frank suggested that "the danger need not be that of probably inducing behavior which has already been made criminal at common law or by statute, but rather of probably inducing any seriously anti-social conduct."¹¹³

In *Commercial Pictures Corp. v. Regents*,¹¹⁴ the New York Court of Appeals had attempted to establish that the clear and present danger test permitted censorship of a motion picture found to be immoral and tending to corrupt morals. The New York court argued that the picture in question pandered "to base human emotions, [and] is a breeding ground for sensuality, depravity, licentiousness and sexual immorality" and concluded that "these vices represent a 'clear and present danger' to the body social." However, except by implication, the court did not contend that anti-social conduct would result from viewing the film. As pointed out above,¹¹⁵ the grounds upon which this decision was subsequently reversed by the Supreme Court were those of vagueness and indefiniteness in violation of due process. The Court thus avoided the necessity of determining whether the "clear and present danger" test was applicable to such a statute, and, if so, whether such a formulation as that adopted by the New York courts met its requirements.

¹¹² Id., at 826.

¹¹³ Id., at 826. It should be observed that this position has much to commend itself. Unless there is some probability that an obscene motion picture will result in serious anti-social conduct as distinguished from impure or lustful thoughts, the rationale of the First Amendment would seem to prohibit governmental intervention which suppresses such expression. Certainly, it is a basic tenet of our form of government that government shall not control thoughts, and that the best test of truth is the power of the thought to get itself accepted in the competition of the market. The implications of thought control, such as are inherent in censorship of the obscene, were well put by Judge Frank: "If the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds? And even if we confine attention to official censorship of publications tending to stimulate sexual thoughts, it should be asked why, at any moment, that censorship cannot be extended to advertisements and true reports or photographs, in our daily press, which, fully as much, may stimulate such thoughts?" Id., at 805. Nevertheless, most motion picture censorship boards do not observe in practice the distinction between films which merely result in sexual *thoughts*, and those which are likely to produce anti-social conduct. Interview with Chairman of Fort Worth Censorship Board, November, 1957. However, the Director of the Division of Motion Pictures for the State of New York has indicated in an interview that he now accepts this distinction as a valid one. Moreover, Judge Frank has suggested that "[f]reedom to speak publicly and to publish has, as its inevitable and important correlative, the private rights to hear, to read, and to think and to feel about what one hears and reads. The First Amendment protects those private rights of hearers and readers." 237 F.2d 796, 808 (C.A.2d, 1956).

¹¹⁴ 305 N.Y. 336, 113 N.E.2d 502 (1953).

¹¹⁵ See discussion at 634 *supra*.

In the *Roth* case, however, the problem was squarely presented to the Supreme Court. The majority held "that obscenity is not within the area of constitutionally protected speech or press"¹¹⁶ and consequently concluded that the "clear and present danger" test was inapplicable to obscene communications. Justices Douglas and Black, in dissent, reaffirmed their position that censorship of the obscene is constitutional only where it is shown to relate to anti-social conduct. Justice Harlan, concurring in part,¹¹⁷ agreed with the dissenters that the words uttered must be likely to induce criminal or immoral sexual conduct, but concluded that the judgment of the California legislature on this issue was not irrational even if perhaps incorrect. By reason of the majority view in the *Roth* case it would appear that the doctrine of "clear and present danger," and indeed the First Amendment itself, will not be important factors in the foreseeable future in determining the validity of obscenity censorship. This is not to say, however, that the censors are free of legal restraint in the area of the obscene. The nature of this restraint is discussed below.¹¹⁸

In the *Roth* case the Supreme Court ruled that obscenity was outside the scope of free speech protection on the grounds that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."¹¹⁹ However, as pointed out by Justices Harlan and Douglas, this conclusion, even if historically sound, does not lay to rest constitutional considerations. Justice Harlan stated:

This sweeping formula appears to me to beg the very question before us. The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press,"

¹¹⁶ 354 U.S. 476, 485 (1957). Some years prior to the *Roth* decision, in *Doubleday and Co. v. New York*, 335 U.S. 848 (1948), the Court was squarely faced with this issue, and divided equally (four to four) in affirming a conviction for violation of a New York obscenity act. In a number of other cases, the Supreme Court had indicated, by way of dicta, that obscenity was outside the scope of the First Amendment. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), for instance, the Court stated: "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words. . . ."

