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# Constitutional Law -- Freedom of Speech -- Motion Pictures

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would not allow the survivor to take the balance as in *Hill v. Havens*, *supra*, whether the contract be for joint ownership with right of survivorship or whether it be for payment to either or to the survivor.<sup>50</sup>

There is a need today for a definite rule by which a person may deposit money in a bank with the assurance that he can make use of the money during his life and that upon his death his wife or some designated person may have funds to live on without waiting for the administration of his estate. A recognition of the contract theory could assure this. If this theory is not followed, then legislation should be passed to make a conclusive right in the survivor.

CHARLES E. NICHOLS.

### Constitutional Law—Freedom of Speech—Motion Pictures

"Expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."<sup>1</sup> Thus the Supreme Court of the United States, in a recent unanimous decision, overturned the thirty-seven year old precedent of *Mutual Film Corporation v. Industrial Commission of Ohio*,<sup>2</sup> and paved the way for a substantial judicial rewriting of the law relating to the official censorship of motion pictures, a practice currently authorized by statute in eight states,<sup>3</sup> and by ordinance in perhaps 75 cities.<sup>4</sup>

The motion picture, from its early years a cause of concern to municipal officials fearful of its potential for evil,<sup>5</sup> was first subjected to

<sup>50</sup> Most North Carolina banks use only the words "payable to either or to the survivor." The Home Building and Loan Association, in addition to this, uses the joint tenancy feature. If the contract theory were followed, the survivor's rights would be the same in either case; but if a dispute developed between *A* and *B* over the account, *B*'s chances would seem to be much better if joint tenancy or joint ownership words were used. See notes 30 and 34, *supra*. For suggestions in drafting joint account signature cards see: 1 PATON'S DIGEST; LEGAL OPINIONS AND BANKING LAW §§ 1810, 1811 (1926).

<sup>1</sup> Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 72 Sup. Ct. 777, 781 (1952).

<sup>2</sup> 236 U. S. 230 (1915), *affirming* 215 Fed. 138 (N. D. Ohio 1914).

<sup>3</sup> Florida, Kansas, Louisiana, Maryland, New York, Ohio, Pennsylvania, and Virginia. For current statute citations, see note 14, *infra*.

<sup>4</sup> Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L. Q. 273, 276 n. 24 (1951); Note, 39 COL. L. REV. 1383, 1385 n. 17 (1939). For a comprehensive view of the development and operation of legal film censorship see INGLIS, FREEDOM OF THE MOVIES (1947); CHAFEE, FREE SPEECH IN THE UNITED STATES 540-548 (1941); ERNST AND LORENTZ, CENSORED: THE PRIVATE LIFE OF THE MOVIES (1930); Note, 64 A. L. R. 505 (1930); Notes, 39 COL. L. REV. 1383 (1939), 60 YALE L. J. 696 (1951); Comment, 49 YALE L. J. 87 (1939).

<sup>5</sup> Motion pictures were invented by Edison in 1889, and first publicly exhibited in 1894. INGLIS, FREEDOM OF THE MOVIES 75 (1947). In 1909 New York banned children under 16 from commercial movie theaters unless accompanied by a parent or guardian. 1 N. Y. LAWS 1909, c. 278. That provision remains a part of the New York law. N. Y. PENAL LAW § 484 (1).

The circumstances under which films are normally shown—the darkened theater, the freedom from outside distraction, the brightly lighted screen—all

official censorship by a Chicago ordinance of 1907.<sup>6</sup> This ordinance required all films to be viewed and approved by the chief of police before exhibition in the city, and empowered that officer to ban any film which he found to be immoral or obscene. Pennsylvania enacted the first state censorship statute in 1911, requiring that all films to be shown in the state be submitted to the state board of censors, which was directed to approve such films as it found to be "moral and proper, and [to] disapprove . . . films . . . which are sacrilegious, obscene, indecent, or immoral, or such as tend to corrupt morals."<sup>7</sup> Statutes patterned after the Pennsylvania act were passed in Kansas<sup>8</sup> and Ohio<sup>9</sup> in 1913.

The constitutionality of movie censorship legislation then in effect was established in 1915, in consequence of a coordinated series of legal actions, the most important of which was *Mutual Film Corporation v. Industrial Commission of Ohio*.<sup>10</sup> Facing for the first time the issue of whether a state had the power to censor films, the United States Supreme Court held the Ohio law to be a valid exercise of the police power of the state. The court justified its holding that the statute worked no abridgement of freedom of speech and press, condemnable under the Ohio Constitution,<sup>11</sup> by declaring that the movies did not

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add immeasurably to the persuasiveness and allure of the movies, particularly among children. Add to this the low quality of fare offered by the early movie houses, and the apprehensions of parents and officials are more readily understandable.

<sup>6</sup> This ordinance was upheld as a valid regulation, under the charter of the city, in *Block v. Chicago*, 239 Ill. 251, 87 N. E. 1011 (1909).

<sup>7</sup> Pa. Laws 1911, p. 1067, § 6. This statute was repealed in 1915, and replaced by a statute (Pa. Laws 1915, p. 534) which has remained basically unchanged to the present. For current citation, see note 14, *infra*.

<sup>8</sup> Kansas Laws 1913, c. 294. This law was repealed in 1917, and replaced by a law that was essentially the same as the present statute. See note 14, *infra*.

<sup>9</sup> 103 Ohio Laws 1913, H. B. No. 322, p. 399. Amended in 1915, the 1913 statute was superseded by the version now in force in 1943. 120 Ohio Laws 1943, p. 475 at 481. See note 14, *infra*.

<sup>10</sup> 236 U. S. 230 (1915), *affirming* 215 Fed. 138 (N. D. Ohio 1914). There petitioner appealed from the refusal of the federal district court to enjoin the enforcement of the 1913 Ohio statute, which made approval by the state censor board a prerequisite to lawful public exhibition of any movie film, and provided that "only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character" should be licensed. 103 Ohio Laws 1913, H. B. No. 322, § 4.

