Constitutional Law - Freedom of Expression - Permissive Bounds of Prior Restraint of Movies

Roger Haydock

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Teitel Film Corporation, in accordance with the Chicago Motion Picture Ordinance, submitted two films for screening by Police Film Review Section, "Body of a Female" and "Rent-A-Girl." The films were refused licensing on the grounds of obscenity, whereupon Teitel Corporation requested the Motion Picture Appeal Board to review the rejection. After viewing the films and conducting hearings, the Board decided to uphold the Section's determination and, following the procedural steps of the ordinance, filed a complaint in the Circuit Court of Cook County seeking a permanent injunction against the public exhibition of the films. The trial court in similar memorandum opinions held the ordinance to be constitutional, found the films to be obscene, and granted the injunction. Thereupon, Teitel Corporation appealed to the Illinois Supreme Court which upheld the lower court's determination that the censorship act was constitutionally valid and that the films were not protected expression. On appeal, the United States Supreme Court, in a per curiam decision, reversed the Illinois court's findings, holding the ordinance to be unconstitutional on its face and as applied. The Supreme Court based the reversal on the precedent set in *Freedman v. Maryland* and decided that the statutory period for administrative censorship and the absence of a provision for a prompt judicial decision violated the procedural yardsticks of *Freedman* and the distributor's first and fourteenth amendment guarantees. *Teitel Film Corporation v. Cusack*, 390 U.S. 139 (1968).

*Teitel* leaves censorship law unchanged and merely reiterates and reaffirms the Supreme Court's holding in *Freedman*. The skeletal guidelines of movie review procedure promulgated by the *Freedman* opinion remain a constitutional model for censorship legislation.

In the instant case, Teitel Corporation asserted two constitutional propositions: the administrative and judicial time periods provided by the Chicago ordinance fell beyond any permissible constitutional prior restraint limitations; the same statutory time guidelines bore no resemblance to the procedural safeguards set down in the *Freedman* case. The Court in its brief decision accepted the validity of petitioner's second contention but did not discuss or analyze the constitutional precedents for the evolution of the *Freedman* case. Likewise, the Court, by passing over petitioner's first contention,

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3 Brief for Defendant at 3, 9, 10, *Cusack v. Teitel Film Corp.*, *supra* note 1.
failed to raise the implications and explications of the doctrine of prior restraint. Of first concern to this case note are these two glossed-over areas: prior restraint as a constitutional doctrine, and the history of movie censorship legislation and judicial review. Of second concern to this note is the feasibility and the desirability of legislative incorporation of the Freedman-Teitel Film guidelines into practical censorship legislation.

A principle constitutional doctrine limiting restriction of first amendment freedom of expression, inherently embodies the conflict between the notions of prior restraint and subsequent punishment. Whereas subsequent punishment is the subjection of individuals or publications to legal prosecution after the act, prior restraint is the legal suppression of material or its expression before publication. This constitutional theory, known as the doctrine of prior restraint, forbids the state or federal government from imposing any pre-publication proscription, with certain few exceptions, on any activity encompassed by the first amendment liberties. In operation, prior restraint acts as a procedural device to restrict the freedom to disseminate ideas.

Historically, prior restraint took the form of licensing and censorship acts. Many forms of such legislation were employed by the British in the sixteenth and seventeenth centuries in their attempts to protect the public security by proscribing certain modes and types of publication. Gradually, the British system of censorship and criminal libel depredated the liberties of Englishmen by the arbitrary suppression of all discussion and dissent unfavorable to the government. Consequently, in American constitutional history, the first amendment was designed to prevent the establishment of any similar pre-publication restraint. Freedom of expression became the rule; previous restraint became the exception.

The doctrine of prior restraint was first invoked as a constitutional tenet in Near v. Minnesota. A Minnesota statute provided for injunctive and contempt relief against anyone publishing obscene or defamatory material. The Court held the statute in operation and effect to be a form of censorship and an unconstitutional restriction on first amendment freedoms, commenting: "[I]f liberty of speech, and of the press, is . . . not an absolute right" and "the

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6 For an in depth discussion of previous restraint and first amendment theories, see Z. Chafee, FREE SPEECH in the UNITED STATES 9-31 (1954).

7 L. W. Levy, Legacy of Suppression 6-10 (1960).


9 Id. at 708.
protection even as to previous restraint is not absolutely unlimited." As instances of where a prior restraint would be constitutionally allowable, the Court noted four situations; "when a nation is at war," where the "primary requirements of decency" demand protection, when "acts of violence and the overthrow by force of orderly government" threaten community security, and where private rights require preservation.

In the ensuing years, the Supreme Court's involvement with prior restraint legislation encompassed many areas and embraced many constitutional liberties. One such area was movie censorship; one such liberty was the freedom of expression.

