South Carolina Law Review

Volume 22 | Issue 1 Article 9

1970

Freedom of Expression and the Censor

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CONSTITUTIONAL LAW — FREEDOM OF EXPRESSION AND THE CENSOR*

Freedom of expression is the slogan of a new wave of permissiveness in our society. A new standard of sexual mores is developing. An unprecedented degree of candor can be found in literature, and in all fields of entertainment. A new era of iconoclasm has shattered many of the moral and social taboos surrounding sex and nudity. It is in this context that the law is struggling to establish the boundaries of freedom of expression and the degree of censorship that is permissible. In the development of these boundaries, the formulation of a workable definition of obscenity is vital, and the future of censorship will largely depend on the standard adopted. This paper will investigate the trend toward a greater freedom of expression and the effect this trend will have on the role of the censor.

I. Toplessness and the Censor

One of the most effective weapons of the censor is the licensing power.[1] The area in which licensing exerts its greatest regulatory power is in the field of alcoholic beverage sales:

> The business of selling intoxicating liquor is one attended with dangers, and under the police power the state may limit the operation of such business to conditions which will minimize its evils.[2]

However, this power wanes as the Department of Alcoholic Beverage Control moves into the shadowy area which often divides conduct, which the department can properly regulate, from expression, which is beyond the scope of the department's authority. The California Court of Appeals case, *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*[3] illustrates both the broad power such a department may have in

*Boreta Enterprises, Inc. v. Department of Alcoholic Bev. Control, 75 Cal. Rptr. 79, ——P.2d —— (Ct. App., 1st Dist. 1969).

1. "The need to obtain a permit or a license for first amendment related conduct such as parading or picketing presents an identical situation [prior censorship]. By manipulating the procedures through which approval is given, the state is able to discourage different types of communicative activity." Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808, 827 (1969).

2. Farah v. Alcoholic Bev. Control Appeals Bd., 159 Cal. App.2d 335, 338, 324 P.2d 98, 101 (Dist. Ct. App., 2d Dist. 1958).

3. 75 Cal. Rptr. 79,—— P.2d—— (Ct. App., 1st Dist. 1969).

regulating conduct in restaurants and bars, and also the problems encountered when it tries to regulate "entertainment."

The Department of Alcoholic Beverage Control in *Boreta* attempted to revoke a liquor license on the grounds that the use of "topless" waitresses was offensive conduct in itself and, therefore, contrary to public welfare or morals. The court, however, held that the display of bare female bosoms alone did not establish that the bar was a "disorderly house." No improper conduct was shown that would warrant such a conclusion. The court decided the case solely on the issue of whether the conduct of the waitresses was "injurious to the public morals, health, convenience or safety. . . ."[4] The court stated that without proof of offensive conduct the attempt to revoke the license was an arbitrary exercise of power and could not be condoned. The court also pointed out that while the department has the duty to maintain standards not contrary to public welfare or morals, this does not include the power to decide what customers may see:

> These principles do not give the department the arbitrary power to act as the arbiter of what patrons may observe. No one who does not consider such a display and exposure clean and wholesome is required to patronize the licensee's establishment.[5]

As the court observed, to permit such regulation would present "some constitutional problems."[6]

In *Boreta*, the court cites many situations in which the Department of Alcoholic Beverage Control can properly revoke a liquor license. The standard utilized is the production of sufficient evidence to establish that the place under investigation is a "disorderly house":

> . . . [I]n order for premises to constitute a disorderly house there must be improper acts committed on the premises. The mere presence of those who might engage in proscribed conduct elsewhere cannot even be grounds for legislation penalizing the licensee. Overt acts of impropriety are required.[7]

4. *Id.* at 89.
5. *Id.* at 95.
6. *Id.* at 97.
7. *Id.* at 89.