¹¹⁷ Justice Harlan dissented in the *Roth* case but concurred in the companion case of *Alberts v. California*, 354 U.S. 476, 496 (1957).

¹¹⁸ See discussion at 646 *infra*.

¹¹⁹ *Alberts v. California*, 354 U.S. 476, 484 (1957). In the recent case of *State of California v. Ferlinghetti*, #B27585 (Munic. Ct., San Francisco, 1957), Judge Horn held that the book *Howl* was not obscene under the California Penal Code. In an extended opinion, Judge Horn applied the "clear and present danger" test and distinguished the *Roth* decision on the ground that it held that a work is obscene only if it does not have "the slightest redeeming social importance." The court then found that the book *Howl* was not without the slightest redeeming social importance and therefore subject to the protection of the First and Fourteenth Amendments. It may well be that other courts, including the United States Supreme Court, will follow this line of reasoning and thus limit the *Roth* decision to so-called hard-core pornography which may be said to be without "the slightest redeeming social importance."

which is as distinct, recognizable, and classifiable as poison ivy is among other plants. . . . But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards.¹²⁰

Justice Douglas, in dissent, expressed the same problem with this pithy statement:

This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?¹²¹

As Justices Harlan and Douglas suggest, the *Roth* decision has not eliminated the constitutional issue in the realm of censorship, but rather has transformed that issue into a quest for a definition of obscenity. The majority in *Roth* are careful to state that "sex and obscenity are not synonymous. . . . Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."¹²² The Court indicated that the treatment of non-obscene sex is subject to the protection of the First Amendment: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment."¹²³ In view of this dichotomy between obscene and non-obscene treatment of sex, the Court recognized that

It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.¹²⁴

Since motion picture censorship in areas other than sex would now appear to be constitutionally prohibited and practically dormant, and since sex censorship must be limited to the obscene, it follows that the remaining constitutional problem in motion picture censorship centers around the definition of obscenity. There is, of course, a serious question as to whether the concept of obscenity is capable of definition. Professor Chafee has persuasively argued that obscenity cannot be defined since, while the law deals in logic, sex contains a large element of irrationality.¹²⁵ He further suggests that, while the law of obscenity undertakes to protect a common standard in a community, there is, in fact, no such common standard since every community is divided into

¹²⁰ 354 U.S. 476, 497 (1957).

¹²¹ *Id.*, at 509.

¹²² *Id.*, at 487.

¹²³ *Id.*, at 488, quoting from *Thornhill v. Alabama*, 310 U.S. 88, 101-2 (1940).

¹²⁴ 354 U.S. 476, 488 (1957).

¹²⁵ Chafee, *Government and Mass Communications* 209 (1947).

groups that have different standards of decency. Moreover, Chafee points to the complexity of the concept of obscenity arising from its inclusion of three different factors: (1) offensiveness, (2) an ideological element that seeks to protect moral standards from criticism, and (3) stimulation of sexual impulses and impure thoughts that may lead to immoral conduct. However, though there is much to be said for the position taken by Chafee and others¹²⁶ that "obscenity" is incapable of definition, in view of the *Roth* decision, a legal (if not a colloquial) definition of "obscenity" becomes a necessity, since otherwise censors may with impunity invade the constitutionally protected area of sex expression under the guise of censoring the obscene. But if *some* definition of the obscene is a legal necessity, that definition to which the courts shall adhere remains somewhat of an open question. It is in this area that perhaps the next, but not the final, step in the quest for constitutional prohibition of motion picture censorship may be taken.

At this point it may be well to review the various definitions of "obscenity" which have through the years attained judicial sanction. In 1863, in the case of *Regina v. Hicklin*,¹²⁷ Sir Alexander Cockburn, of the Queen's Bench, formulated the first generally accepted judicial definition of "obscenity." This definition, the dead hand of which is still felt in some degree, was stated by a federal court to be

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 may fall.¹²⁸

This test was adopted by American courts in 1879 and was generally followed thereafter for a period of some fifty-four years. However, the *Hicklin* doctrine received its first authoritative challenge in 1913 when Learned Hand, then a Federal District Judge, in the case of *United States v. Kennerly*,¹²⁹ felt obliged to follow the *Hicklin* rule, but nevertheless planted the seed for its ultimate demise. Judge Hand stated:

. . . the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time,

. . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are *even today* so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the

¹²⁶ " . . . finding a yardstick for proving a serious work indecent is as difficult as weighing a pound of waltzing mice." 48 Time 25 (Dec. 9, 1946).