The Court has viewed the motion picture as a peculiar means of disseminating information and opinion distinct from other communicative modes. In 

*Joseph Burstyn, Inc. v. Wilson* the Court pointed out that it is a *non sequitur* that "motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." And more to the point, the Court in 

*Freedman v. Maryland*, observed that "The requirement of prior submission to a censor . . . is consistent with our recognition that films differ from other forms of expression." Because of this judicial angle of vision, the regulations placed on movie exhibitions are likewise peculiar. While books, newspapers, and other publications have escaped the tentacles of censorship legislation, movies fall within its restrictive grasp. In each instance of censorship regulation, the Court has attempted to mediate the inherent conflict between the censor's guardianship of the community morals and the individual's freedom to exhibit his expressions.

The beginnings of municipal censorship ordinances date back to the City of Chicago Ordinance of 1907, which provided for a censorship board and

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10 *Id.* at 716.

11 *Id.*


13 343 U.S. 495, 503 (1952).

14 *Supra* note 2, at 60, 61.

15 *Chicago, Illinois City Charter*, art. 5, cl. 5, (1907).
administrative proceedings to screen all films and to deny a license to those which violated the statutory standards of immorality, obscenity, and the portrayal of crime and violence. The thinking of the city council which prompted it to pass such legislation was based on a Judeo-Christian concern for the public welfare and morality. Such a prior restraint was a preventative piece of legislation aimed at reducing the supposed evil effects\textsuperscript{16} of immoral and obscene movies on society. The first judicial determination of the constitutionality of the ordinance bears witness to such a rationale:

The purpose of the ordinance is to secure decency and morality in the moving picture business and that purpose falls within the police power. . . . The welfare of society demands that every effort of municipal authorities to afford such protection shall be sustained, unless it is clear that some constitutional right is interfered with.\textsuperscript{17}

The Illinois court concluded that such legislation did not violate constitutional guarantees; but, contrarily, its existence afforded citizens and society protection by restraining and impeding abuse of constitutional liberties.

The United States Supreme Court first entered the field of judicial determination of the constitutionality of movie censorship in 1915 in \textit{Mutual Film Corporation v. Industrial Commission of Ohio},\textsuperscript{18} setting the precedent for the next thirty-seven years of film censorship laws. Holding that motion pictures are not within the constitutional protection encompassed by the first amendment, the Court stated, "The exhibition of moving pictures is a business pure and simple . . . not to be regarded . . . as part of the press of the country . . . ."\textsuperscript{19} Peripherally, the Court laid the basis of the state's right to enact censorship legislation on the two-tiered platform of the public welfare\textsuperscript{20} and the police power.\textsuperscript{21} The \textit{Mutual Film} decision stood as settled law until

\textsuperscript{16}Infra note 81.

\textsuperscript{17}Block v. City of Chicago, 239 Ill. 251, 258, 87 N.E. 1011, 1013 (1909). The films condemned in \textit{Block} were entitled "The James Boys" and "Night Raiders," neither of which the court spoke highly of: "Pictures which attempt to exhibit that career necessarily portray exhibitions of crime, and pictures of the 'Night Raiders' can represent nothing but malicious mischief, arson and murder. These are both immoral and their exhibition would necessarily be attended with evil effects upon youthful spectators." Id. at 265, 87 N.E. at 1016. Such early twentieth century legislative and judicial concern centered around the twin evils of violence and pornography. Modern enforcement of censorship legislation attacks only the one standard of obscenity. See \textit{Ira H. Carmen, Movies, Censorship, and the Law} 181 (1966). Such current exclusive concern prompted one anonymous poet to exclaim: "This film is under official ban because the hero has uttered damn well, we will go to see another, and watch a gangster shoot his mother." \textit{R. W. Haney, Comstockery in America} 117 (1960).

\textsuperscript{18}236 U.S. 230 (1915).

\textsuperscript{19}Id. at 244.

\textsuperscript{20}Id. at 242.

\textsuperscript{21}Id. at 244.
1948 when in *United States v. Paramount Pictures, Inc.* the Court, by way of dictum, indicated that motion pictures did fall within the scope of first amendment guarantees.\(^{22}\) Four years later *Burstyn*\(^ {23}\) expressly adopted that very proposition.

"Whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of 'speech' or 'the press'" was the issue in contention in *Burstyn*.\(^ {24}\) Reversing *Mutual Film*, the Court declared that movies are "a form of expression whose liberty is safeguarded by the First Amendment."\(^ {25}\) The conclusion that motion pictures are constitutionally protected necessarily raised the issue of prior restraint; and, while the Court held that freedom of expression is the general rule, it did not "follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."\(^ {26}\) Opening the door to the necessity for future decisions, the Court concluded that "it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."\(^ {27}\)

Nine years later the Court, in *Time Film Corporation v. City of Chicago*, faced the issue of whether the first and fourteenth constitutional guarantees "includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture?"\(^ {28}\) Justice Clark, in the opinion, cited *Near v. Minnesota*\(^ {29}\) and *Burstyn v. Wilson*\(^ {30}\) for the constitutional doctrine that first amendment freedoms are not absolute nor are prior restraints absolutely prohibited, and then summarily concluded that prior restraint movie censorship procedure is not per se unconstitutional.\(^ {31}\) The four dissenting justices\(^ {32}\) took issue with the majority on the basis that the case presented approval of "unlimited censorship of motion pictures before exhibition through a system of administrative licensing."\(^ {33}\) They further felt that total lack of

\(^{22}\) 334 U.S. 131, 166 (1948). "We have no doubt that motion pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."

\(^{23}\) 343 U.S. 495 (1952).

\(^{24}\) *Id.* at 501.

\(^{25}\) *Id.* at 501, 502.

\(^{26}\) *Id.* at 502.

\(^{27}\) *Id.* at 505, 506.


\(^{29}\) *Supra* note 8.

\(^{30}\) *Supra* note 23.

\(^{31}\) *Supra* note 28.

\(^{32}\) Chief Justice Warren and Justices Black, Douglas, and Brennan.

\(^{33}\) *Supra* note 28, at 50.
judicial proceedings was violative of the first amendment guarantees because “The delays in adjudication may well result in irreparable damage [to free communication], both to the litigant and to the public.” The *Times Film* case conclusively settled the haggled constitutional question of the validity of movie censorship per se, but the Court offered no standards or any criteria as to what type of censorship legislation sufficiently safeguarded constitutional rights.

In the absence of applicable norms, state legislatures formulated a variety of procedural hodgepodges to restrain the distribution of obscene material in the name of censorship and constitutional prior restraint.

Missouri adopted a statute which allowed a police officer to obtain, at his discretion, a warrant to search for and seize publications, which provided for the warrant to be issued in an *ex parte* proceeding without any hearing on or viewing of the alleged obscene material by the judge, and which required a hearing to be held within twenty days after seizure to determine obscenity. A petitioner’s contention that such legislation was violative of his constitutional guarantees because of the lack of notice and of a pre-restraint hearing was supported in *Marcus v. Search Warrant* by the Court which held that procedure breached the first amendment protection afforded to non-objectionable material. As to what type of procedural safeguards the constitutional guarantees require, the Court was not explicit; but it did make reference to *Kingsley Books, Inc. v. Brown* and the statutory provisions therein.

The New York statute involved in *Kingsley* allowed certain public officials to maintain an action for an injunction to prevent the sale or distribution of any publication of an indecent character. Thereafter, the individual or corporation enjoined was entitled to a trial of the issues within one day after joinder and to a decision by the court within two days after the trial concluded. The Supreme Court found the procedure provided adequate notice to the distributor, a fair determination of the issue, and a prompt judicial hearing, all of which guaranteed the constitutional protection non-objectionable material demands. The Court noted an analogy between a penal obscenity statute and the injunctive statute; in each case, the law moves after publication, and, in each situation, the distributor has notice that the further sale of the alleged objectionable material would subject him to penal consequences.

Rhode Island created a commission “to educate the public concerning any book . . . or other thing containing obscene, indecent, or impure language,

34 Id. at 73.
37 Id. at 442-43.
or manifestly tending to the corruption of youth . . . and to investigate and recommend the prosecution of all violations of said sections. In practice, the Commission would notify a distributor that certain books or magazines distributed by him were reviewed and declared objectionable under the statute and requested him to cooperate or face prosecution. In *Bantam Books, Inc. v. Sullivan*, a case testing the procedure's constitutionality, the Court began by stating that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," and noted that the procedure provided no assurance that protection would be afforded to non-obscene matter. The Court concluded that although the statute attempted to restrict harmful publications from the minds of youths, the cooperation the commission requested invariably caused complete suppression of the material among adults also, restricting their literary diet to what was fit for children.

During this same period of Supreme Court activity with censorship legislation, state courts also responded to similar issues. In *City of Portland v. Welch*, the Oregon Supreme Court held that the Oregon constitution prohibits any type of prior restraint on free speech or press; likewise, the Supreme Court of Georgia, in *K. Gordon Murray Productions, Inc. v. Floyd*, held a prior restraint act violative of the freedom of expression provision in the state constitution.

After the *Times Film Corporation v. City of Chicago* decision in 1961, the Chicago Movie Censorship Act was immediately challenged on the ground that its procedural structure violated constitutional guarantees. In *Zenith International Film Corporation v. City of Chicago*, the district court passed

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39 *Supra note 38*, at 70.
41 Ore. Const. art. I, § 8: "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."
42 217 Ga. 784, 125 S.E.2d 207 (1962).
43 Ga. Const. art. I, § 1, par. 15: "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 . . . ."

