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## *Prior Restraints on Motion Pictures*

When the decision in the *Burstyn Case*<sup>1</sup> was rendered, many felt that the death knell had been sounded for motion picture censorship statutes. Perhaps for many censorship statutes the case was fatal, certainly for the New York<sup>2</sup> and Ohio<sup>3</sup> statutes, but not for the reason that presents itself upon first reading.<sup>4</sup> The *Burstyn Case* did not say categorically, nor even intimate, that each and every prior restraint upon motion pictures is an abridgment of the First Amendment guarantee (and also the Fourteenth Amendment guarantee) of free speech and free press. On the contrary, the Supreme Court purposely left open the question as to whether or not a "clearly drawn statute designed and applied to prevent the showing of obscene films" would be constitutional.<sup>5</sup> The case can merely be cited for the proposition that motion pictures are within the protection of the First Amendment—thus overruling *Mutual Film v. Industrial Commission*,<sup>6</sup> and, secondly, that the New York statute does not provide a sufficient criteria for determining what films come within the purview of the statute.

The *Burstyn Case* affords motion pictures the same protection given to other media of communication. In order to understand what protection motion pictures enjoy, it is necessary, therefore, to determine what freedom the press and other speech enjoys. It is not sufficient, however, merely to evaluate motion pictures on the same basis as other modes of expression. Motion pictures are a unique media which present not only all the old problems of free speech and press, but also new problems of their own.

It is not the contention of the writer that because motion pictures are a more effective media than newspapers, radio, and other means of communication, that they do not come within the periphery of the free speech and press guarantee. To decide that movies are protected by the First Amendment does not, however determine the question of precisely what restrictions are permissible.<sup>7</sup> It is the

<sup>1</sup> *Burstyn v. Wilson*, 343 U. S. 495 (1952).

<sup>2</sup> MCKINNEY'S N. Y. LAWS, 1947, EDUCATION LAW § 122: "The director of the (motion picture) division (of the education department) or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and 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, shall issue a license therefor."

<sup>3</sup> OHIO GENERAL CODE § 154-47b: (BALDWIN'S OHIO REVISED CODE (1953) § 3305.04): "Only such films as are in the judgment and discretion of the department of education of a moral, educational, or amusing and harmless character shall be passed and approved by such department."

<sup>4</sup> *Gelling v. Texas*, 343 U. S. 960 (1952); *State v. Smith*, 108 N. E. 2d 582 (Ohio 1952); *Superior Films, Inc. v. Ohio, & Commercial Pictures Corp. v. New York*, both decided January 18, 1954, 22 LW 3193.

<sup>5</sup> 29 N. D. Lawyer 27 (1954).

<sup>6</sup> *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 330 (1915).

<sup>7</sup> *Burstyn v. Wilson*, *supra* note 1 at 503, "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems."

purpose of this article, therefore, to attempt to reach a conclusion as to the extent that prior restraints may be placed upon motion pictures.

Once any speech is determined to be within the protection afforded by the Constitution, the degree of control permitted within this protective framework will vary according to the characteristics of the particular media. Thus, restrictions against sound trucks must be related to the raucousness of the disturbance.<sup>8</sup> In cases of speech making and parades, the restraint must be in relation to traffic congestion and the time, place, and manner of expression.<sup>9</sup> Similarly, in most states books and newspapers are subject to the same obscenity statutes, but the question of obscenity may be judged differently even as to these two types of publications.<sup>10</sup> In *Kovacs v. Cooper*,<sup>11</sup> Mr. Justice Frankfurter observed in his concurring opinion that "movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated." The characteristics of the motion picture media justifies a greater degree of control within the scope of the constitutional guarantee of free speech and press. The unique facility of movies for dramatic presentation through the use of sound, light, and even of the third dimension, makes motion pictures a powerful vehicle for influencing conduct and behavior.

