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Prior Restraint of Motion Pictures

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PRIOR RESTRAINT OF MOTION PICTURES

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The United States Supreme Court's recent decision in *Freedman v. Maryland*[1] once again raises questions regarding the constitutionality of administrative licensing systems exercising prior restraint over the content of motion pictures. While the *Freedman* decision invalidated a state censorship law[2] on the ground that it failed to provide adequate procedural safeguards with respect to final judicial determination, it reaffirmed the principle laid down in *Times Film Corp. v. City of Chicago*,[3] upholding the validity of statutes requiring the submission of motion pictures for approval, in advance of exhibition. Thus, thirteen years after the Court's recognition in *Joseph Burstyn, Inc. v. Wilson*[4] of the motion picture as a medium of expression deserving protection under the Constitution, freedom to exhibit films is inhibited by administrative prior restraint.[5] It is this perpetuation of the constitutionality of film censorship that requires reexamination.

The inherent assumption underlying the constitutionality of film censorship is that prior restraint of the motion picture is compatible with the guarantees of free speech and press enunciated in the first amendment.[6] This assumption is conditional upon the validity of three premises: (1) that it is possible to draft a clearly drawn censorship statute whose standards satisfy the constitutional test of definiteness; (2) that the administrative operation of film licensing agencies meets the constitutional requirement of fairness implicit in due process of law; (3) that the motion picture is more influential and potentially more harmful in its effect upon human behavior patterns than the press and the other media of communication, therefore justifying its

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1. 380 U.S. 51 (1965).
2. MD. ANN. CODE art. 66A, §§ 2-23 (1957).
3. 365 U.S. 43 (1961).
4. 343 U.S. 495 (1952).
5. New York, Virginia and Kansas have statutes similar to the Maryland statute and the cities of Chicago, Detroit, Fort Wayne and Providence have similar ordinances. Brief for the American Civil Liberties Union as Amicus Curiae, p. 19, Freedman v. Maryland, 380 U.S. 51 (1965). The situation in New York, however, is uncertain. Recently that state's highest court held in Trans-Lux Distrib. Corp. v. Board of Regents of the Univ. of N.Y., 16 N.Y.2d 536 (1965), that the state's motion picture censorship law was null and void on the ground that it violated the fourteenth amendment. Whether the state will appeal the decision or attempt to enact new legislation to meet judicial requirement remains to be seen.
6. U.S. CONST. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

classification in a special category outside the protection of the Constitution. This article will test the validity of these premises, questioning whether administrative prior restraint of motion pictures is constitutionally acceptable.

THE VALIDITY OF STATUTORY CENSORSHIP STANDARDS: DEFINITENESS

Since the *Burstyn* decision, the Court and state courts have consistently invalidated statutory censorship standards when applied to particular motion pictures. The *Burstyn* Court struck down "sacrilegious" as a valid censorship standard on the ground that it was too vague to satisfy the constitutional requirement of definiteness. A unanimous Court recognized that to rely upon an elusive standard like "sacrilegious" was to set the censor "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."[7] The Court ruled that the vagueness of the standard permitted arbitrary administrative determinations, wherein state and local censors were most likely to support the predominant religious sentiment rather than minority viewpoints. Succeeding Court decisions invalidated the statutory censorship standards of "harmful,"[8] "immoral,"[9] and "obscene, indecent and immoral"[10] when applied to particular motion pictures in cases arising from administrative licensing agencies. Meanwhile, state courts were rendering similar verdicts in New York[11] and Maryland[12] censorship cases.

These decisions prompted several states with administrative licensing agencies to amend their censorship laws so as to define more precisely their statutory standards. In 1954 New York inserted a new section which stated that the standards "immoral" and "tend to corrupt morals" would now apply to any motion picture:

> . . . the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness; or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.[13]

7. Burstyn v. Wilson, 343 U.S. at 504-05.

8. Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954).

9. Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y., 346 U.S. 587 (1954).

