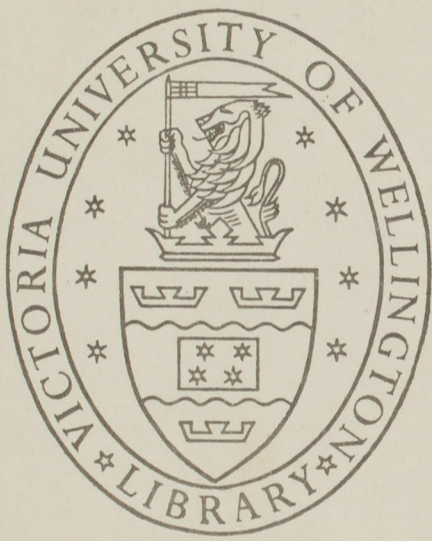


X 11

PIRIE, A.J.

Censorship of films

PIRIE, A.-J.

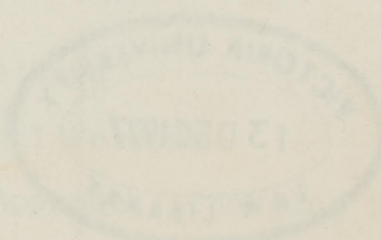


PIRIE, A.J.

Censorship of films

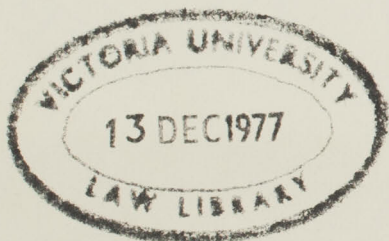
CENSORSHIP OF FILMS :

CONFLICT IN FOCUS



SPECIAL PROJECTS
LL.M.
ANDREW JAMES PIRIE
VICTORIA UNIVERSITY
WELLINGTON.

1976



359690

TABLE OF CONTENTS

	<u>PAGE</u>
1. <u>Introduction - Films and Censorship</u>	1
2. <u>A History of Censorship</u>	2
A. Introduction	2
B. The 1916 Approach	3
3. <u>Conflict with the Cinematograph Films Act</u>	21
A. Introduction	21
B. The Society for the Preservation of Community Standards and Others.	21
C. The Nature of the Conflict.	26
4. <u>The Approach to Conflict Resolution</u>	31
A. Introduction	31
B. The Particular Approach: Challenging the Censor	32
(i) Legal Methods	32
(ii) Extralegal Methods	36
C. The General Approach: Changing the Legislation	42
(i) The Cinematograph Films Amendment Bill	43
(ii) Assessment.	50
5. <u>Conclusion.</u>	56

1. INTRODUCTION : FILMS AND CENSORSHIP:

The historical development of the movies offers an intriguing study.¹ From the commercial debut of Thomas A. Edison's Kinetoscope in New York City on April 14, 1894 to the present day, movies have developed into an exciting and popular medium of mass communication. The representation of reality and the virtually unbounded visual impact created the excitement. The dispensability of education, intellect and even literacy provided the widespread popularity. Yet despite changes in the source of the excitement and the focus of popularity, a common denominator runs through the entire history of film. The movies were a public medium. From the peep show parlour to the nickleodeon to the modern movie theatre, viewing has been a public activity.

Thus, the movies grew up, unashamedly, in public and with their growth came the inevitable excesses.² While a pungent cigar could be offensive in private, the movies could not. The cause of these excesses created by the film makers is a subject in itself. It is sufficient to say the movies intruded beyond the scope of public acceptability and created a conflict between certain public interests over the film's content. Therefore, paralleling the development of the movies is a similar development of methods for controlling the content of such movies and hence controlling the conflict.

1. The Leading histories: Jacob, Lewis. The Rise of the American Film, New York, 1939; Ramsaye, Terry. A Million and One Nights, New York, 1926; Hampton, Benjamin B. A History of the Movies, Chicago, 1947.

2. In fact, the first recorded protest against a movie came just two weeks after Edison's machine was introduced, involving the show called Dolorita in the Passion Dance.

A study of the methods adopted by a particular society for controlling the content of films is a study in censorship. There is already a myriad of literature on this topic and this paper is not intended as a brief for either side of the censorship spectrum. Rather, this paper will be an examination of the manner in which censorship is accommodated in a particular society and how this accommodation takes place. This accommodation and how it is achieved will determine what the result of censorship is to be. If defects or faults are exposed in the approach to this accommodation the results of censorship may be undesirable.

This paper then will look at the censorship of films in New Zealand. First, from an historical perspective, the development of censorship legislation will be outlined with special reference on how this development occurred. Second, despite the conceptual basis of the legislation, conflicts of a particular nature exist. The response to these conflict situations will be the third area of examination with an explanation for both possible and observed responses. Finally, the paper will assess the major observed response to conflict over censorship.

2. A HISTORY OF CENSORSHIP

A. INTRODUCTION:

This section will trace the development of censorship legislation in New Zealand from as early as 1910 to 1974 and attempt to isolate problem areas. The starting point is appropriate since that year records the first significant indication of a need for censorship of films. The concluding date is not the end of N.Z. censorship history. Rather, as will be seen, it is a convenient point to draw the line between two identifiable approaches to the accommodation of censorship.

B. THE 1916 APPROACH:

Apparently the first representation of a need for censorship of films in New Zealand was made in the House of Representatives on 17 August 1910, coming approximately two years after the introduction of the cinematograph to New Zealand.³ The Hon. Sir W.J. Steward (Waitaki) asked,

Whether it is competent to the Borough Councils to forbid the exhibition, within their jurisdiction, of cinematograph-films portraying prize-fights or other objectionable incidents; and, if no such power is now possessed by municipal authorities, will he provide for same in the Municipal Corporations Act Amendment Bill to be introduced this session? ⁴

The Minister of Internal Affairs replied that,

There is no provision to forbid exhibitions of pictures unless they come under the provisions of the Police Offences Act, but the matter is being dealt with by legislation. ⁵

This brief exchange is valuable for two reasons. First, it illustrates that as early as 1910 there existed certain public interests, as Mr Steward surely represented, which conflicted with the content of certain films, ⁶ thus raising an inquiry about a

3. See New Zealand Parliamentary Debates, 1920, v.188 at 739.

4. New Zealand Parliamentary Debates, 1910, v.150 at 644.

5. Ibid.

6. It is interesting to speculate as to the reasons for this objection to prize fight films. The objection may have foreshadowed a 1912 U.S. Congressional Act barring such films which portrayed Negro dominance over white boxers. See Randall, R.S. Censorship of the Movies: The Social and Political Control of a Mass Medium, Wisconsin, 1968, at p.13.

4.

form of censorship. Second, the Minister indicates both the manner in which censorship had been accommodated prior to this dialogue and the likelihood of further legislation to deal with the matter.

In 1910 then, it appears certain provisions of the Police Offences Act ⁷ were the only means of censoring films. The sections the Minister referred to would seem to fall under Part II of the Act which deals with Indecency and vagrancy.⁸ But this legislation was never used to prohibit the exhibition of "prize fights or other objectionable films" and this is understandable. The pertinent section had been consolidated from its original enactment in the Offensive Publications Act, 1892 ⁹ when films were unknown. It is doubtful the section had any application to films except on a very loose interpretation of the ejusdem generis rule. The reference to the Police Offences Act may have been a mistake. The Minister perhaps intended to point out provisions in the Crimes Act. ¹⁰ dealing with crimes against morality as a method of prohibiting the exhibition of films. Again there does not appear to have been any resort to these sections to control the content of film. ¹¹ If the legislation was stretched, there may have been a certain indirect statutory accommodation of censorship interests. But certainly, their prime area of concern was not films, as their general application and lack of use indicate.

7. Consolidated Stats. 1908, No. 146.

8. The most applicable section would appear to be s.43(1)(d), relating to offensive publications, which prohibits any person from "exhibiting any such pictures or matter /of indecent, obscene or immoral nature/...to public view in any house, shop or place or... shows the same.

9. 56 Vict. 1892, No. 42.

10. Consolidated Stats. 1908, No. 32; s.157, which was originally enacted in The Criminal Code Act, 57 Vict. 1893, No. 56 provides that everyone is liable who knowingly, without lawful justification or excuse, (a) publicly exposes...to public view...any picture, photograph, or other object tending to corrupt morals, or (b) publicly exhibits any disgusting object or any indecent show.

11. But see, infra, pg 7, fn.17.

However, the Minister stipulated the issue would be dealt with by legislation. Both the Indecent Publications Act, 1910¹² and the Customs Act, 1913¹³ could be considered as the resulting legislation. While both statutes provide some scope for censorship of films,¹⁴ it is more probable this accommodation is merely an indirect consequence of very encompassing legislation that transgresses into areas of obscenity and indecency. No other legislation followed directly from the 1910 House of Representatives exchange.¹⁵

This initial accommodation of censorship interests is deserving of comment. In 1910 Sir Steward plainly represented that there was in existence a certain degree of conflict over the content of films being exhibited in parts of New Zealand. Yet the legislation that dealt with objectionable films, both prior and subsequent to his remarks, remained virtually unchanged. No further accommodation was apparently deemed necessary notwithstanding the legislation provided a relatively indirect method of censoring films. An assumption as to the reasons behind this general inelasticity to change in 1910 can be made. There would appear not to have been a sufficient moving force to initiate change either because the conflict was not widespread to any degree, or if confined, the individuals in conflict lacked any degree of political coercion.