In *Radio Corporation of America v. United States*,<sup>12</sup> Mr. Justice Frankfurter said:

Man forgets at terrible cost that the environment in which an event is placed may powerfully determine its effect. Disclosure conveyed by the limitation and power of the camera does not convey the same things to the minds as disclosure made by the limitations and of pen or voice. The range of presentation, the opportunities for distortion, the impact of reason, the effect on the looker-on as against the reader-hearer, vary; and the difference may be vital. Judgment may be confused instead of enlightened. Feeling may be agitated, not guided; reason deflected, not enlisted. Reason—the deliberative process—has its own requirement, met by one method and frustrated by another.

War Department experiments have shown that attitude changes and impressions are actually magnified with the passage of time even though the factual material presented in motion pictures had been forgotten.<sup>13</sup> The power of motion pictures in the formation of opinion has been demonstrated by measuring the effects of specific films on the attitudes of audiences. It was shown that while a single showing may not significantly affect the attitude of an individual or group, nevertheless, a continued exposure to such type of films will cause a change.<sup>14</sup> The propensity of motion pictures as a media of instruction and influence is best illustrated by the widespread adoption of films in such fields as education. re-

<sup>8</sup> *Kovacs v. Cooper*, 336 U. S. 77 (1949).

<sup>9</sup> *Cox v. New Hampshire*, 312 U. S. 569 (1941).

<sup>10</sup> See 60 *Yale Law Journal* 696, 709, note 31 (1951).

<sup>11</sup> *Id.* note 8 at 96.

<sup>12</sup> 341 U. S. 412, 425-6 (1951).

<sup>13</sup> KLAPPER, *EFFECTS OF MASS MEDIA*, IV-8-IV-20 (1950).

<sup>14</sup> CHARTERS, "Motion Pictures and Youth," *READER IN PUBLIC OPINION AND COMMUNICATION* (Berelson & Janowitz ed. 1950), 397.

ligion, industry, the armed forces, and government propaganda.<sup>15</sup> Not only are motion pictures a powerful force, but they have the dual characteristic of being able to teach, as well as inform and entertain. As stated by Mr. Samuel Goldwyn, a leader in the industry, the two jobs of the screen are "to entertain and to educate", and that pictures "teach when they are pretending not to."<sup>16</sup>

Thus, it is apparent that even though motion pictures are merely another form of speech that is protected by the First Amendment, such protection not only must be evaluated in the light of the protection given to radio, newspapers, and other publications, but also must take into consideration the unique qualities of motion pictures.

Although the First Amendment is couched in unequivocal terms, nevertheless, the Supreme Court has repeatedly held that freedom of speech and press is not absolute. These freedoms must be counterbalanced against the public interest, that is, the welfare, safety, and morals of the community. Accordingly, the cases are replete with the admonition that "the protection even as to previous restraints is not absolute."<sup>17</sup> Perhaps the best illustration of instances where the right to speak has been validly limited by imposition of prior restraints is where the speech restrained was inimicable to public safety, peace, and order.

Speech advocating the overthrow of the government through use of force and violence does not come within safeguards of the First and Fourteenth Amendments.<sup>18</sup> The *Schenck Case* enunciated the classic "clear and present danger" test whereby the question in every such case is whether "the words used are used in such circumstances and are of such a nature that they will bring about evils that the legislature has a right to prevent."<sup>19</sup> The "clear and present danger" doctrine was the working criteria in these types of cases until reformulated into the "clear and probable danger" doctrine in the case of *Dennis v. United States*.<sup>20</sup> In that case, Mr. Justice Vinson accepted the new formula of Judge Learned Hand in *United States v. Dennis*,<sup>21</sup> when he stated:

In each case courts may ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted "improbability" for "remoteness", because that must be the right interpretation. . . .

Judge Hand further enunciated that "it would be wholly irrational to condone evils which we should prevent if they were immediate; that could be reconciled only by indifference to those who came after us."<sup>22</sup> Mr. Justice Vinson added,

<sup>15</sup> 60 Yale Law Journal 696, 708 (1951). See also JACOB, THE RISE OF THE AMERICAN FILMS 538, 539; (1939); DOOB, PUBLIC OPINION AND PROPAGANDA 501, 504 (1949).

