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## Constitutional Law—Validity of Denial of License to Exhibit Motion Picture

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## CONSTITUTIONAL LAW

## Validity Of Denial Of License To Exhibit Motion Picture

Expression by means of motion pictures is included within the free speech and free press guaranty of the first and fourteenth amendments.<sup>1</sup> The freedom to exhibit is not an absolute one,<sup>2</sup> but its erosion is prevented by limiting the area of permitted governmental intervention. This restricted area of encroachment has been further delimited by recent Supreme Court pronouncements which place curbs upon legislative delegation of wide powers of censorship to administrative bodies.<sup>3</sup> One recognized exception to the general rule of "limited censorship,"<sup>4</sup> is revealed in recent federal and state attempts to control the flow and dissemination of magazines, and other forms of expression which are, by definition, obscene.<sup>5</sup> These successful efforts have reaffirmed the widely-held judgment that obscenity is not within the boundary of constitutionally protected speech. But, use of the word, obscene, does not by merely attaching it as a label to a form of expression, rid us of all the dangers to freedom of speech and the press.

One substantial danger to these guaranteed rights lies in the administrative or judicial determination that a given motion picture, or magazine, *is* obscene, even under modern terminology.<sup>6</sup> There is no problem where a defendant admits the obscene nature of his product, but great areas of disagreement, even by the best of courts, occur when a given standard is applied to a particular film, book, or photograph. The fundamental problem is perceptively squared by Mr. Justice Harlan, concurring in *Alberts v. California*, and dissenting in *Roth v. United States*,<sup>7</sup> when he states that "if obscenity is to be suppressed, the question whether

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

2. *Id.* at page 497.

3. Gelling v. State of Texas, 343 U.S. 960 (1952); Superior Film v. Department of Education, 346 U.S. 587 (1953); Holmby Prods. v. Vaughn, 350 U.S. 870 (1955).

4. Near v. Minnesota, 283 U.S. 697 (1931). See, comment, 6 BUFFALO L. REV. 305 (1957) for a thorough treatment of subsequent restraints in the area of obscene literature, and the impact of recent New York statutory law upon the subject of obscenity.

5. Examples of federal and state statutory enactments can be found in 18 U.S.C. §1461 (federal obscenity statute), and N.Y. CODE OF CRIMINAL PROCEDURE §22-a (state obscenity statute).

6. The Supreme Court, in the *Roth* and *Alberts* decisions, accepted the following definition(s) of the term, obscene:

. . . whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest . . . the test in each case is the effect of the book, picture, or publication considered as a whole not upon any particular class but upon . . . the average person in the community. —U.S.—, 77 S.Ct. 1311, 1312 (1957).

7. *Roth v. United States*, *Alberts v. California* —U.S.—, 77 S.Ct. 1304 (1957). It must be noted that no issue was presented in either case involving the obscenity of the material involved, since it appears to have been the defendants' intention to test the constitutionality of both statutes.

a particular work is of that character involves not really an issue of fact, but a question of constitutional judgment of the most sensitive and delicate kind." The case of *Excelsior Pictures Corporation v. Regents of University*,<sup>8</sup> which decided by a bare majority of the Court of Appeals, that the film, "Garden of Eden," was not subject to prior censorship, presents the problem of film censorship in as dramatic and forceful manner possible. Arguments of great weight and social importance are brought forward by the opposing views generated by the members of the Court; arguments ranging from the preservation of the constitutional separation of powers,<sup>9</sup> to the need of protecting freedoms of expression where any general public concern is not evident, or probable.<sup>10</sup>

Petitioner, Excelsior Pictures Corporation, presented the film "Garden of Eden" before the acting director of the Motion Picture Division of the State Education Department, in order to receive the necessary license to exhibit the movie. The film depicted, in a fictionalised form, the activities of the members of a nudist group in a secluded private camp in Florida. The director denied petitioner a license, and petitioner requested the Board of Regents to review this decision. The Board affirmed the denial of the license, and by applying the provisions of section 1140-b of the Penal Law to the film, found that under the Education Law,<sup>11</sup> the film was indecent, whereupon, on appeal, the Appellate Division<sup>12</sup> annulled the prior determination and ordered the license granted.

The majority opinion of the Court of Appeals, affirmed the action of the appellate court, and supported the finding that the film was not obscene,<sup>13</sup> as the court chose to define the term, indecent.<sup>14</sup> The acceptance of this finding is important in any attempt to understand the reasoning of the majority. The major premise as put forth by Judge Desmond is that only matter which is obscene can be subject to censorship. The film "Garden of Eden" is not obscene (indecent), nor is it made so by applying a penal section involving the wilful exposure of one's private parts to two or more members of the opposite sex,<sup>15</sup> where the

8. 3 N.Y.2d 237, 165 N.Y.S.2d 42 (1957). Here, petitioner contested the finding of the Department of Education that the film to be exhibited was indecent (obscene).

9. 3 N.Y.2d at 249, 165 N.Y.S.2d at 54, 55.

10. *Id.* at 244, 165 N.Y.S.2d at 49.

11. N.Y. EDUCATION LAW §§122 and 124 require the Board of Regents to issue a license unless the 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.

12. 2 A.D.2d 941, 156 N.Y.S.2d 800 (3rd Dep't 1957).

13. See note 8 *supra*, at page 239, 240, 165 N.Y.S.2d at 44, 45.

14. By the application of the maxim *noscitur a sociis*, the Court limited the definition of the term, indecent, to mean obscene. Its action had deeper importance in that it gave to a word, which, standing alone, would be stricken down as too vague; just as the words, immoral, sacrilegious, were rejected by the Supreme Court. 3 N.Y.2d at 242, 165 N.Y.S.2d at 44, 46, 47.

