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Constitutional Law--Censorship of Sacrilegious Movies (Burstyn v. Wilson, 72 Sup. Ct. 777 (1952))

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RECENT DECISIONS

CONSTITUTIONAL LAW—CENSORSHIP OF SACRILEGIOUS MOVIES. —Appellant's license to show the film "The Miracle" was revoked by the Board of Regents on the statutory ground that it was sacrilegious.[1] The Court of Appeals rejected appellant's contention that the statute is unconstitutional as a prior restraint upon freedom of speech and press.[2] Upon appeal, the United States Supreme Court reversed, and *held* that the statute is unconstitutional as an abridgement of the rights of free speech and press insofar as it permits a censor to ban a film on the ground that it is sacrilegious.[3] *Burstyn v. Wilson,* 72 Sup. Ct. 777 (1952).

The constitutionality of motion picture censorship has been settled since the *Mutual Film* decisions[4] of 1915 which laid down the rule that motion pictures are ". . . not to be regarded . . . as part of the press of the country, or as organs of public opinion . . ."[5] falling under the protection of the First and Fourteenth Amendments.[6] The Court was greatly influenced in arriving at this decision

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[1] N. Y. EDUCATION LAW § 122. "The director of the [motion picture] division [shall examine every film] . . . 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." (emphasis added).

[2] Burstyn v. Wilson, 303 N. Y. 242, 101 N. E. 2d 665 (1951). The Court of Appeals also rejected, *inter alia,* appellant's contentions (1) that the word "sacrilege" does not provide a sufficiently definite standard, and (2) that the statute is unconstitutional because, in denying or revoking a license on account of sacrilege, it interferes with religious liberty, and breaches the wall between Church and State.

[3] The Supreme Court, in reversing on the issue of free speech, found it unnecessary, and therefore refused, to rule on appellant's contentions, *supra* note 2, in keeping with their policy of not deciding constitutional questions unless absolutely necessary to do so.

[4] Mutual Film Corp. v. Industrial Commission of Ohio, 236 U. S. 230 (1915); Mutual Film Co. v. Industrial Commission of Ohio, 236 U. S. 247 (1915); *see* Mutual Film Corp. v. Kansas, 236 U. S. 248, 249 (1915).

[5] Mutual Film Corp. v. Industrial Commission of Ohio, 236 U. S. 230, 244 (1915). During the intervening four decades, our concepts of the freedom from state regulation guaranteed by the Fourteenth Amendment have changed radically. See Gitlow v. New York, 268 U. S. 652 (1925); Near v. Minnesota, 283 U. S. 697 (1931); Palko v. Connecticut, 302 U. S. 319 (1937); Adamson v. California, 332 U. S. 46 (1947) (theory of the absorption of certain liberties of the Bill of Rights into the Fourteenth Amendment developed and limited).

[6] RD-DR Corp. v. Smith, 183 F. 2d 562 (5th Cir.), *cert. denied,* 340 U. S. 853 (1950); Mutual Film Corp. v. Chicago, 224 Fed. 101 (7th Cir. 1915);

by its belief that, conceding motion pictures to be media of thought, they are primarily spectacles conducted as ". . . a business pure and simple, originated and conducted for profit." [7] Inasmuch as motion pictures are of recent origin,[8] the courts in the early part of this century were neither aided nor hampered by a common law history of the subject, except, perhaps, by analogy to decisional law involving censorship of the theater. Theater censorship, however, has from the days of the Master of the Revels to the present been considered a valid exercise of the police power of the state,[9] and no reported case involving its constitutionality has ever been decided by a federal court. Since the instant case partially overrules the determination of the *Mutual Film* cases by including motion pictures in the category of speech and press falling within the ambit of the First and Fourteenth Amendments,[10] the question again arises as to the degree of immunity from regulation granted by those guarantees.

Although the criteria for determining the permissible limits of state regulation of speech and press, as laid down by the Supreme Court, have not gone without criticism and are believed by many to be vague and confusing,[11] the Court has consistently held unconstitutional any such infringement by means of prior restraints,[12] naming censorship as one of the evils especially to be condemned.[13] The

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Pathe Exchange, 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); see cases collected in Note, 64 A. L. R. 505 (1929).

[7] Mutual Film Corp. v. Industrial Commission of Ohio, *supra* note 5 at 244. *But cf.* Winters v. New York, 333 U. S. 507, 510 (1948).

[8] See Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORN. L. Q. 273 (1951); Notes, 60 YALE L. J. 696 (1951), 39 COL. L. REV. 1383 (1939).

[9] *In re* Rudhlan Amusement Corp., 146 Misc. 308, 262 N. Y. Supp. 269 (Sup. Ct. 1932); Commonwealth v. McGann, 213 Mass. 213, 100 N. E. 355 (1913); see Note, 60 YALE L. J. 696, 703 n. 19 (1951).

[10] 72 Sup. Ct. 777, 781 (1952).

