COMMENTS

Constitutional Law — Freedom of Speech — Motion Picture Exhibition

A New York statute required all motion pictures to be licensed by the Board of Regents before exhibition to the public and further provided that, unless a picture be "obscene, immoral, inhuman, or sacrilegious, or of such a character that its exhibition would tend to corrupt morals or incite to crime," a license should be issued.[1] Appellant's previously issued license to exhibit the film "The Miracle" was revoked by the Board on the ground that the film was sacrilegious, and this decision was upheld by the Appellate Division[2] and the New York Court of Appeals.[3] On certiorari to the United States Supreme Court, held: reversed. The exhibition of motion pictures is a mode of expression protected against state infringement by the First Amendment through the due process clause of the Fourteenth Amendment. Because the term "sacrilegious" is too broad, the New York procedure was not a permissible prior restraint on such expression and is therefore unconstitutional.

As the Court indicated in its opinion, the principal case represents a shift in the Court's attitude concerning the nature of motion pictures and their effect on public opinion. In 1915 it was held in *Mutual Film Corporation v. Industrial Commission*[5] that in view of the propensity for evil of movies, a statute which gave a board of censors the power to forbid the exhibition of films which were not "moral, educational, or amusing and harmless" was a reasonable exercise of the police power of the state. To the contention that such censorship violated the guarantees of freedom of speech and of the press under the state constitution, the Court answered that although motion pictures might be a media of thought, the exhibition of them was a business carried on for profit like other spectacles and could not be regarded "as

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1. N.Y. Education Law § 122 *et seq.*
2. Joseph Burstyn, Inc. v. Wilson, 278 App. Div. 253, 104 N.Y.S.2d 740 (3d Dep't 1951).
3. Joseph Burstyn, Inc. v. Wilson, 303 N.Y. 242, 101 N.E.2d 665 (1951).
4. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
5. 236 U.S. 230 (1915). The same decision on a similar statute was made in Mutual Film Corporation v. Hodges, 236 U.S. 248 (1915).

part of the press or as organs of public opinion."[6] The Court further ruled that the above quoted words set up a standard sufficiently clear to forestall arbitrary judgment by the censors. Similar opinions were voiced in lower federal and state decisions on similar facts.[7]

The first step in the transition from the *Mutual Film* rationale to that of the principal case occurred in 1925 in *Gitlow v. New York*,[8] where it was held that the guarantees of the First Amendment were protected from state encroachment by means of the due process clause of the Fourteenth Amendment. In 1931 the Court ruled further in *Near v. Minnesota* ex rel. *Olsen*[9] that any arrangement whereby a restraint was put upon the communication of ideas before their communication was a forbidden invasion of freedom of speech and of the press. At the same time the Court in that case pointed out that the principle of immunity from previous restraint was not without limitation but that only in exceptional circumstances could such a restriction be justified.

Following soon after these important judicial developments was the realization that the basic thesis of decisions like the *Mutual Film* case did not square with either the judicial treatment accorded other communication media or the true character of the modern movie. It was pointed out that in the case of other mass media, neither the fact that they were operated for private profit nor their propensity for evil had been considered a decisive

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6. Mutual Film Corporation v. Industrial Commission, 236 U.S. 230, 244 (1915).

7. Fox Film Corporation v. Trumbull, 7 F.2d 715 (D. Conn. 1925); Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909); Pathe Exch., Inc. v. Cobb, 202 App. Div. 450, 195 N.Y. Supp. 661 (3d Dep't 1922), *aff'd*, 236 N.Y. 539, 142 N.E. 274 (1923); Thayer Amusement Corporation v. Moulton, 63 R.I. 182, 7 A.2d 682 (1939). *But cf.* Public Welfare Pictures Corporation v. Brennan, 100 N.J. Eq. 132, 134 Atl. 868 (Ch. 1926). In Thayer Amusement Corporation v. Moulton, 63 R.I. 182, 189, 7 A.2d 682, 686 (1939), the court stated:

> Motion pictures are undoubtedly within the category of shows and exhibitions, and for more than a century these have been considered along with rope or wire dancing, wrestling, boxing, and sparring matches, and also roller skating and dancing in rinks and public halls, as subject to regulation and even prohibition under the police power. . . .

In Pathe Exch., Inc. v. Cobb, *supra*, even newsreels were held subject to censorship on the ground that they were not a part of the press within the meaning of the state constitution.

8. 268 U.S. 652 (1925). See also Grosjean v. American Press Co., 297 U.S. 233 (1936).

9. 283 U.S. 697 (1931).

reason for denying them constitutional protection.[10] In addition, with the invention of the sound track and the growing use by film producers of controversial social and political issues as texts, it became generally recognized that the motion picture was no longer a mere "spectacle" but was in fact an important organ of public opinion.[11]

The Court, consistent with its other decisions in this area, explicitly pointed out that the extension of the constitutional guarantee to motion pictures did not mean that movies were free from all censorship. A narrow exception to the general prohibition against prior restraints exists, but the statutory basis of the restraint must satisfy a test on vagueness which the Court itself has indicated is stricter in the case of limitations on freedom of expression than in other situations.[12] In the principal case, the term "sacrilegious" could not meet this severe test, and thus the statute was struck down. With regard to the type of statutory wording which will meet the above test and thus will continue to be a source of possible restriction to movie exhibition, it has been indicated that narrowly drawn statutes forbidding the use of profane, obscene, or lewd language would not raise a constitutional issue.[13]

In holding that the exhibition of motion pictures should be given constitutional protection, the Supreme Court not only made its opinion with reference to motion pictures consistent with its decisions concerning other media of expression but gave judicial recognition to the true character of the modern movie.

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10. Note, 60 YALE L.J. 696, 702 (1951).
11. *Id.* at 704-708.
12. Winters v. New York, 333 U.S. 507 (1948).
13. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942); Lovell v. Griffin, 303 U.S. 444, 451 (1937). The same opinion was indicated in the principal case. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952).

Another possible source of limitation on the showing of motion pictures is the "clear and present danger" doctrine, which has been applied to restrict speech which tends to incite to crime or other illegal acts or which threatens the existence of organized government. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931); Whitney v. California, 274 U.S. 357 (1927); Schenck v. United States, 249 U.S. 47 (1919).