Moving Picture Abuses and Their Correction in the United States

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AN industry as new and vast as is the moving picture industry in the United States necessarily developed abuses. As it expanded with the rapidity of the automobile industry it necessarily raised many legal questions more or less difficult of solution. So far as authors were concerned the quest for interesting plots brought on copyright cases thus putting new wine into old bottles. So far as the various producing companies are concerned the doctrines concerning unfair competition and monopolies would easily arise not to speak of difficulties growing out of the construction of the intricate contracts made by such companies with each other, with their authors, with their actors and with their exhibitors. Such and similar matters are beyond the proper scope of this article and will therefore not be referred to again.

The purpose of this article is not to concern itself with the financial damages suffered by various persons in consequence of the growth of the industry and the abuses which go with it. Its purpose is to deal with the personal harm experienced in connection with the abuses developed. The production of a moving picture may violate the right of privacy of living persons and such violation may be so gross as to involve the law of libel and slander. These indeed involve harm to

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1 Note (1924) 33 A.L.R. 311.
2 Note (1924) 33 A.L.R. 973.
3 Note (1923) 26 A.L.R. 369.
only limited numbers of persons but nevertheless deserve treatment in this connection.

The law of privacy is of recent origin. It did not gain prominence until an article jointly written by Samuel D. Warren of the Harvard Law School and Louis Brandeis, now of the United States Supreme Court, appeared in 1890 in the Harvard Law Review.

The leading case on the subject so far as moving pictures are concerned appropriately arose in California, the producing center of the industry. The California court deduced the right of privacy from a constitutional provision conceding to all citizens the right to pursue and obtain happiness. Since similar provisions are in force in many other states this decision is of the greatest importance and therefore deserves an extended statement here.

A young unmarried woman for some years pursued the oldest profession open to women. A murder occurred and she was indicted but acquitted after a public trial. Thereafter she changed her mode of life, married, obtained the good opinion of her neighbors and made a place for herself in the local society. Eight years after this change a motion picture company obtained the story from the record of her trial and made it the basis of a film entitled "The Red Kimono." This film was extensively exhibited in California and elsewhere, gave her maiden name and stated that it was based upon the true story of her past life. From it her friends for the first time learned of the unsavory incidents of her early life. Consequently she was scorned, exposed to obloquy, contempt and ridicule and subjected to grievous mental and physical suffering.

On demurrer to the complaint the court said that since she had changed her mode of life she should have been permitted to continue its course without having her reputation and social standing destroyed by the publication of her former depravity for the purpose of private gain. The court concluded: "The publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us, and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial, because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others."4

The development of the doctrine in New York, the distributing center of the motion picture industry and hence the state second in importance to California, has been different. The New York Court of Appeals in 1902 held that a young woman of rare beauty who was

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not an actress, or a literary, artistic or otherwise public person but preferred to enjoy her natural endowments as a private citizen, had no cause of action against a flour and box company which had produced 25,000 excellent lithographed profile likenesses of her on paper 22 by 30 inches with the name of the advertiser prominently printed thereon and which lithographs were distributed for display in stores, saloons and other public places.\(^5\)

The result of this case was that the New York legislature at its next session passed a statute declaring that anyone using for advertising purposes or for purposes of trade the name, portrait, or picture of any living person without having first obtained the written consent of such person was guilty of a misdemeanor and that any such person may enjoin such use of his name, portrait or picture and recover damages by reason of such use.\(^6\)

This statute received its best exposition in connection with the collision on January 23, 1909, between the steamships Republic and Florida on the high seas. The wireless operator of the Republic, John R. Binns, at once sent a "C. Q. D." which was picked up by the Baltic and other ships which transported some 1700 passengers to safety. This action was the first of its kind and saved hundreds of lives. It received the commendation of many nations, of numerous civil bodies and of the press of the world. It further resulted in the publication of his picture in numerous newspapers. He received in consequence many financial offers to exhibit himself as the hero of the disaster but declined them.

