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The Censorship of Moving Pictures: An Open Question

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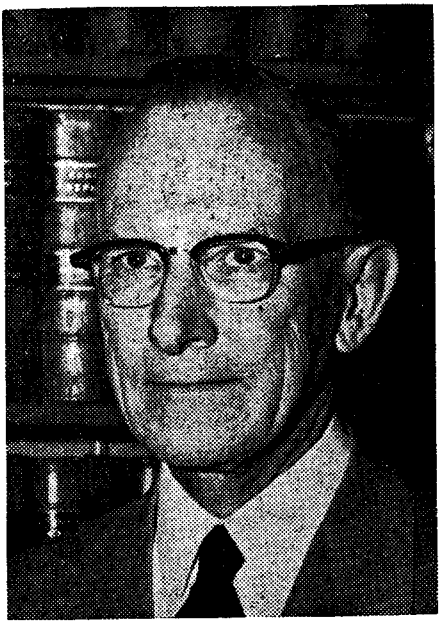

At the end of this academic year Professor J. Howard Toelle retires from the faculty of the Law School. Mr. Russell Smith, speaking at a luncheon in Mr. Toelle's honor, perhaps epitomized the thirty years of distinguished service which he has rendered to our Law School and to the legal profession in the simple phrase "orderly presentation of the law." No higher tribute can be earned by a man who makes legal education his life. Whether lecturing or writing in his field, Mr. Toelle is characteristically clear, orderly and forceful. Two generations of Montana lawyers have been benefited from his presentation of the law, not only as students, but as practitioners and judges as well. The salutory influence of his teaching and writing is woven into the fabric of Montana jurisprudence.

The Montana Law Review was conceived and inaugurated by Mr. Toelle in 1940. From that time to the present he has served in the official capacity of faculty adviser to the Review—but to the students responsible for its publication he has much more. They know him to be the motivating force behind its 17 volumes, the person who has not only formed its policies and assisted in the selection of its articles, but one who has made many and valuable contributions.

For all these many services, we say "THANK YOU."

NOTES

THE CENSORSHIP OF MOVING PICTURES: AN OPEN QUESTION

Today one of the most important media for the communication of ideas is the motion picture. While magazines, newspapers and the radio may devote more time and space to political and social subjects, the percentage of total film production dealing with these issues is steadily rising. Moreover, consideration of themes alone in determining the effect of films on the viewing public does not reflect adequately their influence. A film labeled "musical comedy", for example, may through its combination of character, plot and setting have a significant impact on audience attitudes, aspirations, and behavior. Customary content surveys do not adequately reflect the full impact of motion picture content on public opinion. In addition to the main feature, movie patrons see newsreels, documentaries,

travel films, and other short subjects. The main features, themselves, are not always in one content category alone.[1]

The significance of the motion picture as an organ of public opinion is due not only to the nature of movie content but also to the technological features of the medium. Dramatization through a unique combination of sight and sound makes the ideas presented by movies comprehensible to more of the audience than is the case in any other medium except television.[2] The focusing of an intense light on a screen, the dramatizing of fact and opinion, the semi-darkness of the room where distracting ideas and suggestions are eliminated, all contribute to the effectiveness of movies in shaping and changing attitudes.

A medium of such importance is naturally subject to considerable restraint. Organized interest groups, possessing potential power of boycott, can cause a producer to abandon certain stories, or make changes in screen plays. Another threat Hollywood feels from these groups is their political power to get restrictive legislation passed. Religious, social, professional, racial, national, and business groups actively apply such pressure.

A second factor limiting movie expression is the system of self-regulation embodied in the Motion Picture Production Code. About ninety-five per cent of all pictures released in the United States receive the approval of the Production Code Authority before release.[3]

As a result of these various nonlegal restraints, even the complete limitation of legal censorship would not result in the fullest development of the motion picture as a contributor to the formation of public opinion.