<sup>16</sup> N. Y. Times Magazine, April 22, 1945, p. 12.

<sup>17</sup> *Near v. Minnesota*, 283 U. S. 697 (1931).

<sup>18</sup> *Schenck v. U. S.*, 249 U. S. 47 (1919); *Gitlow v. New York*, 268 U. S. 652 (1925); *Whitney v. California*, 274 U. S. 357 (1927); *Dennis v. U. S.*, 341 U. S. 494 (1952).

<sup>19</sup> *Schenck v. U. S.*, *supra* note 18 at p. 52.

<sup>20</sup> 341 U. S. 494 (1950).

<sup>21</sup> 183 F. 2d 201, 212 (1950).

<sup>22</sup> *Id.* at 212.

"If the ingredients of reaction are present, we cannot bind the government to wait until the catalyst is added."<sup>23</sup>

It is no longer open to question that in such instances a previous restraint can be validly imposed upon this type of speech. Obscenity, hindrance of the war effort, incitement to crime, and dangers to the welfare of the community are other instances which justify prior restraints upon speech and press.<sup>24</sup> Nor is a state powerless to prevent a breach of the peace when the bounds of argument or persuasion are exceeded and there is incitement to riot.<sup>25</sup> The Supreme Court has sanctioned prior restraints in a variety of areas affected by the First Amendment, for example, for the prevention of loud and raucous speeches emanating from sound trucks,<sup>26</sup> upon distribution of literature by minors,<sup>27</sup> and by restricting parades because of the danger of traffic congestion.<sup>28</sup>

The Supreme Court was first confronted with the question of motion pictures and the guarantees of the First Amendment in *Mutual Film Corp. v. Ohio Industrial Commission*.<sup>29</sup> In that case, the Court held that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit like other spectacles and not to be regarded as part of the press of the country or as organs of public opinion within the meaning of freedom of speech.

The first inroad upon this holding, as far as the Supreme Court decisions are concerned, was not made until some thirty years later in the case of *United States v. Paramount Pictures, Inc.*<sup>30</sup> By way of dictum, Mr. Justice Douglas wrote that "we have no doubt that moving pictures like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."<sup>31</sup>

It was the *Burstyn Case* that delivered the final blow to the decision in the *Mutual Film* case:<sup>32</sup>

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Films Corp. v. Industrial Commission*, *supra*, is out of harmony with the views here set forth, we no longer adhere to it.<sup>33</sup>

This, then, was the extent to which the *Burstyn Case* went, that is, motion pictures were placed squarely within the scope of the First and Fourteenth Amend-

<sup>23</sup> *Dennis v. U. S.*, 341 U. S. 494, 511 (1950).

<sup>24</sup> See *Near v. Minnesota*, 283 U. S. 697 (1931): "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirement of decency may be enforced against obscene publication.

<sup>25</sup> *Feiner v. N. Y.*, 340 U. S. 315 (1951). See also *Chaplinsky v. New Hampshire*, 305 U. S. 568 (1942).

<sup>26</sup> *Kovacs v. Cooper*, 336 U. S. 77 (1948).

<sup>27</sup> *Massachusetts v. Prince*, 321 U. S. 158 (1944).

<sup>28</sup> *Cox v. New Hampshire*, 312 U. S. 569 (1940).

<sup>29</sup> 236 U. S. 230 (1915).

<sup>30</sup> 334 U. S. 131 (1948).

<sup>31</sup> *Id.* at 166.

<sup>32</sup> Note 29 *supra*.

<sup>33</sup> Note 1 *supra* at 502.

ments. However, as pointed out previously, the ultimate decision rested upon the determination that the New York statute's sole standard, or lack of one, for prohibiting sacrilegious films was not definite enough. The question of the constitutionality of a well drawn statute requiring censorship of all movies was left open. It is not unreasonable, therefore, and perhaps even compelling, to conclude that motion pictures are not given greater protection than is given to other media of communication, if even that much, and that all the restraints that may validly be placed on other forms of speech and press applies equally to motion pictures.