Nevertheless a moving picture company set to work to produce a number of films which purported to be the true story of the wreck of the Republic and in which an actor took the part of Binns. The imagination was drawn on for color. Binns was represented as fiercely smoking a cigaret during the crisis and smiling and winking and making grimaces for the amusement of the spectators. The films were copyrighted, described in pamphlets and circulars, and distributed widely through New York and elsewhere. They began reaching their market on February 20, less than a month after the wreck. When called to account the producer made no efforts to make amends, did not attempt to recall the pictures or to discontinue their use or to compensate Binns for the use of his name and portrait.

The court concluded its discussion as follows: "The defendant used the plaintiff's alleged picture to amuse those who paid to be entertained. If the use of the plaintiff's name and picture as shown in this case is not within the terms of the statute, then the picture of any

\(^5\) Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

\(^6\) New York Civil Rights Law, §§ 50 and 51.
individual can be similarly made and exhibited for the purpose of showing his peculiarities as of dress and walk, and his personal fads, eccentricities, amusements and even his private life. By such pictures an audience would be amused and the maker of the films would be enriched. The greater the exaggeration in such a series of pictures, so long as they were not libelous, the greater would be the profit of the picture makers and exhibitors. We hold that the name and picture of the plaintiff were used by the defendant as a matter of business and profit and contrary to the prohibition of the statute.  

A newsreel however is a different proposition. Instead of fiction in part or whole it consists of actual photographs of current events of public interest. If any person whose picture appeared in such a reel in recognizable form were to have a cause of action newsreels would probably fall into disuse and the public would be deprived of a very real source of information, education and amusement. The fact, therefore, that such a newsreel truthfully depicts a woman lawyer in an automobile with the chief of police engaged in solving a baffling murder mystery by directing the floor of the back room of a shop to be removed thus leading to the discovery of the body of the victim does not give rise to a cause of action on her behalf under the New York statute.  

What is true under the New York statute would also be true in states where there is no such statute. A considerable degree of protection is thus afforded to newsreel agencies in their quest for interesting pictures. This is illustrated by an Alaska case. In 1926 the Detroit Arctic Expedition financed by Detroit and eastern capital prepared for a flight from Point Barrow, Alaska, over the northpole. The Pathe News Service had acquired the moving picture rights and the consideration agreed upon was depended on to pay a part of the expenses of the undertaking. The International News Service without permission took pictures of the tractors, equipment, supplies and planes assembled at Nenana, Alaska, and indicated that it intended to continue taking such pictures for newsreel purposes. An injunction was prayed from the District Court of the Territory. 

The court on demurrer held that this was not a business enterprise but an heroic adventure, that its purpose was to add to the geographical, astronomical and other scientific knowledge of the world, that the public ever since the ill-fated attempt of Sir John Franklin

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to discover a northwest passage had shown a remarkable interest in such attempts, that hence such explorers are public characters like politicians, statesmen, authors and artists and their adventure a public enterprise in which everyone is interested and in which the public at large is interested, thus excluding any right of privacy. The court therefore concluded that the defendant "has a right to photograph anything connected with the enterprise, provided he can do so lawfully, and provided he violates no confidence of the expedition or its members, and provided he does not interfere with the expedition or its members in taking pictures and publishing them."9

A few minor points may be noted in passing. A moving picture actor clearly waives his right to privacy not only as against the company with which he has contracted but against its assignee as well. He is hence not entitled to enjoin such assignee from re-editing and rearranging these pictures so as to make playlets out of them.20 The mere fact that a factory is photographed with the sign which announces the name of its owner does not give such owner a cause of action though such owner employs many girls and young women and though the title of the film is: "The Inside of the White Slave Traffic." The use of such name under the circumstances is not for trade or advertising within the New York statute.21

When the reflections on persons published by a moving picture tend to bring such persons into disrepute the proper remedy is not slander but libel.12 In the pleadings the plaintiff need not set forth a description of all the scenes projected on the screen and of all the mechanical sounds accompanying them, whether they are words or other sounds, but may rest content to plead the ultimate rather than the evidentiary facts, in other words he may be content to set out a factual description of the objects portrayed including the representations concerning himself. A statement that the plaintiff, whose daughter had been murdered, had neglected her and had permitted her to carry on a clandestine relationship with her murderer is sufficient. Such conduct on the part of a mother is not accepted as proper by right thinking persons and imputing such conduct to a mother tends to expose her to public contempt and aversion, produces an evil opinion of her and deprives her of the amenities of social life.13