¹²⁷ [1868] 3 Q.B. 360.

¹²⁸ *United States v. Bennet*, 24 Fed.Cas. 1093, 1104, No. 14,571 (S.D.N.Y., 1879).

¹²⁹ 209 Fed. 119 (S.D.N.Y., 1913).

supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature.¹³⁰

It was this indictment of the *Hicklin* doctrine—the fact that it subjected mature adults to a standard of what might deprave and corrupt the weaker and more immature elements of the community—that was ultimately to prove unacceptable to our courts. Judge Hand further suggested as a definition of “obscene” that it “be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now. . . .”¹³¹

The *Hicklin* definition of obscenity was finally abandoned by the federal courts with the rendering by Judge Woolsey of his famous opinion in *United States v. One Book Called “Ulysses.”*¹³² Following Learned Hand’s dictum in the *Kennerly* opinion, Judge Woolsey stated:

The meaning of the word “obscene” as legally defined by the courts is: Tending to stir the sex impulses or to lead to sexually impure and lustful thoughts.

. . . Whether a particular book would tend to excite such impulses and thoughts must be tested by the court’s opinion as to its effect on a person with average sex instincts—what the French would call *l’homme moyen sensuel*—who plays, in this branch of legal inquiry, the same rule of hypothetical reagent as does the “reasonable man” in the law of torts and “the man learned in the art” on questions of invention in patent law. . . . It is only with the normal person that the law is concerned.¹³³

Another important modification of the judicial concept of obscenity appeared in the opinion of the Court of Appeals in affirming Judge Woolsey’s decision.¹³⁴ Augustus Hand, speaking for the court, stated:

¹³⁰ *Id.*, at 120–21. This same position was eloquently expressed recently by the well known author, critic and English professor, Mark Schorer, who, in testifying on behalf of the publication *Howl* (as well as a companion work) in *California v. Ferlinghetti*, stated: “Both works are written in angry protest, and to that end the style employed is at once colloquial and denunciatory. The hortatory style is entirely appropriate to the serious nature of the subjects. That the style should encompass the rhythms and diction of ordinary speech is essential to the artistic integrity of these works. Had the authors presented their subjects and points of view in other and less appropriate language, they would have felt their artistic integrity betrayed.”

¹³¹ *Id.*, at 121.

¹³² 5 F.Supp. 182 (S.D.N.Y., 1933).

¹³³ *Id.*, at 184. Judge Woolsey also stated that “*Ulysses*” acted as an emetic rather than as an aphrodisiac. The implication was that if the work had been found to be an aphrodisiac it might have been found obscene. This distinction has been criticized as follows: “Is not the most precious quality of all great artists the power to arouse and stimulate, to quicken an intense emotional experience? Shakespeare’s *Venus and Adonis*, Elizabeth Barrett Browning’s *Sonnets from the Portuguese*, the best of Keats and Shelley are not emetics; . . . Titian’s *Nudes*, Maillol’s rich sculptures, Wagner’s *Tristan* music are, in the truest sense of the word, aphrodisiacs.” Ernst and Lindey, *op. cit. supra* note 91, at 180. Also, on the issue of censoring the aphrodisiacal, Judge Frank has stated: “Suppose it argued that whatever excites sexual longings might *possibly* produce sexual misconduct. That cannot suffice: Notoriously, perfumes sometimes act as aphrodisiacs, yet no one will suggest that therefore Congress may constitutionally legislate punishment for mailing perfumes.” Frank, J., in *United States v. Roth*, 237 F.2d 796, 812 (C.A.2d, 1956).

¹³⁴ 72 F.2d 705 (C.A.2d, 1934).

[W]e believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence, for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.¹³⁵

Thus, what might be called the *Ulysses* standard of obscenity modified the *Hicklin* standard in two important aspects. First, it made the sexual reaction of the average mature adult determinative, rather than the reaction of children or of abnormal adults.¹³⁶ Second, it looked to the dominant effect of the total work, rather than to the effect of selected passages. This, of course, represented an advancement over the *Hicklin* approach. However, even under the *Ulysses* formulation the judicial inquiry was still directed to whether a work tends "to stir the sex impulses or to lead to sexually impure and lustful thoughts." Thus, within the framework of the *Ulysses* doctrine, the trial judge in the *Roth* case instructed the jury thusly:

The words "obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. [Emphasis added.]