A number of cases have seized upon the principal holding of the *Burstyn Case* and have struck down statutes for being vague, indefinite, and uncertain.<sup>84</sup> In *Gelling v. Texas*,<sup>85</sup> the Supreme Court handed down a *per curiam* decision based on the holding in the *Burstyn Case* invalidating an ordinance of the city of Marshal, Texas. Mr. Justice Frankfurter, concurring in the judgment of reversal, stated that an ordinance which permits a Board of Censors to deny an exhibitor's license to any motion picture which in the opinion of the Board is "prejudicial to the best interests of the people of the said city," offends the due process clause of the Fourteenth Amendment on the score of indefiniteness.

In *Superior Films, Inc. v. Ohio* and *Commercial Pictures v. New York*,<sup>86</sup> the U. S. Supreme Court overturned two decisions of state courts on the basis of the *Burstyn Case*. In the *Superior Films Case* the Supreme Court of Ohio<sup>87</sup> held that the statutory criteria that films submitted for exhibition in the State of Ohio be of a moral, educational, or amusing and harmless character, is sufficiently clear, definite, and comprehensive.<sup>88</sup> In the *Commercial Pictures Case*, the Court of Appeals of New York<sup>89</sup> held that a statute providing that a motion picture shall not be licensed if it is immoral or is of such a character that its exhibition will tend to corrupt morals, supplies a sufficiently definite standard. As mentioned above, the U. S. Supreme Court, in a *per curiam* decision, reversed both cases and held that the statutes in question denied to the parties due process of law because the statutes lacked certainty. Mr. Justice Douglas, however, in a concurring opinion in which Mr. Justice Jackson agreed, stated that the First and Fourteenth Amendments are clear and that "no law" means "no law", and that under no circumstances may censorship be sanctioned.

As pointed out earlier, however, there are numerous cases holding that freedom of speech and press is not absolute and that a prior restraint may be imposed only under certain grave circumstances.<sup>40</sup> Of course, the State or Federal

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<sup>84</sup> Note 4 *supra*.

<sup>85</sup> 343 U. S. 960 (1952).

<sup>86</sup> Decided together January 18, 1954, 22 LW 3193.

<sup>87</sup> 159 Ohio St. 315, 112 N. E. 2d 311 (1953).

<sup>88</sup> Note 3 *supra*.

<sup>89</sup> 305 N. Y. 336, 113 N. E. 2d 502 (1953).

<sup>40</sup> Note 18 *supra*; see also Note 24 *supra*.

Government has the onerous burden of demonstrating such an exceptional case in order to justify any previous restraint.<sup>41</sup>

The question in every case is not whether all prior restraints are bad or whether speech and press is permitted to roam unbridled. The answer to the problem of prior restraints lies, however, somewhere in between. To condemn each and every form of restraint as dictatorial and antithetical to democratic government is simply to ignore history. The First Amendment's history abounds with decisions to the contrary. The fact that the restraint as to motion pictures takes the form of censorship does not render all the past First Amendment decisions inapplicable. Motion pictures are peculiarly adapted to this form of regulation. "Preliminary inspection, cutting, and licensing on higher government levels, state-wide, is better than hit-or-miss local criminal prosecution of local police officers."<sup>42</sup> Censorship is not an isolated or a recent innovation. Censorship statutes have been in operation over some thirty years in numerous states.<sup>43</sup> In addition, some of the larger cities in half the states of the Union require prior approval from a municipal censorship board before a film can be shown.<sup>44</sup>

The *Burstyn Case* has been most instrumental in keeping in check any overstepping of the bounds of censorship. All censorship should be suspect, and any attempt under the guise of the police power to infringe upon the fundamental right of freedom of speech and press should be thoroughly scrutinized and permitted only in instances where a substantive evil would result. All censorship statutes should be clear and provide a definite standard or criteria as to just what types of motion pictures come within the framework of the statute. As pointed out in the *Burstyn Case*, and cases thereunder, statutes which leave the entire matter to the opinion of the board of censors, and statutes which require the films to be "harmless", "educational", and not "sacrilegious", leaves too much to the discretion of the censoring board. However, neither must the requirement of definiteness be carried to ludicrous extremes and require the statute to spell out in detail each and every situation that is to come within the purview of the statute. When an attempt is made to avoid the terms of the statute and the statute is being dissected, it is easy to be exacting and meticulous as to its terms.