Teitel Corporation contended that Art. II, § 4 of the Illinois Constitution prohibited any prior restraint of expression: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty . . . ." Teitel Corporation asserted, "... if the language of the Illinois Constitution is to mean anything whatsoever, it cannot be construed to allow a prior restraint such as is imposed by the challenged Chicago Ordinance." Brief for Appellants at 21, *Cusack v. Teitel Film Corporation, supra* note 1. The Illinois Supreme Court rejected that argument and held that prior restraint does not violate any constitutional guarantees of the Illinois Constitution.

44 *Supra note 28*.
45 291 F.2d 785 (1961).
directly on the issue of municipal administration of prior restraint. The guidelines of the licensing act in question provided for a review of all films by the police department and for appeals to be taken to the mayor. The court in its decision systematically listed the following as impairments of the exhibitor's constitutional rights: lack of a full and fair hearing on the standing of the film allowing no opportunity for the exhibitor to be heard or to present evidence of contemporary community standards, the screening of the film as a whole by only one review board in the entire administrative procedure, the lack of standards for the film review board, the absence of a de novo hearing before the mayor, the lack of structural appellate process to the mayor, and a failure to indicate on what grounds the films were rejected.\textsuperscript{46} In response to these judicial objections, the City Council of Chicago revised the censorship ordinance. The amended ordinance provided for a Film Review Section under the supervision of the superintendent of police, a Motion Picture Appeal Board composed of experts in the social and literary fields, and time guidelines within which the administrative process must proceed.\textsuperscript{47}

Three years later, the Supreme Court handed down the \textit{Freedman v. Maryland} decision,\textsuperscript{48} the precedent cited as controlling in the instant case. Petitioner challenged the constitutionality of the Maryland Motion Picture Censorship Statute by arguing that such a licensing procedure presented "a danger of unduly suppressing protected expression" by the allowance of little or late judicial review.\textsuperscript{49} After discussing the statute's format and applying it to the case at hand, the Court decided that "risk of delay is built into the Maryland procedure,"\textsuperscript{50} and concluded:

Applying the settled rule of our cases, we hold a non-criminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.\textsuperscript{51}

Subsequently delineating such censorship safeguards, the Court laid down the procedural requirements: the burden of proving that the film is unprotected expression must rest with the censoring board; the censor's determination

\textsuperscript{46} Id. at 790.
\textsuperscript{48} 380 U.S. 51 (1965).
\textsuperscript{49} Id. at 54.
\textsuperscript{50} Id. at 55. The Court went on, "... as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months, and final vindication of the film on appellate review, six months."
\textsuperscript{51} Id. at 58.
must not be considered a final decision; only a judicial determination can validly impose a final prior restraint; the exhibitor must be assured that within a definite brief period of time the censor will either issue a license or go to court to attempt to restrain the showing of the film; a prompt judicial decision must be guaranteed; and any restraint prior to judicial hearing must be brief and limited to preservation of the status quo. The Court then proceeded to apply these criteria to the Maryland statute and found it wanting as a valid constitutional prior restraint and added, "We do not mean to lay down rigid time limits or procedures, but to suggest considerations in drafting legislation . . .," and further, "how or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the state to decide. But a model is not lacking: Kingsley Books, Inc. v. Brown." Noting the New York injunctive procedure, the Court highlighted its requirement of a judicial decision prior to any restraint and a brief period of time allowed from a hearing to a judicial decision.

In the ensuing years, the Freedman decision stood without employment by the Supreme Court. However, state and lower federal courts applied the applicable procedural standards to various censorship acts. The Maryland Supreme Court reviewed the Maryland statute after revision by the legislature and held the act constitutional when construed in the light of the Freedman holding. The new enactment provides for a Review Board decision within five days after submission of the film. If the film is not approved, the Board must send notice to the exhibitor and apply for a judicial determination within three days. The circuit court is then required to hold a hearing and view the film not later than five days after the complaint is filed, and to hand down a decision within two days after the hearing. Should the court uphold the censor's decision, the exhibitor may resort to the Court of Appeals, such appeal being advanced to the earliest practical date on the court docket. The total administrative process consumes only eight days, and the maximum time allowed for a final judicial declaration is only fifteen days after submission of the film for review. Further, by giving priority on the court dockets to such cases the appellate process is accelerated.

The district court in Interstate Circuit, Inc. v. City of Dallas held a
Dallas censorship act unconstitutional. The ordinance provided for classification of films as suitable or non-suitable for persons under eighteen years of age. Its procedural format required the exhibitor to file a proposed classification of the film with the review board. If the board, contrary to the exhibitor's proposal, refused to license the film, the exhibitor within two days after such order could file a notice of non-acceptance. Thereafter, it became the duty of the board to apply for prompt adjudication. If no injunction was issued within fifteen days after the filing of the notice, the board's initial determination would be suspended. The court found the requirement of "prompt adjudication" too vague and indefinite to ensure exhibitor's right to a speedy determination of the issues.

