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Recent Problems in Obscene Publication Regulation and Motion Picture Censorship: Obscene Publication Prohibition [Shipley] and Motion Picture Censorship [Cook]

Parker L. Shipley

University of Nebraska College of Law, parkershipley@yahoo.com

G. Bradford Cook

University of Nebraska College of Law, bradcook2@mac.com

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RECENT PROBLEMS IN OBSCENE PUBLICATION REGULATION AND MOTION PICTURE CENSORSHIP

There has been growing interest in the field of obscenity and its regulation, and the two following comments discuss some recent problems in the areas of obscene publications and motion pictures. The first discusses local problems in regulation of publication and sale of obscene materials, and analyzes our present state laws, two local ordinances, and recent Nebraska Supreme Court decisions. The second discusses current problems of motion picture censorship and includes a historical review of the development of modern screen censorship.

The Editors

Obscene Publication Prohibition

I. INTRODUCTION

Defendant Nelson was charged with violating an ordinance of the City of Omaha, Nebraska, by having in his possession, with an intent to sell, an obscene publication. The publication in question was the book, *Peyton Place*. The Municipal Court of Omaha found the defendant guilty and levied a fine. The Douglas County District Court affirmed and the defendant brought an appeal to the Nebraska Supreme Court. Without reaching the question of the book's obscenity the Supreme Court reversed, finding the Omaha ordinance, set out below, unconstitutional as vague and indefinite.¹ The ordinance read:²

It shall be unlawful for any person to sell, offer for sale, attempt to sell, exhibit, give away, keep in his possession with intent to sell or give away, or in any way furnish or attempt to furnish to any person any comic book, magazine, or other publication which, read as a whole, is of an obscene nature.

It is generally conceded that a state may legislate against the

¹ State v. Nelson, 168 Neb. 394, 95 N.W.2d 678 (1959).

² OMAHA, NEB., MUNICIPAL CODE c. 12, art. 40.7, Ordinance No. 18508 (1941).

publication of obscene materials,³ and that such legislation is not *ipso facto* unconstitutional.⁴ Even at common law the publication of obscene materials was an unlawful offense.⁵ Today it is universally recognized that obscene publications are not within the constitutionally protected speech or press areas of the First Amendment, applied to the states through the Fourteenth Amendment.⁶ Local problems raised in the battle against obscene literature are: (1) Finding a workable and accurate test for determining what is obscene material, and (2) Drafting a statute not subject to constitutional attack. Neither hurdle was cleared by the City of Omaha in the *Nelson* case.

There seems to be no problem with "hard core" obscenity, or pornography, which clearly has no constitutional protection. The problem comes in identifying this material, as many publications are found in those gray areas where the distinction between obscene and non-obscene becomes difficult.⁷ Such a distinction is also subject to the variety of impressions which a publication may have upon various persons.

II. THE PURPOSE OF LEGISLATION

Anti-obscenity legislation is intended to protect the moral standards of the community. The argument for prohibitions against

³ 67 C.J.S. *Obscenity* § 4 (1950); 11 AM. JUR. *Constitutional Law* § 272 (1937).

⁴ *Near v. Minnesota*, 283 U.S. 697 (1931); See the cases collected in *Roth v. United States*, 354 U.S. 476, 481 (1957); 11 AM. JUR. *Constitutional Law* § 272 (Supp. 1960).

⁵ [1727] *Rex v. Curl*, 2 Str. 788; *Commonwealth v. Sharpless*, 2 Surr. Rep. 91 (1815); See the discussion in Williams, *Obscenity in Modern English Law*, 20 LAW & CONTEMP. PROB. 630 (1955); 33 AM. JUR. *Lewdness, Indecency, and Obscenity* § 4 (1941).

⁶ *Roth v. United States*, 354 U.S. 476 (1957).

⁷ In KRONHAUSEN, *PORNOGRAPHY AND THE LAW* (1959), which attempts to defend "erotic realism," a distinction between pornography and non-obscene "erotic realism" is suggested: "In pornography (hard core obscenity) the main purpose is to stimulate erotic response in the reader. And that is all. In erotic realism, truthful description of the basic realities of life, as the individual experiences it, is of the essence, even if such portrayals . . . have a decidedly anti-erotic effect. But by the same token, if while writing realistically on the subject of sex, the author succeeds in moving his reader, this too, is erotic realism, and it is axiomatic that the reader should respond erotically to such writing, just as the sensitive reader will respond, perhaps by actually crying, to a sad scene, or by laughing when laughter is evoked." *Id.* at 18.

obscene materials has been based upon such grounds as the protection of youth,⁸ the protection against stimulation of impure and libidinous thoughts,⁹ and protection against sex impulses,¹⁰ with some courts branding obscene literature as "poison to the mind causing itching, morbid, lascivious longings of desire and curiosity or propensity for the lewd."¹¹

The case of *People v. Dial Press*,¹² is an illustration of this type of protection. The book, *The First Lady Chatterley*, was found obscene in that its central theme, in the opinion of the court, advocated that the most important thing in a woman's life, more important than any rule of law or morals, was the gratification of her sexual desires. This, the court said, was dangerous to the physical and mental health of young women. The following year, in 1945, the book *Strange Fruit* was found obscene in that it contained over fifty episodes of indecent sexual acts, such episodes being termed harmful to the public.¹³ It has therefore been assumed that obscene literature leads to immoral behavior although no valid study has ever proved this assumption.¹⁴ Some studies negate that theory, coming to the conclusion that the chief stimulus to sex impulses is the human body itself and not printed words. Certainly the former would be difficult to censor. A further argument against the relationship of obscene matter to immoral behavior is that those who read salacious literature would be less likely to become sex offenders for the reason that such reading often neutralizes sexual interests,¹⁵ and still others would find such literature coarse, repellent and non-stimulating.¹⁶

Although the present day tolerance of sex mores should only be gauged by sociological study, it has been suggested that perhaps

⁸ *State v. Clein*, 93 So. 2d 876 (Fla. 1957); *Butler v. Michigan*, 352 U.S. 380 (1957).