15. N.Y. PENAL LAW §1140-b, is fully set forth at 3 N.Y.2d 248, 165 N.Y.S.2d 52.

validity of such statutory application is to be found, neither in the section itself, nor in the legislative history which surrounded its promulgation.<sup>16</sup> Therefore, since the movie in question was not found to be obscene under a reasonable and sensible reading of the statutes in question, it could not be subjected to any censorship. In its opinion, the Court also rejected the old Hicklin test of obscenity,<sup>17</sup> in favor of more recent statutory and judicial tests, reaffirmed the use of section 1141 rather than 1140-b of the Penal Law in aiding the Court in its determination whether a given *film* was obscene, and concluded its arguments by saying that "in the present case the Board of Regents . . . went far beyond the permissible maximum of censorship . . . this unlawful exercise of the censorship power must be overruled by this court."<sup>18</sup>

In a long and wordy dissent, Judge Burke took issue with the majority on the various points of its opinion. He attacked the definition given the term "indecent" by the Court,<sup>19</sup> and stated that the term had a clear and understandable meaning. Also, when read in the light of section 1140-b, the term had a fixed definition for the purposes of section 122 of the Education Law. The opinion continued by reviewing the legislative history of section 1140-b, and concluded that the legislative intent was manifest, and that the section was to be applied when a film depicting a typical nudist colony, was to be exhibited.<sup>20</sup> The dissent sharply challenged the role of the majority in its attempt to limit the area of permissive state intervention, and reiterated the argument that when the legislature has spoken with sufficient clarity, the judiciary must not interpose its own personal judgment by declaring a particular statutory enactment inapplicable.<sup>21</sup> The dissent would thus have upheld the application of section 1140-b to the Education Law provisions relating to movie licensing,<sup>22</sup> and would have given the term, indecent, its own independent significance.

The approach of the majority, seen in the light of the preferred position of the first amendment freedoms,<sup>23</sup> would seem the wiser and more acceptable view. Obscenity, along with criminal libel,<sup>24</sup> apparently are the only remaining areas of

16. 3 N.Y.2d at 243, 165 N.Y.S.2d at 48. The history of the statute demonstrates that the legislature had in mind a particular evil which was creating serious harm to the citizens of the state. It was quickly passed, and from the lack of case law, just as quickly forgotten, until the present decision.

17. See, *Regina v. Hicklin*, L.R., 3 Q.B. 360, 371 (1868), where the test "whether the tendency of the matter . . . 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," was established.

18. See note 8 *supra* at page 244, 165 N.Y.S.2d at 49.

19. *Excelsior Pictures Corporation v. Regents of University*, 3 N.Y.2d 237, 247, 165 N.Y.S.2d 42, 52, 55 (1957).

20. *Id.* at 254, 165 N.Y.S.2d at 52, 53.

21. See note 19 *supra* at page 249, 165 N.Y.S.2d at 54, 55.

22. N.Y. EDUCATION LAW §§122, 122-a, 124.

23. *Thomas v. Collins*, 323 U.S. 516 (1946); *Schnieder v. State*, 308 U.S. 147 (1939).

24. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

permissible governmental penetration where forms of expression are involved. In line with this view, the majority finds that it is a valid exercise of state power to prohibit the exhibition of obscene matter, but an attempt to curb expression by labeling it "indecent," and giving the term its own independent meaning, would present grave constitutional problems when viewed in the light of Supreme Court decisions striking down censorship based upon standards as vague and broad as "indecent."<sup>25</sup> The only avenue of interpretation open to the Court of Appeals would be to interpret the term as it did, thereby giving the word a meaning found acceptable by the highest court, and at the same time avoiding any constitutional questions which would arise if the motion picture were to be denied a license solely on the ground that it was "indecent." The majority also pointed to the accepted practice of applying section 1141 of the Penal Law to motion pictures; that is, to enable the Board of Regents to define the terms "obscene, lewd, lascivious, indecent," when judging a motion picture. Under section 1141, these terms have been defined and the test has become, obscenity, and the attempted use of section 1140-b to help the Board of Regents find a clearer meaning for "indecent," and to give it a meaning different than that placed under section 1141 cannot be justified. The limited purpose and reach of section 1140-b was not meant to extend to motion pictures, nor was it even meant to help define a word as broad as "indecent." The Board of Regents attempted to stretch the statute beyond the limits of its logic, by what appears to be a strained interpretation of the legislative history.

The majority has succeeded in preserving section 122 of the Education Law, in order to apply it under the proper circumstances to a motion picture which any reasonable member of the community would say was totally lacking in social value, and which treated sex in a manner appealing mainly to prurient interest. It has properly declared that, when forms of expression are to be subjected to censorship, the Court should be the final state arbiter on the delicate constitutional questions involved when a film is labeled obscene. The Court should not, and cannot accept any administrative determination as the final word on the subject.

### Police Power—Unlawful Interference With Business

The police power endows the legislature with a wide range of discretion in the enactment of legislation.<sup>26</sup> Ordinarily, if it appears that the object of the legislation in question is to promote the public health, safety, or welfare, and that the means adopted by the legislature are reasonably calculated to reach this end, the legislation must be sustained.<sup>27</sup>

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25. See note 3 *supra*.

26. *Adamec v. Post*, 273 N.Y. 250, 7 N.E.2d 120 (1937).

27. *People v. Perutta*, 253 N.Y. 305, 171 N.E. 72 (1930).