Thirteen days after this decision, the City of Dallas amended the ordinance in issue, the procedural constitutionality of which was upheld in Interstate Circuit, Inc. v. City of Dallas.\textsuperscript{59} The revised ordinance retained the classification and filing procedure but added and changed certain time restrictions. If the censoring board fails to act within five days after receipt of the exhibitor's classification proposal, the classification is considered approved. If the board denies the proposal and the exhibitor files a notice of non-acceptance, the board must seek an injunction, which must be granted within ten days after the notice or the board's order is suspended. If the injunction is granted and the exhibitor appeals, the board must reply within five days and join in the petitioner's request to advance the cause on the court's docket.\textsuperscript{60} After analyzing the ordinance, the court remarked: "It seems obvious that this procedure complies with the standards established in Freedman, with the only possible objection being the length of time necessary to get a final adjudication on the merits."\textsuperscript{61} The court resolved this last problem by noting that, though the city cannot manipulate court dockets, the Texas courts have made it a practice to advance such cases and that a final judgment could be obtained from the Texas Supreme Court within thirty-five days, that being sufficient speed to satisfy Freedman's requirements.\textsuperscript{62}

After the Supreme Court propounded the Freedman guidelines, the City of Chicago amended its censorship ordinance to comply with the procedural safeguards.\textsuperscript{63} It was this revised ordinance which Teitel Corporation tested for constitutionality in the instant case. Teitel Corporation's assertion that

\textsuperscript{59} 366 F.2d 590 (1966).
\textsuperscript{60} DALLAS, TEXAS, MUNICIPAL CODE, ch. 46A (1965).
\textsuperscript{61} Supra note 59 at 600.
\textsuperscript{62} The dissenting judge maintained that the thirty-five day period was not guaranteed by statute or court rule, but merely by court practice; and the absence of such an explicit guarantee made the classification statute violative of the exhibitor's constitutional rights. Id. at 609.
\textsuperscript{63} CITY COUNCIL PROCEEDINGS OF CHICAGO 4263 (1965).
the time allowed for film review was unconstitutionally excessive was evidenced by the municipal bifurcated scheme consuming fifty-eight days at the maximum before a final judicial proceeding could begin and by the city's inability to control the dockets of the state courts to require prompt judicial decisions once the judicial hearings had begun.\(^6\) In defense of the procedural aspects of the ordinance, the city argued that *Freedman* did not lay down a rigid timetable for licensing motion pictures but only substantive due process requirements. The city emphasized that in accordance with *Freedman* the local government was to structure the specific time limits of the censorship process and went on to show good faith compliance with the *Freedman* decision. The ordinance placed the burden of proof on the censor, allowed immediate appeal of the censor's decision, ensured a reasonably prompt final judicial hearing, and provided for review of films by experts in the social and literary arts whose judgment assured a high degree of good faith licensing.\(^6\)

On appeal, the Illinois Supreme Court upheld the constitutional procedural

\(^6\) The Circuit Court of Cook County has a rule, General Order 3-3, which provides that a hearing on an injunction pursuant to the Censorship Ordinance be held within five days after the filing of a responsive pleading. The rule was not invoked in the instant case because of the manner of pleadings of the parties. Brief for Teitel Film Corporation at 7, Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968). The United States Supreme Court pointed out in a footnote that "[c]omments of the trial judge in this case suggest doubt whether the trial court regarded compliance with this rule to be mandatory." *Supra* note 3, at 140.

\(^6\) The procedural text of the ordinance at issue read:

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the City any picture or series of pictures . . . without first having secured a permit therefore from the superintendent of police.

It shall be unlawful for any person to lease or transfer or otherwise put into circulation, any motion picture plates, films . . . to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefore from the superintendent of police . . .

155-2. Before any such permit is granted, an application in writing shall be made therefore to the superintendent of police, and the . . . films . . . shall be shown to the superintendent of police, who shall inspect such . . . films . . . or cause them to be inspected by the Film Review Section herein provided for, and within three days after such inspection he shall either grant or deny the permit . . .

155-7. There is hereby created a Motion Picture Appeal Board . . . Within seven days after rejection by the superintendent of police, the applicant may file a written request with the Motion Picture Appeal Board for review of the decision of the superintendent . . . The Board shall review the picture in its entirety within fifteen days of receipt of said request for review. Within fifteen days after reviewing the picture and before any determination is made by the Board, the exhibitor, his agent or distributor seeking the permit on review shall be given an opportunity to present testimony and statements or arguments in support of the exhibition of said film. Within five days after the hearing, the Board shall serve written notice of its ruling upon the applicant . . .