Under a Constitution which tries to minimize arbitrary restraint on speech and press, state and municipal censorship of motion pictures has occurred with almost no judicial control. Movies have been cut or banned by permanent censorship boards in advance of exhibition, removed from exhibition by police or licensing officials, and withdrawn under informal pressure from city officials. The argument for censorship is usually protection of community morality. But in fact, broad statutory language and limited judicial review have made possible the elimination of films on the basis of highly subjective views of morality or for reasons quite unrelated to moral standards.[4] Only recently has the United States Supreme Court begun to remedy this abuse.[5]

Montana apparently has no movie censorship problem, although under the present statutes, such a problem could possibly arise. A general statute[6] which prohibits the exhibition of indecent pictures would probably not be stretched to include movies. However, Revised Codes of Montana (1947), Section 94-3573 provides:

[1]Fiske & Handel, *Motion Picture Research: Content and Audience Analysis*, Journal of Marketing, Oct. 1946, pp. 129-134.

[2]Dale, *Communications by Picture*, COMMUNICATIONS IN MODERN SOCIETY, 72 (Schramm ed. 1948).

[3]Shurlock, *The Motion Picture Production Code*, 254 ANNALS OF THE AMERICAN ACADEMY 140 (1947).

[4]Note, 60 YALE L.J. 696 (1951).

[5]Joseph Burstyn Inc. v. Wilson, Commissioner of Education of New York, et al., 343 U.S. 495, 96 L. Ed. 1098, 72 Sup. Ct. 777 (1952).

[6]REV. CODES OF MONT., § 94-3603 (1947).

> Every person who shall exhibit moving pictures wherein are shown or exhibited to the public any scenes or pictures depicting burglaries, train robberies, or other acts which would constitute a felony, is guilty of a misdemeanor.

When considering the criminal theme of so many moving pictures currently being produced, it becomes obvious that convictions could become rife under this statute. As a practical matter the statute exists as an anachronism. Probabilities of arrests made under its authority would seem remote, and it is not believed that a conviction rendered under it would be affirmed by a federal court.

Historically, motion pictures have had a difficult time gaining recognition as a medium entitled to constitutional protection. A major obstacle which existed for 37 years was the Supreme Court decision in *Mutual Film Corporation v. Industrial Commission,*[7] which held motion pictures outside the free speech clauses of a state constitution.[8] The Court used an unsound constitutional criterion when it excluded movies from the free speech area on the basis that they are primarily a business. In that case Justice McKenna said:

> It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organis of public opinion.

All of this was changed, however, in the recent pronouncement of the Supreme Court of the United States in the case of *Joseph Burstyn Inc. v. Wilson, Commissioner of Education of New York.*[9] In that case a license for the exhibition of a motion picture entitled *The Miracle* was rescinded by the appropriate New York authorities on the ground that the picture was "sacrilegious" within the meaning of the statute requiring the denial of a license if a film is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." The Court based its reversal solely on the ground that the New York statute is an "unconstitutional abridgement of free speech and a free press."

The Supreme Court of the United States in the *Burstyn* case after reviewing the *Mutual* case, said:

> In a series of decisions beginning with *Gitlow v. New York,*[10] this Court held that the liberty of speech and of the press which the first amendment guarantees against abridgement by the federal government is within the liberty safeguarded by the due process clause of the fourteenth amendment from invasion by state action. That principle has been followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision,

[7] 236 U.S. 230, 59 L. Ed. 552, 35 Sup. Ct. 387 (1915).

[8] The *Mutual* decision approved an Ohio statute which provided that all films shown in Ohio were to be approved in advance by a state censor board. A companion case upheld a similar state censorship statute of Kansas. Mutual Film Corporation v. Hodges, 236 U.S. 248, 59 L. Ed. 561, 35 Sup. Ct. 393 (1915).

[9] *Supra,* note 5. Joseph Burstyn Inc. v. Wilson, Commissioner of Education of New York, et al., 343 U.S. 495, 96 L. Ed. 1098, 72 Sup. Ct. 777 (1952).

[10] 268 U.S. 652, 69 L. Ed. 1138, 45 Sup. Ct. 625 (1925).

> the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the first amendment, through the fourteenth, secures to any form of 'speech' or 'the press.'

The Court then discussed as follows the character of the New York statute and its application:

> 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. New York cannot vest such unlimited restraining control over motion pictures in a censor. Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us.