[11] *See* Dennis v. United States, 341 U. S. 494, 517 (1951) (concurring opinion). After summarizing all the important free speech cases from Patterson v. Colorado, 205 U. S. 454 (1907), Justice Frankfurter says: "I must leave to others the ungrateful task of trying to reconcile all these decisions." *Id.* at 539. *Compare, e.g.*, Schenck v. United States, 249 U. S. 47 (1919), *with* Gitlow v. New York, 268 U. S. 652 (1925); Hague v. CIO, 307 U. S. 496 (1939), *with* Cox v. New Hampshire, 312 U. S. 569 (1941); Martin v. City of Struthers, 319 U. S. 141 (1943), *with* Breard v. Alexandria, 341 U. S. 622 (1951); Saia v. New York, 334 U. S. 558 (1948), *with* Kovacs v. Cooper, 336 U. S. 77 (1949); Terminiello v. Chicago, 337 U. S. 1 (1949), *with* Feiner v. New York, 340 U. S. 315 (1951).

[12] Kunz v. New York, 340 U. S. 290 (1951); Niemotko v. Maryland, 340 U. S. 268 (1951); Saia v. New York, *supra* note 11; Hague v. CIO, *supra* note 11; Near v. Minnesota, 283 U. S. 697 (1931). *Accord:* Murdock v. Pennsylvania, 319 U. S. 105 (1943); Opelika v. Jones, 319 U. S. 103 (1943); Cantwell v. Connecticut, 310 U. S. 296 (1940) (freedom of religion). *But cf.* Kovacs v. Cooper, *supra* note 11; Cox v. New Hampshire, *supra* note 11. For a discussion of these cases, see Note, 25 ST. JOHN'S L. REV. 295 (1951).

[13] *See* Gelling v. Texas, 72 Sup. Ct. 1002 (1952) (concurring opinion);

Court in the instant case, however, limited its attack to the term "sacrilegious" and left undecided the question of whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films.[14] The importance of this decision, then, lies in its holding that ". . . the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views." [15]

It would appear, nevertheless, that a state *can* prevent certain limited classes of speech including ". . . the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words," to which the Supreme Court has strongly asserted that the constitutional prohibition against prior restraint is inapplicable.[16]

"Sacrilegious," as construed by the New York Court of Appeals is synonymous with "blasphemous." [17] In the words of the Supreme Court, "[t]his construction fixes the meaning of the statute for this case. The interpretation of the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature." [18] Blasphemy is a form of libel [19] which the state has the power to suppress for the same reason as any other libel, namely, to prevent a breach of the peace.[20]

From the earliest times, blasphemy has been a crime indictable

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Kovacs v. Cooper, *supra* note 11 at 82; Patterson v. Colorado, *supra* note 11 at 462.

[14] *See* 72 Sup. Ct. 777, 782 (1952). *But see* Gelling v. Texas, *supra* note 13. In the concurring opinion, Justice Douglas wrote: "The evil of prior restraint . . . is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or to read or to hear . . . then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated." *Ibid.*

[15] 72 Sup. Ct. 777, 782 (1952).

[16] *See* Chaplinsky v. New Hampshire, 315 U. S. 568, 572 (1942); Near v. Minnesota, *supra* note 12 at 716; Lovell v. Griffin, 303 U. S. 444, 451 (1938); see 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927).

[17] *See* 303 N. Y. 242, 258, 101 N. E. 2d 665, 672 (1951). Compare the Court of Appeals' definition of "sacrilege" in the instant case with that of "blasphemy" in People v. Ruggles, 8 Johns. 290 (N. Y. 1811). "The language was blasphemous not only in a popular, but in a legal sense; for blasphemy, according to the most precise definitions, consists in maliciously reviling God, or religion, and this was reviling christianity through its author." *Id.* at 292. See also 1 BOUVIER, LAW DICTIONARY 369 (3d ed. 1914). "Blasphemy . . . An impious or profane speaking of God or of sacred things; reproachful, contemptuous, or irreverent words uttered impiously against God or religion."

[18] *See* Winters v. New York, 333 U. S. 507, 514 (1948), citing Skiriotes v. Florida, 313 U. S. 69, 79 (1941), and Hebert v. Louisiana, 272 U. S. 312, 317 (1926).

[19] King v. Waddington, 1 B. & C. 26, 107 Eng. Rep. 11 (1822); King v. Woolston, Fitz. 64, 94 Eng. Rep. 655 (1729).

[20] ODGERS, LAW OF LIBEL AND SLANDER 340 (2d ed. 1887).

under the common law,[21] and for many years was prosecuted under the laws of this state.[22] In addition, the Supreme Court has stated by way of dicta that ". . . freedom of speech and of the press does not permit the publication of libels, *blasphemous* or indecent articles. . . ." [23] Moreover, less than one month prior to the decision in the instant case, the Court held constitutional an Illinois statute protecting ethnic groups from libelous and defamatory publications.[24] While it is true that in that case the Supreme Court overcame the presumption of invalidity attaching to legislation limiting free speech by a showing that the restraint was reasonable, in the instant case there is no suggestion that the restraint was unreasonable and hence the statute cannot be condemned on that ground.