10. Holmby Prod., Inc. v. Vaughn, 350 U.S. 870 (1955).

11. Capital Enterprises, Inc. v. Board of Regents of Univ. of N.Y., 1 App. Div. 2d 990, 149 N.Y.S.2d 920 (1956), wherein the court reversed the Regents' ruling that the film, *Mom and Dad*, was "indecent." Broadway Angels, Inc. v. Wilson, 282 App. Div. 643, 125 N.Y.S.2d 546 (1953), where the court ruled that the film, *Teenage Menace*, could not be denied a license on the ground that its exhibition would "tend to corrupt morals" and "incite crime."

12. United Artists Corp. v. Maryland State Bd. of Censors, 210 Md. 586, 124 A.2d 292 (1956), where the court ruled that the film, *The Man With the Golden Arm*, did not "tend to incite crime" within the meaning of the statutory standard.

13. N.Y. EDUC. LAW ch. 16, § 122a.

The amended New York statute came up for consideration in *Kingsley Int'l Pictures Corp. v. Board of Regents of N.Y.*,[14] involving the film version of D. H. Lawrence's novel, *Lady Chatterley's Lover*. The film had been denied a license by the Board of Regents on the ground that it was "immoral" in that it presented adultery as a desirable, proper, and acceptable pattern of behavior, contrary to section 122a of the amended state censorship statute. New York's highest court affirmed the Regents' determination,[15] but a unanimous United States Supreme Court reversed, holding that section 122a was unconstitutionally applied to the film involved.[16] The Court challenged the constitutional applicability of section 122a of the New York statute, because it denied a license to any motion picture which approvingly portrayed adultery, regardless of the manner in which the relationship was presented. The Court noted that the effect of the statute:

> . . . is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.[17]

Moreover, the Regents contended that the film portrayal of an adulterous relation was repugnant to the moral standards of the community and just cause for denial of a license. In so contending they misconstrued the essence of what the Constitution really protects:

> Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of an opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.[18]

It was obvious after *Kingsley* that the Court had severely narrowed the valid statutory standards that it would uphold in denying exhibition licenses to motion pictures. After the Court had placed "obscenity" outside the protection of the first amendment freedoms of speech and press in *Roth v. United States*,[19] and *Alberts v. California*,[20] censors applied this standard in their

14. 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958), *rev'd*, 360 U.S. 684 (1959).

15. Kingsley Int'l Pictures Corp. v. Board of Regents of N.Y., 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958).

16. Kingsley Int'l Pictures Corp. v. Board of Regents of N.Y., 360 U.S. 684 (1959).

17. *Id.* at 688.

18. *Id.* at 689.

19. 354 U.S. 476 (1957). Here the constitutionality of the federal obscenity statute, 18 U.S.C. § 1461 (1964), which makes punishable the mailing of material that is "obscene, lewd, lascivious or filthy . . . or . . . of an indecent character," was upheld and Roth's conviction sustained.

20. 354 U.S. 476 (1957). This case, decided together with *Roth*, involved the constitutionality of the California obscenity provisions, CAL. PENAL CODE ANN. § 311

determinations, failing, however, to realize that what they considered obscene content in films might not adhere to the Court's definition. The *Roth* Court, rejecting the legal definition of obscenity laid down in an English case,[21] established as the legal test of obscenity "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[22]

The disparity between the censors' and the Court's interpretation of the definition of obscenity was illustrated in succeeding state[23] and lower federal court[24] cases. In each instance the censorial determinations that the particular films were obscene and therefore not entitled to exhibition licenses were overruled. In one case the Court had an opportunity to examine the denial of an exhibition license to a film on the ground of obscenity.[25] The Court wrote no opinion, merely reversing the censorial judgment on authority of *Alberts*. Subsequently, in *Jacobellis v. Ohio*,[26] the Court held that the state courts had erred in the conviction of a Cleveland theater manager for exhibiting a film in violation of the state obscenity law, since the film was not obscene according to the *Roth* test. The Court admitted, however, that the application of an obscenity law to suppress a film required "ascertainment of the 'dim and uncertain line' that often separates obscenity from constitutionally protected expression."[27] In a concurring opinion, Mr. Justice Stewart proposed that the Court restrict the definition of obscenity to "hard-core pornography," even though he frankly admitted:

(1955), which makes it a misdemeanor to keep for sale material that is "obscene or indecent." The provision was upheld and Alberts convictions thereunder was sustained.

