North Dakota Law Review

Volume 29 | Number 2 Article 4

1953

A Critical Analysis of a So-Called Critical Analysis

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A CRITICAL ANALYSIS OF A SO-CALLED "CRITICAL ANALYSIS"

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IN the January issue of this *Law Review*, one Howard Newcomb Morse, who has written widely if not wisely, offered what he termed "A Critical Analysis and Appraisal of *Burstyn v. Wilson*."[1] This case, it will be recalled, is one in which the United States Supreme Court held that moving pictures are a form of communication within the constitutional protection of free speech and free press, and that the constitution bars any attempt to censor a motion picture as "sacrilegious." This case is that rarity in our recent constitutional jurisprudence, a unanimous decision; it has met with universal approval in the law reviews; it has been praised by powerful spokesmen for the denomination to which most of those who wished to ban the particular motion picture involved belong.

Mr. Morse strikes a discordant note amid the general acclaim for the *Burstyn* decision. "What the Supreme Court has done," he tell us, "is to kick the pedestal of Christian morality out from under our hitherto lofty system of law so that our system of justtice crashes to the ground * * *."[2] The plaint that morality has not been given sufficient weight in judicial decisions is hardly a new one; nearly 40 years ago the great Wigmore accused the courts, and the Supreme Court in particular, of having been "callous" to "plain thieving."[3] But to make the accusation is not to prove the charge; and four pages of overblown rhetoric does not constitute a "critical analysis" as that term is usually understood.

Mr. Morse fails to mention that less than a month before the *Burstyn* decision, this very same Supreme Court had announced that: "We are a religious people whose institutions presuppose a Supreme Being."[4] Does this sound like a Court that is poised to kick morality out from under law, or to deprive jurisprudence of the guidance of religious belief? I should have thought not, just as I should have thought that *Burstyn* v. *Wilson* involves no issue of morality. All that the case holds is that the state may not inter-

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1. 29 N.Dak.L.Rev. 38 (1953) The Burstyn case is found at 343 U.S. 495 (1952).
2. 29 N.Dak.L.Rev. 38, 39, (1953).
3. Wigmore *Justice, Commercial Morality, and the Federal Supreme Court; The Waterman Pen Case*, 10 Ill.L.Rev. 178, 184-5 (1915).
4. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

vene to prevent those who are so minded from seeing a motion picture which may be offensive to persons who accept the dogma of the Virgin Birth.[5] I happen to be one of those who believes in that dogma; I think persons who do not believe in the Virgin Birth are quite wrong, but hardly immoral. Mr. Morse indicates by the examples he chooses to discuss that he has not grasped the distinction between morality, which is a matter of behavior, and dogma, which is a matter of belief. Surely he is right when he tells us that a court which condoned murder or stealing or adultery would be twice wrong, for having ignored both man-made and God-made laws of behavior. But the Supreme Court has not done this; it has said only that we may believe as we wish.

This is where what must must seem a theological disputation returns again to legal analysis. Mr. Morse has ignored the Court's acknowledgment of a "Religious Being," and demanded more specifically a "Christian morality." On his side he has an old ill-considered dictum;[6] against him he has the First Amendment. The real heart of Mr. Morse's attack is to be found in the following two sentences:

> "Mr. Justice Clark's injunction against 'favoring one religion over another' constitutes a negation of both the First Commandment and the First Amendment. The Court has interpreted the doctrine of freedom of religion to mean freedom from religion." [7]

This is such utter nonsense as to be reminiscent of the slogans in Orwell's 1984, "War is peace", " 'Freedom is slavery,' and "Ignorance is strength.' " The First Amendment to the Constitution of the United States says:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

No thinking person would contend that his language is free from ambiguities. But there is one thing which is clear from this language, and which, so far as I know, no one except Mr. Morse has ever disputed, it is that this Amendment does prohibit "favoring one religion over another." To argue that a refusal to so favor one religion is a "negation" of the First Amendment is an irresponsible distortion, which will hardly be swallowed by anyone who has ever looked at the Constitutional language. Perhaps this is why Mr. Morse did not favor us by setting out that language.

Nor can the Morse position be strengthened by resort to the

5. Mr. Morse is clearly misinformed in asserting, 29 N.Dak.L.Rev. 38 (1953), that the dogma offended is that of the Immaculate Conception.

6. "* * * [T]his is a Christian nation." Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

7. 29 N.Dak.L.Rev. 38, 39 (1953).

First Commandment, assuming, for argument's sake, that where the Amendment and the Commandment are in conflict, the Supreme Court should follow the latter. The First Commandment says: "Thou shalt have none other God before Me." An Episcopalian, a Unitarian, and a Hebrew all worship the same God, and thus obey that Commandment. They keep the Commandment, though only the Episcopalian would accept the dogma of the Virgin Birth,, and the Hebrew would find this dogma positively offensive. Yet in the name of the First Commandment Mr. Morse would demand protection for the dogma as a matter of "Christian morality."

The Supreme Court last term refused to find in the First Amendment "a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." [8] Is this not the answer to Mr. More's charge that the Court has interpreted "freedom of religion to mean freedom from religion"? The real meaning of the First Amendment, according to the Court, is that: "The government must be neutral when it comes to competition between sects." [9]

Mr. Morse's way is not only barred by the First Amendment; indeed his view would subvert the end which he wishes to serve. The way to promote morality is not to allow the censorship Mr. Morse would uphold. Such censorship would require a Court which refuses to play favorites among religions to approve the banning of anything which would offend any of the 313 sects which exist in this country.[10] The same law which prohibited showing of "The Miracle" would prohibit showing of "The Robe." The result, of course, would be that nothing touching on religion could appear in any movie, nor, presumably, could it be communicated by newspaper or radio or books or television. All that would be needed would be for one sect to find the picture or publication or broadcast offensive, and it would have to be stricken down as "sacrilegious." [11] What would happen to freedom of religion, and to promotion of morality, whether Christian or otherwise, then?

Mr. Morse had the gall to call his paper a "critical analysis."

8. Zorach v. Clauson, 343 U.S. 306, 314 (1952).
9. *Ibid.*
10. Bureau of the Census, Religious Bodies: 1936, Vol. I, iii, 7.
11. Thus the New York Court of Appeals, in the decision which the Supreme Court reversed, had said that the standard was to be: "° ° ° [N] o Religion ° ° ° Shall be treated with contempt, mockery, scorn and ridicule ° ° °." Joseph Burstyn, Inc. v. Wilson, 303 N.Y. 242, 258, 101 N.E.2d 665, 672 (1951).

The truth is that its principal vice is its uncriticalness. Starting with an intuitive feeling that "The Miracle" should not be shown, Mr. Morse has tried to defend that feeling by what seeks to pass for reasoning. Yet the logical end of the reasoning which he offers is that either the state must prohibit that which any group regards as sacrilegous, which would destroy religion, or it must favor one group exclusively, which would destroy the First Amendment. If such an attack on the decision in *Burnstyn* v. *Wilson* has no other merit—and I think this to be true—at least it provides occasion to reflect again on the wisdom of our forefathers, who made religion free, and of a Court which deems it its duty under the Amendment to "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." [12]

12. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

NORTH DAKOTA LAW REVIEW

Member, National Conference of Law Reviews

VOLUME 29 APRIL, 1953 NUMBER 2