⁹ *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840 (1945).

¹⁰ *People v. Vanguard Press*, 192 Misc. 127, 130, 84 N.Y.S.2d 427, 430 (1947).

¹¹ *State v. Kowan*, 7 Ohio Op. 2d 81, 156 N.E.2d 170 (1958).

¹² 182 Misc. 416, 48 N.Y.S.2d 480 (1944).

¹³ *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840 (1945).

¹⁴ See Lockhart and McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587 (1955).

¹⁵ For a brief survey of several of these examinations see American Book Publishers Council, *Censorship Bulletin*, August, 1958.

¹⁶ See the dissenting opinion in *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840 (1945), wherein the learned judge stated: "I can find no erotic allurements such as the opinion makes necessary for conviction. On the contrary, their [referring to scenes in the book] coarseness is repellent." *Id.* at 850.

the present trend in society is for a more liberal tolerance.¹⁷ This was also suggested in the United States District Court decision which lifted the postoffice ban on the book, *Lady Chatterley's Lover*.¹⁸ The opinion of the court openly admits that the book contains:¹⁹

... a number of passages describing sexual intercourse in great detail with complete candor and realism. Four letter Anglo-Saxon words are used with some frequency.

The opinion concludes by stating that at the present stage in the development of our society, the novel did not exceed the outer limits of tolerance which the community as a whole gives to writing about sex and sex relations. Thus, it seems *The First Lady Chatterley* was a bit premature.

III. THE FEDERAL TEST FOR OBSCENITY

The legal test for obscenity which was first introduced into the United States, came from the opinion of Lord Chief Justice Cockburn in the case of *Regina v. Hicklin*,²⁰ decided in 1868. Speaking for the court the Chief Justice said:²¹

I think the test of obscenity is this, 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.

The problem presented by this test was the absence of a limitation upon the amount or degree of obscenity necessary to convict. Thus, any segment of the publication could brand the entire work as obscene. The *Hicklin* rule was soon adopted in the United States, although it was sometimes ignored. In *United States v. Kennerley*,²² the *Hicklin* rule was followed, but in an attack upon the rule, Judge Learned Hand stated that obscenity should be defined according to present community standards. The *Ulysses* case in 1934²³ finally repudiated the *Hicklin* rule and in its place substituted the "read

¹⁷ KRONHAUSEN, PORNOGRAPHY AND THE LAW 19 (1959).

¹⁸ *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

¹⁹ *Id.* 175 F. Supp. at 500.

²⁰ [1868] L.R. 3 Q.B. 360.

²¹ *Id.* at 371.

²² 209 Fed. 119 (S.D.N.Y. 1913).

²³ *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

as a whole test."²⁴ Thus, the injustice of banning a book because one segment was obscene, was discarded and the new rule demanded that the whole of the book, all of its parts, be examined before judging its obscene nature. In 1957, in *Roth v. United States*,²⁵ the United States Supreme Court refined the rule, saying:²⁶

The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest.

Although somewhat nebulous and criticised,²⁷ this is the test as it stands at this writing. The test has had support of municipal officials who have felt they now have a yardstick to measure community standards by trying obscenity cases before a jury of community members and letting that jury set the standard by their decision.²⁸ Other suggested tests for obscenity are found in the proposed Model Penal Code,²⁹ which would allow a showing of the audience to whom the material is directed, the appeal to and the behavior of the audience, the artistic, literary, scientific or educational merits of the material, the degree of public acceptance, the appeal to prurient interest in the promotion of such material, expert testimony, and the testimony of the author, creator or publisher.

The *Roth* test requires judging the material "taken as a whole." Contrary to this requirement is the decision of *State v. Kowan*,³⁰ which held the "read as a whole test," although applying to books, did not apply to magazines. After stating the purpose and some

²⁴ *Id.* at 708. The test was announced as follows: "While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevance of the 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." *Ibid.*

²⁵ 354 U.S. 476 (1957).

²⁶ *Id.* at 489.

²⁷ *State v. Nelson*, 168 Neb. 394, 95 N.W.2d 678 (1959).

²⁸ Melaniphy, *The Interpretations by the Courts of the First and Fourteenth Amendments to the Constitution as They Relate to Obscene Motion Pictures and Publications*, 21 NIMLO MUNIC. L. REV. 65 (1958).

²⁹ MODEL PENAL CODE § 207.10 (2), (Tent. Draft No. 6, 1957).

³⁰ 7 Ohio Op. 2d 81, 156 N.E.2d 170 (1958).

of the history of the above test, the court adopted the reasoning of *City of Cincinnati v. Walton*,³¹ saying:

The *as a whole test* was built up by the courts to escape from the absurd result that was produced when one took, out of context, isolated passages from a sincere book. But where the parts are not specifically related—where, as here, you have a succession of pictures and stories each conveying an individual message—each can be judged individually. The entire magazine should be examined to cast light on the publisher's intent but an individual picture or story in a magazine not related to the whole can be tested by the principles hereinbefore set out, and can be found obscene.