21. Regina v. Hicklin, [1868] 3 Q.B. 360. Here the test of obscenity was based on the effect of isolated passages upon particularly susceptible persons.

22. Roth v. United States, 354 U.S. at 489. The Court further defined prurient as "material having a tendency to excite lustful thoughts." *Id.* at 487. For a critical analysis of the *Roth* test of obscenity see ERNST & SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE (1964); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1 (1960); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960); Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue*, 7 UTAH L. REV. 289 (1961).

23. *E.g.*, Excelsior Pictures Corp. v. Board of Regents of N.Y., 3 N.Y.2d 237, 144 N.E.2d 31 (1957) (nudist colony film not "obscene" since it did *not* appeal to prurient interest). See also Connection Co. v. Regents of the Univ. of N.Y., 17 App. Div. 2d 671, 230 N.Y.S.2d 103 (1962), *aff'd*, 11 N.Y.2d 1105 (1962) (use of four letter word for excretion was vulgar but not obscene within meaning of state statute).

24. *E.g.*, Capital Enterprises, Inc. v. City of Chicago, 260 F.2d 670 (7th Cir. 1958) (contents of film, *Mom and Dad*, not obscene because it failed to appeal to prurient interest). See also Columbia Pictures Corp. v. City of Chicago, 184 F. Supp. 817 (N.D. Ill. 1960) (*Anatomy of a Murder* film not obscene within meaning of Chicago censorship ordinance); Excelsior Pictures Corp. v. City of Chicago, 182 F. Supp. 400 (N.D. Ill. 1960) (*Garden of Eden* film not obscene).

25. Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957).

26. 378 U.S. 184 (1963), *reversing*, 173 Ohio St. 22, 179 N.E.2d 777 (1962).

27. *Id.* at 187.

> I shall not today attempt further to define the kinds of material I understand to be embraced within that short hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.[28]

Since *Burstyn*, the Court has struck down all statutory censorship standards save "obscenity," and the vagaries of judicial interpretations of that standard tend to confirm the view that any standard utilized by administrative licensing agencies defines that preciseness of statutory construction necessary to satisfy the constitutional test of definiteness. To allow censors to continue to apply "obscenity" or other newly contrived standards which lack common consensus in their interpretation, encourages arbitrary administrative determinations in a system of government historically rooted to the rule of law, not men.

Administrative Licensing Agencies and Due Process

Judicial decisions since *Burstyn* were concerned primarily with the validity of statutory standards applied to particular films by administrative licensing agencies. In the recent *Freedman* case, however, the issue confronting the Court was that of an invalid prior restraint. Protected expression was suppressed because the statute did not provide adequate procedural safeguards to the exhibitor applying for an exhibition license.[29] Fundamentally, the censorship procedures in those states and municipalities which require advanced licensing of motion pictures are quite similar. The applicant for a license is compelled by statute to submit his film to the censor in advance of its exhibition. The censors usually exercise one of three alternatives: approval, deletion or rejection. If the film is approved, it receives an exhibition permit or license. If deletions are required as a condition of approval, or if the film is rejected in toto, the applicant generally has both administrative and judicial review.[30]

It was the appeal procedure that the Court scrutinized in *Freedman* and held to be constitutionally deficient. In invalidating the Maryland censorship law,[31] the Court noted that the Maryland statute permitted undue delay in obtaining final judicial determination of board decisions, that no provision

28. *Id.* at 197.

29. See Md. Ann. Code art. 66A, §§ 17, 19 (1957).

30. In Kansas, Maryland and Virginia, administrative review of censorial determinations is under the jurisdiction of the state censor boards. See Kan. Stat. Ann. ch. § 51-101 to §54-109 (1964); Md. Ann. Code art. 66A, § 19 (1957); Va. Ann. Code §§ 2 to 109 (1959). In New York, however, administrative review is under the jurisdiction of the state Board of Regents. See N.Y. Educ. Law ch. 16, § 124.