Similarly, in the companion case of *Alberts v. California*,¹³⁷ the trial judge applied the test of whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires." Therefore, although *Ulysses* represented some modification of *Hicklin*, it still permitted the test of obscenity to turn on whether the work had a tendency to arouse lustful or lascivious thoughts.

The American Law Institute, in an attempts to shift the emphasis away from the subjective reaction of the reader or viewer (even of *l'homme moyen sensuel*), has suggested that the test of obscenity should turn upon the nature of the work itself, rather than upon the audience reaction. Therefore, the Model Penal Code provides that:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion and if it goes substantially beyond customary limits of candor in description or representation of such matters.¹³⁸

¹³⁵ *Id.*, at 708.

¹³⁶ Unfortunately, however, motion picture censorship boards do not always recognize this principle. Thus, in *Times Film Corp. v. Chicago*, during the trial before a Master, the following colloquy ensued: "Q. So that any picture, which may affect someone who is very weak, someone who does not have a great deal of resistance to sexual impulses, then you think that that should be cut out? A. Yes, if it is going to affect, it should be cut out. Q. Did it arouse your sexual instincts, Mrs. O'Hallaren? A. No. But after all, this is my work, and I see it every day; I am used to this, but three years ago, before I was a censor . . . Q. It might have . . . A. . . . it might have bothered me." Transcript of Record at 142, 244 F.2d 432 (C.A.7th, 1957).

¹³⁷ 354 U.S. 476 (1957), *aff'g* 138 Cal.App.2d 909, 292 P.2d 90 (1956).

¹³⁸ §207.10(2) (tent. draft no. 6, 1957).

Apparently it is thought that a determination of the "predominant appeal" of a work will avoid the necessity of weighing elusive subjective reactions.¹³⁹ Yet, it is difficult to understand how "predominant appeal" can be determined without some reference, explicit or implicit, to an individual's subjective reactions. Understandably then, the Supreme Court in the *Roth* case concluded that there is "no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code."¹⁴⁰

It thus appears that *some* definition of obscenity has, in view of *Roth*, become a constitutional necessity (so that the non-obscene may claim the protection of the First Amendment) and that the existing definition is tied to the subjective reactions of *l'homme moyen sensuel*—the reasonably mature adult. The Court in *Roth* recognized that this determination is a difficult one, and "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls. . . ."¹⁴¹ However, the Court concluded that this is not sufficient reason to find a violation of the requirements of due process by reason of a failure to provide reasonably ascertainable standards of guilt.

This court . . . has consistently held that lack of precision is not itself offensive to the requirements of due process. These words applied according to the proper standard for judging obscenity . . . give adequate warning of the conduct proscribed. . . .¹⁴²

It would seem, however, that a serious and underlying ambiguity, far more pervasive than mere "lack of precision," is inherent in the *Roth* Court's treatment of obscenity. The majority opinion states:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties. . . .¹⁴³

The Court then excludes obscenity from such guaranties because it is "utterly without redeeming social importance." This leaves to the motion picture

¹³⁹ "We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehaviour raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehaviour follows from contact with obscenity. Evidence of such consequences is lacking; if actual proof of tendency to corrupt were required, prosecutors would have a difficult task. On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters. Psychiatrists and anthropologists see the ordinary person in our society as caught between normal sex drives and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behaviour. The principal objective of Section 207.10 is to prevent commercial exploitation of this psychosexual penchant." Model Penal Code §207.10, Comment 1 (tent. draft no. 6, 1957).

¹⁴⁰ 354 U.S. 476, 487 n. 20 (1957).

¹⁴¹ *Id.*, at 491.

¹⁴² *Ibid.* See *United States v. Rehbuhn*, 109 F.2d 512 (C.A. 2d, 1940).

¹⁴³ *United States v. Roth*, 354 U.S. 476, 484 (1957).

censor the nice task of determining whether a given film is "utterly without redeeming social importance."¹⁴⁴ Nor is the censor on any more solid ground if he resorts to the standard of whether the predominant appeal of the film "is to prurient interest."