Among the "overt acts" deemed sufficient for the revocation of a license are the employment of girls to loiter in bars and solicit drinks,[8] the fact that an establishment is in an area of high incidence of arrest for drunkenness,[9] the solicitation by prostitutes on the premises,[10] the congregation of homosexuals or lesbians,[11] and the presence of gambling.[12]

The *Boreta* court insisted that freedom of expression was not involved because the regulation of "topless" waitresses concerns itself only with the "manner in which alcoholic beverages may be served":[13]

> The employment of "topless" waitresses has been deemed entertainment for local licensing purposes. (citation omitted). It has been recognized, however, that there is a distinction between the power of the Alcoholic Beverage Control Board to proscribe by regulation the use of bare-breasted female waitresses to attract business to cocktail bars, saloons, and restaurants which serve alcoholic beverages, and the proprietor's right to conduct such activities as entertainment which may be carried out without the serving of liquor.[14]

However, an ordinance requiring that establishments employing "topless" waitresses must obtain special licenses drew unsuccessful constitutional attack in *Robins v. County of Los Angles*.[15] In *Robins*, the court upheld the ordinance, stating that there was no interference with freedom of expression since the ordinance deals with the "commercial aspects of a business

8. Garcia v. Munro, 161 Cal. App. 2d 425, 326 P.2d 894 (Dist. Ct. App., 1st Dist. 1958); Karides v. Department of Alcoholic Bev. Control, 164 Cal. App. 2d 549, 331 P.2d 145 (Dist. Ct. App., 1st Dist. 1958).

9. Torres v. Department of Alcoholic Bev. Control, 192 Cal. App. 2d 541, 13 Cal. Rptr. 531 (Dist. Ct. App., 4th Dist. 1961).

10. Munson v. Department of Alcoholic Bev. Control, 248 Cal. App. 2d 598, 56 Cal. Rptr. 805 (Dist. Ct. App., 2d Dist. 1967); Los Robles Motor Lodge, Inc. v. Department of Alcoholic Bev. Control, 246 Cal. App. 2d 198, 54 Cal. Rptr. 547 (Dist. Ct. App., 3d Dist. 1966).

11. Benedetti v. Department of Alcoholic Bev. Control, 187 Cal. App. 2d 213, 9 Cal. Rptr. 525 (Dist. Ct. App., 1st Dist. 1960). *But see* Vallerga v. Department of Alcoholic Bev. Control, 53 Cal.2d 313, 1 Cal. Rptr. 494, 347 P.2d 909 (1959) in which the court states that evidence of the display of sexual urges and desires must be present, rather than merely showing that the bar was a resort for a certain class of persons.

12. Maloney v. Department of Alcoholic Bev. Control, 172 Cal. App. 2d 104, 342 P.2d 520 (Dist. Ct. App., 1st Dist. 1959).

13. *Id.* at 88.

14. *Id.* at 88.

15. Robins v. County of Los Angeles, 248 Cal. App. 2d 1, 56 Cal. Rptr. 853 (Ct. App., 2d Dist. 1966).

enterprise. . . ."[16] The court felt that the exposure of the naked breast should be reasonably regulated until such practice becomes socially acceptable. It is probable that similar challenges will arise in the future.[17]

Boreta illustrates the ease with which a licensing board can tread on constitutional rights. In *Boreta*, the Department of Alcoholic Beverage Control had promulgated no definite rule or regulation that could cover the *Boreta* situation. The brunt of the department's argument had to be based on a "policy statement." The court at several points noted the potential unconstitutionality involved:

> . . . [W]here, as here, there is no legislative proscription with respect to the conduct complained of, and no rule or regulation regarding it has been promulgated by the department, the licensee must determine for himself whether he will pursue a course of conduct which has not been regulated or subjected to any standards. If he elects to do so, he runs the risk of a subsequent determination by the department that in its discretion his conduct was contrary to public welfare or morals. When it so acts, the department functions as a censor, and however lofty its motives may be, acts arbitrarily and in a manner not contemplated by the constitution.[18]

The court also revealed the potential constitutional issue involved in *Boreta* when it pointed out that while the only way to regulate "innocent activities" such as those involved in *Boreta* is by statute or rule, the court was not called upon to determine the "validity or constitutionality of any particular rule. . . ."[19] The court carefully retreated from any statement concerning the constitutionality of a future department rule restricting "topless" waitresses.