The other cases of this related group were *Mutual Film Co. v. Industrial Comm'n. of Ohio*, 215 Fed. 138 (N. D. Ohio 1914), *aff'd*, 236 U. S. 247 (1915); *Mutual Film Corp. of Missouri v. Hodges*, 236 U. S. 248 (1915) (validity of the Kansas statute upheld); *Mutual Film Corp. v. Chicago*, 224 Fed. 101 (7th Cir. 1915) (Chicago ordinance held not violative of the United States Constitution, Amendments 1 and 14); *Buffalo Branch, Mutual Film Corp. v. Breiting*, 250 Pa. 225, 95 Atl. 433 (1915) (Pennsylvania statute held valid). All of these actions were brought by film distributors, who purchase film prints from producers for rental to exhibitors. Since exhibitors in jurisdictions where censorship is practiced refuse to rent films not approved for showing by the censor board to which they are subject, the burden of censorship falls most heavily on the distributor.

<sup>11</sup> Petitioner maintained in its bill and oral argument before the district court

merit judicial recognition as a medium of expression worthy of constitutional protection; that a state might reasonably find in the harmful potentialities of the movies justification for their restriction; and 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."<sup>12</sup>

Within the protective constitutional bastions raised about it by these decisions, the practice of motion picture censorship developed in virtually complete freedom from successful assault. With the Pennsylvania act of 1915<sup>13</sup> as the basic model, six other states<sup>14</sup> established film censorship as a part of their law, though only three of these later

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that the statute violated the First and Fourteenth Amendments of the United States Constitution. See *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 215 Fed. 138 (N. D. Ohio 1914). However, it apparently abandoned that argument on appeal to the United States Supreme Court, and relied instead on the freedom of speech and press guarantees of the Ohio Constitution, art. I, sec. 11, which reads: "no law shall be passed to restrain or abridge the liberty of speech, or of the press."

<sup>12</sup> *Mutual Film Corp. v. Industrial Comm'n. of Ohio*, 236 U. S. 230, 244 (1915). The court further held that the Ohio law was neither an improper delegation of legislative power, nor an unlawful burden on interstate commerce. On the authority of this holding were decided the other test actions cited in note 10, *supra*.

<sup>13</sup> Pa. Laws 1915, No. 239.

<sup>14</sup> Maryland (1916), MD. ANN. CODE GEN. LAWS art. 66A, § 1 through § 26 (1939), as amended, art. 66A, § 1, § 9 through § 12 (Cum. Supp. 1947); New York (1921), N. Y. EDUC. LAW § 120 through § 132; Florida (1921), FLA. STAT. ANN. § 521.01 through § 521.04 (1943) (the Florida statute, which establishes no censor board, but prohibits the showing of any film not approved by the National Board of Review or the New York state censor board, was declared unconstitutional in *State v. Coleman*, Cir. Ct. of Fla., 11th Judicial Cir., May 1, 1937, 49 YALE L. J. 87, 93 n. 41 (1939)); however, this decision appears not to have been appealed, and the statute is included in the latest codification of the Florida statutes); Virginia (1922), VA. CODE ANN. § 2-98 through § 2-116 (1950); Connecticut (1925), Conn. Pub. Acts 1925, c. 177, repealed, Conn. Pub. Acts 1927, c. 318, § 9 (the Connecticut act took the form of a revenue measure levying a tax on all films licensed and making the tax commissioner the state censor); Louisiana (1935), LA. STAT. ANN. § 4:301 through § 4:307 (West, 1951) (enacted to give to the Huey Long organization effective control of film showings in Louisiana, the statute appears not to have been enforced, due perhaps to Long's death shortly after its passage).

The earlier statutes were amended following the *Mutual Film* cases. See PA. STAT. ANN. tit. 4 § 41 through § 58 (Purdon, 1930), as amended, tit. 4, § 59 through § 66 (Purdon Cum. Supp. 1951); and PA. STAT. ANN. tit. 71 § 119 (Purdon Cum. Supp. 1951); OHIO GEN. CODE ANN. § 154-47 through § 154-47i (Page, 1946), as amended, OHIO GEN. CODE ANN. § 154-47 (Page Cum. Supp. 1951); KAN. GEN. STAT. ANN. § 51-101 through § 51-112, and § 74-2201 through § 74-2209 (1949).

Massachusetts defeated a censorship law in a referendum vote in 1922, but the same result is achieved through a Lord's Day observance statute (restricting certain types of activities on Sunday); which vests censorship powers in the bureau of state police. MASS. ANN. LAWS c. 136, § 1 through § 4 (1950). Since it would be impractical to circulate uncensored films for weekday use only, virtually all films are submitted for censorship. Comment, 49 YALE L. J. 87, 91 n. 31 (1939).

statutes have been seriously enforced.<sup>15</sup> In addition, a substantial number of municipalities have provided by ordinance for censorship of movies.<sup>16</sup> Newsreels were held to be subject to censorship, where no special exemption was extended to them by statute.<sup>17</sup> Although no provision was made for motion picture sound tracks by existing statutes, they were held to be subject to censorship shortly after their introduction in 1926.<sup>18</sup>

The New York motion picture censorship statute<sup>19</sup> may be considered typical of those statutes now enforced. The power of film censorship is exercised by the Motion Picture Division of the State Department of Education.<sup>20</sup> It is a misdemeanor<sup>21</sup> commercially to exhibit, or to sell, lease, or lend for commercial showing any motion picture (with stated exceptions)<sup>22</sup> unless previously licensed by the

North Carolina appears never to have enacted a motion picture censorship statute. Legislation of this type has been under consideration by virtually every state legislature. Harrison, *Television and Censorship*, 21 PA. B. A. Q. 128, 134 (1950).

