Carmen: Movies, Censorship and the Law

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One of the reasons that the ever-ranging debate about movie censorship sheds more heat than light is that the debate usually structures around United States Supreme Court decisions. Like the top of an iceberg, these decisions are visible, measurable, and, standing by themselves, not too perilous. It is the down-under part that counts, however, and this is usually ignored. In this respect, Mr. Carmen adds some new dimensions to the discussion in his book, Movies, Censorship and the Law. He can therefore be forgiven for not digging quite as deeply into the real causes and effects of motion picture censorship as one might wish. He is at least where the action really is.

The traditional law review note or article in this field focuses its attention on the most recent Supreme Court case. It analyzes the decision and seeks to answer the question of whether the Court has moved forward or backward from its previous pronouncements on motion picture censorship. The ambitious author may seek to collate the cases and strive to line them up as showing a rational evolution of the current standards of censorship. It continues to surprise the commentators that a graph of these decisions most closely resembles the flight of a bumblebee.

Motion picture censorship is a phenomenon in a free society. It therefore causes phenomenal judicial pronouncements. Is there any other way to describe the initial movie censorship decision of the Supreme Court in Mutual Film Corp. v. Industrial Commission\(^1\) of 1915? There the Court said that motion pictures were a business “pure and simple, originated and conducted for profit.” Thus, the Court separated out movies from the fabric of law covering other forms of expression such as books or newspapers. Fifty years later many laugh at that decision, and some even think that today motion

\(^1\) 236 U.S. 230 (1915).
pictures have the equal protection afforded other forms of communication. One need only contemplate the reaction to a proposal to screen all the newspapers or books prior to publication to discard that notion.

The fact of the matter is that in 1915 the Supreme Court was looking for an easy way to avoid the impossible task of justifying and yet limiting the wholly different attitude that the American public and government have about motion pictures compared to the other media of communication. The fact of the matter is that even in 1915 the record presented to the Supreme Court showed innumerable censorship authorities regulating this "pure and simple" business of motion pictures. The fact of the matter is that the number of censorship authorities has increased even as the United States Supreme Court has backed away from the simplistic Mutual Film approach to the problem.

One of the places where Mr. Carmen has failed to dig to the root is the "why" of this separate treatment for motion pictures as against the other media of communication. There is a brief discussion in the conclusion about the inconclusiveness of the proof that the viewing of motion pictures in fact does lead to antisocial behavior. However, the author dismisses out of hand the suggestion of the American Civil Liberties Union and others that, absent such convincing proof, the first amendment freedom ought to prevail in its entirety as to motion pictures. Instead Mr. Carmen concludes for enlightened censorship:

It is herewith offered as a considered judgment that under a system of regulation set out above, the motion picture should be allowed to take its place as a first-class medium for cultivation of artistic and intellectual values; and it should never be condemned to the purgatory of censorship domination.

Why? What is this mysterious essence of motion pictures which requires that they be treated differently from the printed word, the spoken word, the still picture? Even television which communicates via the same senses as motion pictures is free from prior restraints. What is it about motion pictures which causes such a different attitude toward the freedom to communicate? Even though the question might have some psychological-mystical connotations, it can hardly be deemed irrelevant to the subject matter of this book. Until one knows why regulation is necessary in a particular field of activity, it is hard to determine what kind of regulation is compatible with our notions of a free society.

Maybe it is a prejudice against Hollywood—a prejudice that is in part based on the fact that everybody connected with motion pictures makes so much money out of it. The Supreme Court in 1915 found that a complete answer to the question in the Mutual Film
case. As late as 1948 one of the great civil libertarians of our time, Alexander Meiklejohn, was willing to lump radio (which was his pet peeve), movies, and newspapers into a category that was not "entitled to the protection of the First Amendment [because they were] not engaged in a task of enlarging and enriching human communication." Rather they were "engaged in making money. And the first amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage." As late as last year the United States Supreme Court in the celebrated Ginzburg case seemed to indicate that the measure of money or money-making motive involved in a communication might affect the measure of freedom that the communication was to enjoy.