9 Smith v. Suratt, 7 Alaska 416.
The Rasputin case decided indeed in England against the alter ego of an American film company is the best illustration of this subject matter. A Russian princess was found to be the Princess Natasha of the film and since she was represented as having been seduced or ravished she recovered a judgment of 25,000 pounds sterling. In sustaining this judgment the court said that the high position of the plaintiff and the wide dissemination of the libel are to be taken into consideration.  

The limitations so far dealt with are indeed valuable but do not reach the real difficulty. It is possible within all of these limitations to produce pictures of crime and lust which defy all sense of decency. Such pictures set before the impressionable eyes of youth a conception of life which easily leads to a dissolute life, to a premature death in the electric chair or in a hospital, and to penitentiary sentences. What is or has been done in the United States in regard to this obvious evil?  

To those in the United States who regard the Sunday as sacred (and they are not a small minority) Sunday laws provide a measure of protection. Such laws usually prohibit all labor on Sunday except work of necessity or charity. The conducting of a moving picture performance has been held to be "labor"15 or "worldly employment or business"16 within the meaning of the statute and has been punished as a crime. If Sunday cessation of moving picture performances is all that is desired such statutes indeed afford very valuable help. However, they are on the statute books of only a limited number of states and in addition are enforced only where there is a sufficiently strong public opinion in their favor. Last but not least they do not affect moving picture performances on the other six days of the week and therefore are not sufficient to protect the youth of the land from improper pictures. Poison taken on a weekday certainly is just as dangerous as poison taken on a Sunday.  

Control exercised over local exhibitors by license laws are fine in theory but do not work out in practice. Due to "block booking" the local exhibitor must generally take all pictures apportioned to him or he will get none. Since the public demands pictures in any case his helplessness is his strength. License laws bearing down too heavily on him become unenforceable and need not therefore be further considered in this connection.  

To old time moving picture enthusiasts the statement flashed across many a silent picture "Approved by the National Board of Censor-

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15 Note (1919) 4 A.L.R. 385.
16 Rosenberg v. Arrowsmith, 82 N.J. Eq. 570, 89 Atl. 524 (1914).
ship” has a familiar ring. The composition of such board however was not so familiar. It was organized in New York in 1909, consisted of unpaid volunteers, later changed its name to “National Board of Review,” even received legislative recognition, but began to fade out when various states passed censorship laws and the conclusions reached by local censorship boards failed to agree in many cases with its own conclusion. It practically received its deathblow when Will H. Hayes was appointed by the industry to guide its destiny as hereinafter described.

The local censorship just referred to has generally taken the form of a local board created to pass on motion pictures before they are allowed to be exhibited in the particular state or city. Of the validity of such legislation there can be no doubt. The federal courts from the United States Supreme Court down have upheld such legislation as being consistent with the United States Constitution. State courts have reached the same result in regard to their respective state constitutions. Such courts include those of Illinois, Kansas, New York, Pennsylvania and Texas.

Next in importance to the validity of such laws is their construction. Not much space can be given to this matter at this time and place. Their effect is to prohibit the exhibition of any uncensored films, not their production or sale. They reach only the exhibitors and those who permit their exhibition. The approval of a film may be made subject to recall. Approval or disapproval is a matter of discretion and expert testimony on the subject is inadmissible. A refusal to license a film should be based upon an examination of it and not upon...

17 Seattle v. Smythe, 97 Wash. 351, 166 Pac. 1150 (1917). This case construes such a statute.
19 Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909); Fox Film Corporation v. Collins, 236 Ill. App. 281 (1925).
24 See Note (1929) 64 A.L.R. 508. The authorities referred to in connection with censorship have been gleaned from this note.
"general knowledge" of its character. The fact that a film illustrates experiences connected with the history of the country does not make it moral or fit to be shown. An appeal to a court is generally provided for from an adverse decision of the board but is not intended to make the court a super-censor but its purpose is merely to prevent an abuse of discretion by the board. A discretion properly exercised will therefore not be overturned by either court or jury. The administrative power to administer the censorship act will be conceded to the board. The courts will exercise only judicial powers. As to talking pictures the language accompanying the picture must be submitted to the board though the statute does not require this in express terms.

