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Constitutional Law - Due Process - Freedom of Expression - Motion Picture Censorship

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CONSTITUTIONAL LAW—DUE PROCESS—FREEDOM OF EXPRESSION—MOTION PICTURE CENSORSHIP—The New York Court of Appeals upheld the denial of a license to exhibit the French motion picture "La Ronde" upon the grounds that it was "immoral" and "would tend to corrupt morals."[1] Censorship of the picture, which dealt with promiscuous sex relations, was held to be a proper exercise of the police power, since its exhibition would present a clear and present danger to the morals of the community, and the words "immoral" and "tend to corrupt morals" were held sufficiently definite for purposes of due process. In another censorship case, the Supreme Court of Ohio affirmed the rejection for exhibition of the motion picture "M," a film giving sympathetic treatment to a schizophrenic child killer, on the ground the picture was "harmful," and held the word "harmful" was neither vague nor indefinite.[2] On appeal of the two cases to the United States Supreme Court, *held,* reversed per curiam,[3] *Burstyn v. Wilson*[4] being cited as authority without further discussion. *Superior Films, Inc. v. Department of Education of State of Ohio, Commercial Pictures Corporation v. Regents of University of State of New York,* (U.S. 1954) 74 S.Ct. 286.

A curious anomaly in the field of constitutional law was finally rectified in the recent Supreme Court movie censorship case of *Burstyn v. Wilson,* and now courts are seeking to determine the extent of that holding. The Court decided in 1915 in *Mutual Film Corp. v. Industrial Commission*[5] that motion picture exhibition was purely a commercial spectacle, not a part of the press or a medium of public opinion, and therefore the censorship of movies did not give rise to a constitutional issue under the First and Fourteenth Amendments.

[1] Commercial Pictures Corp. v. Board of Regents of University of State of New York, (N.Y. 1953) 113 N.E. (2d) 502. The New York Education Law requires that a license to exhibit a motion picture be granted "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ." 16 N.Y. Consol. Laws (McKinney, 1953) §122.

[2] Superior Films, Inc. v. Department of Education, 159 Ohio St. 315, 112 N.E. (2d) 311 (1953). The Ohio censorship law provides that a license shall be given to exhibit only those films which are "of a moral, educational or amusing and harmless character." Ohio Rev. Code (Baldwin, 1953) §3305.04.

[3] Justices Black and Douglas concurred in a separate opinion.

[4] 343 U.S. 495, 72 S.Ct. 777 (1952).

[5] 236 U.S. 230, 35 S.Ct. 387 (1915). See also Mutual Film Corp. v. Hodges, 236 U.S. 248, 35 S.Ct. 393 (1915); Fox Film Corp. v. Trumbull, (2d Cir. 1925) 7 F. (2d) 715; Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909). It was also held that newsreels are not part of the press and are subject to censorship. Pathe Exchange v. Cobb, 236 N.Y. 539, 142 N.E. 274 (1923).

While at the time of the *Mutual* decision only three states[6] had censorship laws, that case was an impetus to the enactment of many such laws. Today, in addition to various municipal ordinances, there are eight states[7] having censorship laws and eleven others[8] with statutes limiting the exhibition of motion pictures in some way. The first step[9] in the transition from the rationale of the *Mutual* case to that of the *Burstyn* case was taken in *Gitlow v. New York*,[10] where the Court decided that the First Amendment freedoms are protected from state encroachment by the due process clause of the Fourteenth Amendment. Next, in *Near v. Minnesota*,[11] it was held that except in rare circumstances prior restraints on freedom of the press or speech are unconstitutional. Encouraged by this judicial climate and by some pregnant dictum,[12] the motion picture industry attempted to persuade the Court to reconsider its holding in the *Mutual* case, at first without success.[13] Then in the *Burstyn* case the Court finally recognized the importance of the motion picture as an organ affecting public opinion, and held that movies are to be included within the free speech and press guarantees of the First and Fourteenth Amendments. Although that case had the desirable effect of overruling the out-dated reasoning of the *Mutual* decision, it was not a clear-cut opinion on the constitutionality of motion picture censorship. Justice Clark, writing for the majority in the *Burstyn* case, reasoned that since motion pictures are part of the press and since the case did not present such an exceptional situation as would justify the imposition of a prior restraint, the censorship was unconstitutional.[14] The concurring opinion argued that

[6] *Ohio*: Ohio Rev. Code (Baldwin, 1953) §3305.04; *Pennsylvania*: Pa. Stat. Ann. (Purdon, 1930) tit. 4, §43; *Kansas*: Kan. Gen. Stat. (1949) §§51-101 to 51-112.

[7] In addition to those cited in note 6 supra: *Florida*: Fla. Stat. (1951) §§521.01 to 521.04; *Louisiana*: La. Rev. Stat. (1950) tit. 4, §§301 to 307; *Maryland*: Md. Code Ann. (Flack, 1951) art. 66A, §6; *New York*: 16 N.Y. Consol. Laws (McKinney, 1953) §120; *Virginia*: Va. Code (1950) §§2-98 to 2-116.