There has been little federal legislation on the subject, despite frequent proposals of national censorship since 1915. INGLIS, *FREEDOM OF THE MOVIES* 68-70 (1947); Note, 60 YALE L. J. 696, n. 1 (1951); Comment, 49 YALE L. J. 87, 102 (1939). Currently a federal statute prohibits the importation of any "obscene, lewd, lascivious, or filthy . . . motion picture film." 62 STAT. 768 (1948), 18 U. S. C. § 1462 (Supp. II, 1949). It is also unlawful to import "prints" or "pictures" promoting treason or insurrection against the United States, or "other articles of indecent or immoral use or tendency." 62 STAT. 718 (1948), 18 U. S. C. § 552 (Supp. II, 1949).

<sup>15</sup> The New York, Maryland, and Virginia acts are enforced. The Connecticut law was repealed two years after enactment. The Florida and Louisiana statutes appear never to have been enforced. See note 14, *supra*.

<sup>16</sup> Among the cities which have some form of film censorship at present are Chicago, REV. CHICAGO CODE § 1952 through § 1961 (1931); Memphis, 1 MEMPHIS DIGEST § 1131 through § 1139 (1931); Detroit, DETROIT COMP. ORDS. c. 63, § 20 through § 22 (1945); Milwaukee, MILWAUKEE CODE OF ORDS. § 83.2 *et seq.* (1941); Atlanta, ATLANTA CODE § 5-305 § 58-107.8, § 66-504 (1942). See Note, 60 YALE L. J. 696, 697 notes 3, 4 (1951), for a discussion of the variant forms which municipal censorship takes.

<sup>17</sup> *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). New York and three other states presently exempt "current events" films from censorship. N. Y. EDUC. LAW § 123; VA. CODE ANN. § 2-106 (1950); PA. STAT. ANN. tit. 4, § 43 (Purdon, 1930); KAN. GEN. STAT. ANN. § 51-103 (1949). An Ohio municipal court recently held newsreels to be exempt from censorship under the Ohio statute. [Raleigh] News and Observer, Sept. 22, 1952, p. 4, col. 3.

<sup>18</sup> *In re Vitagraph, Inc.*, 295 Pa. 471, 145 Atl. 518 (1929); *In re Fox Film Corp.*, 295 Pa. 461, 145 Atl. 514 (1929).

<sup>19</sup> N. Y. EDUC. LAW § 120 through § 132. The present statute was enacted in 1927 (1 N. Y. Laws 1927, c. 153, § 28), and supersedes the original act of 1921 (3 N. Y. Laws 1921, c. 715).

<sup>20</sup> N. Y. EDUC. LAW § 120. The Director and other officers of the Division are appointed by the Board of Regents. N. Y. EDUC. LAW § 120.

<sup>21</sup> N. Y. EDUC. LAW § 131.

<sup>22</sup> Scientific films intended for use only by learned professions, and films intended solely for educational, charitable, or religious purposes, or for exhibition by an employer to his employees for their education and welfare, may be licensed without examination, upon the filing of the prescribed application, including a sworn description of the film. "Current events" films are entirely exempt from

Department.<sup>23</sup> Upon proper submission,<sup>24</sup> each film must be promptly examined, "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, [the censor] shall issue a license therefor."<sup>25</sup>

Where a license is denied,<sup>26</sup> both administrative and judicial review of such determination is provided.<sup>27</sup> However, reversals by the Board of Regents (the directing body of the State Department of Education, and hence of the Motion Picture Division) are rare, and apparently the New York courts have never upset a license denial by the Department of Education.<sup>28</sup> This results largely from the rule that on appeal from the censor, the only question open to the court is whether that officer has abused his discretion.<sup>29</sup> So vague are the

censorship. N. Y. EDUC. LAW § 123. But it is within the power of the Motion Picture Division to decide whether a given film shall be classified as "current events" or not. *Rollins v. Graves*, 177 Misc. 39, 30 N. Y. S. 2d 510 (Sup. Ct. 1941), *aff'd*, 263 App. Div. 907, 32 N. Y. S. 2d 11 (1942).

<sup>23</sup> N. Y. EDUC. LAW § 129.

<sup>24</sup> Application for a film exhibition permit must be made in a prescribed, written form accompanied by a print of the picture to be licensed. N. Y. EDUC. LAW § 127.

<sup>25</sup> N. Y. EDUC. LAW § 122. For the Director's views on the purpose and effectiveness of the operations of the Division, see Alpert, *Talk With a Movie Censor*, Saturday Review of Literature, Nov. 22, 1952, p. 21.

<sup>26</sup> N. Y. EDUC. LAW § 124. If a license is denied, the censor must "furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto." N. Y. EDUC. LAW § 122.

Exhibition permits may be revoked by the censor five days after notice in writing is mailed to the licensee. Thereafter such film may be resubmitted for licensing *de novo*. N. Y. EDUC. LAW § 125. Fraud in the license application or affidavit, or any unauthorized alteration of the film after licensing, or conviction for any crime committed by the exhibition or unlawful possession of any film in the state *per se* works the revocation of any permit outstanding for such film. N. Y. EDUC. LAW § 128. All advertising matter used in connection with any movie must conform to the same standards as the film itself, and the use of matter forbidden by the statute is sufficient cause for revocation of a permit. N. Y. EDUC. LAW § 130.

<sup>27</sup> From the censor's denial of license, appeal lies to the Director of the Division; from the Director's affirmation of the censor, to the Board of Regents, or a designated committee thereof; and from an affirmance by the Board of Regents, to the state courts. N. Y. EDUC. LAW § 124.

