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Constitutional Law - Freedom of Press - Validity of Motion Picture Licensing Statute

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CONSTITUTIONAL LAW—FREEDOM OF PRESS—VALIDITY OF MOTION PICTURE LICENSING STATUTE—The distributor of the motion picture "Lady Chatterley's Lover" applied to the Motion Picture Division of the New York State Education Department for a license, required by New York law,[1] for public presentation of the film. The application was denied on the ground the film was "immoral"[2] within the meaning of the licensing statute.[3] On review,[4] the Board of Regents approved this determination, but on appeal the state supreme court reversed the Board.[5] A divided court of appeals reversed the supreme court,[6] holding that the contents of the film met the statutory definition of "immoral." On appeal to the Supreme Court of the United States, *held*, reversed. The opinion of the Court[7] held that the statute was on its face an unconstitutional restraint on free speech, since, as interpreted by the state court, the statute required the denial of a license to a film simply because it advocated certain ideas, without regard to whether it incited to unlawful conduct and without regard to the method of portraying these ideas. Three justices,[8] concurring in the result, after finding that the statute as interpreted by the state court required either obscenity or incitement to illegal action as part of the definition of "immoral," went on to hold that the statute, constitutional in itself, was applied unconstitutionally in this case, since the contents of the film were neither obscene nor likely to incite to criminal action and hence not within the areas of speech which may be restrained by the states.[9] *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959).

1 16 N.Y. Consol. Laws, pt. 1 (McKinney, 1953) §129.

2 "The director of the division . . . unless such film . . . is . . . immoral . . . shall issue a license therefor." 16 N.Y. Consol. Laws, pt. 1 (McKinney, 1953) §122.

3 ". . . the term 'immoral' . . . shall denote a motion picture film or part thereof . . . which portrays acts of sexual immorality, perversion, or lewdness; or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior." 16 N.Y. Consol. Laws, pt. 1 (McKinney, Supp. 1959) §122-a.

4 16 N.Y. Consol. Laws, pt. 1 (McKinney, 1953) §124 provides for administrative review by the defendant Regents.

5 Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 4 App. Div. (2d) 348, 165 N.Y.S. (2d) 681 (1957).

6 Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 4 N.Y. (2d) 349, 151 N.E. (2d) 197 (1958). Only three judges held the denial of the license under the statute constitutional, Desmond, J., concurring in the result, although doubting the validity of the statute, so that a final decision by the United States Supreme Court could be obtained.

7 The opinion of the Court was written by Justice Stewart, joined by Chief Justice Warren and Justice Brennan.

8 Concurring opinion by Justice Harlan, joined by Justices Frankfurter and Whittaker. Principal case at 702.

9 Several other concurring opinions were written in the case. Justice Frankfurter wrote a separate concurring opinion, principal case at 691, in which he stressed the duty of the courts, once a licensing statute is found to be within constitutional limits (as he found the present statute to be), to accept the responsibility of making a case-by-case finding on the constitutionality of its application. Justice Clark concurred separately, principal case at 699, on the ground the standard established by the statute was not sufficiently definite to serve as a censorship guide. Justice Douglas, joined by Justice Black, concurred sepa-

The opinion of the Court in the principal case marks no significant departure from prior free speech doctrine. While speech which incites to unlawful conduct[10] or is in itself obscene[11] is generally regarded as outside the protection of the First Amendment, it is equally well recognized that the mere advocacy of ideas, albeit unconventional or unpopular, may not be restrained.[12] Once the Court found that the statute in question placed a restraint on speech which advocated an idea in a manner not obscene in itself and short of incitement to unlawful conduct, the invalidity of the statute followed as a matter of course. It should be noted, however, that the ground relied upon by the Court is broader than that previously relied upon the Court to invalidate motion picture licensing statutes. Beginning with *Joseph Burstyn, Inc. v. Wilson*,[13] the Court has struck down licensing statutes[14] on a ground peculiarly fitted to the prior restraint setting, namely, that the statute failed to provide an adequate standard for the censor to apply. In the principal case the Court, although citing *Burstyn* as authority, has turned to a broader ground[15] equally applicable in both prior restraint and subsequent punishment cases. The Court would undoubtedly strike down on the same ground a criminal statute punishing the same conduct proscribed in the licensing statute under discussion, a conclusion which does not necessarily follow where the *Burstyn* rationale is applied.[16]

Of perhaps greater import to those cities and states which seek to use licensing laws in addition to criminal provisions to combat the dissemination of obscene matter is the opinion of the three concurring justices[17]

rately, principal case at 697, on the ground all motion picture censorship is invalid. Justice Black concurred individually, principal case at 690, attacking the views of Justice Frankfurter set out above.