155-7.2. In the event the Motion Picture Appeal Board affirms the decision of the superintendent of police in rejecting a motion picture, the Board, within ten days from the hearing, shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film . . . *CHICAGO, ILL. MUNICIPAL CODE* ch. 155 (1965).

While the instant suit was pending in the Illinois Supreme Court, the City Council of Chicago amended section 155-2 to read that the superintendent must inspect the films within three days of receipt.
aspects in light of *Freedman* and the first and fourteenth amendment guarantees. After citing the *Freedman* guidelines and the structure of the city ordinance, the court, without much detailed analysis, held:

After careful consideration, however, we find it unnecessary to resolve the question of whether plaintiffs or the defendants caused all of the delay. We look rather to the ordinance itself, in the light of *Freedman* and subsequent cases, and conclude that the administration of the Chicago Motion Picture Ordinance violates no constitutional rights of the defendants.

The United States Supreme Court disagreed with these conclusions. On appeal, the issue was "whether the Chicago Motion Picture Ordinance is unconstitutional on its face and as applied." The Court cited *Freedman* and emphasized by italics the specific guidelines; one, "that the censor will within a specified brief period, either issue a license or go to court..."; and, two, the assurance of a "prompt final judicial decision" by the trial court. The Court felt the Chicago ordinance violated these standards, because the fifty to fifty-seven days provided for administrative review did not assure a specific brief period within which the censor will act, and because of the absence of a provision for a prompt judicial trial and determination. Simply interpreted, the Court reiterated its position in *Freedman* and declared that these two aspects of the city ordinance surpassed the procedural limitations of prior restraint and violated the distributor's first and fourteenth amendment guarantees.

*Teitel Film* did not sound the death knell for movie censorship in Chicago. Two months after the instant decision, the City Council of Chicago passed an amended censorship ordinance. Responding to the Court's objections, 69 *Supra* note 1.

67 *Id.* at 63, 230 N.E.2d at 247. The elapsed administrative time for "Rent-A-Girl" was 68 days, while that for "Body of a Female" was 190 days. The elapsed total time between receipt of the film by the censors and issuance of a final permanent injunction by the Illinois Supreme Court was nine months and eleven months respectively. 68 *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

69 *Id.* at 141.

70 *CITY COUNCIL PROCEEDINGS OF CHICAGO* 2404 (March 20, 1968).

The revised provisions of the amended ordinance read:

155-1 . . . It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures . . . without first having secured a permit therefor from the Superintendent of Police. . . . The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code. . . .

All films exhibited to an audience comprised solely of persons eighteen years of age or older may be exhibited without inspection and no permits or fees shall be required therefor.

155-2. Before any such permit is granted, an application in writing shall be made therefor to the Superintendent of Police and the . . . picture or series of pictures . . . shall be shown . . . to the Superintendent of Police, who shall within two days of receipt inspect
the City Council made the Police Board's decision automatically reviewable by the Motion Picture Appeal Board and reduced the total administrative review period to seventeen days, allowing for the initial judicial hearing two and one-half weeks after submission of the film to the licensing board. The Council went beyond the Freedman-Teitel Film safeguards and fashioned a new classification scheme. The new act requires licensing only of those motion pictures to be exhibited before the general public. The ordinance operates as a limited censoring system whereby only films directed at children seventeen years of age or younger must be reviewed and judged licenseable on the sole standard of obscenity. Only future litigation will determine whether such legislation conforms to the Supreme Court's procedural guidelines. However, a present discussion can appraise the newly enacted procedures and analyze the feasibility and desirability of such prior restraint legislation.

Whether the procedural changes in the new act obviate the defects of the prior ordinance is an arguable proposition. The Supreme Court declared the prior ordinance fatally defective on two counts, an excessively long administrative review period, and, the absence of a guarantee for a prompt judicial order. The new ordinance provides for a shorter administrative procedure but does not provide any assurance of a reasonably immediate court decision.

Whether the seventeen day review period conforms to the Supreme Court's notion of constitutional brevity is doubtful. While constitutional guarantees cannot be measured in time sequences, two and one-half weeks may be too long a suppression of constitutionally protected film. In Freedman, the Court held out as a model the New York injunctive procedure which provided for a judicial hearing one day after joinder and for a judicial decision two days after the hearing. In Trans-Lux Distributing Corp. v. Maryland Board of Censors, the Maryland Supreme Court found an eight day administrative period within the bounds of Freedman. In Interstate Circuit, Inc. v. such . . . picture or series of pictures, or cause them to be inspected within two days of receipt by the Film Review Section . . . and forthwith shall either grant or deny the permit. . . .

155-5. It shall be the duty of the Superintendent of Police to refuse to issue such permit if the picture, considered as a whole, is obscene when viewed by children. The term "children" means any person less than eighteen years of age. . . .