12. 1 Geo. V 1910, No. 19

13. 4 Geo. V 1913, No. 63

14. The Indecent Publications Act 1910, was merely a separate enactment of the offensive publication provisions and would only with difficulty apply to films. The Customs Act, 1913, included as prohibited imports all indecent documents and all other indecent or obscene articles.

15. The Municipal Corporations Amendment Act, 1910, 1 Geo. V 1910, No. 81, contained no censorship provisions. A subsequent amendment in 1913 only provided the Borough Councils with authority to provide their own cinematograph exhibition and regulate the charges for admission.

These considerations will have to be borne in mind as the accommodation of censorship in New Zealand subsequently changes. From this rather static situation, significant changes in the accommodation of censorship were to develop. On 27 July, 1916, the Cinematograph-Film Censorship Bill was introduced to the House and read a first time.¹⁶ As the title suggests, the Bill was to provide for the censoring of cinematograph films. Before its mechanics are examined, the question arises as to the reason for the Bill. Had the circumstances of 1910, in which Sir Steward's request for this type of legislation produced no results, changed?

The moving force behind the Bill can be gleaned from the statements of the then Minister of Internal Affairs at the Bill's second reading:

Honourable members, of course, know that during the last ten years there has been an enormous development in connection with film pictures. At first these pictures were largely confined to scenic and industrial works, but during recent years there has been a large development. They have taken on the representation of drama and melo-drama, and, unfortunately, very questionable elements have in some cases been introduced into the pictures. An agitation started a year or two ago for the purpose of bringing about a censorship of films, and as a result the Internal Affairs Department obtained information as to what was being done in other countries.

16. New Zealand Parliamentary Debates, 1916 v.177, at 572.

Matters were brought to a head in this country largely by the Catholic Federation, which drew public attention to the abuse of film pictures, and sent out circulars to the whole of the Borough Councils of New Zealand and a number of educational authorities. Many replies were received from Borough Councils and educational authorities supporting the proposal for a censorship of films. A deputation waited upon me shortly after I took office, and since then the subject has been carefully considered from all points of view. The Churches came into line in connection with the demand, and the educational authorities, and a number of women's associations of New Zealand - all asking more particularly that the children might be protected from the disastrous effects that would result from film pictures of a not necessarily immoral, but highly suggestive, character being placed before children. As a result, this Bill has been prepared for the purpose of giving effect to the wishes of the people. I feel this Bill has been so demanded by the country that I am sure the House will pass it unanimously. 17

-
17. Ibid at 572-3. Gordon Mirams, a well known New Zealand film critic and, in fact, the fourth Censor, recounts in his book, Speaking Candidly: films and people in New Zealand, Wellington 1945, at 77-8, the event that actually precipitated the legislation: "In 1916 a film called Woman and Wine was on circuit in this country and had reached Wanganui; complaints were made to the local police; they went into the theatre and stopped the show on the ground that it was indecent. Their action aroused a great deal of public interest, and three months later the first censorship legislation was introduced.

Before the Legislative Council, similar reasons for the Bill's introduction were given by the Minister of Immigration:

I would remind the Council that this legislation has been asked for by a large number of citizens whom we all respect and who made representations to the Government on the subject during the last recess that some such power was necessary. It is ^{not} only the question pertaining to indecency that is involved. Honourable gentlemen will remember the faked film purporting to represent the execution of Nurse Cavell. Such matters as that are as important as the questions of public morality and crime, though I do not say, by any means, that that is not of considerable importance. 18

However the Bill was not entirely without criticism. Opposition was voiced by Mr J. Payne (Grey Lynn) representing interests in the film business.

In the first place, I understood this was a war session, and did not anticipate that any one would be so bigoted and narrow-minded as to bring down, during war-time, any measure that would bear hardly upon any particular industry: This Bill emanated as a result not of a desire to improve public morals, but from the Roman Catholics, because films were shown not with intent to offend, but owing to the fact that leading cinematographic

18. Ibid. at 601. The objection to the film portraying the execution of Nurse Edith Cavell is a reference to Herbert Wilcox's famous historical film, Dawn.

companies today are filming as dramas some of the leading and most prominent novels of the day. Quite without intent to offend, these films have been made, and the Roman Catholics have taken exception to certain of them which tended to build up bigotry against their religion. They were quite justified in making that protest; and I emphatically endorse the protest they made, or that any person might make regarding a picture that was against their religion. But when they have made that protest they ought to have been content, because if there is a clean show in the world today it is the New Zealand picture show. It is the wrong time to suggest this departure. I was at Fullers' a fortnight ago, and I saw a scene in a revue which if we had put it on and shown it as a film would have raised the ire of every goody-goody in the community. A man takes up a girl in his arms and dances round with her - it was a kind of a faun dance. Now, any man with a clean mind would see but the artistry in it. There was nothing lewd in it, and nothing suggestive of the lewd in it. He takes all the various parts - dances, ballet-girls, scenery, and all the rest of it - in the light of an artistic entertainment, and it goes at that. ¹⁹

19. Ibid at 574-5.

Clearly, the father of the legislation was the Catholic Federation, with certain solicited public support.²⁰ The conflict over the content of certain films was to be resolved by eliminating the objectionable elements. The conflict would then never arise. Had this accommodation of censorship been solely directed at what Mr Payne termed "bigotry against their religion" the protest would have been justified. However, an examination of the resulting legislation shows that the elements to be eliminated were of much wider scope than these religious interests. Mr Payne's claim that the New Zealand picture shows were free of "blue suggestiveness"²¹ and that there existed an artistic element to be protected did not prevent the Bill from coming into force on 1 October 1916.²²

A brief analysis²³ of the 1916 Act serves two purposes. First, it will indicate just what interests were to be recognized or not recognized. Second, an understanding of the mechanics of the Act will facilitate an appreciation of subsequent amendments and developments.

-
20. The actual number of individual interests the Catholic Federation represented can be approximated by looking at the Catholic population. The New Zealand Official Year Book 1918 states the 1916 census recorded 151,605 Roman Catholics, or 13.84% of the total population of 1,099,449!
21. N.Z.P.D. 1916, at 575. Mr Payne's argument that censorship was not needed is perhaps somewhat biased. He supported it with the example of a young projectionist who blacked out parts of a natural-history film dealing with bird life, thus preventing the children in the audience from seeing a cuckoo empty out the eggs and young of another nest. If not relevant to the existing protest, at least it was an amusing anecdote.
22. Cinematograph-films Censorship Act, 1916. 1 Geo.V 1916 at No. 10
23. Suitable for a brief Act of eight sections contained in less than a page of the statute books!

The manner in which the Act provided for the censorship of films was quite straightforward. Censors were to be appointed by the Governor to approve submitted films. No film could be exhibited prior to such approval. The Censor could approve the film generally, limit the exhibition to a specified class of persons, or refuse approval either absolutely, or until certain alterations were made.²⁴ Section 4(3) offered the only indication of when approval would be refused:

Such approval shall not be given in the case of any film which, in the opinion of the censor, depicts any matter that is against public order and decency, or the exhibition of which for any other reason is, in the opinion of the Censor, undesirable in the public interest.

The Act gave a right of appeal to any applicant dissatisfied with the Censor's decision, to a three man Board of Appeal.²⁵ Any person who contravened the Act was liable to a fine of fifty pounds and the film was subject to forfeiture.

The Act clearly provided the accommodation for censorship that the Catholic Federation was seeking. But did it go further? Films could be refused approval for exhibition or alterations made in their content. The Minister of Internal affairs gave an indication of the circumstances when the Censor would exercise

24. Regulations made under Cinematograph-films Censorship Act, 1916 New Zealand Gazette, 1916, v.3 at 2987.

25. The regulations did not stipulate the manner in which the Minister was to constitute the Board but the practice developed to appoint one member nominated by the film industry, one by social organisations and a third "suitable" person.

these discretionary powers under s.4(3):

... the approval of the censor shall not be given in the case of any film which depicts any matter that is against public order and decency - as to that, of course, there can be no question - or the exhibition of which for any other reason is, in the opinion of the censor, undesirable in the public interest ... it has purposely been made broad, because there are films which do not involve matters of public order and decency, but which may be very questionable in their effect upon the public mind. Take, for instance, certain classes of pictures that have been shown in connection with the war. It could not be said that they were against public order and decency, but they certainly were very detrimental to the recruiting that was going on throughout New Zealand; and the clause has been made purposely wide. There is another class of pictures that I may here refer to - namely, pictures dealing with disease and that exhibitions of these may be given in some cases, under strict precautions, to men only, and in other cases to women only. ²⁶

The broad discretionary powers do not appear to reflect solely the interests of the Catholic Federation. The justification for such powers is questionable. The concern over disease was a Public Health matter, while the provision for censorship of war films may not even have been necessary. ²⁷ The comment that

26. New Zealand Parliamentary Debates, 1916, at 572-3

27. Regulations made 1 March 1916 pursuant to the War Regulations Act, 1914 empowered the Minister of Defence to prohibit the exhibition of any cinematograph or moving picture which may reasonably be supposed to represent or relate to any event in the course of the present war. See New Zealand Gazette, 1916, v.1, at 627-8.