Even if the standards invoked in the *Roth* opinion are not so vague as to violate due process (and it is difficult to accept the Court's decision that there is not such vagueness), they are sufficiently vague as to render highly questionable their application by censorship boards. Even if we accept the *Roth* decision that obscenity is outside the protection of the First and Fourteenth Amendments, there is still a constitutional question as to whether prior restraints may be invoked in an area where the dividing line between the constitutionally protected and unprotected is most difficult.¹⁴⁵ It must be remembered that neither the *Roth* case nor the companion *Alberts* case involved the issue of prior restraint. In each case the defendants were convicted after the fact at jury trials in which all of the safeguards inherent in criminal proceedings were observed. The importance of this distinction has been pointed out as follows:

Under a system of prior restraint, the issue of whether a communication is to be suppressed or not is determined by an administrative rather than a criminal procedure. This means that the procedural protections built around the criminal prosecution—many of which are constitutional guarantees—are not applicable to a prior restraint. The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, the immeasurably tighter and more technical procedure—all these are not on the side of free expression when its fate is decided.¹⁴⁶

It is therefore suggested that, even if the standard for determining obscenity is sufficiently definite for a subsequent punishment determination based upon the above procedural safeguards of a jury trial, it is nevertheless much too vague to permit of prior restraints by censorship boards where procedures are questionable.¹⁴⁷ The doctrine of prior restraint was invoked by the Court

¹⁴⁴ In *United States v. Alpers*, 338 U.S. 680, 686-87 (1950), Justice Black, in dissent, states: "People of varied temperaments and beliefs have always differed among themselves concerning what is 'indecent.' Sculpture, paintings and literature, ranked among the classics by some, deeply offend the religious and moral sensibilities of others. And those which offend, however priceless or irreplaceable, have often been destroyed by honest zealots convinced that such destruction was necessary to preserve morality as they saw it."

¹⁴⁵ See *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁴⁶ Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Prob.* 648, 657 (1955). See also dissent by Brennan, J., in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 447 (1957).

¹⁴⁷ In the important case of *United States v. Kennerly*, 209 Fed. 119 (S.D.N.Y., 1913), Learned Hand expressed the opinion that any danger inherent in the ambiguity of the term obscenity was minimized by a jury determination in each case. He thus stated: "A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." *Id.*, at 121.

in the *Burstyn* opinion.¹⁴⁸ Furthermore, in the *Times Film Corporation* case the Supreme Court, in invalidating the action of the Chicago censor, cited the *Alberts* case where subsequent punishment, as distinguished from prior restraint, had been upheld. From this, it seems entirely possible that when the Court renders an opinion in a motion picture censorship case involving the issue of obscenity, the *Roth* and *Alberts* cases will be distinguished as subsequent punishment decisions. Thus, motion picture censorship may be rejected as an invalid prior restraint in that an administrative tribunal is not equipped to make the decision of whether the motion picture content is or is not constitutionally protected.¹⁴⁹

VI

However, if the Supreme Court declines to invalidate obscenity motion picture censorship per se, then, in order to assure minimal conformity with constitutional requirements, it appears necessary to develop and clarify standards for determining the obscene which are capable of being recognized and observed by censorship boards. As long as the only standards for determining the obscene are those vague standards suggested in the *Roth* opinion, there will be, in effect, no standards at all except in the most extreme cases. There is, of course, a danger than any definition which is too specific will require an automatic determination of obscenity in some cases where a loose definition would permit of a non-obscene interpretation. Judge Bok, in his famous opinion in *Pennsylvania v. Gordon*,¹⁵⁰ observed, "as long as censorship is considered necessary, it is as impossible as it is inadvisable to find a self-executing formula." Other commentators have taken a similar position:

One thing is certain. Any attempt to legislate a detailed code would be disastrous. The vagueness of the statutory words is bad enough, but at least a measure of elasticity

¹⁴⁸ It has been suggested that censorship of motion pictures does not constitute a true prior restraint since punishment of a motion picture exhibitor occurs only after the exhibition of a censored motion picture. However, in *Near v. Minnesota*, 283 U.S. 697 (1931), where the Court first enunciated the full doctrine of prior restraint, the statute, found to be defective, did not even provide for prior approval of publication. Only after a person had published "malicious, scandalous and defamatory" matter could he be enjoined. Accordingly, it has been observed that, theoretically, "the statute could hardly be said to set up prior restraint." Nevertheless, the Court recognized that in practice "the system was bound to operate as a serious prior restraint. Punishment could be summarily dispensed by a single official, without jury trial or the other protections of criminal procedure. . . . Under such circumstances, any publisher seeking to avoid prison would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to sentence. The judge would, in effect, become a censor." Emerson, op. cit. supra note 146, at 654. Cf. Frankfurter's characterization of *Near v. Minnesota* in his opinion for the Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957).