[8] *Connecticut*: Conn. Gen. Stat. (1949) §8580 as applied through §3702; *Illinois*: Ill. Rev. Stat. (Ill. Bar Assn., 1953) c. 38, §471; *Iowa*: Iowa Code Ann. (1946) §725.3; *Massachusetts*: Mass. Laws Ann. (1949) c. 136, §§2 to 4; *Montana*: Mont. Rev. Code Ann. (1947) §94-3573; *Nebraska*: Neb. Rev. Stat. (1943) §28-1120; *North Carolina*: N.C. Gen. Stat. (1950) §14-193; *Texas*: Tex. Pen. Code (Vernon, 1952) art. 527; *Vermont*: Vt. Stat. (1947) §8492; *West Virginia*: W.Va. Code Ann. (1949) §6109; *Wisconsin*: Wis. Stat. (1951) §351.38(3). See also the federal statute prohibiting importation of obscene films, 18 U.S.C. (1946) §396, and INTERNATIONAL MOTION PICTURE ALMANAC 646-656 (1949), discussing the motion picture industry's self-imposed regulations.

[9] It should be noted that the Mutual case did not decide whether the Ohio censorship statute violated the First Amendment as applied through the Fourteenth since the First Amendment was not considered a restraint upon the states.

[10] 268 U.S. 652, 45 S.Ct. 625 (1925).

[11] 283 U.S. 697, 51 S.Ct. 625 (1931).

[12] Justice Douglas, writing for the majority in an antitrust proceeding, said, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." United States v. Paramount Pictures, 334 U.S. 131 at 166, 68 S.Ct. 915 (1948).

[13] RD-DR Corporation v. Smith, (5th Cir. 1950) 183 F. (2d) 562, cert. den. 340 U.S. 853, 71 S.Ct. 80 (1950).

[14] Burstyn v. Wilson, note 4 supra, at 781-782.

censorship under the statute was a denial of due process because the statute[15] was too vague and indefinite.[16] It is clear that something more is needed to guide the states in determining when they may constitutionally censor a motion picture. The problem is made more acute in view of the intimation in the *Burstyn* case that censorship of a picture on the grounds of *obscenity* would be constitutional.[17] Since the principal case now decides that censorship on the basis of *immorality* is unconstitutional, the states are faced with the difficult problem of distinguishing between these two terms. Apparently the Court is not ready as yet to accord to motion pictures all the privileges of the press, as is evidenced by the necessity for a concurring opinion in the present case by Justices Black and Douglas advocating complete freedom from censorship. No indication has been given, however, as to what test will be applied to determine the constitutionality of the censorship. The fact that a restraint on expression is under consideration makes it possible that the "clear-and-present-danger" test will be used to examine the propriety of the censorship, although that test has generally been employed in testing the constitutionality of after-imposed sanctions on expression[18] rather than prior restraints. However, the constantly reiterated theme that the main basis for censorship of motion pictures is their propensity for evil among children,[19] coupled with the fact that the clear-and-present-danger test itself may have recently undergone some refinement,[20] would seem to indicate that a rule of reason may be the definitive test. Such a rule of reason could take the form of a reasonable man test, allowing the censorship to stand only if reasonable men would agree that the exhibition of the picture in question would tend to promote the substantive evil that a state has the right to prevent, or it could be less strict and uphold the censorship so long as the board of censors appeared to have acted reasonably in the exercise of their discretion. Although not brought out in the opinion, an interesting point allowing for some speculation on this general question is the fact that the Court made its own review of the pictures involved in the principal case.[21] This may mean that film censor-

[15] The Court was considering the word "sacrilegious" of the New York statute quoted in note 1 supra.

[16] Nor is Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002 (1952), of much avail. The majority opinion merely cited the Burstyn case as the basis for its decision, while one concurring opinion was based on indefiniteness and the other stated only that the case represented the evil of prior restraint in a most flagrant form.

[17] Burstyn v. Wilson, note 4 supra, at 782.

[18] Antieau, "The Rule of Clear and Present Danger: Scope of Its Applicability," 48 MICH. L. REV. 811 (1950).

[19] CHAFEE, FREE SPEECH IN THE UNITED STATES 540-548 (1948).

[20] Chief Justice Vinson, in Dennis v. United States, 341 U.S. 494 at 510, 71 S.Ct. 857 (1951), quoted from the appellate opinion by Judge Learned Hand: "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." See Corwin, "Bowing Out of Clear and Present Danger," 27 NOTRE DAME LAWYER 325 (1952), where the author states his belief that this language authorizes the court to weigh the substantive good protected by a statute against the "clear-and-present-danger" requirement, thus making the test a rule of reason.

[21] N.Y. TIMES, Jan. 19, 1954, p. 1:6-7.

ship will stand only if reasonable men would agree that exhibition of the picture would tend to promote the substantive evil.[22]

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[22] It would appear that the courts of Ohio and New York adopted the test that censorship is justified unless all reasonable men would believe to the contrary. The fact that the Supreme Court reversed these decisions would tend to indicate that the Court adopted a narrower test of what censorship was proper. However, this reversal is not conclusive as to the test applied because the reversal may have resulted just from a different interpretation of the facts.