"there is no question as to what matters are against public order and decency" is ambiguous. The provision is clearly wider than "bigotry against religion" and probably refers back to the Minister's earlier comments on "the questionable representation of drama and melodrama" and "the disastrous effects of, not necessarily immoral but highly suggestive films, being placed before children". An extremely wide base for censorship had thus been established. The Catholic Federation, through their respected and important position in the community, had provided a structure whereby every interest in film exhibition, whether commercial, artistic, entertainment or moral would be affected. Public support, based on protection of children, is not truly reflected in the Act. The Catholic Federation had imposed their interests regarding the morality of film content on everyone. Mr Payne offered a striking analogy:

I remember when the Leeds City Council, in response to a long-continued agitation on the part of the purists of that town, gave its consent to the destruction of the heroic statue of Apollo which was there as a complete man. For years they agitated for the abolition of that statue in their museum and finally the City Council was prevailed upon to give way. and those agitators were able to glory in the smashing of that marble statue, one of the most beautiful works one could possibly see. 28

28. New Zealand Parliamentary Debates, 1916, at 576.

These wide powers of censorship were to remain relatively unchanged for sixty years. However this lack of inertia did not imply a corresponding consensus over the accommodation of censorship and agreement with its application. An examination of the changes in the censorship legislation will illustrate the absence of fundamental change along with the very real conflict with the censorship provisions.

To begin with, in 1920 an insight was given into the true scope of the censorship powers accommodated in 1916.

A motion by Mr G.M. Thomson was made in the House, That the Government be asked to strengthen and make more drastic the censorship of the cinematograph-films introduced into this country, with the object of eliminating the noxious elements which are tending to destroy the moral sense of so many young persons.²⁹

The motion appeared to be based on some dubious evidence that certain suggestive pictures tend "to draw the young people away from the path that they ought to tread, and to induce them to embark upon enterprises which...will assuredly land them in trouble."³⁰ This seemed to imply the need to distinguish between pictures shown to adults and children and, as such, was not an original thought.³¹ However, the real intent of the motion was much broader. Speaking of a need "to combat moral disease"

29. New Zealand Parliamentary Debates, 1920, v.188 at 736

30. Ibid. at 740

31. See above p.7,13.

Mr Thomson stated,

"I am as well aware as anyone that it is quite impossible to make people good by Act of Parliament and all we can do in a case like this is to withdraw the temptations; and I think, if we try to purge a picture-film of all undesirable suggestive elements, we shall be doing a benefit to the whole of the people simply by giving them a pure form of amusement. It is, I think, recognized by nearly all parents that everything that tends to make home life better and purer is most desirable from their point of view, and everything that suggests nastiness and dirtiness or the glorification of vice, as some films do, should be eliminated from public view. What is too bad to be shown to children should not be shown at all. I am aware that some people hold different views;"³²

The seconder of the motion included his definition of a bad picture as one "which causes adults or children to think in an improper direction by suggestion, what they would not otherwise think of at all."³³ The disturbing fact of this rather reactionary motion was not in its misleading language, its lack of evidence of public support, its failure to present the "different views", or that it was agreed to. Rather, it was the recognition that the Censor already had the "very great power" to carry out the terms of the motion. The type of censorship interests proposed could already be accommodated by the 1916 Act.

32. New Zealand Parliamentary Debates, 1920, at 738-9.

33. Ibid at 740.

Given the revelations in this motion, it is not surprising that the subsequent amendments to the 1916 Act dealt primarily with other than censorship matters. While a 1926 amendment did allow for the censorship of film posters,³⁴ two substantial legislative excursions in 1928 and 1934 had little impact on the censorship provisions. The Cinematograph Films Act, 1928,³⁵ consolidated the previous censorship legislation but was primarily concerned with requiring a certain quota of British films to be exhibited in New Zealand.³⁶

Similarly, an amending Act in 1934³⁷ was prompted by the Report of the Committee of Inquiry into the Motion-Picture Industry, 1934.³⁸ The Committee of Inquiry dealt primarily with unfair trading relations between the Film Exchanges (distributors) and the Exhibitors' Associations. The Act reflects this emphasis. However, the Committee was also required to determine "whether any amendments are desirable in the present provisions of the Cinematograph Films Act or regulations". Submissions by the film societies of New Zealand were most interesting. They represented that film societies were interested in the artistic, cultural and technical aspects of film production rather than the

34. Cinematograph-Film Censorship Amendment Act, 1926, 17 Geo.V 1926, No. 22

35. 19 Geo. V 1928, No. 20

36. The quota system was not designed as an indirect attempt to censor objectionable American films, but rather, was an attempt to encourage and promote the British film industry.

37. 25 Geo V 1934-35 No. 36.

38. Appendix to the Journals of the House of Representatives of New Zealand, 1934-35, V.III, H-44A.

entertainment value of the film and suggested the initial accommodation of censorship interests did not contemplate these interests.³⁹ This conflict between film society interests and the wide censorship interests of the 1916 Act had surfaced in 1933. The Wellington Film Society, a few months after its incorporation in July, 1933 had screened two films banned by the Censor - *The Road to Life* and *The Animal Kingdom!* The argument that film societies were, or should be, exempt from censorship was unsuccessful and the Society was convicted.⁴⁰

While the Committee of Inquiry recommended that the Act should not apply to film societies, the exemption was never put in the legislation. In refusing the recommendation, the Minister of Internal Affairs made some illuminating comments:

.....but it is considered unwise to depart from the principle of censorship. I feel that all pictures released, for any purpose whatever, should be subject to censorship in some shape or form...It will give all parties that have pictures for exhibition confidence that they are all treated alike.⁴¹

A slight change in the Appeal structure, although not recommended by the Committee of Inquiry, was also implemented by the Act. The right of appeal, given to the trade against a rejection by the

39. Ibid, at 14

40. Police v The Wellington Film Society (Inc.) (1934),
29 M.C.R.87

41. New Zealand Parliamentary Debates, 1934, at 1056.

Censor, was extended to give the Minister or any person authorised by the Minister the right of appeal against an "inadvertently approved" film. In other respects the accommodation of censorship remained unchanged.

Two minor amendments took place in 1953 and 1956. The former⁴² provided for the exemption of certain films from censorship. This was purely for administrative convenience and was to cover short educational, medical, natural-history, sporting and similar films to be exhibited non-commercially. The 1956 amendment⁴³ merely tightened the Act's definition of premises to include open air theatres.

However, a major consolidation of the legislation finally took place in 1961 with the enactment of the Cinematograph Films Act, 1961.⁴⁴ The Act repealed all the prior legislation dealing with cinematograph films. However, the purpose of the Act was not only to consolidate this legislation but also to "bring its provisions in accordance with modern conditions."⁴⁵ But this incompatibility with modern conditions did not extend to the censorship of films. The Act put into statute form many of the existing regulations, including those dealing with appeals and reduced the licence-related problems of exhibiting films non-commercially.⁴⁶ The reasons for leaving censorship provisions intact was explained by the Minister of Internal Affairs.

42. N.Z. Stats. 1953 No. 71

43. N.Z. Stats 1956 No. 70

44. N.Z. Stats. 1961, No. 59. This had been preceded by a 1960 amending Act whose provisions are contained in the consolidated Act.

45. New Zealand Parliamentary Debates, 1961, V.328 at 2822.

46. The Act excluded from its provisions all films to be exhibited by means of television, although the Censor administratively performed this task until 1968.

The fact that no real change has been found necessary in the law relating to the important matter of film censorship is, I think, a tribute both to the soundness of the present law and to the way in which successive censors have interpreted it. Recent censors have maintained a very high standard of firmness and humanity, accompanied by a reasonable degree of broadness in outlook. 47

This support of the censorship provisions is worthy of comment. This accommodation of censorship was criticized in 1916 as being an attempt by the Catholic Federation to impose their interests on other film concerns. The dangers inherent in, and the conflict with, such broadly worded legislation have been mentioned. How then can the provisions be sound? The discretion of the Censor appears to be important. If the censor, in determining what is contrary to public order or decency or undesirable in the public interest, does not solely approve films with Catholic Federation interests in mind, or purge everything from films that suggests nastiness or dirtiness, then the legislation becomes sounder. If all legitimate interests in film are considered the criticism of the 1916 Act diminishes. The criticism was really directed at the approach of the Catholic Federation which reflected "a very high standard of firmness" but not a "reasonable degree of broadness". Their approach to resolving their conflict over the content of films had a narrow perspective. According to the Minister, this perspective has been broadened by the Censor's interpretation of the censorship legislation.

47. N.Z.P.D. 1961, at 2823.

48

This legislative history, then, is extremely valuable. It illustrates that the initial accommodation of censorship has virtually remained unchanged for almost sixty years. This does not by itself invite criticism. But the manner in which this initial accommodation took place is subject to criticism. A conflict over the content of films was attempted to be resolved by instituting, what appeared to be, very foreboding censorship provisions, especially in light of Mr Thomson's comments of 1920. The censorship provisions could have been used to secure only one interest in films to the exclusion of all others, as it appeared to be intended by the movers of the legislation. The effect of their application proved less drastic through a careful exercise of the Censor's discretion. The legislation is thus described as sound. But had the Catholic Federation been appointed as Censor would the comments of 1961 still hold true? Therefore, the history most importantly illustrates this undesirable approach to resolving conflict over the content of films. The revelation is useful for comparison. That is to say, if further conflict over censorship exists, ⁴⁹ will the problems of a "Catholic Federation" approach be repeated?