Thus, the Court narrowed the permissible area for prior restraint on motion pictures, leaving however, an undecided region that was to be explored by two state decisions less than a year later.

The first of these decisions is *Superior Films v. Department of Education.*[11] The controlling Ohio Code provision[12] stated that "only such films as are in the judgment and discretion of the board of censors of moral, educational or amusing and harmless character shall be passed."

The motion picture, "M", as shown by the certificate was rejected for the following reasons, among others: "1. There is a conviction that the effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime. 2. Presentation of actions and emotions of child killer emphasizing complete perversion without serving any valid educational purpose. Treatment of perversion creates sympathy rather than a constructive plan for dealing with perversion."

The plaintiff film company relied largely upon the *Burstyn* decision and asserted that motion pictures are a mode of expression entitled to the same protection as "speech" and "the press," and that violation of this guaranty is protected from infringement by the state by the fourteenth amendment to The Constitution of the United States.

The Supreme Court of Ohio, after reviewing the *Burstyn* decision, said:

> We conclude that, although a motion picture may not be rejected because of 'sacrilegious' expressions or portrayals, 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. As we view it, the United States Supreme Court has not ipso facto taken away all community control of moving pictures by censorship, and this court will not do so under the claim of complete unconstitutionality of censorship laws.

In answer to the plaintiff's contention that the statute offered a too indefinite criterion for censorship, the Ohio Court said that the general

[11] 159 Ohio St. 315, 112 N.E.2d 311 (1953).
[12] GEN. CODES OF OHIO, § 154-47b (1943).

words in the statute "were found to get precision from the sense and experience of men." The court, because of the absence of evidence showing that the defendant had abused its discretion, refused to review the record on its merits and denied the plaintiff's petition. There were two dissents on the ground that the statute was unconstitutional.

Less than a month later the case of *Commercial Pictures Corp. v. Board of Regents*[12] was decided by the New York Court of Appeals. The censorship body determined that the motion picture, *La Ronde,* was not entitled to be licensed for public exhibition on the ground that it was "immoral" and would "tend to corrupt morals" within the meaning of the state law. The court described the film in the following manner:

> The film from beginning to end deals with promiscuity, adultery, fornication, and seduction. It portrays ten episodes with a narrator. Except for the husband and wife episode, each deals with an illicit amorous adventure between two persons, one of the two partners becoming the principal in the next. . . . At the very end, the narrator reminds the audience of the author's thesis: 'It is the story of everyone.'

The plaintiff contended that the statute was invalid because it imposed a prior restraint upon the exercise of free speech and press, and that the standard was too vague and indefinite to satisfy the standards of due process.

The court first considered whether motion pictures, as part of the press, are altogether exempt from prior restraint or censorship. In answering this question in the negative, the court relied principally upon the *Burstyn* decision, quoting this portion of that case: "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and at all places." The opinion suggests that the motion picture under consideration represented a "clear and present danger" to society and concluded that the statute in question, as a protective measure, was a reasonable and valid exercise of the police power.

The court next considered the standard applied. Section 212 of the Education Law provides that a motion picture shall not be licensed if it is "obscene, indecent, *immoral,* inhuman, sacrilegious, or is of *such a character that its exhibition would tend to corrupt morals* or incite to crime." (Italics supplied). The court stated that it was concerned only with the words italicized. The court said that the terms "immoral" and "morals" must be taken to refer to the moral standards of the community, and therefore the standards of any special and particular segment of the whole population were not to control. The court decided that by "immorality," the legislature meant "sexual immorality" and then made the following statement: "It should be remembered that we are not here dealing with a moral concept about which our people widely differ; sexual immorality is condemned throughout our land." A gradation of language in the statute proceeding from "obscene" to "indecent" to "immoral" also was pointed out, the court seeming to imply that a lesser degree of evil was necessary for the censorship of the last than of the first.

The remaining question before the court was whether the statute was

[12]305 N.Y. 336, 113 N.E.2d 502 (1953).

properly invoked against the motion picture *La Ronde*. The court answered the query thus:

> Although vulgar pornography is avoided, suggestive dialogue and action are present throughout and not merely incidentally, depicting promiscuity as the natural and normal relation between the sexes, whether married or unmarried. Can we disagree with the judgment that such a picture will tend to corrupt morals? To do so would close our eyes to the obvious facts of life.