<sup>28</sup> Note, 39 COL. L. REV. 1383, 1397 (1939). The Commissioner of Education refused to license the movie *Birth of a Baby*, finding it "indecent" and "immoral." The Board of Regents modified the Commissioner's determination, and allowed exhibition for educational purposes only. It was sustained by the Appellate Division. *American Committee on Maternal Welfare, Inc. v. Mangan*, 257 App. Div. 570, 14 N. Y. S. 2d 39 (3d Dep't 1939). A New Jersey court has held differently in a similar situation, ruling that where the presentation of a certain film "would not be objectionable if conducted under non-commercial auspices, it is not within the power of the defendants [censors] to revoke a theatre license if the same film is shown under commercial auspices." *Hygenic Productions, Inc. v. Keenan*, 1 N. J. Super. 461, 62 A. 2d 150, 152 (Ch. 1948).

<sup>29</sup> *Midwest Photo-Play Corp. v. Miller*, 102 Kan. 356, 169 Pac. 1154 (1918); *Rollins v. Graves*, 177 Misc. 39, 30 N. Y. S. 2d 510 (Sup. Ct. 1941), *aff'd*, 263 App. Div. 907, 32 N. Y. S. 2d 11 (1942); *Foy Productions Ltd. v.*

standards to be applied that there will rarely be a total lack of evidence to support the censor's determination.

From its pronouncement, the *Mutual Film* rule, and the numerous federal and state decisions which followed it virtually without dissent, drew sharp criticism from law reviews,<sup>30</sup> text-writers,<sup>31</sup> and motion picture producers,<sup>32</sup> as well as from film distributors seeking relief from the onerous restrictions of censorship. Extensive advances had been made in movie production, both in the general artistic quality of film dramas and in the technical processes of production. More important had been the increasingly frequent film treatment of ideational themes—of political, social, economic and religious issues—which made all the more objectionable the virtually absolute power of the censor to determine what pictures a large portion of the population might see. Yet the motion picture industry continued to be restrained by a harness devised for the silent, one-reel, flickering product of nickelodeon days.<sup>33</sup>

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Graves, 253 App. Div. 475, 3 N. Y. S. 2d 573 (3d Dep't 1938), *aff'd*, 278 N. Y. 498, 15 N. E. 435 (1938); Hallmark Productions, Inc. v. Department of Education, 153 Ohio St. 595, 93 N. E. 2d 13 (1950); State v. Clifton, 118 Ohio St. 91, 160 N. E. 625 (1928) (where censor refused to examine film of Dempsey-Tunney fight and denied license for its exhibition, the court reversed his determination as being unreasonable and arbitrary); *In re Franklin Film Mfg. Corp.*, 253 Pa. 422, 98 Atl. 623 (1916). *Contra*: Equitable Motion Picture Corp., 25 Pa. Dist. 114 (1916) ("This right of appeal . . . is not limited to an inquiry into the good faith of the board or to the question of an abuse of the discretion primarily vested in them, but assigns to the court the duty of determining *de novo* whether or not the reel in question . . ." is such as may be licensed. 25 Pa. Dist. at 115.

<sup>30</sup>Kadin, *Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting*, 19 B. U. L. REV. 533, 552-554 (1939); Kupferman and O'Brien, *op. cit. supra* note 4; Notes, 39 COL. L. REV. 1383 (1939), 60 YALE L. J. 696, 719 (1951); Comment, 49 YALE L. J. 87, 110-113 (1939); 15 COL. L. REV. 546 (1915).

<sup>31</sup>INGLIS, FREEDOM OF THE MOVIES p. vi (1947); ERNST, THE FIRST FREEDOM 182 (1946); CHAFEE, FREE SPEECH IN THE UNITED STATES 540-548 (1941).

<sup>32</sup>Early in 1939, Walter Wanger declared the time opportune to demand for the movies the freedom accorded the press. N. Y. Times, Jan. 15, 1939, § 9, p. 5, col. 2. More recently, Eric Johnston, head of the Motion Picture Association, said, "We intend to meet the issue of political censorship head-on in the highest court in the land. We're after a clear cut decision that will give the screen the full protection and freedom guaranteed by our American Bill of Rights." 36 CORNELL L. Q. 273, 278 (1951).

<sup>33</sup>The objections to film censorship are many. Rarely are its effects wholly confined to the jurisdictions having operative censor boards. Producers must try to anticipate the demands of the more important censor groups, with the result that the whole American movie audience has its movie fare "censored" in the process. The low salaries paid censors are not likely to attract persons "well qualified by education and experience" for the job, nor is the political character of most of these positions any assurance of the possession of such qualifications.

It is significant that after 1922, the nadir of movie morality, only two censorship statutes were enacted, one of these being quickly repealed, and the other being deliberately designed as a political control measure. Apparently the efforts of the film industry at internal improvement, beginning seriously in 1922, were material in reducing the need for such official control.

The granting of full freedom from censorship to radio and television brought

An avenue of attack not available to the opponents of film censorship at the time of the *Mutual Film* decisions was opened up by *Gitlow v. New York*,<sup>34</sup> where the United States Supreme Court first interpreted the guaranties of personal liberty embodied in the First Amendment as restrictions on state action. Yet, despite a Supreme Court dictum noting the obsolescence of its 1915 attitude towards censorship,<sup>35</sup> both state and federal courts resisted to the last all urgings that they administer to it the *coup de grace*.<sup>36</sup>

Events leading up to the decision under consideration, *Joseph Burstyn, Inc. v. Wilson*,<sup>37</sup> illustrate certain of the dangers inherent in movie censorship, particularly the responsiveness of the system to pressures exerted by well-organized groups. Imported into the United States without objection from customs authorities,<sup>38</sup> *The Miracle*,<sup>39</sup> a short Italian-made picture, was combined with two other foreign-language films into an English-subtitled trilogy, *Ways of Love*. Licensed with-

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the illogical result that a given film, banned from the theaters of a state, might at the same time be telecast from stations therein without hindrance. 48 STAT. 1091 (1934), 47 U. S. C. § 326 (1947); *Allen B. Dumont Laboratories, Inc. v. Carrol*, 86 F. Supp. 813 (E. D. Pa. 1949), *aff'd*, 184 F. 2d 153 (3d Cir. 1950), *cert. denied*, 340 U. S. 929 (1951).