31. Md. Ann. Code art. 66A, §§ 2 to 23 (1957).

was made for judicial participation in the censor board's decision, and that exhibitors rather than the board bore the burden of origination and persuasion in judicial review.[32] Previously, the presumption of constitutionality existed so long as the applicant whose film had been denied a license always had final recourse to the courts. The *Freedman* Court, however, recognized the inherent unfairness in the presumption, since the time-consuming factor involved in court litigation is especially damaging to the motion picture medium, which relies heavily upon current publicity to attract its audience. A unanimous Court noted that the risk of delay was built into the Maryland censorship procedure.[33] In the only reported case[34] the initial judicial determination had taken four months, while final vindication of the film on appellate review had taken six months.[35] Furthermore, the Court recognized the necessity of the film exhibitor to be assured, either by statute or judicial construction, that the censoring agency will, within a specified brief period, either issue a license or go to court to restrain the exhibition of the film.[36] Without these procedural safeguards, local exhibitors may find it too burdensome to challenge censorial determinations. The Court noted that the film distributor, too, might be unwilling to accept the costs and burdens of litigation in a particular state or city with administrative licensing systems when he can freely exhibit the film in most of the country.[37]

Two weeks later, the Court, in *Trans-Lux Distrib. Corp. v. Board of Regents of the Univ. of N.Y.*,[38] reversed per curiam the judgment of the state court of appeals on the authority of *Freedman*. The issue in the state courts was whether the Board of Regents' order to delete two scenes deemed "obscene" in the Danish film, *A Stranger Knocks*, should be upheld.[39] The significance of the *Trans-Lux* decision is that the Court did not rule on the obscenity issue; rather it implicitly invalidated the administrative licensing system in New York on procedural grounds.

Special Category Classification of the Motion Picture

The *Burstyn* Court had upheld the constitutionality of administrative prior restraint of the motion picture medium on the ground that each method of expression is different and that no general rule can apply to establishment of precise regulations for dealing with the specific problems of each. However,

32. Freedman v. Maryland, 380 U.S. at 55.
33. *Id.* at 56.
34. United Artists Corp. v. Maryland Bd. of Censors, 210 Md. 586, 124 A.2d 292 (1956).
35. Freedman v. Maryland, 380 U.S. at 57.
36. *Id.* at 58-59.
37. *Id.* at 59.
38. 380 U.S. 259 (1965).
39. See Trans-Lux Distrib. v. Board of Regents of the Univ. of N.Y., 14 N.Y.2d 88, 248 N.Y.S.2d 857 (1964), *affirming*, 19 App. Div. 2d 937, 244 N.Y.S.2d 333 (1963).

the Court did place a "heavy burden" on the state to justify the exercise of prior restraint as applied to the motion picture.[40] While the "heavy burden" still existed in *Times Film Corp. v. City of Chicago*,[41] the Court upheld the constitutionality of an administrative film licensing law on the ground that the motion picture medium, because its influence on human behavior was felt to be greater and potentially more harmful than the impact of the other media of communication, was excluded from the freedom accorded to the press in *Near v. Minnesota*.[42] The *Freedman* Court affirms the view that motion pictures are not necessarily subject to the precise rules governing other methods of expression.[43] It notes that with films as with other media, "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[44] There is no suggestion in *Freedman*, however, that the same requirements for overcoming the presumption apply, and the *Times Film* distinction between media must be assumed to survive.

In *Near*, the Court had upheld the right of the state to punish subsequent to the abuse of publication which violated statutory standards. The *Times Film* majority limited its approval of prior restraint to the film medium, which had the effect of classifying the motion picture in a special category outside the constitutional protection accorded to the press. Mr. Chief Justice Warren, in his *Times Film* dissent, took issue with the "special classification" concept because it led the majority to endorse the principle that one medium of communication can be subject to prior restraint while the others cannot. The special classification concept was inconsistent with the Court's decision in *Near* and was a judicial construction without substance. The Chief Justice stated that "the Court in no way explains why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship."[45] The Court had failed to present the necessary evidence to support its exclusionary rule for the motion picture. Nor did the Court recognize the increasing public exposure to television, an exposure of far greater consequence than that of the film medium. But even if the motion picture were to exert a substantially greater influence upon human behavior than the other media, the Chief Justice insisted that "that fact constituted no basis for the argument that motion pictures should be subject to greater suppression."[46]