48. There have been four amendments to the Act since 1961. A 1962 and 1970 amendment did not deal with censorship. The 1967 amendment was a response to a judicial interpretation of the appeal provisions. See below page 34. The 1969 amendment was one of many providing for an appeal on a question of law to the Administrative Division of the Supreme Court from the Censorship Board of Appeal.

49. There have been indications that conflict does exist for film societies and individuals pressing for increased censorship. See above, page 14, 16.

3. CONFLICT WITH THE CINEMATOGRAPH FILMS ACT, 1961

A. INTRODUCTION:

Despite "sound" censorship legislation in 1961, this section will illustrate that a great deal of conflict exists both in relation to the legislation and its particular application, with special reference to the period 1961-1974 when the conflict became most patent. A conceptual basis for these conflicts will be established which will facilitate an understanding of the problems of their resolution.

B. THE SOCIETY FOR THE PRESERVATION OF COMMUNITY STANDARDS AND OTHERS.

While it was convenient to isolate the conflict of the Catholic Federation in 1916, an attempt to present all subsequent conflicts over film censorship in New Zealand would not only be impossible but also unnecessary. Rather, this paper is concerned with those interests in film that are in a clearly identifiable conflict over the accommodation of film censorship. These conflicts will be illustrated with specific examples where possible but they are not intended to be exhaustive.

Before presenting the film interests in conflict, it is necessary to ask how are these interests in conflict? Two possibilities exist. First, there may exist a conflict over the actual accommodation of censorship. A libertarian view that censorship serves no purpose and infringes on freedom of speech principles will be in conflict over any provision for censorship. Other views that censorship should not be universal in application, or conversely, be of much wider scope in application, present similar types of conflict. This is conflict over the censorship

legislation, the development of which has been presented above. Second, there may exist a conflict over a particular application of the censorship law. This conflict may have much wider application since not all film interests will be in conflict over the legislation. A censor's decision may create conflict with any interest in film including libertarian interests. Table 1 and 2 indicate the extent of the censor's activity from 1961-74 and hence the scope for this type of conflict.

TABLE 1 ACTIVITY OF CENSOR OF CINEMATOGRAPH FILMS,
1961 - 1974

YEAR	TOTAL FILMS EXAMINED	TOTAL FILMS REJECTED	TOTAL FILMS CUT	NUMBER OF CUTS
1974	1666	42	402	1592
1973	1321	25	255	893
1972	1411	38	314	1119
1971	1317	27	292	1240
1970	1588	14	303	1035
1969	1586	6	360	1317
1968	1535	4	314	960
1967	1495	5	259	748
1966	1607	20	338	1040
1965	1804	32	398	1206
1964	1386	11	399	1183
1963	1466	13	407	1275
1962 ^a	1470	23	461	1349

Figures in table are taken from the annual reports of the Department of Internal Affairs for the years ending 31 March.

^a 31 March, 1961 - 31 March, 1962.

TABLE 2 CLASSIFICATION OF FILMS, 1961-1974

YEAR	TOTAL	G ^a	Y	A	S	R	REJEC
1974	1666	980	149	247	2	246	42
1973	1321	774	148	170	2	202	25
1972	1411	864	120	173	2	214	38
1971	1317	855	116	173	2	141	27
1970	1588	1113	167	169	3	122	14
1969	1586	1152	148	162	3	115	6
1968	1535	1105	122	137	4	63	4
1967	1495	1119	144	153	5	69	5
1966	1607	1249	131	138	5	64	20
1965	1804	1355	162	155	8	91	32
1964	1386	993	150	138	6	88	11
1963	1466	1142	199	189	4	83	13
1962	1470	1126	188	178	29	75	23

Figures in table are taken from the annual reports of the Department of Internal Affairs for the years ending 31 March.

a

G, general audience; Y, recommended age limit; A, recommended for adults; S, recommended for children; R, restricted to specific age.

That conflict of both a general and particular nature exists is not in doubt. In the 1974 Report of the Department of Internal

Affairs,⁵⁰ the Minister addressed himself to this range of conflicts:

Censorship of films is a controversial matter. The spectrum of opinion is wide. At one end there are those who hold that censorship is repugnant because it implies that some person or persons know what is good for others. Some people take a more moderate stand accepting that young persons should be protected from films which deal explicitly with violence and/or sex. At the other end of the spectrum there are those people who believe that such films are corrosive of general community standards and behaviour and should be banned altogether. The role of the film censor in this atmosphere of conflicting interests is not easy.⁵¹

The most overt conflicts appear to lie at the ends of the spectrum. At one end is the Society for the Preservation of Community Standards with their vociferous secretary, Miss Patricia Bartlett. As their name implies this group's concern with film exhibition tend to echo the 1920 call for stricter censorship. Their conflict is with both particular decisions of the Censor and the "liberal" legislative provisions. Perhaps the most striking illustration of their conflict occurred in 1970 when Miss Bartlett, on behalf of the Society, petitioned Parliament to provide a statutory definition of "indecent" within the Cinematograph Films Act, 1961.⁵²

50. Appendix to The Journals of the House of Representatives, 1974, v.3, G-7.

51. Ibid. at 21-22

52. The petition contained 41,199 signatures and was made along with three similar individual petitions containing 8,085 signatures.

The Parliamentary Petitions Committee made no recommendation
to Parliament in respect of the petition.⁵³

At the other end of the spectrum could be placed the film societies of New Zealand represented by the New Zealand Federation of Film Societies. There are a multitude of individual film societies in the larger New Zealand centres and their origin dates back to at least 1933. Their members are composed primarily of individuals interested in the artistic, cultural and technical production of films. The Federation functions by procuring films of interest that are not being shown commercially and distributing such films to the various societies. These films must be submitted for the Censor's approval prior to exhibition. The conflict of the Film Societies also tends to be on both the general and particular level. Writing in Comment, Peter Boyes reasoned New Zealanders "were living in the dark ages with regard to films"⁵⁴ and went on to criticize the Censor's decision to cut or ban a variety of film society films. At the general level, the film societies want their films exempt from censorship.⁵⁵ As well, they seek a more libertarian approach to the censorship of films in general, for as the President of the Federation has stated,

the censor is liable to be asked to do
what only society itself can do.⁵⁶

-
53. Appendix to The Journals of the House of Representatives, 1970, v.4, I-1, at 6.
54. Boyes, Peter, "Film Censorship and Distribution in New Zealand" (1966), 28 Comment: New Zealand Quarterly Review 38.
55. A continuation of their feelings from 1933!
56. New Zealand Federation of Film Societies, Newsreel, May, 1962 at 9.

Somewhere between these two extremes lie the commercial interests in films. Both the film's distributor and exhibitor have a vested interest in ensuring the film is viewed by as many patrons as possible. However their conflict is not so identifiable on the spectrum. A complete rejection of a film can create a distinct conflict.⁵⁷ However, cuts to allow a film to avoid rejection or provide a wider certificate may be accepted or even demanded.⁵⁸

While there will also be a wide array of individual conflicts between the two extremes, none are clearly identifiable and simply approximate to some degree either the libertarian or more restrictive views. What the above comments illustrate is that clearly visible conflicts exist, just as, in perspective, the Catholic Federation's conflict was identifiable. Before examining the approach to the resolution of these conflicts an understanding of the nature of the conflict is necessary.

C. THE NATURE OF THE CONFLICT.

An examination of the nature of these general and particular conflicts is in effect an explanation. What is in conflict? Why are they in conflict? This type of explanation is important for two reasons. First, it will facilitate an understanding of the approach taken to resolve the conflict. Second, it will enable problems in such approach to be more easily identified.

57. See infra pp 33-34 for a discussion on appeals by distributors and exhibitors in response to such a decision.

58. See Boyes, Peter supra, fn 54 at 39.

An appropriate starting point is the censorship legislation. All the types of dispute seem to focus on either its very existence or its manner of application. Why then is this law in existence? The answer from an historical perspective has been canvassed. From a conceptual point of view, the question raises more fundamental issues. Perhaps the best answer is found in the work of Roscoe Pound, the doyen of American sociological jurisprudence. Pound saw law as "a social institution to satisfy social wants - the claims and demands and expectations involved in the existence of civilized society - by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organised society".⁵⁹

Law was a means of social order. It could function in two ways. First, it could provide an authoritative statement of the boundaries of acceptable conduct, by laying down standards of behaviour to be observed. Second, law could act as a mechanism for the resolution of conflict which might arise through deviance from these encoded norms or differences in interpretation of the legal code. Applied to censorship legislation, both functions are apparent. In discussing conflict however, the latter deserves later consideration.

Pound uses an appropriate example to illustrate the basis for this ordering.