<sup>34</sup> 268 U. S. 652 (1925). The court said in that case: "For present purposes we may and do assume that . . . freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." 268 U. S. at 666. This protection has been specifically extended to *newspapers*, *Near v. Minnesota*, 283 U. S. 697 (1931), and *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *street distribution of leaflets*, *Schneider v. State*, 308 U. S. 147 (1939); *picketing*, *Thornhill v. Alabama*, 310 U. S. 88 (1940); *public playing of phonograph records*, *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *house-to-house distribution of religious publications*, *Martin v. City of Struthers*, 319 U. S. 141 (1943); *distribution of crime magazines*, *Winters v. New York*, 333 U. S. 507 (1948); and the *use of sound amplifiers*, *Kovacs v. Cooper*, 336 U. S. 77 (1949).

<sup>35</sup> "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948).

<sup>36</sup> *E. g.*, *RD-DR Corp. v. Smith*, 89 F. Supp. 596 (N. D. Ga. 1950), *aff'd*, 183 F. 2d 562 (5th Cir. 1950), *cert. denied*, 340 U. S. 853 (1950); *Gelling v. Texas*, 247 S. W. 2d 95 (Tex. Cr. App. 1952), *reversed*, 343 U. S. 960 (1952).

<sup>37</sup> 343 U. S. 495, 72 Sup. Ct. 777 (1952).

<sup>38</sup> To import "any obscene, lewd, lascivious or filthy . . . motion picture film" was at that time a criminal offense under 35 STAT. 1138 (1909), 18 U. S. C. § 396 (1947). The importation of any obscene "print" or "picture" was also barred. 46 STAT. 688 (1930), 19 U. S. C. § 1305 (1947).

<sup>39</sup> Produced in Italy under the direction of Roberto Rossellini in 1948, *The Miracle* is the story of a demented Italian peasant girl who is made drunk, seduced, and then immediately abandoned by a stranger whom she believes to be St. Joseph. Her resulting pregnancy she declares to be of divine origin; in answer to this proclamation, her companions taunt and mock her cruelly. The narration makes clear the association, in the mind of the girl, of her own experience with the Virgin Birth. The film ends with the birth of her child in a deserted hillside chapel. Crowther, *The Strange Case of "The Miracle,"* *Atlantic Monthly*, April 1951, p. 35, 36-37.

out difficulty,<sup>40</sup> the trilogy opened at the Paris Theatre in New York City on December 12, 1950.<sup>41</sup> Immediately attacked by the National Legion of Decency as "a sacrilegious and blasphemous mockery of Christian religious truth,"<sup>42</sup> *The Miracle* was officially condemned by Cardinal Spellman,<sup>43</sup> and the Paris Theatre picketed by members of the Catholic War Veterans organization and other Catholic lay groups.<sup>44</sup>

In response to extensive protests against the showing of *The Miracle* (though it was strongly defended both by Protestant clergymen and by some Catholics), the Board of Regents, having viewed the film and found it to be "sacrilegious" and therefore barred under the terms of the statute,<sup>45</sup> ordered its exhibition permits revoked.<sup>46</sup> The distributor of the film took the Regent's determination into the New York courts for review. Both the Appellate Division<sup>47</sup> and the Court of

<sup>40</sup> *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777, 785 (1952). The censor could have refused to issue an exhibition permit had he found the film "sacrilegious." N. Y. EDUC. LAW § 122.

<sup>41</sup> *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777, 785 (1952).

<sup>42</sup> N. Y. Times, Dec. 31, 1950, p. 23, col. 4.

<sup>43</sup> N. Y. Times, Jan. 8, 1951, p. 1, col. 2.

<sup>44</sup> Crowther, *supra* note 39, at 38. "The most logical assumption, on the face of the evidence, is that *The Miracle* became an issue after it opened in New York, and that the Catholic artillery was assembled in mounting arrays as it was seen that the distributor and the theatre were far from minded to heed the special objections of the Church." *Id.* at 36.

Italian Catholic critics disagreed as to whether *The Miracle* was sacrilegious. Although possessed of the power to ban the movie from Italy, the Vatican did not do so, and it was widely distributed there. *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777, 784-785 (1952). American Catholic opinion was by no means united. Allen Tate, well-known Catholic poet and critic, observed, "in the long run what Cardinal Spellman will have succeeded in doing is insulting the intelligence and faith of American Catholics with the assumption that a second-rate motion picture could in any way undermine their morals or shake their faith." N. Y. Times, Feb. 1, 1951, p. 24, col. 7.

As a part of the effort to halt its showing, *The Miracle* was declared by the New York City Commissioner of Licenses to be "blasphemous," and a revocation of the exhibiting theater's license was threatened, should the film not be withdrawn. A New York court quickly found the Commissioner to have exceeded his authority in this instance. *Joseph Burstyn, Inc. v. McCaffrey*, 198 Misc. 884, 101 N. Y. S. 2d 892 (Sup. Ct. 1952). New York, following the majority rule, holds that state censorship precludes censorship by local authorities. See Note, 126 A. L. R. 1363 (1940).

<sup>45</sup> N. Y. EDUC. LAW § 122.

<sup>46</sup> N. Y. Times, Feb. 17, 1951, p. 9, col. 2. A committee of the Board of Regents had previously viewed the film and, despite protests of the licensee that it was without authority to do so, had recommended revocation of the license. *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777, 779 (1952). The statute authorizes revocation only by the Director or other person authorized to issue such permits. N. Y. EDUC. LAW § 125.