The Court's present view, expressed in *Times Film*, restates the third

40. Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 503-04.
41. 365 U.S. 43 (1961).
42. 283 U.S. 697 (1931).
43. Freedman v. Maryland, 380 U.S. at 57.
44. *Ibid.* The *Freedman* Court quoted Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
45. Times Films Corp. v. City of Chicago, 365 U.S. at 76.
46. *Id.* at 77.

premise which supports the constitutionality of administrative prior restraint of the film medium. The contention of the *Times Film* majority[47] was that since the motion picture was potentially more harmful in its effect upon human behavior, the medium necessitated the drawing of a distinction between it and the other media of communication.[48] Once the Court drew the distinction and placed the medium in a special category, it followed logically that it could constitutionally be subject to administrative prior restraint by state and local censors for the maintenance of public morality. The Court, however, failed to present collaborating evidence for its special classification concept in *Times Film*.[49] This viewpoint characterized the research conducted in the 1930's by a group of sociologists, psychologists and educators who studied the effect which the motion picture exerted upon the behavior patterns and conduct of children. The studies, known as the Payne Fund studies, were stimulated by public criticism of Hollywood films, especially the increasing number of gangster and Mae West-type films. The results of the studies,[50] which encompass numerous investigations, showed that motion pictures should be selected for children's viewing because a relationship exists between films and the formation of behavior patterns and mental attitudes. One particular study went further and suggested that the medium was a contributing factor to delinquency and crime causation.[51]

Had the Court rendered its *Times Film* decision at the time of the Payne Fund studies instead of thirty years later, the rationale for its belief that a positive correlation exists between the content of motion pictures and subsequent anti-social behavior patterns would have had the benefit of evidence resulting from contemporary social research. For three decades, however, the Payne Fund studies have been subjected to vigorous criticism from the behavioral and social sciences for conclusions drawn on the basis of faulty methodology.[52] Space does not permit a complete listing of the evidence gathered to refute the Payne Fund studies, but even a partial examination of contemporary social research contradicts the premise of a direct causal relationship between the motion picture and anti-social behavior.[53] Five

47. The *Times Films* majority was comprised of Justices Clark, Stewart, Harlan, Wittaker (now retired) and Frankfurter (deceased).

48. Times Films Corp. v. City of Chicago, 365 U.S. at 49-50, 76.

49. *Id.* at 77 (dissent).

50. FORMAN, OUR MOVIE MADE CHILDREN (1933).

51. BLUMER & HAUSER, MOVIES, DELINQUENCY, AND CRIME (1933).

52. *E.g.*, ADLER, ART AND PRUDENCE (1937). Adler criticized the methodology employed by the researchers and the conclusions drawn from questionable methodological techniques.

53. See generally ADLER, *op. cit. supra* note 52. DEUTSCHER, THE SOCIAL CAUSES OF SOCIAL PROBLEMS: FROM SUICIDE TO DELINQUENCY (1963). Deutscher claims that delinquency is basically a social problem and will ultimately be solved only when there is an intervention in the ongoing processes of the society, *i.e.*, when there is an altering of

Justices, however, in *Times Film* upheld the constitutionality of prior restraint, partially on the basis of a popularly held, but scientifically unsound premise.

ADMINISTRATIVE PRIOR RESTRAINT AND THE FIRST AMENDMENT

The *Burstyn* Court elevated the legal status of the film medium, and brought motion pictures within the protection of the first amendment. The Court recognized the development of the medium as an instrument of communication, holding that motion pictures:

> . . . are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.[54]

While the Court recognized the significance of the medium in its *Burstyn* decision, it went on to state the limitations of its ruling. The Court's holding was not to be misconstrued to mean "that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places."[55] The *Times Film* majority reiterated this limitation.[56] The *Freedman* Court, however, criticized reliance on *Times Film* by Maryland's highest court and stated that the only question tendered for decision in *Times Film* was "whether a prior restraint was necessarily unconstitutional *under all circumstances*,"[57] and that the case should not be interpreted broadly as