While *Boreta* is not an example of censorship in the ordinary sense, it represents an area in which an agency designed to regulate conduct can move into the realm of expression.[20] As the Supreme Court has stated, "[i]t is characteristic of the freedoms

16. 56 Cal. Rptr. at 860.
17. Rogge, *The High Court of Obscenity*, 41 ROCKY MT. L. REV. 1, 52 (1969) noting that one such challenge reached the Supreme Court's 1968-1969 docket.
18. Boreta Enterprises, Inc. v. Department of Alcoholic Bev. Control, 75 Cal. Rptr. 79, 100 (Ct. App., 1st Dist. 1969).
19. *Id.* at 98.
20. *Id.* at 87. In *Boreta* an obscenity charge was dropped by the department. Such a charge would have squarely raised a freedom of expression issue.

of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments."[21] Once any regulatory body enters the area of pure expression, as opposed to conduct, the power of censorship is greatly curbed. This area is controlled by the first amendment guarantees of freedom of speech and press which protect expression and dissemination of ideas and is made applicable to the states by the fourteenth amendment. These guarantees are abridged only in instances of sedition or obscenity.[22]

II. OBSCENITY, THE PERFORMING ARTS, AND THE CENSOR

The states have the power to regulate amusements and exhibitions to the extent that such regulation does not encroach on the area of control granted to the Federal Government in this field by the constitution. The first amendment charges the Federal Government to protect free speech and press against any regulation. However, the first admendment guarantees do not protect all speech or all expression, and suppression of material which is obscene, lewd, indecent and immoral is allowed.[23] Today, the power of the censor to suppress what he deems "obscene" is becoming increasingly limited as the Supreme Court definition of obscenity becomes increasingly restrictive.

The performing arts were first placed within the purview of the first and fourteenth amendments' guarantees in *Burstyn v. Wilson*[24] which involved the attempted censorship of a motion picture as "sacrilegious". The Court stated that the role of our government does not include suppressing any "real or imagined attacks upon a particular religious doctrine"[25] and therefore a motion picture could not be banned because a censor deemed it "sacrilegious."[26]

In the opinion, the Court cited *Near v. Minnesota*[27] as the guideline for the proper instances in which prior restraint might be utilized. In *Near*, the Court recognized two areas for such prior restraint: obscenity and sedition.[28] Therefore, *Burstyn* brought motion picture censorship as well as censorship in

21. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).
22. Rogge, *The High Court of Obscenity*, 41 ROCKY MT. L. REV. 1, 1 (1969).
23. Adams Newark Theatre Co. v. Newark, 22 N.J. 472, 126 A.2d 340 (1956), *aff'd*, 354 U.S. 931 (1957).
24. 343 U.S. 495 (1952).
25. *Id.* at 505.
26. *Id.* at 506.
27. 283 U.S. 697 (1931).
28. *Id.* at 716.

analogous forms of entertainment, theatre and television, into the struggle of establishing a definition of obscenity that would regulate the degree of expression permissible through these mediums.

The standard of obscenity used until recently is that of *Roth v. United States*:

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.[29]

However, the *Roth* definition was not exclusive.[30] In *Manual Enterprises Inc. v. Day*,[31] the Court stated that prurient interest appeal alone was not the proper test for obscenity and that "patent offensiveness" of the material must also be shown. In *Jacobellis v. Ohio*,[32] the Court decided that material can not be proscribed unless it is shown to be " 'utterly' without social importance." The *Memoirs* decision stated that the three elements of "patent offensiveness", "prurient interest", and "utterly without social importance" must coalesce before the obscenity of any material can be found.[33] Thus, through a process of grafting onto the *Roth* test, the Court has reached a highly restrictive test for obscenity.

The *Roth* definition itself has been subject to definition of its terms, most importantly in respect to "the average person" and "contemporary community standards." The Court has stated that these two terms are to be determined on a national standard of society at large or people in general as opposed to a local or state standard in determining the constitutional criteria of obscenity.[34] The implementation of a national standard insures a uniform concept of obscenity which changes with the tenor of the times, not the town or county.

With the *Ginzberg v. United States*[35] and *Mishkin v. New York*[36] decisions, criteria for obscenity have been developed to handle unusual situations which the general test for obscenity is

29. 354 U.S. 476, 489 (1957).
30. *See* Rogge, *The High Court of Obscenity* (pts. 1-2), 41 ROCKY MT. L. REV. 1, 201 (1969); Haimbaugh, *Obscenity, and End to Weighing?*, 21 S.C.L. REV. 357 (1969).
31. 370 U.S. 478 (1962).
32. 378 U.S. 184 (1964).
33. A Book Named, "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).
34. Jacobellis v. Ohio, 378 U.S. 184 (1964).
35. 383 U.S. 463 (1966).
36. 383 U.S. 502 (1966).

unable to effectively regulate. *Ginzberg* added the criteria of pandering or "commercial exploitation of erotica solely for the sake of their prurient appeal."[37] This test made it possible to suppress materials whose subject matter itself might not be obscene, but which because of the obvious effort, as witnessed through production, sale, and publicity to emphasize solely the sexually provocative aspects and to create a salacious aura for the material, has the overall effect of purely an appeal to the prurient interest.