155-7.1. . . Within seven days after rejection by the Superintendent of Police, the Motion Picture Appeal Board shall meet to review the decision of the Superintendent. . . . Within three days after the Board's meeting, the Board shall serve written notice of its ruling upon the applicant. . . .

155-7.2. In the event the Motion Picture Appeal Board affirms the decision of the Superintendent of Police in rejecting a motion picture, the Board, within three days from the hearing, shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film. CHICAGO, ILL., MUNICIPAL CODE, ch. 155 (1968).

71 See text between footnotes 50 and 52.

72 Supra note 56.
City of Dallas, the Federal Court of Appeals declared a nine day administrative procedure a sufficient compliance with the Freedman yardsticks. As a practical matter, adequate administrative review of a motion picture can readily take place in a matter of days, five at the most, under an efficient censoring procedure. Ultimately, the failure to provide for a brief administrative period coupled with the absence of a guarantee for a prompt judicial order must render the new Chicago ordinance fatally defective, on the same grounds Teitel Film found the prior ordinance constitutionally void.

To remedy this legislative quandary, the city can revise the new enactment to afford a five day administrative time period but cannot, on its own, assure the promptness of judicial proceedings. It must seek the cooperation of the judiciary. Courts at both the trial and appellate levels must make it a practice to manipulate their dockets giving priority to censorship cases. In Trans-Lux Distributing Corp. v. Maryland Board of Censors, a statute provided for the advancement of censorship cases on the court schedules. In Interstate Circuit, Inc. v. City of Dallas, the state courts voluntarily advanced such causes. Until the Illinois courts agree to advance censorship cases, long periods of decisional delays will result, subjecting non-obscene motion pictures to first amendment infringement.

Of final concern to this case note is a statutory proposal for practical censorship legislation designed to replace the constitutionally abusive administrative systems. Recommendations for prospective censorship enact-

73 Supra note 59.
74 In the past, the Illinois courts have not juggled their dockets to accommodate censorship cases. Supra notes 1, 64 and 67.
75 Supra note 56.
76 Supra note 59.
77 Censorship of obscene motion pictures is constitutionally allowable and legislatively accepted in a number of states and municipalities.

On a municipal level, the number of cities with censorship ordinances is uncertain. Various surveys conclude with different results: a 1954 investigation discovered 60 communities with censorship regulation, a 1957 survey showed less than twenty cities with similar legislation, and a third study concluded that fifty municipalities licensed films. But all the investigations agreed that most cities reviewed films haphazardly; only a handful of cities systematically enforce censorship ordinances on a daily basis. IRA H. CARMEN, MOVIES, CENSORSHIP, AND THE LAW 184-86 (1966).

On a state level, four states currently provide by statute for movie censorship regulation: Florida (FLA. STAT. § 521.01-03 (1955)), Louisiana (LA. REV. STAT. § 4:301-4:307 (1950)), Maryland (MD. ANN. CODE art. 66A, § 1-26 (1965)), New York (N.Y. EDUC. LAW § 120-32 (McKinney 1953)). For a detailed and thorough analysis of the operation of such ordinances and statutes see IRA H. CARMEN, supra.

On the federal level, two statutes incorporate the prior restraint-censorship procedure: 18 U.S.C. § 1462 prohibits the importation of obscene material into the country and 18 U.S.C. § 1461 prevents obscene films from being shipped through interstate commerce or through the mails. Under both provisions, the determination of obscenity is decided by an administrative screening procedure.
ments are not wanting. Justice Brennan speaking for the Court in *Jacobellis v. Ohio*78 remarked:

We recognize the legitimate and indeed exigent interest of states and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to "reduce the adult population . . . to reading . . . what is fit for children. . . ." State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.79

In an earlier pronouncement, the Court acknowledged that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression."80 Analogously, much censorship legislation has been prompted by a community consensus that a cancerous cause and effect relation exists between obscene films and youthful immorality.81 Chicago's newly passed ordinance bears witness to such a conclusion. These judicial and social expressions give rise to the thesis that movie censorship is only practical when directed at youthful audiences.82


78 378 U.S. 184 (1964).

79 Id. at 195.

80 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). A state supreme court justice best explicated the rationale of such a conclusion: "In these times of alarming rise of juvenile delinquency and of increasing criminality in this country, attributed by social agencies, at least in part, to the character of the exhibitions put on in the show houses of the country, criminal prosecution after the fact is a weak and ineffective remedy to meet the problem at hand." *Superior Films, Inc. v. Dept. of Educ.*, 159 Ohio St. 315, 328, 112 N.E.2d 311, 318 (1953).