IV. THE ROTH TEST IN NEBRASKA

Following the language of the federal test in the *Roth* case, the Omaha ordinance, found unconstitutional in the *Nelson* decision, concluded with the following phrase: "which, read as a whole, is of an obscene nature."³² This particular part of the ordinance was declared unconstitutional. In the *Nelson* opinion the Nebraska Supreme Court went on and construed the federal test.³³ No trouble was found with the words "average person" which were held comparable to the reasonable man standard so often used in tort litigation. "Prurient interest" did not fare as well, the court pointing out that it doubted whether a judge or a juror would be able to apply the phrase without conjecture or resort to a dictionary. The phrase "contemporary community standards" was said to create an area of vagueness that would itself require a holding that the ordinance was vague and indefinite. "Community" was found highly analogous to the term "locality," which was found fatally vague in *Connally v. General Construction Co.*³⁴ The Nebraska court denounced the phrase, "of an obscene nature," saying this was far more indefinite than the phrase "prurient interest." In *State v. Pocras*,³⁵ a Nebraska case dealing with a City of Lincoln ordinance, which was decided

³¹ 3 Ohio Op. 2d 252, 257, 145 N.E.2d 407, 414 (1957).

³² *Supra* note 2.

³³ *State v. Nelson*, 168 Neb. 394, 397-99, 95 N.W.2d 678, 681 (1959).

³⁴ 269 U.S. 385 (1926).

³⁵ 166 Neb. 642, 90 N.W.2d 263 (1958). The court ruled on and found unconstitutional the language of LINCOLN, NEB., MUNICIPAL CODE, § 21-213 (1936), which read in part: "It shall be unlawful for any person or persons within the limits of said city . . . to sell or offer for sale, or dispose of in any manner, any obscene, lewd, or indecent book, picture, or other publication or thing." (Emphasis added).

approximately a year prior to the *Nelson* decision, the same court held the language, "obscene, lewd or indecent" sufficient to meet the constitutional requirements of due process of law. The court quoted from *State v. Becker*,³⁶ which in part stated:³⁷

The words of the statute, obscene, lewd, licentious, indecent, lascivious, immoral, scandalous are . . . descriptive of the character of the publication . . . Those descriptive words are neither vague nor indefinite. . . Those words set out within this statute a clear and ascertainable standard of guilt which is readily to be comprehended.

Therefore, perhaps what is "obscene" is more ascertainable and definite than something of an "obscene nature."

Following the *Nelson* decision, the City of Omaha ordinance was redrafted to remove those portions found objectionable by the state supreme court. Before approval of the new ordinance could be obtained, the United States Supreme Court rendered the decision in *Smith v. California*.³⁸

V. SCIENTER AND DUE PROCESS OF LAW

In the *Smith* case the Supreme Court found unconstitutional a City of Los Angeles ordinance which made it a crime:³⁹

. . . for any person to have in his possession any obscene or indecent writing, or book . . . in any place of business where . . . books . . . are sold or kept for sale. . . .

The ordinance was held to violate the freedom of the press, safeguarded by the Due Process Clause of the Fourteenth Amendment, in that it imposed an unconstitutional limitation on the public's access to non-obscene constitutionally protected matter. The Court declared the element of *scienter* as to the contents of a book to be necessary for a conviction of the bookseller, saying that *mens rea* is the rule of, rather than the exception to, Anglo-American criminal jurisprudence.⁴⁰ The seller's knowledge of the obscene contents of the book must now be proved. The Court sidestepped the question of what evidence would be necessary to show that the

³⁶ 364 Mo. 1079, 272 S.W.2d 283 (1954).

³⁷ *Id.* at 1087, 272 S.W.2d at 288.

³⁸ 361 U.S. 147 (1959). Noted in 26 BROOKLYN L. REV. 289 (1960); 35 N.Y.U.L. REV. 1086 (1960).

³⁹ For purposes of comparison, see the Los Angeles ordinance set out in full in 361 U.S. at 148 (1959).

⁴⁰ *Smith v. California*, 361 U.S. 147, 150 (1959).

seller had knowledge of a book's obscene contents by saying, "We need not . . . pass on what sort of mental element is requisite to a constitutionally premissible prosecution of a bookseller for carrying an obscene book in stock."⁴¹ This failure to establish some guideposts in establishing *scienter* evidence was criticized in a concurring opinion by Mr. Justice Frankfurter.⁴² The Court did state, however, that eyewitness testimony of a bookseller's perusal of a book would not be necessary to prove a seller's awareness of its contents. And to counteract the possibility of false denials of knowledge the Court stated:⁴³ "[I]t has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind."

In the case of *City of Cincinnati v. King*,⁴⁴ the appeal was decided after the *Smith* decision and the Ohio court found a seller guilty of having in his possession, with an intent to sell, a publication which the defendant knew to be obscene. Because of this knowledge, the defendant had hid the publication in his basement. Specific knowledge here met the test of the *Smith* case. By dictum the Ohio court also asserted that general knowledge of a publication's obscene contents would be sufficient to convict. The court stated that facts which would put a seller on inquiry were: (1) Cheap paper-covered books selling for several dollars, and (2) Their titles, covers and names may suggest the nature of their contents. Whether these latter elements will be accepted remains to be seen.

Typically, obscene literature legislation has been in the form of strict-liability laws protecting the public welfare, in which mere possession was sufficient to convict;⁴⁵ such were the ordinances in the *Nelson* and *Pocras* cases. The impact of the *Smith* decision has necessitated re-writing present obscenity legislation of many states and cities throughout the country.

With the decision in the *Smith* case, the City of Omaha again amended its obscene publications ordinance by inserting the word

⁴¹ *Id.* at 154.

⁴² *Id.* at 162.

⁴³ *Id.* at 154.