Conceding that the law as it is presently enunciated by the Supreme Court precludes the enactment of prior restraints on speech with the possible exception of those in relation to obscenity,[25] it is submitted that an interpretation which would preclude any prior restraint on blasphemy is foreign to the intentions of the framers of the Constitution and wholly repugnant to the moral sense of the American people. This nation is founded upon a belief and trust in God. He is the ultimate sanction of our laws. We recognize our dependence upon Him in our organic documents and utterances, on our coins and through our public prayers. Our philosophy of government is entirely consonant with a jealous respect for His Name and Person. The enactment of group libel [26] and anti-defamation [27]

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[21] State v. Mockus, 120 Me. 84, 113 Atl. 39 (1921); Commonwealth v. Kneeland, 20 Mass. (37 Pick.) 206 (1838); State v. Chandler, 2 Harr. 553 (Del. 1837); People v. Ruggles, *supra* note 17; *cf.* Updegraph v. Commonwealth, 11 S. & R. 394 (Pa. 1824) (conviction reversed because of fatal omission in the indictment); People v. Porter, 2 Park. Crim. Rep. 14 (N. Y. 1823) (conviction reversed because based on uncorroborated evidence).

[22] Common law crimes were abolished in New York in 1881. See N. Y. PENAL LAW § 22.

[23] *See* Robertson v. Baldwin, 165 U. S. 275, 281 (1897).

[24] Beauharnais v. Illinois, 72 Sup. Ct. 725 (1952).

[25] Matter of Commercial Pictures Corp. v. Board of Regents, 280 App. Div. 260, 114 N. Y. S. 2d 561 (3d Dep't 1952), recently upheld the banning of the film "La Ronde" on the ground that it is obscene. The distributors have indicated that they will ultimately appeal the decision to the United States Supreme Court on the authority of the instant case. N. Y. Times, June 15, 1952, p. 68, col. 4.

[26] See Beauharnais v. Illinois, *supra* note 24 (conviction for violation of group libel statute affirmed). Pertinent parts of the applicable statute read: "It shall be unlawful . . . to . . . exhibit in any public place in this state any . . . moving picture . . . which . . . exposes the citizens of any . . . religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." *Id.* at 728.

[27] There are at present some ten jurisdictions which maintain penal sanctions against blasphemy: CONN. REV. STAT. § 8566 (1949); DEL. REV. CODE § 5250 (1935); IOWA CODE § 728.1 (1950); ME. REV. STAT. c. 121, § 33 (1944); ANN. LAWS MASS. c. 272, § 36 (Michie, 1952); N. H. REV. LAWS c. 448, § 1 (1942); N. J. REV. STAT. § 2:165-2 (1937); PA. STAT. ANN. tit. 18, § 4523

penal legislation may be practicable to protect individuals or groups from libelous and insulting attacks upon their religious beliefs. When applied to blasphemy of the Godhead, however, it is grossly inadequate. The statute in the instant case is a legitimate effort of the duly-chosen officials of the State of New York to prevent the offensive reviling of the Deity. It is respectfully submitted that such an interest is paramount to the incidental dangers ordinarily inherent in prior restraints upon speech.

CONSTITUTIONAL LAW — FREEDOM OF SPEECH AND GROUP LIBEL.—Appellant, convicted of violating a statute [1] forbidding the exhibition of lithographs portraying lack of virtue of a class of citizens,[2] contended that the statute contravened the Fourteenth Amendment because it was vague and unlawfully abridged freedom of speech and press. On certiorari, the United States Supreme Court, with four Justices dissenting, *held* that this state law proscribing libels directed at a defined group is constitutional unless it "is a wilful and purposeless restriction," and that this law, as construed by the state court, provided an ascertainable standard of guilt. *Beauharnais v. Illinois,* 72 Sup. Ct. 725 (1952).

Libelous utterances were criminal at common law [3] because of their tendency to provoke a breach of the peace; [4] truth alone, therefore, was not a defense.[5] As far as groups were concerned, however,

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(Purdon, 1930); R. I. GEN. LAWS c. 610, § 16 (1938); VT. REV. STAT. c. 371, § 8493 (1947).

[1] ILL. REV. STAT. c. 38, § 471 (1951), which states: "It shall be unlawful for any person . . . to . . . present or exhibit in any public place in this state any lithograph . . . which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . ."

[2] The lithograph was framed as a petition, and the specific libel contained therein was the following warning: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL." Beauharnais v. Illinois, 72 Sup. Ct. 725, 740 (1952) (dissenting opinion).

[3] See State v. Burnham, 9 N. H. 34, 38 (1837); Commonwealth v. Clap, 4 Mass. 163, 169 (1808); King v. Summers, 1 Lev. 139, 83 Eng. Rep. 337 (K. B. 1665).

[4] Rex v. Saunders, T. Raym. 201, 83 Eng. Rep. 106 (K. B. 1670); *see* State v. Avery, 7 Conn. 266, 269 (1828).

[5] Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825); 20 HALSBURY'S LAWS OF ENGLAND 384 (2d ed. 1936).