

## BOOK REVIEW

BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT. By Edward de Grazia\* and Roger K. Newman.\*\* New York: R.R. Bowker Co., 1982. Pp. 532. \$24.95.

REVIEWED BY ABNER J. MIKVA\*\*\*

When Associate Justice Potter Stewart made his candid admission that "perhaps I could never succeed" in intelligibly defining hardcore pornography, but "I know it when I see it,"<sup>1</sup> he unintentionally carved his niche in Supreme Court one-liners. It mattered not that he had probably set a new record for candor, or that he was only saying explicitly what other jurists had been implying for dozens of years; he was roundly denounced, both in scholarly and popular circles, for having pointed out that the emperor had no clothes.

Worse yet, Justice Stewart's subjective reaction failed to diminish the unceasing efforts to create objective criteria for the cause of censorship. All those words and phrases that have been used to justify the censorship of motion pictures—from "immoral," "indecent," and "tending to excite lustful thoughts" to "patently offensive," "appealing to prurient interests," "utterly without redeeming social importance," and "obscene"—continue unabated. Yet for the most part they remain sound and fury signifying nothing. Applying such standards requires no more and indeed allows no less than that which would be required by Justice Stewart's candor if it was put into practice.

BANNED FILMS<sup>2</sup> parses out all of the legal battles that not only preceded but have since followed Justice Stewart's moment of truth. Both the "story" of movie censorship, which is Part One of the book, and the chronological case histories of 122 films meant to be exemplars of that story, which comprise Part Two of the book, make clear why Justice Stewart's profundity was uttered in a concurring opinion in which no other Justice joined.<sup>3</sup> The book, in short, is far more success-

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<sup>1</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>2</sup> E. DE GRAZIA & R. NEWMAN, *BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT* (1982).

<sup>3</sup> Indeed, other Justices of the Supreme Court apparently have referred to Justice Stewart's remarks only twice in written opinions, each time to demonstrate that defining unprotected obscenity is difficult, if not impossible, to do. *See, e.g., Smith v. United States*, 431 U.S. 291, 311, 313 & n.9 (1977) (Stevens, J., dissenting); *Miller v. California*, 413 U.S. 15, 37, 39 (1973) (Douglas, J., dissenting).

ful in reaching its goals than the courts and society have ever been in reaching theirs.

Lawyer de Grazia and historian Newman use their book to describe the history of movie censorship as a small chapter in the larger phenomenon of censorship of all forms of communication. Except for noting the obvious explanation that movies generically are a more effective medium for communicating one's message, the book offers no great truths about the field; nor does it try to analyze why films have been treated more harshly than other forms of speech. Although the suspected bias of the authors as civil libertarians and advocates in the field more than occasionally comes through, they do very little propagandizing for the broad freedom of expression that they undoubtedly believe movies deserve.

Yet in their attempt to synthesize all of the cases and judicial opinions that must be used to tell the complete story of movie censorship, the authors necessarily wield influence over the conclusions that a reader will take from the book. The first conclusion that can be derived, especially after examining the chronology of case histories provided in the book's latter half, is one that can also be derived from looking at a few movies currently being shown at local theatres: movie censorship has not accomplished its stated purpose. Many, if not most, of the case studies included in the book represent failed attempts by censors to ban the disputed films. Although censorship efforts have often delayed a movie's airing or have resulted in objectionable parts being removed before public distribution, only rarely have the efforts of censors completely stopped the showing of a movie, and even then only for selected audiences or in limited jurisdictions.

Moreover, attempts to ban movies have often backfired from the perspective of the censors. Whether due to the additional publicity generated by controversial efforts to censor, or to the natural curiosity of potential moviegoers, more often than not a movie is seen by more people after an attempt to censor the film has been made—whether or not the effort to ban the movie has been partially successful. Indeed, the reviewer recalls one experience in Chicago when the exhibitors quoted directly from the judge's injunction which originally banned the film (and which was overturned on appeal) in order to advertise the movie.

The prime example of this latter phenomenon, however, must be Otto Preminger's *The Moon Is Blue*, a 1953 film that failed to receive the seal of approval from an industry board and was thereafter barred from various jurisdictions by government censors. Despite these limitations on its distribution, or perhaps because of them, the film demonstrated that economic disaster did not necessarily follow from at-

tempted censorship. Rather, the film's experience proved, as one commentator noted, that "Provocative Subject equals Protests equals Publicity equals Profits."<sup>4</sup> One need only mention more recent movies such as *I Am Curious—Yellow* and *Deep Throat* to confirm this hypothesis.

It does not follow that the movie censors are wasting their time or that their efforts will have no redeeming censorious value. The tenacity of censors can be credited, at least in part, for the continued censorship of movies found to be obscene under the standards of *Roth v. United States*<sup>5</sup> and *Miller v. California*.<sup>6</sup> Perhaps more important, however, is the chilling effect that even the threat of censorship has had on the production of motion pictures. The authors of *BANNED FILMS*, for all their exactitude in cataloguing the cases involving movie censorship that have reached the courts, cannot collect those unknown cases in which writers ignored controversial subjects, directors avoided objectionable scenes, or editors eliminated questionable words or pictures. Such unrecoverable forms of expression would be a truer measure of censorship and its pervasive nature; yet the ugliness of censorship is that just such anticreative effects can never be fully catalogued.