The results however have not been very favorable. The matter of any kind of censorship is distasteful to the average run of Americans, which sentiment is not without importance when such a statute is sought to be enforced. There is left in the American public a considerable amount of puritanic ideals which are apt to come into conflict with certain modern conceptions and both may be represented on the same board leading to a division of opinion as to what is moral and what is not. The fact that the censorship boards are confronted with published pictures (rather than with the question of whether a particular story shall or shall not be filmed) is a further difficulty. Last, but not least, such censorship is in force in only a limited number of states leaving the other states wholly unaffected by it. Not very much has therefore been gained by such legislation.

All the forces called into action by various states have been of little permanent effect on the moving picture industry. The baneful effect which pictures exalting gangsters, adulterers and prostitutes have on youth and adolescence have not been effectively controlled by them. Yet the tendency of the moving picture industry even before the depression was from innocence to filth, from wild west stories to overheated pent houses, from beautiful curls to undressed women. The depression sent the producers on a violent search for sexual and

29 State ex rel. Midwestern Film Exchange v. Clifton, 118 Ohio St. 91, 160 N.E. 625 (1928). The title of the film in question was: "The Dempsey-Tunney Boxing Exhibition."
30 Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909). The films involved were: "The Night Riders" and "The James Boys."
32 People ex rel. Fox Film Corporation v. Chicago, 209 Ill. App. 586 (1918).
34 Mid-West Photo-Play Corporation v. Miller, 102 Kan. 356, 169 Pac. 1154 (1918).
criminal plots. Their quest was successful. Clean pictures were all but superseded. The result in 1934 was such that out of 133 moving pictures listed by P. S. Harriman, editor of Harrison's Reports, 71 were found to be unsuitable for children and adolescents, 18 were doubtful and only 30 were approved.

What was done to check the growing evil? In some European countries reviewing commissions and other agencies were created to direct the industry towards the national works of great poets and writers and thus make them into educational agencies of the greatest importance. No better method of teaching literature and art to the masses could be devised. The motion picture speaks by means of a vivid and concrete imagery which the mind absorbs with pleasure and without fatigue.

While nothing of this sort was attempted in the United States one important step was taken by the industry itself. On March 4, 1922, Will H. Hayes resigned his office as Postmaster General in President Harding's cabinet to become the "Czar" of the moving picture industry. One of the purposes of this move was to prevent the rising tide of filth from becoming too nauseating. He accordingly submitted to the industry a code "to maintain social and community values in the production of silent, synchronized and talking moving pictures." This code laid down very valuable restrictions which if they had been obeyed would have entirely changed the subsequent history.

On March 31, 1930, this code was solemnly adopted by the Association of Moving Pictures Producers, Inc., and ratified by the Board of Directors of the Motion Pictures Producers and Distributors of America, Incorporated. Twenty companies signed the agreement but most of them did not adjust their policy to it. Instead they steadily went from bad to worse. Soon many pictures produced were merely a gigantic travesty on life. American ideals were misrepresented to the world of cinema patrons in the crudest manner. The moving picture industry was on the verge of becoming one of the most corrupting influences of all time.

Since self-regulation had failed and regulation by state or nation even where attempted was ineffectual the Catholic hierarchy decided to take action. At the charity conference held in New York in October, 1933, the Apostolic Delegate, Cicognami, said: "What a massacre of the innocence of youth is taking place hour by hour. How shall the crimes that have their direct sources in immoral pictures be measured? Catholics are called by God, the Pope, the Bishops and the priests to a united and vigorous campaign for the purification of the cinema, which has become a deadly menace to morals." As a consequence the Legion of Decency was formed the following month at a meeting of
80 Catholic bishops held in Washington and Catholics were urged to join the movement and make it effective.