The court refused to form an independent judgment as to the picture and affirmed the order of the Regents.

There was a concurring opinion written by Judge Desmond which went further in every respect than the majority opinion. It is perhaps enough to say that his opinion of *La Ronde* was that it had no other content than an undue emphasis on the carnal side of the sex relationship.

A penetrating analysis of every facet of the case was present in a trenchant dissent by Judge Dye. He stated that in a case involving civil rights the reviewing court is bound to re-examine the whole record of the original hearing. The pictures are reviewed, he said, by a board that passes judgment based solely on what the members of the board itself happen to think about it at a given time, and added that the appellate court was left at the great disadvantage of not knowing what standards guided the agency in making its determination. He concluded by suggesting that the term "immoral" and the words "tend to corrupt morals" be stricken from the statute, since they are void of any definite meaning.

These two cases were both heard on appeal at the October term of the United States Supreme Court in 1953.[14] The judgments were reversed in a per curiam decision citing only the *Burstyn* case. However, a concurring opinion was filed by Justice Douglas, with whom Justice Black agreed. In a short summary of the law of free speech and more specifically of prior restraint, Justice Douglas mentions the case of *Near v. Minnesota*[15] as interpreting the first amendment to preclude previous restraints upon publication. The *Burstyn* case, he goes on, brought motion pictures within the free speech and free press guaranty of the first and fourteenth amendments. He concludes, thusly:

> The first and the fourteenth amendments say that Congress and the states shall make 'no law' which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take the step. In this nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor.

This unequivocal statement by an associate justice of the United States Supreme Court would, at first blush, seem to suggest an answer to a problem that has been plaguing the motion picture industry for almost a half a century. Were movies at last to be declared free from the heavy hand of state and municipal censorship? Seven months later the answer was handed down by the Supreme Court of Illinois in the case of *American Civil*

[14]346 U.S. 587, 98 L. Ed. 329, 74 Sup. Ct. 286 (1954).
[15]283 U.S. 697, 75 L. Ed. 1357, 51 Sup. Ct. 625 (1931).

Liberties Union v. Chicago.[16] The court was called upon to review the censorship of *The Miracle.* Strangely enough, this was the same moving picture that was involved in the decision of the Supreme Court of The United States in the *Burstyn* case. In referring to the *Burstyn* case the Illinois court said: ". . . we do not regard [this decision] as automatically compelling us to overrule our prior approval of the Chicago censorship ordinance." The case was then sent back to the trial court for a more complete factual review.

What then is the status of moving picture censorship? The remainder of this comment will be devoted to an attempt to answer that question.

The first step towards this goal must be a complete analysis of The Supreme Court opinion that overruled the *Commercial* and *Superior* cases. In considering the concurring opinion of Justice Douglas, we must begin by reminding ourselves that the views expressed in this opinion apparently were not shared by a majority of the Court.

One possible reason for the reversal is that the statutes invoked by the state courts, although applicable to some films that would be censorable, were so broad as to sanction the censorship of films which may not constitutionally be censored. The term, *immoral,* which was the basis of censorship in the *Commercial* case, has a variety of meanings varying according to time, geography, and to some extent, subjective judgment.[17] Funk and Wagnall's *Dictionary* says the term, immoral, may and does include illicit sexual behavior. But, according to *Black's Law Dictionary,* the meaning is not limited to sexual impurity, but includes in addition offenses hostile "to public welfare." *Corpus Juris* includes as part of the definition, conduct that is "inimical to rights or interests of others," "corrupt," "depraved," and sometimes "unprofessional" conduct. A term of such vague and undefined limits, since it would fail to furnish the objective criterion necessary to insure that there shall be no interference with the exercise of rights secured by due process of law, could easily be the reason for the Supreme Court's reversal. In the *Superior* case, the picture transgressed the statute, because it was "harmful." One need hardly mention that "harmful" is every bit as indefinite as "immoral," and would be subject to the same infirmities. Employing this sort of criteria, a board of censors could suppress half of the moving pictures it reviewed.