Mishkin elaborated the scope of "prurient interest" to encompass deviant sexual groups. The Court stated that if it were clear that the material were consumed by and designed for a deviant sexual group as opposed to the general public, the test for obscenity is the appeal to such a group's prurient interest measured by the appeal to the particular or peculiar interest in sex of the members of the deviant group.[38]

The effect of the Court's attempts to formulate a standard is one of increased permissibility in the area of freedom of expression. The criteria for obscenity are guided and created by the Court's adherence to the theory that as long as some attempt to convey an idea is found or some evidence of an intellectual effort is discernible, the constitutional protection of the first amendment is warranted.[39]

Licensing

While the new definitions of obscenity themselves are making it increasingly difficult for any form of police power to brand material as obscene and thus to regulate it, the Court has also attacked the very core of censorship—the licensing power or prior restraint. *Near v. Minnesota* began this attack by stating that the primary purpose of the first amendment is to prevent previous restraints upon publication:

> The exceptional nature of its (first amendment's) limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant principally, although not exclusively, immunity from previous restraints or censorship.[40]

37. Ginzberg v. United States, 383 U.S. 463, 466 (1966).
38. Mishkin v. New York, 383 U.S. 502, 508 (1966).
39. *See* Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959); United States v. A Motion Picture Entitled "I Am Curious—Yellow," 404 F.2d 196 (2d Cir. 1968).
40. 283 U.S. 697, 716 (1931).

In *Near*, the Court stated that the object of the statute involved was to suppress a newspaper or periodical rather than punish it, and therefore violated first amendment guarantees.

In the entertainment field, the issue of prior restraint has been dealt with most frequently in motion picture cases. The whole scheme of the requirement of securing a license before showing a motion picture came under fire in *Time Film Corporation v. Chicago.*[41] It was argued that all motion pictures should be shown without any prior submission of the film to any licensing authority and that the state's remedy lay in the criminal process if there were any offense. The Court rejected this sweeping attack noting the privilege against prior restraint is not absolute and that obscenity has never been sanctioned under the Consitution. The Court stated that the state had the power to devise the system it deemed most effective in combating obscenity but added: "(we), of course, are not holding that city officials may be granted the power to prevent the showing of any motion picture they deem unworthy of a license."[42]

While *Time Film* upheld this scheme of censorship, the procedural aspects of the licensing power were sharply curtailed in *Freedman v. Maryland.*[43] The Court held that the Maryland licensing procedure was unconstitutional due to the fact of the built-in risk of delay in securing the license which in itself becomes a restraint of freedom of expression. The Court set out broad but demanding guidelines for censorship proceedings:

> [T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited . . . [to] the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. . . . Therefore, the procedure must also assure a prompt final judicial decision to minimize the deterrent

41. 365 U.S. 43 (1961).
42. *Id.* at 50.
43. 380 U.S. 51 (1965).

effect of an interim and possibly erroneous denial of a license.[44]

In *Freedman*, the Court notes that while motion pictures may not be subject to the precise rules that govern other forms of expression, censorship in this area as in all others is viewed with a "heavy presumption against its validity."[45]

Aside from this active form of prior restraint through licensing prior to exhibition, the Court also has assailed the indirect restraining forces. *Freedman* involved this aspect of censorship also. The Court observed that the exhibitor's stake in having one film shown might be insufficient to endure any lengthy litigation, and he might also be unwilling to go through such proceedings when he knows he can show his film in most of the country without such a delay.[46]

In *Bantam Books Inc. v. Sullivan*,[47] indirect restraining forces were also attacked. In *Bantam Books*, the Rhode Island legislature created the "Rhode Island Commission to Encourage Morality in Youth" whose duty it was to "educate the public" concerning the obscenity, indecency, corrupting tendency and impure language of any material disseminated in the state. The commission also made it a practice to notify distributors of its findings of objectionability of their material for sale, distribution or display to the youth in Rhode Island, and to remind the distributors of the commission's duty to recommend prosecution of purveyors of obscenity to the Attorney General. Consequently, many distributors stopped circulation on receipt of such notification. Here the Court stated that any form of "legal advice" from an agency with only "informal sanctions — the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation . . ."[48] was in itself a form of unconstitutional censorship. The Court added that such legal advice squelched voluntary actions and bypassed the safeguards of the criminal process.