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the social institutions, such as the school and the neighborhood, within the delinquent area. To reduce delinquency to a personal problem and to observe the individual as the unit of study rather than the total society in which he lives is to fall into the trap of reductionism. ROBINSON, JUVENILE DELINQUENCY (1960). "There is, however, no consensus among the experts as to the effect on delinquency of *any* of the mass media of communication and no well-documented scientific study in this admittedly important field has yet been published." *Id.* at 160. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY, 215-19 (5th ed. rev. 1955) ("existing evidence is inconclusive on the effect of movies on delinquent behavior"). Cressey, *The Motion Picture Experience as Modified by Social Background and Personality*, 3 AM. SOCIOLOGICAL REV. 516-25 (1938) where the author claims that the Payne Fund studies emphasized the negative influence of the movies while the results of his own research indicated that movies exert a "reflexive" influence, *i.e.*, whatever attitudes and general information children may gather from the motion picture depends somewhat upon how effective the connection is with inadequate social background and individual limitations in intellect. Pittman, *Mass Media and Juvenile Delinquency*, JUVENILE DELINQUENCY ch. 10, 230-47 (1958). Here the author contends that BLUMER & HAUSER, *op. cit. supra* note 51, was exploratory in nature and therefore its findings were not meant to be definitive and conclusive. Pittman further questions the validity of Blumer and Hauser basing their statistics on information received from delinquent or criminal offenders to the effect that the motion picture was an important factor in their criminal careers, since it is dubious whether delinquents possess enough insight to assess the factors which created the situation.

54. Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 501.

55. *Id.* at 502.

56. Times Film Corp. v. City of Chicago, 365 U.S. at 48.

57. Freedman v. Maryland, 380 U.S. at 53 (emphasis in original) quoting Bantam Books, Inc. v. Sullivan, 372 U.S. at 70.

approving the concept without qualification. Mr. Justice Douglas, however, in a brief concurring opinion, reiterated his position on film censorship: "I do not believe any form of censorship—no matter how speedly or prolonged it may be—is permissible."[58] In a single footnote to this opinion, he expressed doubt that the system upheld in the *Times Film* case could survive the procedural test in *Freedman*.[59]

From *Burstyn* to *Freedman* the Court has preferred to decide cases involving administrative film licensing laws on the narrowest grounds possible, striking down vague statutory standards and recognizing procedural limitations in administrative licensing systems. Nevertheless, the underlying assumption that prior restraint of the motion picture does not violate first amendment freedoms of speech and press remains. The *Freedman* Court did not depart from this assumption, but merely announced an added criterion for testing the validity of statutes requiring advance approval of motion pictures.

On the other hand, state courts have ruled against the assumption, holding administrative film licensing systems to be an infringement of the liberty of speech and press provided for in the federal constitution and in their respective state constitutions. The Ohio Supreme Court has ruled that its state censorship act[60] was too "general in character and does not appear to meet the implied test of a restrictive and clearly drawn statute."[61] The majority agreed that the *Burstyn* decision was sufficient authority to hold that the statute contravenes the first and fourteenth amendments to the Constitution.[62] Similarly, the Supreme Judicial Court of Massachusetts held the state's Sunday censorship statute[63] to be void, *prima facie*, as a prior restraint on the freedom of speech and press guaranteed by the first and fourteenth amendments to the Constitution.[64] The Pennsylvania Supreme Court invalidated the state's motion picture censorship statute on the ground that it offended the due process clause of the fourteenth amendment.[65] When the state legislature drafted a new statute,[66] the state supreme court struck it down as a violation of article I of the Pennsylvania Constitution and the due process clause of the fourteenth amendment.[67] The court was cognizant