The activity of the Legion took a two-fold form. The first aim was a classification of the current pictures into such as Catholics might attend and such as they should boycott. This work in November, 1934, was entrusted to Cardinal Mundelein of Chicago. Since, however, New York is the distributing center of the industry it was transferred to Cardinal Hayes of New York in November, 1935. The various means by which this classification was made available to Catholics and others throughout the country need not be described in this article.

The second effort was directed toward pledging the Catholic laymen to carry out the purposes of the legion. A pledge-card accordingly was prepared and signatures procured throughout the country. This pledge protested against unwholesome moving pictures as a grave menace to youth, to home life, to country and to religion. The signers promised to stay away from all motion pictures except those which do not offend decency and Christian morality.

This attack was adroitly directed against the very nervus rerum of the producers. Says a Catholic writer: "The challenge is simple. The producers tell us that they listen only to the voice of the box-office. Splendid. The boxoffice is their god. We will attack their god in the defense of the morality of our God." The efficiency of this attack was soon felt at Hollywood. Accordingly the Motion Pictures Producers and Distributors of America, Inc., in 1934 sent Mr. Martin Quigley of New York, and Mr. Joseph I. Breen of Hollywood to the meeting of the Episcopal Committee with the information that the industry had formulated a plan effective as of July 1, 1934, for self-regulation. This plan included the discontinuance of the producers jury which had proved its inefficiency. Its functions were taken over by the code administration while the board of directors assumed the final responsibility for the character of the products of the industry.

The general results have been very gratifying. In consequence of the improvement in condition thus accomplished the Pope in July, 1936, in his encyclical "Vigilanti Cura" expressed his gratitude to the hierarchy of the United States and to the faithful who cooperated with them under the direction and guidance of the Legion of Decency. In the course of his discussion he said: "Because of your vigilance and because of the pressure which has been brought to bear by public opinion, the motion picture has shown improvement from the moral standpoint: crime and vice are portrayed less frequently; sin no longer is so openly approved or acclaimed; false ideals of life no longer are presented in so flagrant a manner to the impressionable minds of

36 See THE MOTION PICTURES BETRAY AMERICA, Daniel A. Lord, S.J., at p. 44.
Those who stayed away from the motion picture theater because it outraged morality are patronizing it now that they are able to enjoy clean films which are not offensive to good morals or dangerous to Christian virtue.”

The Pope however was not content to leave the industry to its own devices. To make sure that the improvements would not be merely temporary he directed that “all pastors of souls will undertake to obtain each year from their people a pledge similar to the one already alluded to, which is given by their American brothers, and in which they promise to stay away from motion picture plays offensive to truth and Christian morality.”

In accordance with a resolution of the Bishops’ meeting at Washington in 1935 that the pledge be taken throughout the United States on the Sunday within the Octave of the Immaculate Conception such pledge was taken in open service in the Milwaukee Archdiocese on December 13, 1936, the congregation rising and repeating the following pledge. “I condemn indecent and immoral motion pictures, and those which glorify crime or criminals. I promise to do all that I can to strengthen public opinion against the production of indecent and immoral films, and to unite with all who protest against them. I acknowledge my obligation to form a right conscience about pictures that are dangerous to my moral life. As a member of the Legion of Decency, I pledge myself to remain away from them. I promise further, to stay away altogether from places of amusement which show them as a matter of policy.” Such a pledge annually repeated throughout the United States in all Catholic congregations cannot but have a most decisive influence in keeping moving picture production and exhibition within proper bounds.

Within such bounds a marvelous future now lies before the industry. The art of photography is now so advanced as to leave little to be desired. The scenery, history and literature of the world and its music, whether in the form of folk songs, symphonies or operas furnish inexhaustible material which can be made highly entertaining by the genius of present day writers and other artists. Whatever will be the effect of television (once it is perfected) in transferring the stage from the silver screen in theaters to the walls of mansions and cottages television itself will have to call on the arts and crafts developed in Hollywood. Even though all moving picture theaters should disappear (a result not to be anticipated) the moving picture industry would advance. Instead of leasing its products to local exhibitors it would lease or sell them to broadcasters.