... consider the queue before the ticket window

59. Pound, Roscoe An Introduction to the Philosophy of Law, Yale, 1954, at 47.

of a theatre on the first showing of a new and well-advertised picture starring some popular favorite. Very likely many more are seeking admission than the theatre can accommodate. If those seeking admission did not line up or were not lined up in this way, it might not be possible for many or even for any to get in. At any rate, the process of getting in would be a long and painful one in which many would be likely to be injured. Many would give up. Many others would be deterred by the scramble, would not try to join in it, and would turn about and go elsewhere.⁶⁰

In other words, these norms are set by satisfying a multiplicity of desires and demands with the least conflict where all cannot be met. This ordering is done by recognising certain of these interests, defining the limits within which these interests are recognised and securing the interests so recognised.⁶¹ Pound classified three types of interests: individual, public and social.⁶² Social interests are interests of society as a whole, "compromises of conflicting individual interests in which we turn to some interest frequently under the name of public policy to determine the limits of reasonable adjustment".⁶³ In recognising, delimiting and securing these interests, Pound recognised the importance of values. Any ordering must have behind it some canon of valuing

60. Pound, Roscoe, Social Control Through Law, Yale, 1942 at 63.

61. Ibid, at 65.

62. Ibid, at 69. The distinction between public and social is somewhat tenuous and not made in this paper.

63. Freeman, M.D.A. The Legal Structure, London, 1974 at 83.

the conflicting and overlapping interests.

This process does not occur in isolation. The theory is that law will not impose a social order but would only confirm and support one. In Bohannan's words:

some customs in some societies are
reinstitutionalized at another level:
they are restated for the more precise
purposes of legal institution.⁶⁴

Law then develops through correspondence with social organisation. Where social interests are encoded, the danger in elite representation is evident.

Censorship legislation, then, is designed to balance the individual interests in freedom of expression and choice against individual moral interests: The legislation is a compromise. The social interest is established to exclude only cinematograph films "undesirable in the public interest". This delimitation is based on the value that moral welfare in society is desirable. The social interest is secured through the Censor's decision and appropriate sanctions.

64. Bohannan, P. "The differing realms of law", Law and Warfare, New York, 1967, at 47.

The nature of the conflict centering on New Zealand censorship legislation now becomes more apparent. There would appear to be no conflict of values. The real conflicts arise because of the Act's compromise. The purpose of ^{the} legislation was to balance the competing individual interests and establish a societal norm. The balancing was to occur through social correspondence to achieve a reasonable readjustment. However, conflict, as noted, still exists. At the general level, there is conflict between the individual interests as to what is this norm. Both the more censorship and less censorship interests are competing for permanent recognition. At the particular level, the same type of conflict may exist. However, because the social interest is flexible, the exercise of the censor's discretion may resolve the competition between the individual interests. There may be no interest in "more censorship" for a particular film. However, if there is an interest in "less censorship", the conflict will shift to the particular social interest. The conflict is now between individual and social interests. The same type of conflict would arise at the general level if the social interest was changed to permanently resolve the competition for an individual interest. The explanation for both types of conflict is easily understandable. At the general level, censorship provisions lack a solid logical foundation, even given the value of moral welfare is desirable. What proof is there that the censorship of all films that are not indecent is necessary? ⁶⁵ The social interest that censorship legislation creates is also flexible and lacks precise definition. What degree of censorship will

65. See above at p.2

approximate the social norm in each particular case? The elusiveness of answers for each question is the basis for the conflict over the answers.

The connection between these conflicts and the social interest is important. Any resolution of either type of conflict requires some manipulation of the social interest. Any interaction between the individual interests will be inconclusive since there exists a legislative determination of this interaction. Therefore, the social interest, this compromise of interests, or, in effect, the accommodation of censorship, must be changed to resolve the conflicts. There are two approaches. First, at the particular level, the censor's decision could be reversed. Second, at the general level, the censorship legislation could be changed. Both approaches involve changes in the social interest. This implies a change in the balance between the competing interests. The danger of an imbalance arising is obvious.

4. THE APPROACH TO CONFLICT RESOLUTION

A. INTRODUCTION:

Given the conceptual underpinnings of the conflict over censorship legislation and its use, a general or particular approach may be taken to promote its resolution. This section will examine whether these approaches have been taken in New Zealand, and, if so, whether the attempt to resolve the conflict exposes any of the fundamental deficiencies alluded to in the history of the legislation and illustrated in the nature of the conflict.

B. THE PARTICULAR APPROACH: CHALLENGING THE CENSOR

This type of approach is appropriate to begin with. It merely requires an explanation of why it has seldom been used by the individual or group interests that are in conflict. The dangers that may be inherent in such an approach are primarily theoretical.

The Censor in making a particular decision as to whether a film is approved, classified, cut or banned may not always be able to strike the balance the legislation intends. In fact, the balance may never be struck if film interests dispute his very existence. The resulting conflict can, however, be resolved by changing the censor's decision. This is not to say all individual interests in conflict over the decision will be resolved. In examining the legal and extralegal methods of reversing a Censor's decision, this is an important consideration.

(i) Legal Methods

The function of law as a means of conflict resolution has been mentioned. It is convenient then to examine its usefulness in resolving disputes of the type in question. There are numerous disincentives to resort to legal dispute resolution.⁶⁶ Perhaps the common denominator of all disincentives is accessibility. Accessibility may be restricted through cost, formality, lack of knowledge, uncertain results, to name a few. The three legal methods of changing a censor's decision all exhibit varying degrees of this type of restriction rendering their usefulness questionable.

66. Aubert, V. "Courts and Conflict Resolution" (1967), 11 Journal of Conflict Resolution 40 at 41-46.

First, the Cinematograph Films Act does provide for appeals against the whole or any part of any decision of the Censor. ⁶⁷

The appeal is limited to the person who submitted the film. ⁶⁸

The Censorship Board of Appeal can uphold, reverse or vary the decision of the Censor. ⁶⁹ A further appeal on a question of law to the Administrative Division of the Supreme Court is provided.

Clearly the statutory limitation on standing restricts the accessibility. The appeal may manage the conflict for exhibitors and distributors but will be of little use to other unrepresented interests. ⁷⁰ The Wellington Film Society did use this method to permit an uncut screening of Dusan Makaveyev's, W.R. *Mysteries of the Organism*, at the 1976 Wellington Film Festival. The Censor had originally banned the film.

There would also appear to be disincentives that limit accessibility to the appeal provisions for even the exhibitor himself. The following table indicates the extent and disposition of appeals from the Censor's decision to ban a film.

67. Cinematograph Films Act, 1961, s.96(1).

68. Ibid

69. Ibid s.98

70. See Randall, R.S. Censorship of the Movies: The Social and Political Control of a Mass Medium, Wisconsin, 1968, at 116. Economic factors were seen as the prime motivation for an appeal by an exhibitor or distributor.

TABLE 3 NO. OF FILMS REJECTED	APPEAL FIGURES ON BANNED FILMS			APPEALS ALLOWED	% ALLOWED
	APPEALS	% APPEALED	COMPARIBLE U.S. %		
237	48	20.2	15-40	15	31.2

FIGURES from Annual Reports of the Department of Internal Affairs 31 March 1963 - 31 March 1974; and Randall, *supra*. fn.70 at 115. U.S. figures are appeals on cut and banned films.

The low rate of success may explain the lack of use of the appeal system. It may also be explained by the power of the Board to substitute its own decision for that of the Censor, notwithstanding the appellant only appeals a part of the Censor's decision.⁷¹

A right of appeal against the Censor's approval of a film is also given to the Minister or any person authorized by the Minister. This 1934 provision has no application if a film is rejected. Its usefulness to reverse a Censor's approval of a film rests on its record. It has never been used!⁷² Its purpose as a political safeguard seems more probable.

71. The power of the Appeal Board to do this was held *ultra vires* in Columbia Films (New Zealand) Ltd v The Cinematograph Films Censorship Board of Appeal, [1967] N.Z.L.R. 191 (C.A.). It is not clear whether the subsequent 1967 amendment, in response to this case, followed the Court's decision or gave the Board added power to determine appeals.

72. Mirams, Gordon *supra*.fn.17 at 86 noted this problem and no record of its use from that date is apparent.

A second legal attack on the Censor's decision may come through judicial review by way of an application for review under the Judicature Act. The lack of use of this approach reflects a range of difficulties. While the problem of standing may be surmountable,⁷³ any order obtained cannot compel the censor to exercise his discretion in a particular manner and his decision would remain unchecked. Judicial review on an administrative law basis has limited use once the censor has made his decision.

Finally, as early as 1910 it was seen there was a restriction on the importation or exhibition of indecent objects which might include indecent cinematograph films. However, there are a variety of deterrents to a private prosecution under either the Crimes Act or Customs Act.⁷⁴ Cost, judicial delay and burden of proof are all prohibitive factors. Even if action is brought, the question is whether the film is indecent. While the difficulty of definition may be reduced,⁷⁵ the objection to the film in most cases would not approximate indecency. The scope for use of this method of challenging a censor's decision is extremely narrow - only when the censor approves an indecent film. A prosecution would not be available to reinstate a banned film or specific excisions. Thus, the practical accessibility of a criminal prosecution is limited.

73. See: Attorney-General ex rel. McWhirter v Independent Broadcasting Authority, [1973] 1 Q.B. 629 (C.A.); Thorson v Attorney-General of Canada et al (no. 2) (1974), 43 D.L.R. (3rd) 1 (S.C.C.).

74. Crimes Act 1961, N.Z. Stats. 1961 No. 43, s.124; Customs Act, 1966, N.Z. Stats. 1966 No. 19, s.48(1).

75. Police v Rose Publishing Co. Ltd, [1974] 1 N.Z.L.R. 745 (S.C.)

(ii) Extralegal Methods

What is meant by reference to extralegal methods of changing the Censor's decision regarding a particular film? As the name suggests, these are methods of conflict resolution, being adjudication, mediation, negotiation or unilateral action, which lack a legally institutionalised structure. The existence and use of these modes of conflict resolution do not depend on legislative action but private social action, either on the individual or group level. If there is no effective private social input, extralegal methods of conflict resolution become only theories. The following discussion explains why they remain theories as regards censorship disputes in New Zealand.