⁴⁴ 11 Ohio Op. 2d 433, 168 N.E.2d 633 (1960).

⁴⁵ For example see our present state laws found in NEB. REV. STAT. §§ 28-920 to -926 (Reissue 1956).

"willfully" for the purpose of showing *scienter*.⁴⁶ The ordinance now reads:⁴⁷

It shall be unlawful for any person or persons *willfully* to print, sell, offer for sale, attempt to sell, loan, give away, exhibit, distribute, show, keep in his possession with intent to sell, or give away any obscene, lewd, indecent, libidinous, immoral, lustful book, comic book, picture, magazine, or other publication.

Obviously, the City of Omaha was still relying on the finding by the Nebraska Supreme Court in the *Pocras* case that the words "obscene, lewd, indecent, libidinous, immoral or lustful," had an ascertainable standard of guilt and met that due process requirement.

The word "willfully," as used in the Omaha ordinance, is a word of many meanings and its definition is often set by reference to its context. "Willfully" can be construed to mean intentionally, voluntarily or knowingly, and under such a construction its insertion would fail to meet the *scienter* requirement of federal due process. It is submitted that the addition of the following phrase to the Omaha ordinance would clear up any difficulty with the word "willfully," to wit:⁴⁸ "knowing said publication to be obscene, lewd, indecent, libidinous, immoral or lustful."

It should be pointed out that not all local authorities have turned to the courts or to legislation to solve obscene publication problems. At times some authorities have resorted to informal prohibitions through threats of prosecution made to the seller. Such "do-it-yourself" techniques have been held unlawful.⁴⁹

VI. THE CITY OF LINCOLN ORDINANCE

By comparison, the present ordinance of the City of Lincoln, Nebraska,⁵⁰ redrafted after the *Pocras* decision in 1958, although eliminating mere possession, makes no mention of a *scienter* re-

⁴⁶ Correspondence to Parker Shipley from Edward M. Stein, Assistant City Attorney, City of Omaha, Nebraska, February 8, 1960.

⁴⁷ OMAHA, NEB., MUNICIPAL CODE § 25.46.070 (as amended 1958) (emphasis added).

⁴⁸ See the present ordinance set out in the text of this article at footnote 47.

⁴⁹ *Bantam Books, Inc. v. Melko*, 25 N.J. Super. 292, 96 A.2d 47 (1953).

⁵⁰ The 1958 amendment to the LINCOLN, NEB., MUNICIPAL CODE § 21-213 (1936), reads: "It shall be unlawful for any person or persons within the limits of the City of Lincoln to sell, offer for sale, loan, give away, distribute or show any obscene, lewd or indecent book, picture, magazine, or other publication or thing."

quirement and is still a strict liability ordinance. It is submitted that this ordinance is unconstitutional under the due process requirement of the *Smith case*, in not compelling a mental element of *scienter* as a condition for a conviction.

VII. NEBRASKA STATE LAWS

The state obscenity laws, on the books at this writing, are found in chapter 28, article 9 of the Nebraska Revised Statutes.⁵¹ They have been on the books untouched since 1887. There is no requirement of *scienter* in these laws and mere possession, regardless of knowledge, is made sufficient for a conviction. These sections prohibiting mere possession or which do not require an element of *scienter* are clearly unconstitutional.⁵²

VIII. CONCLUSION

Obscenity regulation is in a period of transition, turning from obsolete strict liability to the necessity of an awareness of wrongdoing to uphold a conviction. Without guideposts, the long process of case-by-case decision will eventually answer the question of what constitutes awareness for the *scienter* requirements of due process of law. Because of this void left by the *Smith case*, prosecutors will be forced to guess intelligently if they are to sustain the proof requirement of the *Smith case*.

In Nebraska our present state obscenity laws have been recognized as unconstitutional and legislation is now pending before the Unicameral to correct this situation.⁵³

The decisions of the Nebraska Supreme Court in the recent cases *State v. Pocras*⁵⁴ and *State v. Nelson*,⁵⁵ were based upon the constitutional infirmity of an uncertain standard of guilt. There-

⁵¹ NEB. REV. STAT. §§ 28-921, -922; -924 to -926 (Reissue 1956).

⁵² At this writing, a bill is pending before the seventy-second session of the Nebraska Legislature which would amend the state's obscenity laws. The object of the bill as introduced would be to provide both criminal and civil sanctions for violations. Since there has been no final action on the bill, as this article went to press, no attempt to cover its specific provisions will be made. (L.B. 676).

⁵³ See note 52 *supra*.

⁵⁴ 166 Neb. 642, 90 N.W.2d 263 (1958).

⁵⁵ 168 Neb. 394, 95 N.W.2d 678 (1959).

fore, any legislation which is passed in Nebraska will have to be free of vague or ambiguous terms—a requirement which is difficult to meet in the obscenity area. The federal test for what is obscene material has been heavily criticized by the Nebraska Court and any attempt to employ that test in Nebraska would be futile. Our court, however, has given positive answers, in that a reasonable man standard can be used in judging an article's effect upon the consumer, and that the words "obscene, lewd, indecent, libidinous, immoral or lustful" convey an ascertainable standard of guilt.

Parker Shipley, '61

Motion Picture Censorship

I. INTRODUCTION

Petitioner, a motion picture distributing corporation, wished to exhibit in Chicago, Illinois, the movie, *Don Juan*, but refused to submit the film to the Board of Censors as was required by the Municipal Code prior to its public showing.¹ The appropriate city official refused to grant the permit on the sole ground that the film had not been produced for examination. Petitioner brought an action for an injunction and an order for the issuance of the permit, contending Section 155-4 of the Code was unconstitutional on its face as a prior restraint within the prohibition of the First and Fourteenth Amendments.² *Held*: Section 155-4 of the Chicago Mu-

¹ "Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship. . . . If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays, depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit." CHICAGO, ILL., MUNICIPAL CODE § 155-4 (1931).