10 See Feiner v. New York, 340 U.S. 315 at 321 (1951); Kasper v. Brittain, (6th Cir. 1957) 245 F. (2d) 92 at 95.

11 See Chaplinsky v. New Hampshire, 315 U.S. 568 at 571 (1942); Roth v. United States, 354 U.S. 476 (1957).

12 See Terminiello v. Chicago, 337 U.S. 1 at 4 (1949). See also the concurring opinion of Justice Brandeis in Whitney v. California, 274 U.S. 357 at 376 (1927).

13 343 U.S. 495 (1952).

14 Gelling v. Texas, 343 U.S. 960 (1952); Superior Films, Inc. v. Department of Education of Ohio, Division of Film Censorship, and Commercial Pictures Corp. v. Regents of University of State of New York, 346 U.S. 587 (1954); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955).

15 Justice Clark, concurring at 699, applied the Burstyn rationale strictly, finding the statute as interpreted by the New York courts did not provide an adequate standard for the censors.

16 It may well be that a word or phrase which is not sufficiently definite to provide an adequate censorship standard could be sufficiently precise to meet the test that a criminal statute which is so vague as to fail to give notice that an act has been made criminal before it is done violates due process. See the discussions of the "void for vagueness" rule in Winters v. New York, 333 U.S. 507 (1948); Jordan v. De George, 341 U.S. 223 (1951); Roth v. United States, note 11 supra; Bernard, "Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment," 50 MICH. L. REV. 261 (1951).

17 See note 8 supra.

who took a different view of the New York statute, finding a requirement of obscenity or incitement to crime in the statutory definition of "immoral." From this concurring opinion, which marks the first departure from the recent summary per curiam disposition of obscenity censorship cases,[18] two matters stand out: first, states or cities may refuse to license a film because of its obscenity, the question of obscenity being determined by application of the test of *Roth v. United States;*[19] second, it is the function of the judiciary, including the Supreme Court when necessary, to make the determination of obscenity in such cases. The concurring justices make it clear that if the licensing statute used obscenity as a standard, they would regard the statute as valid.[20] This position is reinforced by the decision in *Kingsley Books, Inc. v. Brown,*[21] approving prior restraint on the distribution of obscene literature so long as adequate procedural safeguards were maintained. Since the often posed "double standard"[22] of censorship works to the disadvantage of motion pictures, the theory of the *Kingsley Books* decision would be applied against films as well as literature. While it could perhaps be argued that the use of the word "obscene" in a licensing statute would be subject to the vagueness

[18] Sunshine Book Co. v. Summerfield, (D.C. D.C. 1955) 128 F. Supp. 564, affd. (D.C. Cir. 1957) 249 F. (2d) 114, revd. per curiam 355 U.S. 372 (1958), in which the Court, on the authority of Roth, note 11 supra and note 19 infra, reversed determinations that certain nudist publications could be barred from the mails because of their allegedly obscene contents; Times Film Corp. v. Chicago, (N.D. Ill. 1956) 139 F. Supp. 837, affd. (7th Cir. 1957) 244 F. (2d) 432, revd. per curiam 355 U.S. 55 (1958), relying on Alberts v. United States, a companion case to Roth, in overruling the denial of a film license under the Chicago film obscenity ordinance; One, Inc. v. Oleson, (9th Cir. 1957) 241 F. (2d) 772, revd. per curiam 355 U.S. 371 (1958), relying on Roth and reversing the denial of an injunction against the continued barring from the mails of certain magazines treating the topics of homosexuality, lesbianism, and other sexual deviations. None of these per curiam decisions discussed constitutional questions, and the summary reversals left unclear whether the objection was to the fact of obscenity or the test of obscenity applied in the courts below.