<sup>47</sup> *Joseph Burstyn, Inc. v. Wilson*, 278 App. Div. 253, 104 N. Y. S. 2d 740 (3d Dep't 1951). Appellant contended that the New York statute under which *The Miracle* was banned was invalid on three counts: (1) it was a previous restraint on freedom of speech and of the press, prohibited both by the New York Constitution, art. I, § 8, and by the United States Constitution, Amendments 1 and 14; (2) the term "sacrilegious" was so vague as to violate the demands of due process of law; and (3) the statute constituted an infringement on the guaranty of separation of Church and State.

Appeals,<sup>48</sup> relying primarily on the *Mutual Film* precedent, sustained the license revocation as against all contentions of appellant.

The Supreme Court of the United States, in deciding the case on appeal<sup>49</sup> from the courts of New York, limited itself to consideration of the issue of whether the alleged abridgement of the freedoms of speech and of the press was violative of the federal constitution. Mr. Justice Clark, speaking for the court, dispatched with incisive brevity each of the main elements of the *Mutual Film* rationale. That the movies may be designed to entertain as well as to inform was found to be no contradiction of their status as a significant medium for the communication of ideas. The profit motive of the motion picture industry was declared to have no relevance to the movies' claim to constitutional protection; as the court observed, the business character of book and newspaper publishing has never been accounted material in determining the scope of their freedom. The allegedly superior capacity for evil possessed by the films was found to be of possible relevance in determining the scope of community control which should be permitted, but it was not viewed as authorization for "substantially unbridled censorship such as we have here."<sup>50</sup> Having thus rejected the chief arguments in support of the *Mutual* rule, the court for the first time declared that motion pictures lie within the protective embrace of the freedom of expression guaranties of the First and Fourteenth Amendments.<sup>51</sup>

Yet, Mr. Justice Clark continued, "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."<sup>52</sup> Nor are the movies necessarily subject to precisely the same rules as govern other modes of expression. But the First Amendment makes freedom of expression the rule, and the burden is now upon the censoring jurisdiction to justify any restraint which it imposes.<sup>53</sup>

Turning to the specific wording of the New York statute under which *The Miracle* was banned, the court discovered in the statutory

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Briefs as *amici curiae* were filed by the New York Civil Liberties Committee and the National Council on Freedom from Censorship on behalf of appellant, and by the New York State Catholic Welfare Committee on behalf of appellees.

<sup>48</sup> *Joseph Burstyn, Inc. v. Wilson*, 303 N. Y. 242, 101 N. E. 2d 665 (1951). Two judges favored reversal of the Regents' order.

<sup>49</sup> *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777 (1952). See *Extracts from Briefs to the United States Supreme Court in Burstyn v. Wilson, et al.*, 12 LAW. GUILD REV., 82 (1952).

<sup>50</sup> *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777, 781 (1952).

<sup>51</sup> *Id.* at 783.

<sup>52</sup> *Id.* at 781. The Supreme Court has frequently held that freedom of expression is not absolute. *E. g.*, *Feiner v. New York*, 340 U. S. 315 (1951); *Kovacs v. Cooper*, 336 U. S. 77 (1949); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942); *Near v. Minnesota*, 283 U. S. 697 (1931).

<sup>53</sup> *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777, 781 (1952).

condemnation of "sacrilegious" movies no narrow, explicit, and justifiable exception to the rule of freedom just enunciated. The term "sacrilegious" was found to be so vague that "the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."<sup>54</sup> But vagueness was not the only defect in the New York law. Said the court, "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."<sup>55</sup> Thus the court actually limited itself in terms to the holding that "a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'"<sup>56</sup>

Where then does the law stand today, in the light of the *Miracle* decision, with regard to the official censorship of motion pictures? Obviously those statutes and ordinances which authorize the banning of films found by a censor to be "sacrilegious"<sup>57</sup> are to that extent invalid. Furthermore, much of the present legislation is highly vulnerable, in whole or in part, in that it is so vague as to provide the censor with no intelligible working criteria.<sup>58</sup> The Supreme Court has indicated

<sup>54</sup> *Id.* at 782.

<sup>55</sup> *Ibid.* The New York Court of Appeals had said, "There is nothing mysterious about the standard [sacrilegious] to be applied. It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures." *Joseph Burstyn, Inc. v. Wilson*, 303 N. Y. 242, 101 N. E. 2d 665, 672 (1951).

<sup>56</sup> *Joseph Burstyn, Inc. v. Wilson*, 72 Sup. Ct. 777, 783 (1952). As Mr. Justice Reed pointed out in a concurring opinion, this narrow holding means that the court must measure the facts of each license denial against the principles of the First Amendment to determine its permissibility. *Ibid.*

In a concurring opinion, Mr. Justice Frankfurter dwelled lengthily on the etymology of the word "sacrilegious," which appears never to have received judicial definition prior to the instant case. Consequently neither court nor censor could know what was condemnable under that term. To offer to all 300 religious sects of the United States protection from any offense, as proposed by the New York courts, would have the effect, he pointed out, of extending such protection only to those groups capable of raising a politically substantial outcry, as in the present case. *Id.* at 783.

<sup>57</sup> MD. ANN. CODE GEN. LAWS art. 66A, § 6 (1939); N. Y. EDUC. LAW § 122; PA. STAT. ANN. tit. 4, § 43 (Purdon, 1930).

<sup>58</sup> *E. g.*, the Ohio law allows the showing of "only such films as are . . . of a moral, educational or amusing and harmless character. . . ." OHIO GEN. CODE ANN. § 154-47b (Page, 1946). The Louisiana statute employs exactly the same standards. LA. STAT. ANN. § 4:304 (West, 1951).