The task therefore, is to continue to guarantee and protect the cherished freedoms of the First Amendment, but with the valid limitations sanctioned in the past. It is not denied that unrestrained censorship could be but the first step

<sup>41</sup> *Burstyn v. Wilson*, *supra* note 1.

<sup>42</sup> 29 N. D. Lawyer 27, 31 (1953).

<sup>43</sup> See Kansas Gen. Stat. Ann. c. 51, c. 74, art. 22 (1949); Md. Ann. Code Gen. Laws, art. 66A (Flack 1939); N. Y. Ed. Law, art. 3, §§ 120-132 (Baldwin Dec. Supp. 1948); Ohio Gen. Code Ann. § 154-47 (Page Supp. 1950); Pa. Stat. Ann. tit. 4, c. 2 (Purdon Supp. 1950); Va. Code Ann. tit. 2-98 to 2-116 (1950); La. Rev. Stat. tit. 4, § 301-307 (1950). See also Mass. Ann. Laws, c. 272, § 232 (1933).

<sup>44</sup> Ala., Ark., Calif., Conn., Fla., Ill., Mass., Michigan, Minn., Mo., Neb., N. J., Okla., Ore., R. I., Tenn., Texas, Wash., and Wisc. See 60 Yale Law Journal 696, note 2 (1951).

to outright suppression. However, purveyors of filth should not be permitted to wrap themselves in the U. S. Constitution. The Constitution does not compel us to sit by idly while the morals, safety, and the very Constitution itself is threatened by a real and substantial evil. The Constitution permits us, and morality compels us to eradicate these substantive evils before materialization.

JOSEPH M. KOLMACIC

## *Bibles, Wall of Separation and Rationality*

On December 7, 1953, the Supreme Court of New Jersey added new height to the "wall of separation between Church and State,"<sup>1</sup> when it decided the case of *Tudor v. Board of Education*.<sup>2</sup> Whether or not this action by the New Jersey court, in the light of the First Amendment to the Federal Constitution,<sup>3</sup> judicial precedents, and sound legal thinking, is a reasonable one, and whether or not the effect of such action upon a desired policy of uninterrupted cooperation between Church and State may become a detrimental one, is the subject of this writing.

In the *Tudor Case*, the Gideons International<sup>4</sup> submitted an offer to furnish bibles to New Jersey public school students free upon request. The offer extended to students from 5th grade through high school and the Board of Education of Rutherford County was to be the medium for such distribution. The Board drew up a request form to be signed by the parents. The Board also requested that: (1) only the names of pupils whose parents had previously signed for the bibles should be used in any announcement; (2) pupils whose parents had signed for bibles were to report to the home room at the close of the session and no other pupils were to be in the room when the bibles were distributed; and (3)

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<sup>1</sup> In the words of Jefferson, the clause in the First Amendment, against establishment of religion by law, was intended to erect a "wall of separation between Church and State." *Reynolds v. United States*, 98 U. S. 164 (1878). This metaphor has been freely thrust about the courts and secularistic circles since its first utterance. Evidence of its use as a ruling principle can be found in such a noted case as *Everson v. Board of Education*, 330 U. S. 1 (1947), where the Court said: "The Constitution requires, not comprehensive identification of State with religion, but complete separation." However, recognition is warranted in the following observation by the learned Mr. Justice Cardozo: "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder v. Massachusetts*, 291 U. S. 87 (1934).

<sup>2</sup> 14 N. J. 31, 100 A. 2d. 857 (1953).

<sup>3</sup> U. S. CONST. FIRST AMEND. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."

<sup>4</sup> Gideons International—a religious sect founded in 1898 in Boscobel, Wisconsin. Formerly known as the Christian Commercial Men's Association of America, its purpose is to place copies of the bibles in hotels and institutions.