What the book can and does demonstrate in a persuasive way is the vast amount of self-regulation, impossible to challenge under the first amendment because of the lack of "state action," that over the years has been voluntarily adopted and accepted by the movie industry. In many respects, it is this story which is the hidden focus of the book, and which might well startle the general reader. In 1916, when movie producers and directors first formed the National Association of the Motion Picture Industry, a self-censorship program meant to avert federal legislation and regulation was initiated. Thereafter, the heyday of the Motion Picture Association of America, from the 1920's through the 1950's, provided the industry with its most pervasive self-control. Virtually all segments of the industry agreed to this self-regulation: producers agreed to have screenplays reviewed by the trade association before production began and to submit completed films for association endorsement, distributors agreed not to handle films that had not earned a seal of approval, and many theatres agreed not to show even those unapproved films that reached the local level. It was not until a few movie giants, most notably Otto Preminger in the mid-1950's, successfully distributed their movies with-

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<sup>4</sup> E. DE GRAZIA & R. NEWMAN, *supra* note 2, at 87.

<sup>5</sup> 354 U.S. 476 (1957).

<sup>6</sup> 413 U.S. 15 (1973).

out industry approval that the stranglehold of self-regulation was largely broken. Even today, however, most movies are still submitted to a Code and Ratings Administration which reviews films, makes suggestions aimed at improving a movie's rating, and eventually rates the movie with the intention of guiding the public concerning a film's suitability for children. There can be no doubt that this simple ratings code itself has an antispeech effect that would be unconstitutional if accomplished under the aegis of the law.

A second conclusion that is reinforced after reading this book is that there is a push-pull factor operating in American society as it becomes more heterogeneous and pluralistic. The greater number of categories and subgroupings within the society, the more frightened some people become of the growing differences between "them" and "us." If there is only one town idiot parading up and down in front of city hall, or one theatre-owner showing a movie in the red-light district, he can be tolerated with amusement. If there are several dozen, all marching to different drummers or playing several movies in various neighborhoods, those supporting the status quo in society become frightened. This, in turn, leads them to use the powers that be to calm their fears, usually by censoring or regulating that which is so disturbing.

The other side of the coin, of course, is that the more categories and subgroupings that exist, the more different kinds of communications are needed to reach all of those people. This dilemma is clearly evidenced in *BANNED FILMS*: the movie fare of the 1930's did not include the antisocietal messages of the 1980's; but the movie fare of the 1930's, even using updated language and mores, would not begin to satisfy the different kinds of moviegoers currently visiting theatres across the country. Thus, an American society becomes more pluralistic, there is an increasing tension between the need for greater variety in motion pictures and the fear that such variety instills in the mainstream of the population. This tension is, in turn, the underlying source for many of the most vehement attempts at movie censorship.

A third conclusion, and the one which becomes more and more inescapable as new decisions are issued by the courts, is that the judiciary is an abysmal keeper for these fermenting standards, morals, and ideologies. It is when there is no consensus in society that courts usually are called upon to find a "solution" to the problem. It serves no purpose, however, to complain that neither judges nor juries can find the truth if there is no truth to be found. A judicially proclaimed consensus can never be as satisfactory as a consensus that is politically achieved; however, it is the political difficulty surrounding these issues which moves litigants to seek a judicial resolution. This is the stuff

of which hard cases have always been made, and movie censorship is just one more variation on the recurrent theme.

In sum, it must be recognized that for the most part there are no clear-cut conclusions. Chief Justice Vinson was castigated almost as much as Justice Stewart when he proclaimed that "[n]othing is more certain in modern society than the principle that there are no absolutes."<sup>7</sup> Messrs. de Grazia and Newman similarly can be pilloried for having concluded that the whole history of movie censorship is inconclusive. They provide no improved formula for how the courts should or will respond to first amendment questions in future movie censorship cases. But perhaps that is the key lesson to be drawn from **BANNED FILMS**.

The censorius amongst us certainly have no reason to feel chastened because of the few cases that have been lost along the way. A local movie censor could well read the book and believe that his or her life had been vindicated. At the same time, the lascivious amongst us certainly have not been retarded from their lustful quest by the few cases in which their freedom of expression has not been defended successfully. A moviegoer can today view just about anything that his or her heart can possibly desire. Indeed, both sides would be correct in their view that the history of movie censorship and the first amendment is the story of nonconclusions, all of which are thoroughly documented and chronicled in this worthwhile book.

**BANNED FILMS** is not a bible. It does not separate good from evil or even suggest that the next century's censors will be less prolific than ours. The book takes a small piece of the conundrum that arises when a lot of different people, including a whole industry and various levels and branches of government, are concerned about what other people are seeing and hearing. That these things are being said and heard in movies makes the conundrum more difficult to understand and more frightening to comprehend because things are said and heard so well in the movie picture. Like its counterpart **BANNED BOOKS**,<sup>8</sup> **BANNED FILMS** lists the attempts to censor. The quantity and quality of those censorship efforts ought to remind us how futile it is to seek to educate by telling people what not to know.

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<sup>7</sup> *Dennis v. United States*, 341 U.S. 494, 508 (1951).

<sup>8</sup> A. HAIGHT, *BANNED BOOKS: 387 B.C. to 1978 A.D.* (C. Grannis 4th ed. 1978).