A second possible basis for the Supreme Court's decision, and probably the one that demands the deepest probing, is that the films themselves did not possess those qualities which would justify their censorship. There seems to be two generally recognized exceptions to the constitutional doctrine that forbids censorship of speech and the press. One is the "clear and present danger test" and the other, "the primary requirements of decency" concept.

These two concepts have cropped up as indistinguishable parts of the same theory, as completely independent ideas, and as interrelated facets of a single rule. Striving for a more lucid analysis, we will consider them separately.

[16]3 Ill. 2d 334, 121 N.E.2d 585 (1954).

[17]Parmelee v. United States, 72 App. D.C. 203, 113 F.2d 729 (1940); United States v. Kennerly, 209 Fed. 119 (S. D. N. Y. 1913); Foy Productions v. Graves, 253 App. Div. 475, 3 N.Y.S.2d 573 (1938); CARDOZO, PARADOXES OF LEGAL SCIENCE.

The "clear and present danger" test was first applied by Mr. Justice Holmes in 1919.[18] Generally, it stands for the proposition that speech cannot be restrained unless there is a clear and present danger that the speech will produce a serious substantive evil that the state has power to prevent. Since the Supreme Court agrees that moving pictures are entitled to the freedom of expression and protection provided by the first and fourteenth amendments, there is every reason to believe that it will appraise the content of such medium in the light of the "clear and present danger" theory.

In the *Commercial* case, the New York Court of Appeals referred to the "clear and present danger" theory, stating that the vices bred by a motion picture which panders to base human emotions represent a "clear and present danger" to the body social.[19] The Supreme Court of The United States, however, defines "clear and present danger" as a more restricted doctrine: "Neither 'inherent tendency' nor 'reasonable tendency' to cause a substantive evil is enough to justify a restriction of free expression."[20] The dissenting opinion in the *Commercial Pictures* case quotes the following review of *La Ronde* appearing in the *Los Angeles Daily News:*

> Here is a lovely motion picture, a gay, a glad, a sad, a sentimental movie . . . about the Vienna of candlelight and carriages, of wine, women and waltzes . . . a picture about illicit love, but it is told without prudishness and with a deftness, discretion and understanding that make it more moral than most censor shackled pictures on the subject.

This critique, and many others in the same tenor, illustrate that reasonable men are likely to hold different opinions as to whether the showing of such a motion picture will cause a substantive evil. It would seem to follow that there was not, at least conclusively, a "clear and present danger" sufficiently imminent to override the protection of The United States Constitution.[21] The least the defendant should be entitled to is a prima facie case that the picture does not constitute a "clear and present danger," with the burden of proof on the state to show that it does.

The difficulties that arise in the application of the "clear and present danger" test to moving pictures are numerous. If it were established that seeing a certain movie would, in fact, induce normal persons to engage in sexual conduct that seriously deviates from the accepted community standards, there might be constitutional power to censor the movie. But, a major difficulty arises, because it is impossible to know that the motion picture will have that effect; instead, the effect of any movie upon the action of normal individuals is in the realm of prophecy. The issue would seem to be whether a particular movie will adversely affect the moral conduct of the normal viewer, and whether the possibility of that adverse effect is sufficiently great to constitute the "clear danger" needed to outweigh the social values of the free distribution of the movie and the harm to society

[18]Schenck v. United States, 249 U.S. 47, 63 L. Ed. 470, 39 Sup. Ct. 247 (1919).

[19]Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 113 N.E.2d 502, 504 (1953).

[20]Bridges v. State of California, Times-Mirror Co. v. Superior Ct. of in and for Los Angeles County, 314 U.S. 252, 86 L. Ed. 192, 62 Sup. Ct. 190 (1941).

[21]Thornhill v. Alabama, 310 U.S. 88, 84 L. Ed. 1093, 60 Sup. Ct. 736 (1939).

that would result if this type of motion picture were subject to censorship. There is a marked absence of dependable information concerning the effect of "immoral" movies on human conduct. The most recent case upholding censorship on moving pictures has recognized this problem.[23] There, the Supreme Court of Illinois, in considering the application of the "clear and present" danger doctrine, said:

> We agree that the determination that a film or book is obscene must rest on something more than speculation, and that the tendency toward sexual stimulation must be probable and substantial. But we do not agree that the State is limited to the prevention of overt sexual conduct produced by films to the exclusion of consideration of the stimulating tendency which they may have. It may be anomalous to treat obscenity differently from other limitations on free speech, but if so, the difference is one which has long been accepted.