² "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I, and, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

municipal Code is not unconstitutional *per se* as requiring the submission of films prior to their public exhibition.³

The principal case climaxes a long history of doubt as to the validity of motion picture censorship laws solely on the ground that they exercise a prior restraint upon publication. Prior restraint has historically meant such restrictions before publication as injunction or censorship as opposed to punishment subsequent to publication.⁴

At the English common law, after the expiration of the last Licensing Act, one writer had shown the general antipathy toward any form of prior restraint before publication.⁵ In the movie industry, prior restraint takes the form of censorship by a governmental body before a movie can be seen by the public. The movie is already in existence, but before its exhibition statutes and ordinances require its submission to a Censorship Board before the necessary permit is issued. The laws set forth different standards by which the censor is able to ban the film in its entirety, or delete isolated scenes which fall within the prohibitions of the laws. The laws make the censor the overseer of the public morals and conduct. The natural supposition to be drawn from these laws is the existence of a public standard of conduct which should be guided by the censor's personal convictions. This type of official censorship—the requirement of

³ *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

⁴ The earlier English law forbade the right of free speech and press when it was used to criticize the sovereign or the government. This was so even if the views expressed were true. The problem of freedom of expression was compounded when the printing press was introduced and became widely used in the middle of the seventeenth century. At this time, the Crown regulated the use of the press by determining the number of printers and presses, when printing could be done, and finally by requiring all books to be licensed before circulation. 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, 2-4 (1912). The procedural vehicle was the powerful Star Chamber, whose powers gradually increased until 1637 when the following decree was passed: "That no person or persons whatsoever shall presume to print . . . any seditious, schismatical, or offensive Books or Pamphlets, to the scandal of Religion, or the Church, or the Government . . . or particular person or persons whatsoever . . ." Hales, *Introduction to MILTON, AREOPAGITICA* at V (1904). The Licensing Act, 1662, 13 & 14 Car. 2, c. 33, illustrates the breadth of the system. No person was allowed to print any book until it was first entered with the Stationers' Company, a government monopoly, and duly licensed by the appropriate state or clerical functionary. In 1694, the last Licensing Act expired, and Parliament refused to pass another. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 309, 310 (1883).

⁵ "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published. . . .

advance approval before a film can be shown—illustrates what is probably the closest approach to the English Licensing Laws of the seventeenth century. No doubt, censorship of motion pictures is prior restraint in its classical form.⁶ The purpose here is to analyze the issues involved in motion picture censorship and how the Supreme Court has decided these issues under the United States Constitution.

II. MOTION PICTURES UNDER THE FIRST AND FOURTEENTH AMENDMENTS

The City of Chicago passed the first motion picture censorship ordinance in 1907.⁷ Two years later, this ordinance brought about the first litigation concerning censorship of films, and the ordinance was upheld.⁸ It was not until 1915 that the Supreme Court of the United States was faced with a similar issue in *Mutual Film Corp v. Ohio*.⁹ The court, in construing the Ohio Constitution, regarding

[T]o subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning" 4 BLACKSTONE, COMMENTARIES 145 (4th ed. Kerr 1876). Blackstone's quotation has often been referred to in order to ascertain the meaning of the First Amendment. "[T]he main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publication as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Cited also in dissenting opinion in *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 53 (1961) (Warren, C. J., dissenting). Other cases have repudiated the Blackstone theory. See *Schenck v. United States*, 249 U.S. 47 (1919); *State v. McKee*, 73 Conn. 18, 46 Atl. 409 (1900); *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867 (1907).

⁶ See note 4 *supra*.

⁷ CHICAGO CITY CHARTER, art. 5, cl. 45 (1907).

⁸ *Block v. City of Chicago*, 239 Ill. 251, 87 N.E. 1011 (1909).

⁹ 236 U.S. 230 (1915). "The court could not then realize the importance of this new method for communicating facts and ideas to great masses of the public. In spite of the deeply rooted Anglo-Saxon antagonism to censorship of the press, the Justices were willing to distinguish films and let them be subject to the previous restraint which even Blackstone regarded as inconsistent with free discussion. Justice Holmes is said to have expressed regret, many years afterwards, that he ever concurred

freedom of speech and of the press,¹⁰ in relation to the Ohio censorship statute,¹¹ held motion pictures outside the protection of freedom of the press. In reaching this conclusion, the court reasoned that motion pictures were merely spectacles and outside the ambit of public expression.¹² At the time of this decision, only three states had censorship laws.¹³

The decision of the *Mutual* case did not change quickly, and was reiterated in subsequent decisions both as to its reasons and results.¹⁴ But a slow erosion took place within the Supreme Court. In *United States v. Paramount Pictures*,¹⁵ Mr. Justice Douglas, by way of *dictum*, expressed the First Amendment's protection of motion pictures.¹⁶ His feelings were reiterated in the dissent in *Kovacs v. Cooper*,¹⁷ in which Mr. Justice Douglas concurred.

The *Mutual* decision was not overruled until 1952 in *Joseph Burstyn, Inc. v. Wilson*.¹⁸ In that case the issue of whether motion pictures were a form of expression to be protected within the First Amendment as applied to the states through the Privileges and Immunities Clause of the Fourteenth Amendment was squarely before the court. The court had to consider the New York censor-

in this decision and that he did not sense its consequences." CHAFEE, *FREE SPEECH IN THE UNITED STATES* 544 (1941).