81 Whether the community's recognition that obscene material induces immoral or criminal behavior is a valid thesis remains statistically debatable. There exists no correspondingly conclusive consensus among psychologists, sociologists, and other social scientists and their investigations and studies. See generally MURPHY, *CENSORSHIP: GOVERNMENT AND OBSCENEY* 131-51 (1960); Giglio, *Prior Restraint of Motion Pictures*, 69 DICK. L. REV. 379 (1965); compare concurring opinion of Justice Douglas in *A Book Named "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 431-32 (1966), with the dissenting opinion of Justice Clark in the same case at 452-53. While statistically and authoritatively there is debate, from an educational viewpoint obscenity is harmful. Impressionable children and maturing adolescents feed and grow on what they read and see. Should their literary and recreational diet include perverse, immoral, and pornographic materials, these publications will necessarily effect the thinking and actions of youths, which effect, if uncontrolled will lead to the harmful consequences of perversiveness and immorality.

82 See generally, Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149 (1967); Note, "For Adults Only": The Constitutionality of Governmental Film Censorship By Age Classification, 69 YALE L. J. 141 (1959).
Present legislation now exists on which a proposed censorship act can be modeled. Such legislation is of two types: injunctive remedies guaranteeing prompt judicial hearings; and, classification schemes effectively protecting non-objectionable material. Exemplificative of a practical injunctive process, New York has enacted a statute which enables public officials to bring an injunctive action to restrain the dissemination of objectionable publications; the person enjoined is entitled to a trial on the issues one day after joinder and to a judicial decision two days after the trial. Florida has adopted a statute applying the New York scheme to motion picture restraint. The statute provides for a state attorney to obtain an injunction against the pending exhibition of an objectionable film; the person enjoined is allowed a trial on the issue one day after joinder. Illustrative of the classification system, the cities of Dallas and Chicago have passed limited procedures narrowing the scope of censorship to films accessible to children under the age of eighteen. The preceding analysis coupled with the Freedman-Teitel Film safeguards presents suggestions for the constitutional make up of prospective censorship enactments. The proposed legislation should incorporate these drafting guidelines.

On the municipal level, a practical ordinance would operate as a legislative hybrid, containing elements of both the injunctive process and the classification system. Under its provisions, a city attorney would be permitted to bring an injunctive action against the pending exhibition of an obscene film only if the exhibitor sought to show the movie to the general public; the person enjoined would be entitled to a trial on the issue of obscenity three days after joinder and to a judicial determination two days after the trial. The implementation of such an ordinance would require the cooperation of the judiciary to juggle their dockets to give priority to such cases.

On the state level, a viable statute would act in a similar manner, again incorporating provisions of both the injunctive and classification procedures. Under its provisions, a state attorney would be allowed to obtain an injunction against the pending exhibition of an obscene movie if the exhibitor sought to show the movie to adults and children alike; the person enjoined would be entitled to a trial on the issues one day after joinder and to a judicial decision two days after the trial ended.

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83 See text between footnotes 36 and 37.
85 See text between footnotes 59, 62, 70 and 71.
86 The additional three days in the municipal scheme allows for a greater latitude of
The above proposed censorship legislation would operate as a prior restraint within the bounds of the Freedman-Teitel Film guidelines. Such an enactment would provide for the suppression of objectionable motion pictures before their exhibition while affording non-objectable films a high degree of constitutional protection. While such a proposal does not obviate all the pitfalls of a censorship system, it minimizes such hazards and strikes a balance between the public's right to constitutional protection from the abuses of liberties and the individual's freedom to express himself.\textsuperscript{87} Inherent in any censorship system are dangers of the infringement of first amendment guarantees, but that is the risk to be perceived by governmental bodies who employ a prior restraint on the dissemination of objectionable materials.

Legislatures are not without avenues of approach to the social evil of toxic publications and films. Post-publication penal statutes criminal in nature,\textsuperscript{88} classification systems, injunctive proceedings in rem or in personam, administrative censorship, all present constitutional alternatives, some more viable than others. But, in the implementation of any one or more of these schemes, legislators and censors must not lose sight of the extra-constitutional proposition that "law can discover sin, but not remove."\textsuperscript{89}

Roger Haydock

\textsuperscript{87} The advantages of such an injunctive-classification scheme are many: Not every exhibited film is subject to a previous restraint, only those motion pictures to be shown to adults and children alike. Secondly, the adults' first amendment liberties are not violated by the proposed scheme, only the children's freedom of viewing is curtailed, and justifiably so in light of the harmful effects of obscene material. Thirdly, the bureaucratic administrative process is eliminated in favor of a guaranteed prompt and efficient judicial procedure. Lastly, an attorney, schooled in legal and social doctrines, rather than a civil censor, usually insensitive to the community pulse, takes the first censorship step.

\textsuperscript{88} For a proposal for revised criminal statutes for the dissemination of objectionable material to children and adults see, R. H. Kuh, FOOlish FIGleaves 249-268 and 290-316 (1967).

\textsuperscript{89} JOHN MILTON, PARADISE LOST XII, 1.290.