One field in which censorship can still exert an effective power in entertainment today is in restricting the audience. The Court in the *Ginsberg* case stated that the constitutional powers

44. *Id.* at 58-59.
45. *Id.* at 57.
46. *Id.* at 59.
47. 372 U.S. 58 (1963).
48. *Id.* at 67.

of the state include the regulation of the well-being of its children and the proscription of certain materials for children's consumption if it is rational that exposure to such materials might be harmful.[49] In *Bantam Books* this same idea was expressed:

> Certainly in the face of rising juvenile crime and lowering youth morality the State is empowered consistent with the Constitution to use the above procedures [publicize findings as to the obscene character of any publication, solicit public support in preventing such publications from reaching juveniles, to furnish such findings to publishers, distributors and law enforcement officials, and aid in prosecution of offenders] in attempting to dispel the defilement of its youth by obscene publications.[50]

This area of censorship has few opponents. Already the motion picture industry has adopted such a code with the age limit for "X" movies given local discretion. It is also easy to see why such an area of censorship would be acceptable. It is an area in which everyone agrees that harmful side effects can develop and which has little relation to the principle issue of obscenity — what is permissible for the general public.

III. Conclusion

The ambit of protection under the first amendment is best illustrated by the recent case *United States v. A Motion Picture Entitled "I Am Curious — Yellow."*[51] The Court admitted that this film's sexual content was presented with "greater explicitness than has been seen in any other film produced for general viewing."[52] Sexual intercourse is depicted as well as scenes of oral-genital activity. Yet this film was not found to be obscene. The Court found that the film did have social value and that while sex was a very important aspect of the film, the dominant theme was not sex.[53]

Censorship finds itself in the midst of rapidly changing conceptions of what is obscene. With the power to license under strict surveillance and regulation, with any form of informal

49. Ginsberg v. New York, 390 U.S. 629, 639 (1967).
50. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 76 (1963).
51. 404 F.2d 196 (2d Cir. 1968).
52. *Id.* at 198.
53. *Id.* at 199.

restraint working under the heavy presumptions of unconstitutionality, the role of censorship is being reduced to a bare minimum. An examination of current trends in entertainment is indicative of the imminent death of censorship. In 1964, Lenny Bruce's obscenity conviction for his use of four-letter words and gestures indicative of masturbation on the stage was reversed in Illinois.[54] On Broadway, *Hair* and off Broadway *Oh, Calcutta* utilize scenes involving the nudity of men and women as well as a barrage of four-letter dialogue, and neither show has been closed. In California, "toplessness" is becoming passé, and the state is witnessing the advent of the "bottomless" era. Television entertainment is becoming increasingly permissive and allows the use of sexual jokes and comedy sketches.

In this mood of permissiveness in expression, the ranks of advocates of the complete abolition of the censor are increasing. Justices Douglas and Black are firm in their convictions of this complete abolition as every obscenity decision indicates. Legal writers are also advocating this position:

> There should be no obscenity legislation or litigation as such. If there is conduct which amounts to a breach of the peace, indecent exposure, contributing to the delinqency of a minor, or the like, prosecute such conduct. But do not censor what individuals read, see or hear.
>
> . . . .
>
> In the long run we would be better off if we had no obscenity legislation at all. The pornographers would have had their day and that would be that.[55]

While the Supreme Court has not abolished censorship theoretically, the practical effect of its decisions has rendered the censor virtually powerless. The increasing restrictiveness of the test for obscenity is indicative of the Court's present philosophy toward censorship: "The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose."[56] In the atmosphere of this philosophy, the censor will find it extremely difficult to litigate obscenity cases successfully.

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54. People v. Bruce, 31 Ill. 2d 459, 202 N.E.2d 497 (1964).
55. Rogge, *The High Court of Obscenity*, 41 ROCKY MT. L. REV. 1, 7 (1969).
56. Ginsberg v. New York, 390 U.S. 629, 649 (1967).