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Constitutional Law - Due Process - Validity of Refusal to Permit the Showing of a Motion Picture on the Grounds of Obscenity

Donald F. Oosterhouse S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW—DUE PROCESS—VALIDITY OF REFUSAL TO PERMIT THE SHOWING OF A MOTION PICTURE ON THE GROUNDS OF OBSCENITY—A Chicago municipal ordinance made it unlawful to exhibit any motion picture without first having secured a permit from the Commissioner of Police. The commissioner is required to issue the permit unless he finds the picture "immoral or obscene. . . ."[1] On these grounds he refused to permit exhibition of "The Miracle." Plaintiffs brought suit to have the ordinance declared unconstitutional and to restrain enforcement of the prohibition on the picture. The trial court granted the relief asked. On appeal, *held,* reversed and remanded to determine if the motion picture is obscene. A prior restraint on the exhibition of obscene motion pictures does not violate the Fourteenth Amendment. However, in determining whether the picture is obscene, the state has the burden of showing affirmatively that the dominant effect of the film, when considered as a whole, is substantially to arouse sexual desires, and that the probability of this effect outweighs whatever merits the film may possess.

[1] Chicago Municipal Code (1939) §155-4.

American Civil Liberties Union v. Chicago, 3 Ill. (2d) 334, 121 N. E. (2d) 585 (1954), appeal dismissed for want of a final judgment, 75 S. Ct. 572 (1955).

It is anomalous but true that only since 1952 have motion pictures been given protection as a form of speech under the First and Fourteenth Amendments.[2] According to the earlier view, the exhibition of motion pictures was only a business and not included within the freedoms of speech or press.[3] Prior restraint, as contrasted with subsequent criminal punishment, is the most offensive type of restriction upon freedom of expression and is the least likely to be upheld by the courts.[4] Yet prior restraint upon obscene films has the support of dictum in a number of Supreme Court cases.[5] In the recent cases involving such prior restraint, the Court has consistently struck down the restraint.[6] The opinion in *Joseph Burstyn, Inc. v. Wilson*[7] gives three possible attitudes toward licensing of movies: the basis of the restraint is not a legitimate interest of the state;[8] the standard of the restraint, although in a valid area, is too indefinite;[9] the evidence does not show that the particular motion picture offends a valid standard of decency.[10] There is support on the Court for still another view—that *all* prior restraints are void.[11] Several decisions have struck down licensing provisions held valid by state courts, but the majority opinions give no particular grounds other than citing the *Burstyn* case.[12] Thus, reversal of a New York case upholding

[2] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777 (1952), was the first case to hold that motion pictures were within the protection of the First and Fourteenth Amendments. See also United States v. Paramount Pictures, 334 U.S. 131 at 166, 68 S.Ct. 915 (1948).

[3] Mutual Film Corp. v. Industrial Comm., 236 U.S. 230, 35 S.Ct. 387 (1915). "Justice Holmes is said to have expressed regret, many years afterward, that he ever concurred in this decision and that he did not sense its consequences." CHAFEE, FREE SPEECH IN THE UNITED STATES 544 (1941). For one of many criticisms of this decision, see 60 YALE L.J. 696 (1951).

[4] Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556 (1907); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931); Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1938); Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 (1945); 4 BLACKST. COMM., Hammond ed., 151-152 (1890).

[5] Chaplinski v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948); Near v. Minnesota, note 4 supra.

[6] Joseph Burstyn, Inc. v. Wilson, note 2 supra; Superior Films v. Dept. of Education, 346 U.S. 587, 74 S.Ct. 286 (1954); Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002 (1952).

[7] Joseph Burstyn, Inc. v. Wilson, note 2 supra.

[8] Id. at 505.

[9] Id. at 507 et seq. Concerning the requirement of definite standards for censorship, see 14 MD. L. REV. 284 (1954).

[10] Joseph Burstyn, Inc. v. Wilson, note 2 supra, at 506-507.

[11] In a concurring opinion in Superior Films v. Dept. of Education, note 6 supra, at 589, Justice Douglas, with Black concurring, took a rigid view: "In order to sanction a system of censorship I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take that step." Because these justices concurred on this ground it is fair to say that the basis of the majority opinion must not have been an absolute ban on censorship.