¹⁴⁹ The dissenting opinions by Chief Justice Warren and Justices Douglas, Black and Brennan in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445, 446, 447 (1957), lend some substance to this hope. The dissenting opinions all stress the lack of procedural safeguards where the state invokes a prior restraint. (The *Kingsley* case involved an injunctive procedure against sale and distribution of certain booklets under N.Y. Code Crim. Pro. [McKinney, 1958] §22-a).

¹⁵⁰ 66 D. and C. 101, 151 (Pa.C.P., 1949).

exists which enables conscientious judges to interpret the law in the light of the times. A rigid set of rules would be infinitely worse because it would hamstring the courts and destroy the "changing content" of the statute so essential to its sane administration.¹⁵¹

One can agree that any arbitrary and limited self-executing formula for determining obscenity might do more harm than good. Nevertheless, the danger inherent in permitting every censorship board to make, in effect, its own determination of constitutional law (i.e., what is obscene and therefore not protected by the First Amendment), where such determination is made on the vague and subjective standards of the *Roth* case, is sufficiently great that some more definite, if not self-executing, formula is to be desired.

In an attempt to modify and reconcile the equally dangerous consequences of an overly vague and an overly precise judicial definition of obscenity, the following approach is suggested. It should be recognized first that censorship of motion pictures presents certain considerations not present in other forms of censorship.¹⁵² With respect to the "over-all impact" doctrine discussed above,¹⁵³ it is clear that the doctrine is most readily applicable in the case of motion pictures¹⁵⁴ in which, unlike in a book, it is physically impossible, generally, for the salacious minded to ignore the innocent portions of the work and concentrate exclusively on the prurient passages.¹⁵⁵ This element, plus the fact that the medium by its nature derives its impact primarily from the appearance and actions of people rather than, as in the case of a novel, from the thoughts of characters or the author's descriptive passages, makes it appropriate to invoke somewhat different standards in determining the obscenity

¹⁵¹ Ernst and Lindey, op. cit. supra note 91, at 260.

¹⁵² It has sometimes been suggested that, because of its greater vividness and impact, a motion picture should be subjected to more severe censorship standards than a book. See, e.g., Code of the Motion Picture Producers and Distributors of America, Inc., adopted June 13, 1934. However, most motion picture censors today take the view that the same standards applicable to books should be applied in determining obscenity of motion pictures. Interviews with the Director of the New York Division of Motion Pictures and the Chairman of the Maryland State Board of Motion Picture Censors, November, 1957.

¹⁵³ See discussion at 649 supra.

¹⁵⁴ Although the Director of the New York Division of Motion Pictures has, in an interview, indicated recognition of the "over-all impact" doctrine, and in accordance therewith no longer bans entire scenes from a motion picture, the New York censors nevertheless still delete specific footage contained in a questionable scene. The Chairman of the Maryland State Board of Motion Picture Censors has likewise acknowledged in an interview an obligation to conform with the "overall impact" test.

¹⁵⁵ Note, however, Model Penal Code §207.10, Comment 10: "However, 'consideration as a whole' does not mean that a grossly pornographic picture is exempt from criminal sanctions merely because it is sandwiched in between unobjectionable reproductions, that an excessively bawdy skit is immune because it constitutes only one scene in a musical revue, or that one obscene short story is saved by the propriety of the rest of the anthology. It does mean that a novel like 'Ulysses' could not be condemned on the basis of fifty pages of soliloquy and fantasy of one of its characters, even assuming these fifty pages standing alone would violate the law, since *this portion of the story is integral with the rest* and the total appeal of the work is not prurient."

of a film. If the appearance and actions of persons in "real life" are not censored, it is a curious sort of logic which permits these same appearances and actions to be censored when depicted upon the motion picture screen.¹⁵⁶ Thus it would be unthinkable that anyone could be arrested for referring in a conversation to facts relating to sexual affairs in which he or others may have engaged. Yet, these same facts, if related on the screen, have been the basis for censorship.¹⁵⁷ This suggests the first irreducible minimum prerequisite for motion picture censorship. Unless the conduct seen on the screen would, if seen in real life, constitute "indecent exposure," such conduct should not be censorable on the screen. Indecent exposure is capable of a relatively precise definition—the New York statute perhaps being typical:

A person who willfully and lewdly exposes his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another so to expose himself, is guilty of a misdemeanor.¹⁵⁸

Such a standard is capable of being understood by the most obtuse censor.¹⁵⁹ Furthermore, it would effectively immunize from censorship most adult dramas dealing with controversial themes.