¹⁰ "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." OHIO CONST. art. I, § 11.

¹¹ "[O]nly such films as are . . . of a moral, educational, or amusing and harmless character . . ." OHIO REV. CODE § 3305.04 (1960).

¹² "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, not intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion." 236 U.S. 230, 244 (1915).

¹³ OHIO REV. CODE § 3305.04 (1960); PA. STAT. ANN. tit. 4, § 43 (1930); KAN. GEN. STAT. §§ 51-101 to -112 (1949). These statutes are taken from the recent editions of the respective state statutes.

¹⁴ *Mutual Film Corp. v. City of Chicago*, 224 Fed. 101 (7th Cir. 1915); *Eureka Productions v. Lehman*, 17 F. Supp. 259 (E.D. N.Y. 1936). Even as late as 1950 the decision was relied upon. *RD-DR Corp. v. Smith*, 183 F.2d 562 (5th Cir. 1950), *cert. denied*, 340 U.S. 853 (1950).

¹⁵ 334 U.S. 131 (1948).

¹⁶ "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *Id.* at 166 (1948).

¹⁷ See 336 U.S. 77, 102 (1949) (Black, J., dissenting).

¹⁸ 343 U.S. 495 (1952).

ship statute¹⁹ as applied to the motion picture, *The Miracle*. The court had little trouble finding motion pictures now within the protection of the First and Fourteenth Amendments.²⁰ The court did have difficulty invalidating the statute on the grounds of prior restraint, for although they mentioned it,²¹ they had previously stated that each method of expression presents its own problems and control might therefore differ.²²

The court was confronted with an additional problem since the censorship board had revoked the license to show *The Miracle* on the grounds that it was "sacrilegious." The issue presented by the term "sacrilegious" was whether it met the standards of the Due Process Clause of the Fourteenth Amendment as being too vague or indefinite. Therefore, the court also had to consider the procedural due process requirements of the Constitution. Mr. Justice Frankfurter felt that the term "sacrilegious" was clearly too vague to meet the above requirements of procedural due process.²³ Therefore, in spite of what the court had said regarding the issue of un-

¹⁹ The New York censorship statute empowers the censor to examine every motion picture sought to be exhibited in the state and to license them for exhibition, "unless such film or part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character [as] would tend to corrupt the morals or incite to crime . . ." N.Y. EDUC. LAW §§ 122-32 (1953).

²⁰ "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. 495, 501 (1952).

²¹ "This court recognized many years ago that . . . previous restraint is a form of infringement upon freedom of expression to be especially condemned." 343 U.S. 495, 503 (1952).

²² "If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here. * * * It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. . . . 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." 343 U.S. 495, 502-03 (1952).

²³ "We not only do not know but cannot know what is condemnable by 'sacrilegious.' And if we cannot tell, how are those to be governed by the statute to tell.

"It is this impossibility of knowing how far the form of 'sacrilegious' carries the proscription of religious subjects that makes the term unconstitutionally vague." 343 U.S. 495, 531 (1952) (Frankfurter, J., concurring).

constitutionality *per se* in relation to the statute being a prior restraint on expression by means of censorship, the court explicitly stated that they *did not decide*, "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."²⁴

Therefore, the *ratio decidendi* of the *Burstyn* case is two-fold. Motion pictures now seem to be within the protection of freedom of speech and of the press under the First Amendment as applied to the states under the Privilege and Immunities Clause of the Fourteenth Amendment, and if a censorship statute is to be held constitutional at all, it must be definite under the necessary requirements of Procedural Due Process. The court's *dictum* relating to the possibility of prior restraint upon motion pictures as a form of expression does find weight in previous language used by the court. In *Near v. Minnesota*,²⁵ the court was concerned with the Minnesota "Gag Statute" which made available injunctive relief against newspapers when they published copy tending toward criminal libel. The court, holding the prior restraint unconstitutional, mentioned certain exceptions to the rule of complete freedom of expression.²⁶ These exceptions have been reiterated in a number of decisions in the form of criminal punishment for expression outside the limits of

²⁴ 343 U.S. 495, 506 (1952).

²⁵ 283 U.S. 697 (1931). The United States Supreme Court invalidated the statute, MASON'S MINN. STAT. § 10123-1 (1927), as a prior restraint upon publication under the First Amendment as applied to the states through the Privileges and Immunities Clause of the Fourteenth Amendment.

The leading case in Nebraska concerning prior restraint upon newspaper publication is *Howell v. Bee Publishing Co.*, 100 Neb. 38, 158 N.W. 358 (1916). In that case Howell, before becoming a candidate for governor, published a statement disaffirming any desire to seek the post. As the primary election approached he changed his mind, but the defendant published the original statement in its newspaper. Howell sought an injunction to restrain defendant from again publishing or circulating the article. The lower court held for Howell, but the Supreme Court of Nebraska reversed, stating, "[A] court cannot use its equity powers to prevent the publication of political matter merely on the ground that it is untruthful or misleading, its truthfulness and its publication for good motives and for justifiable ends being a defense in an action at law." 100 Neb. 39, 42, 158 N.W. 358, 359 (1916). The case was decided under the Nebraska Constitution: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." NEB. CONST. art. I, § 5.