Since the *Miracle* decision, the United States Supreme Court has reversed the conviction in a state court of an appellant who exhibited *Pinky* after it was banned under a Marshall, Texas, ordinance which authorized the local censor board to deny an exhibition permit to any film which, in its opinion, was "of such character as to be prejudicial to the best interests of the people of said City." *Gelling v. Texas*, 343 U. S. 960, 72 Sup. Ct. 1002 (1952) (memorandum decision), *reversing* 247 S. W. 2d 95 (Tex. Cr. App. 1952). Frankfurter, J., concurring, noted that the ordinance offended the due process of law clause of the Fourteenth Amendment on the score of "indefiniteness." 72 Sup. Ct. 1002.

that it might approve statutes including as standards "words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent, or disgusting."<sup>59</sup> Such general phrases as "tend to debase or corrupt morals,"<sup>60</sup> or "tend to corrupt morals or incite to crime,"<sup>61</sup> would probably be found to lack sufficient definiteness, unless strictly construed by censor or court. The familiar practice of justifying a denial of license with the mere quotation of a statutory phrase, thus avoiding the necessity for findings and supporting reasoning,<sup>62</sup> will doubtless be more closely restrained.

The misuse of censorship standards permissible in themselves, or the attempted use of standards not set forth in the statute relied upon, would almost certainly be struck down by the courts.<sup>63</sup> Movies dealing with political and social issues have proved especially susceptible to the censor's ban on quite diverse, not to say devious, grounds.<sup>64</sup> It is

<sup>59</sup> *Winters v. New York*, 333 U. S. 507, 518 (1948).

<sup>60</sup> KAN. GEN. STAT. ANN. § 51-103 (1949); PA. STAT. ANN. tit. 4, § 43 (Purdon, 1930). In *Commercial Pictures Corp. v. Regents of the University of New York*, 280 App. Div. 260, 114 N. Y. S. 2d 561 (3d Dep't 1952), a court split 3-2 upheld a denial of license for exhibiting *La Ronde* which, it had been found, was "immoral" and "would tend to corrupt morals." Two dissenting judges contended that the whole New York statute is unconstitutional, under the *Miracle* decision. In these cases, they argued, "the rule should be . . . [that] the determination of any board or bureau should only be upheld where it is clear that any conclusion to the contrary would not be entertained by any reasonable mind." *Id.* at 566.

<sup>61</sup> VA. CODE ANN. § 2-105 (1950); MD. ANN. CODE GEN. LAWS art. 66A, § 6 (1946).

<sup>62</sup> Kadin, *supra* note 30, at 555.

<sup>63</sup> *E. g.*, *Schuman v. Pickert*, 277 Mich. 225, 269 N. W. 152 (1936) (Detroit ordinance allowed censoring only of movies found "immoral or indecent"; censor was reversed when he banned film, in reliance on this ordinance, solely because he considered it "pure Soviet propaganda").

<sup>64</sup> *Gelling v. Texas*, 343 U. S. 960 (1952); *RD-DR Corp. v. Smith*, 89 F. Supp. 596 (N. D. Ga. 1950), *aff'd*, 183 F. 2d 562 (5th Cir. 1950), *cert. denied*, 340 U. S. 853 (1950) (*Lost Boundaries* banned from Atlanta solely because censor believed that it might "adversely affect the peace, health, morals and good order of the City" by encouraging racial strife); *United Artists Corp. v. Board of Censors*, 189 Tenn. 397, 225 S. W. 2d 550 (1949), *cert. denied*, 339 U. S. 952 (1950) (*Curley* banned under Memphis ordinance barring films "inimical to the public safety, health, morals, or welfare" because it showed white and Negro children attending the same school); *U. S. v. Motion Picture Film The Spirit of '76*, 252 Fed. 946 (S. D. Cal. 1917) (film consisting of incidents from American Revolution, including scenes showing extreme cruelties committed by British troops, suppressed on grounds that it would tend to weaken wartime support for an ally); *Hygenic Productions, Inc. v. Keenan*, 1 N. J. Super. 461, 62 A. 2d 150 (Ch. 1948) (*Mom and Dad*, dealing with parental delinquency and venereal disease, banned for commercial showing, though not considered by censor to be obscene or indecent); *American Committee on Maternal Welfare, Inc. v. Mangin*, 257 App. Div. 570, 14 N. Y. S. 2d 39 (3d Dep't 1939), *aff'd*, 283 N. Y. 551, 27 N. E. 2d 278 (1940) (*Birth of a Baby* banned from places of amusement as "indecent" and "immoral," though non-commercial showing allowed); *Foy Productions, Ltd. v. Graves*, 253 App. Div. 475, 3 N. Y. S. 2d 573 (3d Dep't 1938), *aff'd*, 278 N. Y. 498, 15 N. E. 2d 435 (1938) (*Tomorrow's Children*, dealing with sterilization, banned by New York censor as immoral); *Hallmark Productions, Inc. v. Department of Education*, 153 Ohio St. 595, 93 N. E. 2d 13 (1950) (*The Devil's Weed* rejected as "harmful"); *American Committee to Aid Spanish*

possible, however, that the future banning of films, either before or after exhibition, on purely political grounds might be required to satisfy the "clear and present danger" test.<sup>65</sup>

There may be a demand that each film be viewed, not as a mere succession of scenes, but as a whole work, and evaluated according to its "dominant effect."<sup>66</sup> Such is the rule applied by customs officials to books.<sup>67</sup> Yet the very nature of a motion picture film, from which, unlike a book, a scene or a line may readily be deleted to meet local demands, may argue against this innovation.