58. *Id.* at 61-62.
59. *Id.* at 62.
60. OHIO REV. CODE ANN. tit. 33, § 3305.01 to 3305.09 (1964).
61. R.K.O. Radio Pictures, Inc. v. Department of Educ. of Ohio, 162 Ohio St. 263, 122 N.E.2d 769 (1954).
62. *Id.* at 265, 122 N.E.2d at 771.
63. MASS. GEN. LAWS ch. 136, § 4 (Ter. ed. 1953).
64. Brattle Films v. Commissioner of Pub. Safety, 333 Mass. 83, 127 N.E.2d 891 (1955).
65. Hallmark Prod., Inc. v. Carroll, 384 Pa. 348, 121 A.2d 584 (1956).
66. Pa. Motion Picture Control Act, PA. STAT. ANN. tit. 4, § 70 (1959).
67. Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59 (1961), *cert. denied*, 368 U.S. 897 (1961).

of the *Times Film* ruling; however, it maintained that *Times Film* "in no way involved the rights guaranteed the individual by the Pennsylvania Constitution."[68] The court referred particularly to article I of the Pennsylvania Constitution which guarantees:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of liberty.[69]

In two censorship cases[70] involving local administrative film licensing systems, state courts ruled the exercise of prior restraint to be repugnant to their respective constitutions. The Supreme Court of Oregon, in *City of Portland v. Welch*,[71] invalidated the city's censorship statute on the ground that censorship operating under an administrative licensing system constituted prior restraint, rather than subsequent punishment, contrary to article I of the state constitution. In *K. Gordon Murray Prod. Inc. v. Floyd*,[72] the Supreme Court of Georgia held the Atlanta motion picture censorship ordinance to be repugnant to that section of article I of the Georgia constitution which provides:

> No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty.[73]

These decisions illustrate the basic disagreements between the Supreme Court's position and that of specified state courts. The highest state courts of Pennsylvania, Ohio and Massachusetts have held motion picture censorship to offend the first and fourteenth amendments to the federal constitution: a viewpoint which a majority of the Court has yet to accept. Furthermore, the Pennsylvania, Oregon and Georgia Supreme Courts have invalidated film censorship on the ground that such exercise of prior restraint violates the liberty guaranteed to speech and press in their respective state constitutions. The anomaly of the Supreme Court's position is more clearly seen when it is realized that the speech and press provisions of the above state constitutions are similar in spirit, if not in language, to the guarantees accorded free expression in the first amendment to the Constitution.

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68. *Id.* at 95-96, 173 A.2d at 65.

69. PA. CONST. art. I, § 7.

70. City of Atlanta v. Twentieth Century-Fox Film Corp., 219 Ga. 271, 133 S.E.2d 12 (1963); Gordon Murray Prod. Inc. v. Floyd, 125 S.E.2d 207 (Ga. 1962). See City of Portland v. Welch, 367 P.2d 403 (Ore. 1961).

71. 367 P.2d 403 (1961). The Oregon Constitution states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." OREGON CONST. art. I, § 8.

72. 125 S.E.2d 207 (1962).

73. GA. CONST. art. I, § 1.

CONCLUSION

In effect, the *Freedman* Court reaffirmed the right of the state to require the advanced submission of all films to an administrative licensing system, but added the requirement that in administering the censorship procedure, the state has to insure that the finality of the censor's determination lies in a judicial determination.[74] The implication in *Freedman* is that judges, rather than censors, can impose a valid final restraint. Mr. Justice Douglas, joined by Mr. Justice Black, nevertheless "would have put an end to all forms and types of censorship and given full literal meaning to the command of the First Amendment."[75]

Despite the evidence that statutory censorship standards fail to meet the constitutional test of definiteness, that they are procedurally defective, and that the effect of film content as a source of anti-social behavior lacks verification in contemporary social science research, the Supreme Court's recent decision in *Freedman* perpetuates motion picture censorship in our society. Though the Court has limited the jurisdiction and operation of film censors, it has failed to give legal status to the motion picture equal to that of the other media. It is submitted that such status should be promptly recognized.

74. Freedman v. Maryland, 380 U.S. at 57-58.

75. *Id.* at 61. Two weeks after Freedman and concurrent with its ruling in the *Trans-Lux Distrib. Corp.* case the Court denied a petition for a writ of certiorari in a case which challenged the New York film licensing system, Gate Film Club v. Pesce, 236 F. Supp. 828, 339 F.2d 888 (1964), *cert. denied*, 85 S. Ct. 1023 (1965). Only Justice Douglas was of the opinion certiorari should be granted.