However, it is important that the "indecent exposure" standard be recognized merely as the irreducible prerequisite and not as an automatic yardstick. That is, a motion picture should not necessarily be censored even if sexual organs are exposed—and even if the censor might consider such exposure vulgar or indecent—since it is established that nudity per se is not obscene.¹⁶⁰ In fact, the extent to which photographs of sexual organs may be exhibited without constituting obscenity was emphatically underscored by the United States Supreme

¹⁵⁶ This paradox is explored in Legman, *Love and Death: A Study in Censorship* (1949), in which the author points out that love, which is legal in fact, may, by reason of censorship, become illegal on paper, while murder, while illegal in fact, is not only legal on paper, but one of the most prevalent forms of publication.

¹⁵⁷ Transcript of Record at 167, *Times Film Corp. v. Chicago*, 244 F.2d 432 (C.A. 7th, 1957). However, the recent case of *One, Incorporated v. Olesen*, 355 U.S. 371 (1958), indicated that the Supreme Court may be inclined to find that mere discussion of sexual matters, even if of an abnormal variety, cannot be the basis of an obscenity finding. In this case the Court of Appeals for the Ninth Circuit had found an issue of the magazine "One" obscene and therefore non-mailable because of an article entitled "Sappho Remembered," the story of a young girl succumbing to an affair with a lesbian. In a per curiam memorandum decision reversing the Court of Appeals, the Supreme Court merely cited *Roth v. United States*, 354 U.S. 476 (1957). Cf. Model Penal Code §207.10, Comment 7 (tent. draft no. 6, 1957): "Advocacy of change in sexual mores in a manner not predominantly addressed to prurient interests, e.g., a novel presenting a sympathetic picture of lesbians, the Kinsey Reports on sex practices in our society, or the comments of The American Law Institute explaining the chapter on Sex Offenses, are not to be made criminal merely because they deal with the subject of sex."

¹⁵⁸ N.Y. Penal Law (McKinney, 1958) §1140.

¹⁵⁹ In *Times Film Corporation v. Chicago*, one of the members of the Chicago board of censors testified that she did not know the meaning of the word "pornographic." Transcript of Record at 113, 244 F.2d 432 (C.A.7th, 1957).

¹⁶⁰ *Parmelee v. United States*, 113 F.2d 729 (App.D.C., 1940).

Court in one of its few obscenity cases since the *Roth* decision. In *Sunshine Book Co. v. Summerfield*,¹⁶¹ the Court, in a per curiam memorandum decision, reversed the District of Columbia Court of Appeals which had found certain photographs in the magazine *Sunshine and Health* to be obscene. The Supreme Court gave no explanation of its decision other than a citation of the *Roth* case. This must be understood, however, as a determination that the photographs in question, at least within their context, did not have a predominant appeal to prurient interest. It is, then, instructive to note the content of the photographs which the Federal District Court had found,¹⁶² and the Court of Appeals had affirmed, to be obscene. Among the photographs thus held to be obscene were "a picture of a man on water skis, taken at some distance. His genitalia are clearly revealed, appearing in the center of the picture . . . a young girl . . . standing within short range of the camera, approximately some eight to ten feet, in a frontal view showing the clear detail of the pubic area . . . two girls [in] . . . a side view and the sunshine clearly shows the fine, soft texture of pubic hair of the adolescent girls. . . ." All of the foregoing photographs, plus a number of others, were found by the Supreme Court *not* to be obscene.¹⁶³

It is, then, suggested that only those motion pictures which exhibit sexual organs may even be candidates for censorship and, as to such films, censorship may be applied only where the censor is justified in concluding that the predominant appeal of the film taken as a whole appeals to prurient interest.¹⁶⁴ Certainly this approach still leaves open the possibility that some films will be unjustifiably suppressed. However, it at least has the merit of reducing the area of subjective discretion to the relatively limited class of films which exhibit nudity. In this area the Supreme Court decision in the *Sunshine Book* case suggests that the constitutionality of nudity censorship is narrowly circumscribed.