As a particular example, a recent decision of the Censor approved the screening of the film version of Ken Kesey's book, *One Flew Over the Cuckoo's Nest*. However, admission was restricted to those eighteen years of age and over and a great many cuts were made in the dialogue. Hypothetically, a conflict between individual interests could have developed. Commercial interests would either be concerned at the cuts being made or at the restricted admission. As well, artistic or libertarian groups might want the excised portions included for their own interests. On the other hand, there may be individuals or groups, having an entertainment or moral interest in the film, who want further excisions made or the entire film rejected. These two sides of the conflict - either propounding less or more censorship of the film - need only have indirect knowledge of the other side's competing interest. The Censor's decision must only provide them with the knowledge that they are in conflict with other competing interests the Censor is balancing.

In this situation, there are a variety of extralegal ways in which the Censor's decision could be changed. On the one hand, the exhibitors could screen an uncut version of the film or admit those under eighteen. The artistic or libertarian interests could negotiate with the exhibitor to appeal or arrange for an underground screening of the uncut version. Assuming the Censor is independent, little else could be done extralegally on this side. However on the other side, the approach is much more flexible. Their individual conflicts would be resolved if the film is not shown or if certain individuals do not see the film. This would require some degree of power, force or authority. Power to prevent exhibition could be exerted by way of public pressure, demonstration or boycott aided by the force of the economic sanctions these entail. While no authority over the exhibitor may exist, there could exist group authority, direct or indirect, through peer pressure, acceptance etc. to prevent individuals from viewing the film. Given these possible courses of action, why have they failed to be utilized in New Zealand. The simple answer, of course, relates back to lack of social action but the underlying reasons for such inaction differ on either side of the dispute.

For the interests seeking less censorship in a particular film, problems are apparent from the mere mention of the actions available to them. The extralegal actions designed to change the censor's decision are, with one exception,⁷⁶ illegal. The

76. Any negotiations designed to pressure the exhibitor to appeal would be hindered by the serious limitations relating to this appeal already noted. See above at page 33-34.

offences are contained specifically in the Cinematograph Films Act,⁷⁷ and a sanction provided for their commission. While a small amount of this type of activity does occur,⁷⁸ its use as an effective extralegal means of conflict resolution is limited. There are two explanations for this. First, from the point of view of the interests seeking less censorship, the extralegal methods mentioned all result in a direct change in the Censor's decision. The methods do not initiate or promote change but rather represent change themselves. They require a direct deviance from the social interest the Censor establishes according to law. Hence it is not surprising the extralegal methods produce illegal results and create further conflict. While the benefits of this change are desirable, the costs are excessive and not generally avoidable. Therefore, effective resort to these extralegal methods of conflict resolution is not viable.

However, for the interests seeking more censorship of a particular film, a distinction is obvious. The conflict will be resolved for these interests if the film is not shown or not shown to a specific class of individuals. The change in the Censor's decision is indirect. His decision to prohibit exhibition of certain portions or restrict admission is not contravened. There is no direct conflict created with the Censor's social interest norm and thus

77. Cinematograph Films Act, 1961, s.16.

78. Note for example the recent uncut screening of *The Night Porter* alleged to be an unintentional violation of the Censor's decision. There is also some indication that banned films are being screened in New Zealand. See below at p.55 fn.112

costs of resolving this new conflict are not incurred as above. But despite this apparent availability, there has still existed a significant lack of effective private social action by the interests concerned. The reasons behind this inactivity can be gathered by a brief comparison with a contrasting situation.

In the United States, it has been said "the source of almost all censorial energy related to the exhibition of films is private".⁷⁹ Groups such as Combat (a group formed by the representatives of various churches in Wauwautosa, Wisconsin), the Mothers of Minnesota, the New Orleans Do Something About It Committee for Moral Safety, the National Catholic Office for Motion Pictures, formerly the Legion of Decency, as well as sub-groups of many established groups and organizations provide this censorial energy. The exact nature and impact of their activity has been the subject of numerous studies.⁸⁰ The National Catholic Office provides an illustration. The Office rates films, independently of the film industry's ratings, from morally unobjectionable for general patronage up to objectionable for all or condemned. These ratings are circulated in all dioceses and implemented in several ways: encouragement of individual Catholics to observe the ratings or direct action against the exhibitor through boycotts and other economic sanctions. The

79. Randall, R.S. supra, fn.70, at 158.

80. See for example. Ayer, Bates, Hermann. "Self Censorship in the Movie Industry", (1970) Wis. L. Rev. 791; Ernst M. and A.U. Schwartz Censorship: The Search for the Obscene, New York, 1964, at 234; Hunnings, Neville March. Film Censors and the Law, London 1967; Leary, T.B. and R.J. Noall "Entertainment: public pressure and the law", (1957-58) Harvard L. Rev. 326 ; Philips, Guy, Film Censorship, London 1975. Randall R.S. supra.

effectiveness of most activity rests on the size and degree of organisation.⁸¹

The content of films around which this extralegal activity centres is very much dependent on the First Amendment - the constitutional protection of free speech. The movie's initial classification was "business pure and simple".⁸² However in 1952, the U.S. Supreme Court held that motion pictures were a significant medium for the communication of ideas and fell within the free speech guarantee of the First Amendment.⁸³ Thus, as a practical matter the only permissible censorship objective was obscenity with its elusive standard. The scope for objection to a film's content, while having limited legal support, was quite extensive.

The distinction with the New Zealand picture helps explain the lack of extralegal activity, so rampant in America. The mobilization of private censorial groups is, in part, dependent on an object of mobilization. New Zealand simply does not exhibit a great many pictures that provoke objection, at least not from the group able to best take advantage of extralegal activities. The New Zealand censorship scheme is a system of prior restraint and most objections are so removed by the Censor. The incentive to mobilize - organise and act, is not great or consistent enough.⁸⁴

81. Supra. fn. 26(5). Randall does note, at 179, that the movies are, for many, escapist entertainment and not capable of rational decision which would hinder the effectiveness of extralegal censorship.

82. Mutual Film Corp v Ohio (1915) 236 U.S. 230.

83. Burstyn v Wilson (1952), 343 U.S. 495.

84. This conclusion is supported by Randall at 173-178, who compared motion picture licensing (censoring) areas with former licensing areas. He concluded the existence of a licensing system may inhibit the use of other control agencies while the termination of licensing controls results in vastly increased use of other control agencies.

The benefits to be achieved are simply not high enough often enough. As well, the costs of such activity are escalated because the results are not certain - the effectiveness and certainty of result depend on organization, already found to be weak. To be sure, there has been some extralegal activity by those seeking further restrictions in particular films - letters to papers, speaking out at group meetings. However, this could be described as only the first action level and the impact at this level on resolving the particular conflict is, at best, minimal.

There is, of course, the theoretical question as to whether such extralegal activity is functional or dysfunctional.⁸⁵ The arguments for the latter are imposing. First, this informal censorship often is based on reviews, advertising or even title and not the film itself as is with formal censorship. Second, and most importantly, the substantive standards are likely to be far broader (or narrower, depending on the point of view) and wholly subjective. For example, the aim of the Catholic Office ratings⁸⁶ is not to control obscenity but to control "immoral expression". Third, there are no procedural safeguards. In conceptual terms, the conflict between individual interests is resolved by changing the social interest without reference to, or protection for, other interests supposed to be included in the social interest - an elitist imbalance at the particular level.

85. Perhaps not so theoretical. See *infra*, pp. 43-50.

86. Randall, *supra*. fn.70 at 171.

Thus the conflicts between individual interests are not being resolved at the particular level. The Censor's decision on an individual film cannot effectively be attacked and changed either legally or extralegally, directly or indirectly. Questions have been raised as to whether such action, in certain circumstances, would be desirable, if available. The conflict remains. It is not surprising the interests concerned have resorted to a more general approach.

C. THE GENERAL APPROACH:

A more general approach also affords a manner of resolving the conflict for the individual interests concerned. Rather than deal with particular films, this approach encompasses films in general and the more general conflict between stricter censorship interests and more liberal interests. Again the conflict is resolved for each interest if the social interest set by the Censor does not delimit their particular interest. Here, the conflict is not with particular decisions but rather with the actual manner in which censorship is accommodated. As an example, the Censor's decision to excise a film society film may produce conflict at the particular level between individual interests who feel the film should be banned and the film society which feels the excised parts are not undesirable. The resolution of these conflicts has been considered. However, at the general level, individual interests who feel the Censor always leaves in certain objectionable scenes may be in conflict with the film societies who feel these type of films should never be subject to censorship. The resolution of the conflict requires a change in how the Censor sets the social interest. The general approach must, therefore, deal with censorship legislation.

The following discussion will illustrate that this approach has been taken in New Zealand. Considering the inaccessibility and impracticality of resolving conflict at the particular level, this result is understandable. A comprehensive examination of the approach will provide a basis for assessment. That is to say, various problems in resolving censorship conflict have raised their heads, both from an historical and conceptual perspective of the legislation. Will the approach to resolve the conflict through legislative change exhibit these same characteristics?