A third reason for the reversal of the *Commercial* and *Superior* cases may have been that the motion pictures under consideration did not violate the "primary requirements of decency." This phrase first appeared as dictum in *Near v. Minnesota.*[24] The Court quoted the following passages from Chaffee's *Freedom of Speech:* "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." The Court goes on to say, "On similar grounds, the primary requirements of decency may be enforced against obscene publications."[24] In *Chaplinsky v. New Hampshire,*[25] the Court said:

> 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 have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[26]

[23]American Civil Liberties Union v. City of Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954).

[24]283 U.S. 697, 75 L. Ed. 1357, 51 Sup. Ct. 625 (1930).

[24]It is interesting to note, however, that Chaffee differentiates between these two grounds for censorship in his *Free Speech In the United States.* ". . . the law also punishes a few classes of words like obscenity, profanity, and gross libels upon individuals, because the very utterance of such words is considered to inflict a present injury upon listeners, readers, or those defamed, or else to render highly probable an immediate breach of the peace. *This is a very different matter from punishing words because they express ideas which are thought to cause a future danger to the state.*"

[25]315 U.S. 568, 86 L. Ed. 1031, 62 Sup. Ct. 766 (1941).

[26]These words are usually accompanied by an impressive list of citations to indicate that other cases, too, have found exceptions to the right of free speech. The cases cited are ones where the court has permitted either subsequent punishment or prior restraint for activity alleged by the defendant to be under the protection of the free speech and press guarantees of the Constitution. Here are some of the cases com-

Here, again, Chaffee is the authority cited. This dictim, which appears to have been derived solely from the works of a lone writer, has been cited time and time again as a justification for censorship.[27] Since the Supreme Court has recently applied this very language in the *Burstyn* case, it appears that the "primary requirements of decency" are to be considered in determining the validity of censorship.

Without attempting to carefully define this nebulous yardstick, we may suppose that strong language or acts are required to merit prior restraint. Chaffee, who seems to have the last word in this immediate area, says that in determining whether the expression merits prior restraint, such measures as "lewd," "obscene," "libelous," "insulting or fighting" and "tend to incite an immediate breach of the peace" are to be employed. In light of what has been said by qualified critics in regard to one of the pictures whose censorship was considered, it seems safe to say that the films in controversy did not violate the "primary requirements of decency." Since the *Burstyn* case, which was cited by the Supreme Court as authority for reversal in their per curium opinion, contains this very language, it seems reasonable to suppose that this exception to the prohibition of prior censorship was endorsed by the Court.

We have considered three possible bases for the Supreme Court's reversal of the *Commercial* and *Superior* cases. It is submitted that any one alone, or any combination of the three, could have been reason enough for the Court's decision. Consequently, it is believed by the writer, that theoretically, motion pictures are still subject to censorship. Before such censorship will be upheld by the Supreme Court, however, three requirements must be fulfilled.

First, the statutes must be carefully limited to insure that no picture that is not violative of an interest that the state has a right to protect, will be censored. A second requirement for valid censorship is the existence of a "clear and present danger" that the motion picture in question will bring about a serious evil that the state has a right to prevent. The last requirement demands, at least when the basis for censorship is obscenity or immorality, that the movie in question violate the "primary requirements