CONCLUSION

Since, as indicated above, reliable evidence is lacking that anti-social conduct is caused by motion pictures, it should follow that under the guaranties of the First and Fourteenth Amendments the content of motion pictures should be free from governmental regulation. In any event, even if subsequent punishment may be invoked, the prior restraint of censorship boards should be

¹⁶¹ 355 U.S. 372 (1958).

¹⁶² 128 F.Supp. 564, 570 (D.D.C., 1955).

¹⁶³ *Id.*, at 571.

¹⁶⁴ Since the case of *State v. Ferlinghetti*, the San Francisco Police Department has apparently adopted the more liberal view toward nudity suggested herein. Thus the San Francisco Police Department announced that it was decided to drop prosecution of the motion picture, *Karamoja*, since, although it involved nudity, it was a "documentary and anthropological study." A representative of the department further explained that "the shots involving nudity were isolated, and not aimed at inciting anti-social or immoral action. Anyway, if we moved against this picture we'd probably have to be on the alert for pictures of natives in the *National Geographic Magazine*." *San Francisco Examiner*, October 11, 1957.

abolished.¹⁶⁵ Only such an approach permits a full recognition of the libertarian concepts upon which our nation was founded and upon which our theory of democracy operates. Justice Brandeis, speaking of wire tapping, could as appropriately have been speaking of official motion picture censorship when he said:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹⁶⁶

The many cities which exercise no official motion picture censorship furnish ample evidence that community morals are not inextricably tied to this device for the curtailment of free expression. Indeed, some communities provide an example of a libertarian approach to content of motion pictures which might well be emulated. One such community has supplanted the official city censorship board with an unofficial group. This group, rather than censoring undesirable films, pursues a positive approach by encouraging attendance to worthwhile films.¹⁶⁷ Under such slogans as "Select the Best—Forget the Rest," attempts are made to stimulate interest in what may be considered worthwhile films by means of mailing lists, organized phone campaigns, and special screenings for selected high school representatives. Films are classified as "Adult," "Adult plus Mature Young People, 12-16," "Adult and Young People" and "Family," which classifications are published weekly. If any persons or groups disagree with the classifications, they are at liberty to publicize any contrary classification.

It would appear that official censorship directed only to children would be constitutional.¹⁶⁸ The censorship boards of Chicago and other cities have censored some films only with respect to juvenile attendance.¹⁶⁹ The author

¹⁶⁵ In distinguishing between prior restraint and subsequent punishment in the field of motion pictures, Justice Douglas has stated: "Censorship is hostile to the First Amendment. That does not mean that the citizen can with impunity say what he likes, print what he likes, produce on the stage what he likes, draw or photograph what he likes for public showing. He is under restraint, as we have seen. But those restraints are carefully restricted and narrowly drawn to fit precise evils. They too operate as restraints in the manner in which all law tends to become a deterrent. But being narrowly drawn and being enforced by separate unrelated trials, they do not become a system whereby an individual, a board, or a committee subtly enforces its own moral, political, or literary code on the community." Douglas, *The Right of the People* 72 (1958).

¹⁶⁶ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

¹⁶⁷ Interview with the Chairman of the Dallas Motion Picture Board of Review, November, 1957.

¹⁶⁸ See *Butler v. Michigan*, 352 U.S. 380 (1957).

¹⁶⁹ The Chairman of the Maryland State Board of Motion Picture Censors has proposed an amendment to the Maryland statute which would permit restricting certain motion pictures to adults and children sixteen years of age and over. The Chairman has been informed by the Attorney General of Maryland that the amendment would be constitutional.

has been informed that this method of censorship has worked in practice, and has not, as has sometimes been suggested, resulted in encouraging juvenile attendance to motion pictures labeled as "adult." The Dallas voluntary-positive approach is probably to be preferred over even this limited type of censorship. In any event, official censorship, if it has any place at all, should certainly be limited to juvenile audiences.

If, however, the courts continue to reflect the libertarian approach here suggested, then, at the very least, the concept of obscenity must be defined in a more limited manner. In this connection the "indecent exposure" approach, discussed above, would prove helpful. This, however, can be only an interim measure. Unhampered freedom of expression must eventually prevail.