²⁶ *Near v. Minnesota*, 283 U.S. 697, 716 (1931): "[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has

the First Amendment,²⁷ such as criminal libel and inciting riots. What the court does fail to point out is that there are an equal number of decisions which constantly reaffirmed the proposition of no prior restraints in the form of licensing ordinances which act as censorship in fields other than the exhibition of motion pictures.²⁸

Although the Supreme Court had not held censorship as applied to motion pictures *per se* unconstitutional, there arose between 1952 and 1961 a number of *per curiam* decisions invalidating every motion picture censorship law which came before the Supreme Court. It is interesting to note the different concurring opinions which seemingly expand the narrowness of the *Burstyn* decision. In *Gelling v. Texas*,²⁹ the court was confronted with a censorship ordinance from Texas. 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" and provided criminal fines. The Texas Court upheld both the ruling of the Censorship Board and a fine of \$200.00 for showing the film without their approval.³⁰ The Supreme Court reversed, citing the *Burstyn* decision and *Winters v. New York*.³¹ In citing these two opinions, the court appears to be declaring the Texas ordinance unconstitutional under the "vague and indefinite" standards of the Procedural Due Process Clause of the Fourteenth Amendment, in that "of such character as to be prejudicial to the best interests of said city," is too broad a standard for the censor-

been recognized only in exceptional cases: 'When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured. . . .' *Schenck v. United States* 249 U.S. 47, 52. . . . On similar grounds, the primary requirements of decency may be enforced against obscene publications. . . . The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force.' *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 439 (1911)."

²⁷ *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Feiner v. New York*, 340 U.S. 315 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²⁸ *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

²⁹ 343 U.S. 960 (1952) (*per curiam*).

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

³¹ 333 U.S. 507 (1948).

ship board to operate under.³² The concurring opinions take opposing positions.³³

In reversing the lower courts in *Superior Films, Inc. v. Department of Education and Commercial Pictures Corp. v. Regents*,³⁴ the court cited only the *Burstyn* decision. The *Superior* case was based upon whether the movie was "moral" and "tending to corrupt morals." In spite of the concurring opinion, the majority appears to be invalidating the lower court decision on the criterion of vagueness. In *Holmby Productions, Inc. v. Vaughn*,³⁵ the court failed to eliminate the status of censorship strictly under the First Amendment, citing only the *Burstyn* case. Again, one can infer that the reasons for reversal were based upon the Procedural Due Process Clause of the Fourteenth Amendment.

The last *per curiam* decision was handed down by the Supreme Court in *Times Film Corp. v. City of Chicago*.³⁶ The Censorship Board of Chicago had refused to issue the necessary permit for the motion picture, *Game of Love*, on grounds that the movie was "immoral and obscene". Upon reversal, the Supreme Court cited *Alberts v. California*³⁷ and *Roth v. United States*.³⁸ In citing these two cases, the court introduced another issue into the movie censorship problem. Both *Alberts* and *Roth* dealt with obscenity in publications. The court held obscene expression not to be within the protection of the First Amendment,³⁹ and set forth a standard for

³² The lower court dismissed the problem of the wide discretion given to the Board of Censors because the issue had not been raised. Therefore, the problem of delegating too much authority to such a board was not decided. 157 Tex. Crim. 516, 247 S.W.2d 95 (1952).

³³ 343 U.S. 960 (1952) (Frankfurter, J., concurring); 343 U.S. 960 (1952) (Douglas, J., concurring).

³⁴ 346 U.S. 587 (1954) (*per curiam*). Both decisions were handed down at the same time.

³⁵ 350 U.S. 870 (1955) (*per curiam*).

³⁶ 355 U.S. 35 (1957) (*per curiam*).

³⁷ 354 U.S. 476 (1957).

³⁸ 354 U.S. 476 (1957).

³⁹ "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, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. 476, 484 (1957). In discussing another type of literature—crime magazines and comic books—which appears to be "without redeeming social importance," the court had previously found to be protected in *Winters v. New York*, 333 U.S. 507 (1948) by stating, "We do not accede

deciding whether a publication was obscene.⁴⁰ By citing these two cases, two inferences may be drawn. First, the contents of the motion picture in question did not meet the court's standards for obscenity, and secondly, since the movie was not obscene, the content of the motion picture was under the protection of the First Amendment. But the question of unconstitutionality due to prior restraint remained unanswered.

In *Kingsley Pictures Corp. v. Regents*,⁴¹ the Supreme Court was again confronted with the New York Censorship Law.⁴² The Board had refused to license the picture, *Lady Chatterly's Lover*, because its content was a "presentation of adultery as a desirable and proper pattern of behavior."⁴³ The Supreme Court held the basis for not issuing the license unconstitutional since the First Amendment's purpose was for the protection of ideas. The court carefully pointed out that the state court had "unanimously and explicitly rejected any notion that the film is obscene,"⁴⁴ and cited the *Roth* case.

III. THE TIMES CASE

As the facts of the recent Supreme Court holding in the *Times Film Corp. v. Chicago*,⁴⁵ previously stated in the Introduction, point out, it is not unconstitutional for a censorship statute to empower an administrative agency with the right to view every motion picture before its public exhibition. Therefore, censorship laws are not *per se* unconstitutional. The issue was so put to the court that it had only to decide the method of the censorship law, and not the

to appellee's suggestions that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine. Though we see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best literature." 333 U.S. 507, 510 (1948).

⁴⁰ "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. 476, 489 (1957).

⁴¹ 360 U.S. 684 (1959).

⁴² See note 19 *supra*.

⁴³ 360 U.S. 684, 685 (1959).

⁴⁴ *Id.* at 686.