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monly found, with the suppressed activity designated parenthetically: Gitlow v. New York, 268 U.S. 652, 69 L. Ed. 1138, 45 Sup. Ct. 625 (1925) (advocating the commission of conspiracy by mass strike to overthrow the government by unlawful means); Feiner v. New York, 340 U.S. 315, 95 L. Ed. 267, 71 Sup. Ct. 303 (1950) (making an inflamatory speech to a mixed crowd of negroes to rise up in arms and fight for equal rights); Kovacs v. Cooper, 336 U.S. 77, 93 L. Ed. 513, 69 Sup. Ct. 448 (1948) (operating a "sound truck" which emitted "loud and raucus noises"); Cox v. New Hampshire, 312 U.S. 569, 85 L. Ed. 1049, 61 Sup. Ct. 762, 133 A.L.R. 1396 (1941) (marching in groups of from 15 to 20 along the sidewalks in the business district of a populous city); Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 Sup. Ct. 766 (1941) (addressing a person on a public street as a "damned fascist" and a "damned racketeer"); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 55 L. Ed. 797, 31 Sup. Ct. 492, 34 L.R.A. (n. s.) 874 (App. D.C. 1910) (publishing words which constituted a signal to continue an illegal boycott); Schenk v. United States, 249 U.S. 47, 63 L. Ed. 470, 39 Sup. Ct. 247 (1918) (conspiring to circulate a pamphlet tending to influence men to obstruct the draft). It is interesting to note that not one of these cases involved censorship of, or punishment for, expressions against "the primary requirements of decency."

[27]Commercial Pictures Corporation v. Board of Regents, 305 N.Y. 336, 113 N.E.2d 502, 510 (1953); Burstyn v. Wilson, 303 N.Y. 242, 101 N.E.2d 665, 675 (1951); Superior Films v. Department of Education, 159 Ohio St. 315, 112 N.E.2d 311, 317 (1953).

of decency." We have pointed out the difficulties attendant to defining "the primary requirements of decency," and of phrasing statutes to specifically apply only to pictures which are inimical to the public welfare or public morals. As a practical matter, such a state of perfection may never be reached, but until it is, it seems likely that the Supreme Court will continue to prohibit the prior censorship of moving pictures.

EUGENE C. TIDBALL

CONSTITUTIONAL QUESTIONS RAISED BY MONTANA'S NEW INCOME TAX LAW

The 1955 amendments to the income tax laws of the State of Montana pose interesting problems of constitutionality.

Section 84-4905[1] now reads in part: "Adjusted gross income shall be the taxpayer's gross income as defined in section 62 of the Internal Revenue Code of 1954 or as that section shall be labeled or amended. . . ." In a similar manner the deductions from gross income for determining adjusted gross income under the federal code are incorporated into the Montana law by reference to the appropriate section number of the federal code.[2]

Although there are some state not permitting the practice,[3] the majority of American jurisdictions, including Montana,[4] regard incorporation by reference as an acceptable procedure when the purpose is to pass a law similar to one that is already in existence in another jurisdiction. This is not considered to be a delegation of legislative power.[5] But when an attempt is made to incorporate into a statute a foreign law as it now appears on the statute books of the foreign jurisdiction, together with changes thereafter to be made, the lawmakers are walking on uneasy ground.

Two questions are raised by the Montana amendment which this paper will consider, namely:

1. Does that part of Section 84-4905, *supra,* which reads "as that Section shall be labeled or amended," render the statute void as an unconstitutional attempt to delegate legislative power to the federal government, by including future amendments by the United States Congress in the laws of the State of Montana?

[1]This section supersedes §§ 84-4906 and 84-4907, REVISED CODES OF MONTANA (1947). The amended law also includes interest on all state, county, and municipal bonds, which are not taxed by the federal government. Interest on United States obligations and dividends on national banks situated in Montana are excluded from the state tax.

[2]REV. CODES OF MONT. § 84-4906 states: In computing net income, there shall be allowed as deductions:

(a) The items referred to in §§ 161 and 211 of the Internal Revenue Code of 1954, or as §§ 161 and 211 shall be labeled or amended, except that state income tax paid shall not be deductible and also subject to exceptions provided in § 84-4909, relating to items not deductible.

(b) Federal income tax paid within the taxable year. (Note: § 84-4909, *supra,* excludes personal expenses, building and property improvements, and premiums on life insurance policies, where taxpayer is a beneficiary.)

[3]For example, New York: N. Y. Const. Art. III § 17 states: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or shall enact that any existing law or part thereof, shall be applicable, except by inserting it in such act."

[4]State v. District Court, 83 Mont. 400, 272 Pac. 525 (1928).

[5]Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58, 70 A.L.R. 449 (1930).