The motion picture industry may see fit to send other test cases through the courts with the object of reducing censorship legislation to a nullity by a patient process of judicial pruning. Jurisdictions desiring to continue film censorship may be expected to offset such a move by legislative amendments making more definite the grounds for censorship available to their censors.<sup>68</sup>

There is the possibility that the whole system of official censorship will pass to its deserved place in limbo, either by outright repeal or by judicial construction. Yet even if all censorship legislation were struck down, there would remain the very substantial restraints placed on motion picture producers by their own extensive system of self-censorship and taboos,<sup>69</sup> the numerous private, non-industry reviewing agen-

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*Democracy v. Bowsher*, 132 Ohio St. 599, 9 N. E. 2d 617 (1937) (*Spain in Flames*, a documentary on the Spanish Civil War, banned by censor board on grounds that "it was harmful in stirring up race hatred and that it was antireligious").

<sup>65</sup> Note, 60 *YALE L. J.* 696, 712 (1951). Such a showing would of course be unnecessary where the words or representations were obscene or libellous in nature. *Beauharnais v. Illinois*, 343 U. S. 250 (1952).

<sup>66</sup> This suggestion has been made to the courts, only to be rejected. *Eureka Productions, Inc. v. Byrne*, 252 App. Div. 355, 300 N. Y. Supp. 218 (3d Dep't 1937).

<sup>67</sup> "Each word of the book contributes like a bit of mosaic to the detail of the picture which Joyce [the author] is seeking to construct for his readers." *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S. D. N. Y. 1933), *aff'd*, 72 F. 2d 705 (2d Cir. 1934).

<sup>68</sup> There remain, in any event, the criminal obscenity statutes, which have always been the chief reliance of most jurisdictions. *E. g.*, N. C. GEN. STAT. § 14-193 (1943). There are also available to municipal authorities zoning, fire, sanitary, and building laws and ordinances which have been employed to effect an indirect censorship of movie content through the simple expedient of threatening revocation of theater licenses, should a disfavored film be shown. *Silverman v. Gilchrist*, 260 Fed. 564 (2d Cir. 1919); *Bainbridge v. Minneapolis*, 131 Minn. 195, 154 N. W. 964 (1915).

<sup>69</sup> The Motion Picture Association of America (prior to 1945 the Motion Picture Producers and Distributors of America), was established by the industry in 1922. The avowed purpose of the organization, popularly known as the "Hays Office," was to clean up the movies from the inside, a job in which it has achieved varying degrees of success. The actual work of the M. P. A. is carried on chiefly by two subsidiary agencies. The Production Code Administration supervises production by member companies from script to finished film. All advertising material is similarly handled by the Advertising Code Administration. At times criticized as stultifying factors in film production, the M. P. P. D. A. and M. P. A. appear to have been largely successful in blocking the further

cies;<sup>70</sup> and the economic pressures arising from the necessity of maintaining a large and steady "box-office," which means never seriously offending any significant group or point of view.<sup>71</sup>

Although it is but a first step, the *Miracle* decision promises to do much to bring the law of film censorship into phase with the ideal of substantially complete freedom of expression from all prior restraints, which has increasingly characterized the law of the United States.

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### Costs—Attorney Fees as Costs in Taxpayers' Actions

The recent case of *Horner v. Chamber of Commerce*<sup>1</sup> involved a taxpayer's action to recover, for the benefit of a municipality, public moneys which had been unlawfully disbursed.<sup>2</sup> The court held that "where, on refusal of municipal authorities to act, a taxpayer successfully prosecutes an action to recover, and does actually recover and collect, funds of the municipality which had been expended wrongfully or misapplied, the court has implied power in the exercise of a sound discretion to make a reasonable allowance from the funds actually

extension of official censorship. INGLIS, FREEDOM OF THE MOVIES 87-96 *et seq.* (1947). The M. P. A. embraces 95% of the producers, distributors, and exhibitors of the nation. Few theaters will rent films lacking the M. P. A. seal of approval, which is borne by 95% of all films released in the United States. *Hughes Tool Co. v. Motion Picture Association of America, Inc.*, 66 F. Supp. 1006 (S. D. N. Y. 1946).

<sup>70</sup> The National Board of Review, pioneer in the field of non-industry film reviewing, was formed in 1909 with the encouragement of certain producers fearful of threatened government control. Working independently of the film industry, and with non-professional viewers, the Board operates in the public interest under the slogan, "Selection Not Censorship." It does not censor films, but views and approves those films which in the opinion of the viewers are neither violative of the obscenity statutes, detrimental to public morality, nor subversive in effect upon the national audience, when evaluated as a whole. Its operations are financed by fees charged producers for reviewing films submitted by them. INGLIS, FREEDOM OF THE MOVIES 74-82 (1947); 49 YALE L. J. 87, 108-109 (1939).

The National Legion of Decency was formed in 1933 at the instance of the Catholic Bishops of the United States, and soon secured for itself a position of great power. Acting as a reviewing agency, the Legion classifies films for the information of all Catholics, a great many of whom take a periodic pledge to respect the group's recommendations. In its "C" or "condemned for Catholics" rating, the Legion holds a weapon the potency of which is much feared by producers. INGLIS, *op. cit. supra* at 120-125 (1947). See Kazan, *Pressure Problem*;] *Director Discusses Cuts Compelled in "A Streetcar Named Desire,"* in EMERSON AND HABER, EDs., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 722 (1952). There are also several other private organizations which review films in the interest of their members and the public. See 60 YALE L. J. 696, 714 n. 40 (1951).

<sup>71</sup> ERNST, THE FIRST FREEDOM 202-203 (1946).

<sup>1</sup> 236 N. C. 96, 72 S. E. 2d 21 (1952).

<sup>2</sup> See *Horner v. Chamber of Commerce*, 235 N. C. 77, 68 S. E. 2d 660 (1952); *Horner v. Chamber of Commerce*, 231 N. C. 440, 57 S. E. 2d 789 (1950) (The case was before the Supreme Court twice on appeal. The background facts may be found in these decisions.)