[12] Superior Films v. Dept. of Education, note 6 supra; Gelling v. Texas, note 6 supra.

a prior restraint because the movie was "immoral" and "tended to immorality," construed by the state court to mean only sexual immorality, may mean that this is not a valid standard by which to prevent the showing of a motion picture, or it may be that the facts did not show the particular motion picture to be immoral or tending to immorality.[13] Thus, no decision squarely precludes censorship of obscene material.[14] The principal case presents clearly the issue of whether or not a state or city may prevent exhibition of a motion picture because it is obscene. The holding that the ordinance was valid squares with what indications there are of the Supreme Court's views.

The clear and present danger test, usually applied to restraints upon free speech,[15] is not applied in the area of censorship for obscenity except as it may be tacitly assumed by the court that publication or exhibition of obscene material automatically meets that test.[16] If prior restraint upon obscenity is valid at all, the test does not seem to apply as an additional requirement. The principal case, by inference, rejects the clear and present danger test for obscene movies when it states that a movie must be judged as a whole in terms of its effect on the normal viewer and that its tendency to arouse sexual desires must be balanced against its merits.

Obscenity has long been considered a definite enough standard for criminal statutes,[17] more because it is necessary to have some standard than because it provides a clear, easily workable test.[18] The modern test is "whether a publication taken as a whole has a libidinous effect"[19] upon the ordinary reader, i.e., whether it exploits "dirt for dirt's sake." If it is true that morality is "necessary

[13] Superior Films v. Dept. of Education, note 6 supra, involved two appeals, one from Ohio and one from New York. In the Ohio case a license to exhibit the picture was denied because the picture was found "harmful." This standard is obviously invalid. In the New York case a state court denied the license because the movie was immoral and "would tend to corrupt morals." The state court had limited immorality to mean sexual immorality. The particular ground for the decision is not determinable from the per curiam opinion reversing the state court.

[14] Some cases have held a prior restraint upon obscene materials valid where the issue was the revocation of the privilege of using the mails, but not where a right of free expression was restricted. Knowles v. United States, (8th Cir. 1909) 170 F. 409; United States v. Rebhuhn, (2d Cir. 1940) 109 F. (2d) 512.

[15] Schenk v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919), dealt with free expression of political ideas.

[16] Antieau, "The Rule of Clear and Present Danger: Scope of Its Applicability," 48 MICH. L. REV. 811 at 829 et seq. (1950); 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATION 54 (1947).

[17] Rosen v. United States, 161 U.S. 29, 16 S.Ct. 434 (1896); United States v. Rebhuhn, note 13 supra; New American Library of World Literature v. Allen, (D.C. Ohio 1953) 114 F. Supp. 823; United States v. One Book Entitled "Ulysses," (2d Cir. 1934) 72 F. (2d) 705; Attorney General v. One Book named "Forever Amber," 323 Mass. 302, 81 N.E. (2d) 663 (1948). For a history of the censorship of literature, see Alpert, "Judicial Censorship of Obscene Literature," 52 HARV. L. REV. 40 (1938).

[18] CHAFEE, FREE SPEECH IN THE UNITED STATES 531 (1941); 52 MICH. L. REV. 575 at 578 (1954).

[19] United States v. One Book Entitled "Ulysses," note 17 supra, at 707. See also United States v. One Obscene Book Entitled "Married Love," (D.C. N.Y. 1931) 48 F. (2d) 821.

to good government and the happiness of mankind,"[20] it is not unreasonable to say that the state has a legitimate interest in protecting its citizens, particularly its youth, from exhibition of dirt for dirt's sake.[21] However, there is always danger that the censor will use the indefiniteness of the standard to prohibit the expression of ideas repulsive to him personally rather than material inherently obscene. This danger is great enough to convince some writers that there should be no censorship at all, even for obscenity.[22] However, this danger is met by judicial review of the finding of obscenity, and, as in the principal case, by placing upon the state the burden of showing obscenity.

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[20] An Ordinance for the Government of the Northwest Territory, art. III (1787).

[21] The argument that subsequent criminal punishment is inadequate ignores the possibility that fear of punishment may operate, *in effect*, as a stricter prior restraint than licensing.

[22] CHAFEE, FREE SPEECH IN THE UNITED STATES 547-548 (1941); 42 CALIF. L. REV. 122 (1954).