There is more to the mystery than that, however, when it comes to motion pictures. The abandonment of the Mutual Film rationale establishes that there is more. Yet the cases do not shed too much light on the problem, because judges usually are unwilling to describe the visceral reasons that underlie the feeling that there is something unique about motion pictures as a form of communication. Local censorship authorities are a much better source. In the reviewer's experience with cases before the Chicago censors the reasons have to do with the darkness of theaters, the fact that both sexes see a motion picture together, and the fact that the motion picture is "larger than life."

If these reasons are valid, then the system of regulation perhaps ought to take them into account. How about a regulatory scheme which says that certain kinds of motion pictures can be shown only in well-lighted theaters? How about a scheme which precludes bisexual audiences? If this sounds silly, then contemplate the fact that the motion picture "Never on Sunday" was completely banned by some censorship authorities, limited to "adults only" audiences by others, screened in advance throughout the country, but just recently was shown to television audiences throughout the country without any such limitations or prior reviewing.

A separate segment of the mystery is also treated somewhat cavalierly by the author. This has to do with the notion that motion pictures must be previously restrained. Our basic law precludes anticipatory restraint of all kinds of behavior that has antisocietal consequences, ranging from the commission of a crime to the writing of a book. The exhibition of motion pictures, however, may be subject to prior restraint. The author, although acknowledging the difficulties inherent in prior censorship (and his own personal distaste for such a system) made no inquiry as to why there was this strong impetus for reviewing motion pictures, and only motion pictures,

2. A. MEIKLEJOHN, FREE SPEECH 104 (1948).
in advance of their exhibition. Indeed in discussing Burstyn v. Wilson, which supposedly brought motion pictures to a constitutional parity with other forms of communication, the author saw little significance in the Court’s ambiguous treatment of prior restraint as an exception to such parity.

Some of the most useful material in the book appears in the appendices containing interviews with various censorship authorities. First of all, it is good reading (the Chicago authorities vigorously deny the charge that the censor board is made up of “policemen’s widows” and point out that two of the censors are aldermen’s widows). Secondly, the interviews point up some dismaying notions about freedom of communication in general. Thus, one of the interviewees affirmed the desirability of prior restraints as against subsequent punishment by saying: “It is better to have a board. You have centralized control. Under the other system everyone is a censor.” Another complained that the courts were “bending over backwards to favor freedom of speech considerations.” Another stated: “It is important to remember that movies are made only for financial profit and not for educational or artistic reasons.”

Most important, the appendices confirm the contention that the courts propose and the censorship authorities dispose. Many of the censorship authorities operate without lawyers; almost all say they operate on a case-by-case basis with little if any attention being paid to the fine legal niceties so agonizingly constructed by the courts and analyzed by the legal commentators.

The author uses the appendices as well as other field research to good avail in the text. It is the grist out of which the practice of censorship is juxtaposed against the law of censorship. As said before, this is the unique contribution that makes the book well worth reading.

One other sin of omission ought to be noted. Anyone who has read the literature of censorship cases is struck by the fact that many of the decisions which were heralded as major break-throughs in favor of freedom really only involved word changes. Thus “obscene” became “lewd” became “lascivious” became “prurient.” There is a semantic phenomenon at work, and it is worthy of analysis. Some have suggested that when the standard of prohibition comes into too common usage it is no longer an effective standard. When someone could describe a piece of furniture that he found distasteful as being “obscene,” the courts had to find a new password for the fraternity of censors to apply in their work. If this suggestion is valid, then “prurient” may have a limited life expectancy as well. In any event,

5. The author gave short shrift to the puzzlement of C. Herman Pritchett who commented on the case in Civil Liberties and the Vinson Court 41 (1954). Pritchett foresaw difficulty because of this ambiguity, but to the author the case was clear.
since so much allegedly turns on the particular words used, the phenomenon is worthy of further analysis.

Some day a lawyer-sociologist-psychiatrist-semanticist will write a book explaining why motion picture censorship is such a pervasive notion. In writing such a book that hybrid author will certainly find Mr. Carmen's book most useful. Until it is written Mr. Carmen's book will at least tell the reader how motion picture censorship works, which is a lot more than can be derived from reading either the court decisions or the legal commentaries about those decisions.

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