⁴⁵ 365 U.S. 43 (1961).

substance.⁴⁶ The case certainly does not stand for the proposition that once the censor has viewed the movie he may proceed unrestricted, for the same scrutiny mentioned previously in the other motion picture cases will be applied. The court justifies its results under the previously discussed exceptions to the First Amendment, and relies heavily upon the *dictum* of the *Burstyn* case.⁴⁷

From the above cases two conclusions can be drawn. The Court will first examine a censorship statute under the Procedural Due Process Clause of the Fourteenth Amendment in order to be certain that it is not vague or indefinite. If the statute in question meets the necessary requirements for definiteness, and the motion picture is not obscene within the *Roth* test, the Court will decide the issue under the Privileges and Immunities Clause of the Fourteenth Amendment as incorporating the guaranties of the First Amendment.⁴⁸ Those areas thus protected may be summarized as follows: Any motion picture which is of a religious nature,⁴⁹ or which could be considered political, even if it contains criminal libel,⁵⁰ would be protected against prior restraint. The censorship of newsreels, assuming they depict politics or social conduct, is probably *per se* unconstitutional.⁵¹ The possibility of a censorship board banning or deleting parts of a film because disorder or riot might be caused is not clear. It appears reasonable that the court would apply

⁴⁶ "[T]he broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide. . . . Petitioner's narrow attack upon the ordinance does not require that any consideration be given to the validity of the standards set out therein. They are not challenged and are not before us." 365 U.S. 43, 46 (1961).

⁴⁷ See note 22 *supra*.

⁴⁸ Even though the court may find the censorship board's standard in violation of those areas protected within the First Amendment, the court seemingly prefers to apply the Procedural Due Process test first. There is authority for this approach: "2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it' [or] '... unless absolutely necessary to a decision of the case. . . .'"

"3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . .'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-7 (1936) (Brandeis, J., concurring).

As to the *Roth* test and obscenity in general, see the companion comment preceeding.

⁴⁹ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁵⁰ *Near v. Minnesota*, 283 U.S. 697 (1931).

⁵¹ *State v. Smith*, 48 Ohio Op. 310, 108 N.E.2d 582 (1952).

the same tests in motion pictures as it does in other fields of expression. Ever since *Terminiello v. Chicago*,⁵² the "clear and present danger" test appears to be of little value.⁵³ Therefore, it seems reasonable that the court would scrutinize the standards applied by the various censorship boards for censoring motion pictures in the same manner the court scrutinizes laws in other fields which limit freedom of expression.

IV. CONCLUSION

Although the holding in the second *Times* case is narrow in respect only to the right to view and not necessarily to the right to censor pictures, the court cannot limit its decision solely to obscene films. It necessarily follows that if the censor has the right to view, he must view everything in order to ascertain if the picture is obscene. If any film can be censored, then he may see all films.⁵⁴

While the time it takes to view motion pictures is reasonably short, if the same system of prior inspection were to be applied to

⁵² 337 U.S. 1 (1949).

⁵³ In a recent New York case, *Rockwell v. Morris*, 29 Law Week 2385 (N.Y. Sup Ct. App. Div. 1st Dept. 1961), a "self-styled" American Nazi applied for a permit from the commissioner of parks in order to speak, and was not given alternative suitable location and date as required by the city ordinance. The New York court held such conduct by the commissioner violated the New York Constitution, and stated: "There is no power in government under our Constitution to exercise prior restraint of the expression of views, unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal. . . . Only if [speaker] speaks criminally (or, perhaps, if it is established on a proper record, in that very rare case, that he will speak criminally, not because he once did, but that he will this time, and irreparable harm will ensue) can his right to speak be cut off." *Id.* at 2386.

Times Film Corporation is now appealing a Virginia case which upheld the censor's refusal to grant a necessary permit on the grounds that the movie in question might cause "disorder." *New York Times*, Feb. 26, 1961, p. 54, col. 1.

⁵⁴ It is interesting to compare the requirement of "probable cause" which must, under the Fourth Amendment of the United States Constitution, be satisfied before an arrest or search can be made with the court's decision in the instant case, which in effect sanctions the seizure of the film with no showing of probable cause. The argument, for example, made in the instant case, that a seizure without probable cause should be sustained because in many cases a search is necessary to uncover any evidence of crime, when advanced in the search and seizure area, has generally been rejected. See *State v. Buxton*, 238 Ind. 93, 148 N.E.2d 547 (1958).

other media, then the time element might become repressive. But even disregarding the time element, the exhibitor now and the author possibly, in the future, is at the mercy of a zealous censor who wishes to "protect" society from "harmful" ideas. Under such a system, delays could be costly to the industry while appeals are taken through the courts.⁵⁵

Under censorship, in cases where relief against prior restraint is not constitutionally protected, the exhibitor is deprived of a jury trial which is available under criminal statutes.⁵⁶ Under the criminal procedure, the defendant has the presumption of innocence, trial of the issues involved, a determination of the facts, and other Procedural Due Process safeguards. The benefit of censorship laws to society is doubtful,⁵⁷ and the harm to a free society is obvious.⁵⁸

G. Bradford Cook, '62

⁵⁵ "Vindication by the courts of *The Miracle* was not had until five years after the Chicago censor refused to license it." *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 73 (1961) (Warren, C.J., dissenting).

⁵⁶ Many states have statutes making the exhibition of obscene, immoral, indecent, or impure motion pictures a criminal act. ILL. REV. STAT. c. 38 § 470 (1959); N.Y. PENAL CODE § 1141(1) (1955); N.C. GEN. STAT. § 14-193 (1953); OHIO REV. CODE § 2605.40 (1955); VT. REV. STAT. § 8492 (1947); WIS. STAT. § 351.38(3) (1953).

⁵⁷ See KRONHAUSEN, *PORNOGRAPHY & THE LAW* 267 to 280 (1959).

⁵⁸ See dissenting opinions in *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 50-84 (1961).