(i) The Cinematograph Films Amendment Bill

A prime example of this general approach lies in the Cinematograph Films Amendment Bill. The Bill was introduced by Mr Jonathon Hunt on 27 March 1974 as a Private Member's Bill "to update and restructure the present Cinematograph Films Act as far as it relates to the censorship of films."⁸⁷ Before examining the Bill's provisions to determine how, or if, it was to resolve individual conflicts, two questions are worthy of answer. First, although the answer has been hinted at, what reasons were given for the Bill considering the comments in 1961 that the legislation was sound? Second, is there any indication of the moving force behind the Bill? The answers to both will facilitate an appreciation of the direction the Bill's provisions take.

The best answer to these questions is given, not surprisingly, by Mr Hunt:

It could well be asked why the Bill should be introduced. I can give two main reasons. As I have already mentioned, I have a deep

87. New Zealand Parliamentary Debates, 1974, v.390 at 1244.

interest in films and in the film industry, which is surely one of the most spectacular industries and art forms that has developed in the twentieth century. Also, the censorship provisions of the existing Act fail for four reasons. First, they are inadequate, as the more important provisions of the existing Act date from 1916, when social conditions and the state of film-making were somewhat different. Secondly, they are vague. The criteria in section 14 are matters contrary to public order or decency the exhibition of which would for any other reason be undesirable in the public interest. What does that mean?

Thirdly, the present censorship provisions are negative, and no allowance is made for taking into account any merit a film may have. Fourthly, the censorship provisions of the existing Act are inadequate. The criteria deal only with the presentation of matter and not with the manner of presentation. No guidance is given on when a film should be banned rather than cut. No reasons need be given for either the censor's or the appeal board's decisions.

In short, the present Act is an administrative jumble, a fine example of parliamentary "graftsmanship".⁸⁸

88. Ibid. at 1244-45.

The reason for the Bill then is not only Mr Hunt's personal interest in films but also the criticism directed at what are termed inadequacies in the manner of censoring. Hunt's obvious thrust here is at censorship provisions that do not take account of "a spectacular art form" in that no allowance is made for any merit a film may have or its manner of presentation. From these reasons, it is not unusual to discover the weight of the film societies is behind the Bill. Indeed, Mr Hunt's personal interest in films stems from his association for many years with the Auckland Film Society, Kelston Film Society (in which he is a projectionist) and the Auckland Alternative Cinema. The Bill was in fact drafted with the assistance of the film societies. The Bill then appears to be a response by the film societies to their conflict over the existing legislation. As represented earlier, the film society interests were directed at removing society films from censorship as well as promoting a more liberalized approach to the censorship of all films. An examination of the Bill's provisions illustrates how these interests are recognised.

First, as regards the censorship of films acquired by film societies, the Bill offers a deceptively simple solution. The Censor is given power to exempt from censorship films of artistic merit or social importance that are to be exhibited to members of approved film societies or exhibited at film society film festivals. The power to exempt is discretionary although there is no indication of when such discretion would not be exercised. Also, the exhibition may be restricted to any specified class or description of persons.

89

89. Cinematograph Films Amendment Bill. s.12(4)(i)(j).

In any event, if exempted, the film will be uncensored. If the film is not exhibited at a film festival, only members of film societies⁹⁰ are permitted to view them. At film festivals, public viewing is unrestricted unless limited by the censor.

Second, whether the Bill produces a more libertarian approach to censorship is not as clear on its face. However, a careful reading shows the Censor's power to excise or ban films is made much more difficult and onerous and, in some cases, restricted. The Bill, as with its predecessor, requires the Censor to examine and classify each film. Instead of considering whether a film is "contrary to public order and decency or undesirable in the public interest", specific guidelines are established for the Censor to follow. These guidelines relate to the character of the film, the nature of the audience and the place or any special circumstance of exhibition.⁹¹ Mr Hunt states the Censor will now more clearly be able to balance a film's good points alongside its bad points.⁹² However, there is suggestion the Censor's decisions already reflect this balance and the guidelines are now merely statutorily spelt out.⁹³

After consideration of these guidelines, the Censor must either approve the film for exhibition,⁹⁴ refuse approval or indicate excisions are required before classification. The latter two powers of censorship are limited. Before banning a film, the

90. Membership in New Zealand Film Societies is acquired by persons eighteen years of age and over on payment of a set fee.

91. The criteria are comparable to those specified in s.11 of the Indecent Publications Act, 1963, for use in determining whether a book is indecent.

92. *Supra*. fn.89, Explanatory Note, at ii

93. N.Z.P.D. 1974 at 1246.

94. The film may be classified as "G" - exhibited to persons of any age, "Y" - exhibited to persons over a specific age, and "A" - exhibited only to adults.

Censor must be satisfied

it depicts and is substantially concerned with matters of cruelty, violence, crime or sex in a manner which is blatant and excessive; and

it is wholly or substantially devoid of artistic merit and of any importance for social, scientific or other reasons. ⁹⁵

(emphasis added)

As was noted in the House discussion of the Bill, "this is an extremely broad interpretation."⁹⁶ It is reminiscent of the American approach to the definition of obscenity. If the Censor is able to satisfy himself the whole film should be banned, he must give written reasons for his decision.⁹⁷

The difficulties in banning a film have serious implications for the Censor's power to excise under the Bill. The Bill specifically states excisions by the Censors are undesirable unless some social purpose is achieved and should not be made where the filmmaker's purpose or the film's continuity or atmosphere would be impaired.⁹⁸ The social purpose would appear to refer back to the criteria the censor must consider. But after balancing these interests, the filmmaker's interest

95. Supra. fn.89 s.13(7).
 96. N.Z.P.D. 1974, at 1246
 97. Supra, fn.89 s.13(9).
 98. Ibid. s.14(2).

is given equal weight. The Censor is faced not only with this imbalance but also the difficulty of reconciling the competing interests. If the Censor is able to solve this problem, he is faced with two restrictions. First, he cannot, in any event, make excisions from a film he proposes to accord and does in fact accord an adult classification.⁹⁹ The Censor would have difficulty in avoiding this restriction. Any proposal to ban the film unless excisions are made would be subject to the stringent banning limitations noted. This leads into the second restriction on the Censor's power to cut films. The Censor has no power to require excisions unless agreed to by the person who submitted the film.¹⁰⁰ Mr Hunt indicates this clause records the present practice of the Censor but given other clauses, it has serious ramifications. If the person accedes to the excisions, the Censor classifies the film on the assumption the excisions expressly acceded to have been made.¹⁰¹ If the excisions are not agreed upon, the Censor must still classify the film but has no power to make excisions or assume they have been made. His recourse would be to ban the film or permit exhibition to adults only. The former course would be subject to banning difficulties. The latter result would be an uncensored viewing by adults which may be the result the Bill intends. The extreme difficulties in making excisions are apparent.

99. Adult is redefined in the Bill to mean persons of or over 18 years in what appears to be an attempt to reduce the impact of this provision.

100. Supra. fn.89 s.14(6).

101. Ibid. s.14(7).

Therefore, as regards the film society conflicts, the Bill can be seen as a clear attempt at their resolution. Not only are society films exempt from censorship but a definite liberalized approach to the entire system is produced. Should a particular decision of the Censor still create conflict, the Bill provides an improved mechanism to the film societies for its particular resolution. The Bill establishes a new Cinematograph Films Censorship Board of Appeal to determine appeals against decisions of the Censor.¹⁰² The recommendations for appointment of the five member board, two of whom must have special qualifications in or particular knowledge of films, can only be made after consultation with the New Zealand Federation of Film Societies.¹⁰³ Under the 1961 Act, the right of standing on an appeal was a concern to the film societies where they had not submitted the film. Hunt's Bill provides a right of appeal to any person authorized by the Minister or the Chairman of the Board of Appeal.¹⁰⁴ Also, on appeal, the Board may give any person leave to appear and be represented by counsel, call evidence and make representations. The importance of the appointment provision takes on added significance. Finally, while the Board is not bound by the Censor's decision and must reach its own conclusion, the Bill imposes the same difficulties and restrictions

102. The fact that only classification decisions can be appealed may either reflect the film societies' view that the excision powers are limited, as described above, or that classification decisions will include a review of excisions made.

103. Supra, fn.89, s.19A(3).

104. Ibid. s.191(2).

on censorship that the Censor must labour under.

(ii). Assessment

Any assessment of an approach to conflict resolution must look intuitively to see if any conflict has been resolved. Prior to the Bill, the interests of the film societies related to the censorship of their films, both generally and particularly, and a need for a more liberalized approach by the Censor. These interests were in conflict with the interests of Patricia Bartlett's Society. The Bill, if enacted, would clearly resolve the conflict of individual interests at both the general legislative level and, following that, at subsequent particular film levels. The film society interests would no longer be in competition for greater recognition. However, as the nature of these conflicts was explained, a resolution of the individual interest conflicts, in some cases, would shift the conflict to the individual-social interest level. Therefore, while the Bill recognises the film society interests, individual interests in censorship of all films and interests in stricter censorship are severely delimited in the Bill. A conflict with the newly established social interest, at both general and particular levels would exist. And, there is no assurance this would only involve individual interests now in conflict with the film society interests. The change in social interest delimits other individual interests presently silent, while further delimiting those of Patricia Bartlett et al.