[19] ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Roth v. United States, note 11 supra, at 489.

[20] "I do not understand that the Court would question the constitutionality of the particular portions of the statute with which we are here concerned if the Court read, as I do, the majority opinions in the Court of Appeals as construing these provisions to require obscenity or incitement, not just mere abstract expressions of opinion." Concurring opinion of Justice Harlan, principal case at 707.

[21] 354 U.S. 436 (1957). A majority of the Court, including Justices Frankfurter, Clark, Harlan, and Whittaker of the present court, approved New York's statutory procedure allowing the issuance of a temporary injunction against the distribution of obscene material, where a final decision on the fact of obscenity was to be made by a state court within a few days. Justice Brennan, who dissented in the case at 447, did not object to the fact of prior restraint, but felt the question of obscenity should be determined by the jury rather than the court.

[22] "Nor need we here determine whether, despite problems peculiar to motion pictures, the controls which a State may impose upon this medium of expression are precisely coextensive with those allowable for newspapers, books, or individual speech." Opinion of the Court, principal case at 689-690. But see Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 at 500-501 (1952).

test applied in *Burstyn*, this is probably not the case.[23] The *Roth* test which, although enunciated in a case involving a criminal prosecution, has been generally applied in cases of prior restraints on alleged obscenity,[24] provides the standard by which the determination of obscenity must be made. But although the same test is to be used in both prior restraint and subsequent punishment cases, the question of who is to apply the test may now depend on the nature of the restraint. Although Justice Black is alarmed at the prospect of the Supreme Court making the application in each case, the question having "so little in common with law suits,"[25] at least four justices[26] and perhaps a majority of the Court,[27] as well as the lower courts,[28] consider it essential to the protection of First Amendment rights that the determination be made by the courts, with a de novo viewing on appeal. Thus, unlike the rule in criminal actions,[29] it may be that the *Roth* "average person" and "community standard" tests will be applied by the courts rather than by the juries in prior restraint cases. If the Supreme Court now is going to determine the fact of obscenity on its own, lower courts may no longer be inclined to hold particular matters not obscene in order to avoid the discussion of constitutional questions and a more realistic application of the *Roth* test may result.

Dean L. Berry, S.Ed.

[23] See Joseph Burstyn, Inc. v. Wilson, note 22 supra, where at 505-506 the Court states: ". . . it is not necessary for us to decide . . . whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." See also Roth v. United States, note 11 supra, where the Court discusses the vagueness of the term "obscene." Cf. Times Film Corp. v. Chicago, note 18 supra.

[24] See, e.g., cases cited in note 18 supra. See also Grove Press, Inc. v. Christenberry, (S.D. N.Y. 1959) 28 U.S. LAW WEEK 2044; Capital Enterprises, Inc. v. Chicago, (7th Cir. 1958) 260 F. (2d) 670. Cf. Maryland State Board of Censors v. Times Film Corp., 212 Md. 454, 129 A. (2d) 833 (1957), decided before Roth.

[25] Justice Black, concurring in the principal case at 691.

[26] See notes 8 and 21 supra.

[27] It may well be that the summary per curiam reversals in the past two years, discussed in note 18 supra, were based on separate factual findings by the Supreme Court.

[28] See, e.g., Times Film Corp. v. Chicago, note 18 supra; Capital Enterprises, Inc. v. Chicago, note 24 supra; Maryland State Board of Censors, note 24 supra; Excelsior Pictures Corp. v. Regents of the University of the State of New York, 3 N.Y. (2d) 237, 144 N.E. (2d) 31 (1957).

[29] See Roth v. United States, note 11 supra. But see United States v. Keller, (M.D. Pa. 1958) 158 F. Supp. 940, revd. on other grounds (3d Cir. 1958) 259 F. (2d) 54; Cincinnati v. Walton, (Cin. Mun. Ct. 1957) 145 N.E. (2d) 407; Commonwealth v. Moniz, (Mass. 1959) 155 N.E. (2d) 762.