Certain criticisms of the film societies' approach to the resolution of their conflicts now surface. At this general level, the resolution of conflict requires legislative change. The key to Pound's theory of this change is that law will

balance any competing claims or demands through a process of social intercourse. This process must be especially patent where the law must establish a social interest or a compromise between the competing interests. The imbalance of Hunt's Bill is blatantly apparent. The historical perspective on censorship legislation is now much more significant. In 1916 the Catholic Federation, through their high degree of mobilization and respected position, were able to impose broad film censorship restrictions on all New Zealand film interests. While the desired impact of this initial legislation has been mitigated through censorial discretion, the criticism of the Catholic approach remains. The criticism does not go to their protest. A censorship of this right would never be justified. Rather, the criticism is directed at the abuse of the law. The Catholic Federation prevented, or attempted to prevent, a balancing of competing interests through use of their organization and position. In the same way, but at the other end of the scale, the approach of the film societies would seem to be an attempt to impose an imbalance. Only an elite may view uncensored films and everyone will be subject to their libertarian interests. The saving factor for much harsher criticism of the 1916 approach, the Censor's discretion, has limited preservation in Hunt's Bill. The justice Pound saw law as providing through its balancing act is not the individual justice the film society Bill represents.

To be equitable, an argument justifying the film society approach must be raised. Hunt's Bill is not a legal imbalance but merely a Bill. The film societies have a right to present their opinion as part of the social correspondence by which the law-makers must balance competing interests and reach a compromise with the least

amount of friction. The Bill represents the exercise of that right. The argument has logical appeal but pragmatic problems. It is not questioned that the process of law making may result in a compromise that is not free of conflict. Nor is it argued that competing interests should not have an input into the formation of such compromise. But, as with the Catholic Federation in 1916, the influence of a competing interest may by itself preclude a balance being struck. The Catholic Federation were able to influence the legislative process not because their interests by themselves represented a balance but because of their relative organisation and position with respect to other interests. The film societies are in an analagous position. Their interests are not, on any test,¹⁰⁵ more widespread, acceptable or deserving of recognition than a variety of other film interests, vocal or silent. But, a brief examination of the balancing to be done illustrates their position of significant advantage to influence the outcome.

The task of setting a compromise in censorship legislation is in the hands of a special Select Committee. Before the Committee is not only Hunt's Bill but also the Cinematograph Films Bill introduced by the Hon. H.L.J. May, Minister of Internal Affairs on 15 August 1975.¹⁰⁶ Does this Government Bill provide a balanced approach to the competing interests? The Hon. R.D. Muldoon, in commenting on the Bill, recognised

the inevitable conflict between the commercial-
ization of sex and violence in films for entertainment

-
105. Mr Hunt placed the membership of film societies in New Zealand at 40,000. Compare this figure with the number petitioning Parliament in 1970 for more stringent censorship and the Catholic population in 1916.
106. New Zealand Parliamentary Debates, 1975, v.400, at p.3576

and the move towards less censorship of films
as an art form,¹⁰⁷

but his remark that "the Bill has to try to devise a means of dealing with both" hints that no balance had yet been struck. The Bill's provisions support this conclusion. The Bill consolidates and amends the 1961 Act and, as such, is concerned with a variety of important film industry matters unconnected with censorship. The major thrust of the Bill is not towards censorship. Also, the minimal changes in the accommodation of censorship, although ambiguous, appear to reflect, primarily only film society or political interests.¹⁰⁸ First the Bill provides for exemption by regulation of eligible films. While eligible films are not listed, it seems the regulations will reflect Hunt's statutory list.¹⁰⁹ Second, following Hunt's Bill, specific criteria are laid out for the Censor to consider in examining a film. After considering these factors, the Censor must approve the film if, in his opinion, it is "not likely to be injurious to the public good". The meaning of this phrase is not defined but it appears to have been extracted from the definition of an indecent object under The Indecent Publications Act, 1963. The assumption may be that a film is now not likely to be injurious to the public good until it is indecent. The

107. Ibid. at 3578

108. This is surprising. See "Censorship" (1967), 32 Comment: A New Zealand Quarterly Review 1 where the liberal approach of the Indecent Publications Tribunal comes under criticism through pressure from "the Chief Catholic Opposition Whip, Henry May".

109. Ibid. Mr Hunt indicates the film societies will be pleased with the exemption powers although this interpretation seems in conflict with Mr May's statement, supra, fn.87 at 1248, that "it is dangerous to give certain people special privileges."

restrictions on banning and cutting contained in Hunt's Bill are not necessary under this interpretation. Finally, in discussion of the Bill, there was some indication the individual community interests, such as Patricia Bartlett's Society, would have recognition and protection under the Bill's review sections.

Mr May envisaged a Review Board comprised of

a very good cross section of representatives of the Community... no matter what legislation covers problems such as film censorship, ultimately the question comes back to the point of view of the individual... in the final analysis the decision must be made by the individual members of the public who will be appointed to the board.

110

As regards its operation, Mr May stated "when a film comes into the category of being objected to by people, then it will be dealt with by the Board of Review".¹¹¹

The Bill does not reflect the apparent intention to provide an accessible means of review. The right of review is restricted to those persons who submit the film to the Censor. On the review, not only is the audi alteram partem rule restricted to a "file hearing" or "hearing on the papers" for the applicant, but also no other person has a right to appear before or be heard by the Board. There is provision for the Minister to require the film to be examined where the film has been approved and exhibited

110. N.Z.P.D. 1975 at 3519.

111. Ibid. at 3576

and the Minister considers the apparent effect of the film is likely to be injurious to the public good. The section's usefulness in balancing interests is doubtful. Similar provisions in the 1961 Act where an appeal could be authorized by the Minister had never been used. Now some degree of mobilization would be necessary to persuade the Minister to act. Such social action by the groups this section would benefit has been almost non-existent. Finally, the interpretation of when a film is likely to be injurious to the public good may restrict the Minister's action given a liberal interpretation. Or, conversely, the section may provide an automatic safety valve for any public pressure which creates more difficulties for this paper than it solves.

Thus, the full interests of the film societies of New Zealand have been laid before the Select Committee. The interests are clearly presented in the form of proposed legislation, legislation which simply does not strike a balance between the competing interests. The corresponding Government Bill does little to improve the imbalance and, if anything, creates a further distortion. Submissions by interests outside the scope of these Bills have tended to be either individualized complaints or so broadly articulated as to be of little help in devising a legislative formula to balance all the interests.¹¹² Some explanation for this continued lack of effective mobilization by interest groups has been canvassed.¹¹³

112. See generally the 105 submissions to the Select Committee and in particular the submission of the Society for the Preservation of Community Standards, which stated, in part that too many feature films exhibited in New Zealand cinemas show an unhealthy preoccupation with sexual immorality and physical violence. Not to make use of censorship in a period such as the present one would be "the equivalent of moral suicide".

113. See above at page 40.

On the other hand, the film societies have a tremendous advantage. Central organization is already present and support on these issues over a long period has facilitated their concerted action and their Bill is not without political respect. Their interests, while apparently not relatively greater than other competing film interests, will have a relatively greater impact on the formation of the compromise. The logical result will be an imbalance and a repeat of 1916.

5. CONCLUSION

Film censorship is in for a change. It will be the first significant change since 1916 when the Catholic Federation introduced censorship to New Zealand. The accommodation of censorship at both points in time will have a common characteristic not related to its subject matter or effect. The connection between two pieces of legislation sixty years apart lies in the underlying conflict behind the changes in the law. The Catholic Federation and the Federation of New Zealand Film Societies are the real fathers of the changes. The Catholic Federation intended to ensure that their moral interests in film were recognized. The elite imbalance the 1916 Act appeared to create, out of "respect" for the Catholic Federation, equalized somewhat over the years. Now the Film Societies intend to ensure their artistic and libertarian interests are recognized by new legislation. The proposal is for another elite imbalance but with little evolutionary

equalising mechanisms. Granted, the imbalance is only a proposal. Yet in 1916, because of the organisation and position of the Catholic Federation, the imbalance became law. Similarly the Film Societies are strongly organised and carry a degree of political respect. Their influence on any attempt to balance the competing interests will be significantly greater than the impact of other film interests. In 1976, as in 1916, the legislation apparently will be not the result of a balanced compromise but a forced compromise. Because of this imbalance, future conflict is inevitable. This conflict will not be merely "the least amount of friction" Pound foresaw, but conflict through injustice. It will only be a matter of time before another elite pressure group in conflict will again move for censorship changes. As the saying goes, history does repeat itself.

VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

F
Folder
P1

PIRIE, A. J.
Censorship of films.

359,690

A Fine According to Library
Regulations is charged on
Overdue Books.

VICTORIA
UNIVERSITY
OF
WELLINGTON
LIBRARY

200013
PLEASE RETURN BY
30 AUG 2000
TO W.U. INTERLOANS

PIRIE, A. J.

Censorship of films

111
LIKIE, A.J.
Corporship of films

3 0 YNB 3000
PLEASE RETURN BY
20 MAY 1988
Overdue books
penalties is charged on
LIBRARY

249/80
PLEASE RETURN BY
14 APR 1986
TO W.U. INTERLOANS
PLEASE RETURN BY
20 MAY 1988
TO W.U. INTERLOANS

CU 488/29
PLEASE RETURN BY
7 APR 1988
of 10c per day is
charged on overdue books
TO W.U. INTERLOANS

