"FOR ADULTS ONLY": THE CONSTITUTIONALITY OF GOVERNMENTAL FILM CENSORSHIP BY AGE CLASSIFICATION*

RESTRICTION of the area of constitutionally permissible film censorship in a period of mounting concern with juvenile behavior and attitudes [1] has prompted interest in age classification—licensing particular motion pictures for exhibition only to persons above a specified age. Although the Supreme Court has never held prior restraint per se unconstitutional,[2] it has, on various grounds, declared invalid every system or application of motion picture censorship which it has had occasion to consider [3] since categorizing the motion picture as a form of expression protected by the first and fourteenth amendments.[4] Such categorization and application of a stringent due-process test of vagueness to any licensing statute which may permit infringement of free communication are the cornerstones of the doctrinal structure erected in censorship cases.

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*Paramount Film Distrib. Corp. v. City of Chicago, 172 F. Supp. 69 (N.D. Ill. 1959).

1. See, *e.g.*, N.Y. Times, Aug. 25, 1959, p. 1, col. 8; *id.*, Aug. 31, 1959, p. 1, cols. 2-3; *id.*, Sept. 1, 1959, p. 1, cols. 7-8; *id.*, Sept. 3, 1959, p. 1, col. 5; Life, Sept. 9, 1957, p. 47.

2. See Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957) ("[T]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test."); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959).

3. *Ibid.*; Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957) (per curiam); Holmby Prods., Inc. v. Vaughn, 350 U.S. 870 (1955) (per curiam); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) (per curiam); Commercial Films Corp. v. Regents of the Univ. of the State of N.Y., 346 U.S. 587 (1954) (per curiam); Gelling v. Texas, 343 U.S. 960 (1952) (per curiam).

4. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). *Burstyn* was foreshadowed by United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), in which the Court in dictum said, "moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *Id.* at 166. Previously, in Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915), the Supreme Court, in holding that motion picture censorship did not violate the free speech provisions of the Ohio constitution, considered film exhibition "a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as organs of public opinion." *Id.* at 244. The *Mutual* Court did not consider whether the Ohio statute violated the federal constitution, perhaps since the first amendment was not held to apply to the states through the fourteenth amendment until Gitlow v. New York, 268 U.S. 652 (1925).

Burstyn reversed the New York decision, 303 N.Y. 242, 101 N.E.2d 665 (1951), which had upheld N.Y. EDUC. LAW § 122. The statute, which forbade the exhibition of "sacrilegious" films, was held to be an unconstitutional restraint on free speech because "the state has no legitimate interest in protecting any or all religions from views distasteful to them," 343 U.S. at 505, and because of the "broad and all inclusive definition of 'sacrilegious,'" *id.* at 504.

The Court has invalidated general licensing statutes, apparently as unconstitutionally vague,[5] whose standards include: "prejudicial to the best interests of the people,"[6] "sacrilegious,"[7] "harmful,"[8] "immoral . . . [and may] tend to corrupt morals,"[9] and "obscene, indecent, and immoral, and such as tends to debase or corrupt morals."[10] Yet *Roth v. United States*[11] held "obscenity" unprotected speech and a definite enough criterion to support a postcommunication penalty. But the Supreme Court has repeatedly avoided decision on whether "obscenity" would be a valid standard for prior restraints.[12] The unwillingness of the Court squarely to decide whether prior restraints are necessarily unconstitutional and its apparent inability to agree upon workable standards or procedures for identifying censorable material have recently been vividly demonstrated.[13]

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5. Because most of these decisions were rendered per curiam, the basis of the Court's action can only be gleaned from a somewhat speculative analysis of the citations given in each case, and it is possible that some of the statutes may have been invalidated not because of vagueness, but because they infringed on first amendment areas. Or, the two tests may be intertwined. See note 64 *infra* and accompanying text.

6. Gelling v. Texas, 343 U.S. 960 (1952) (citing *Burstyn* and Winters v. New York, 333 U.S. 507 (1948)).

7. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

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

9. Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y., 346 U.S. 587 (1954) (decided in one per curiam opinion with *Superior Films*).

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

Additionally, the Court has held application of "immoral and obscene" to *Game of Love* invalid on the ground that as a matter of law the picture was not obscene.

Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957). Since "obscene," if properly applied, is constitutionally definite, Roth v. United States, 354 U.S. 476 (1957), and the Court did not cite *Winters, Burstyn,* or *Superior Films,* it is unlikely that the *Times Film* standard was vague.

11. 354 U.S. 476 (1957).

12. "The area of permissible restraint in this field remains somewhat cloudy." Kingsley Int'l Pictures v. City of Providence, 166 F. Supp. 456, 461 (D.R.I. 1958); see Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505-06 (1952).

13. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., *supra* note 12, held unconstitutional N.Y. EDUC. LAW § 122(a), which required the denial of a license to any film which "portrays acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior." Mr. Justice Stewart, writing for Mr. Justice Brennan and Mr. Chief Justice Warren as well, reached the conclusion of unconstitutionality by finding that the statute condemned the advocacy of an idea—in the film at bar (*Lady Chatterly's Lover*), that adultery can sometimes be acceptable or proper behavior. 360 U.S. at 688. Justices Black and Douglas, concurring, would have struck the statute on the broad ground that all forms of prior restraint are prohibited by the first amendment. *Id.* at 697. Although only two Justices assumed this position, plaintiff's attorney relied on it very heavily both on brief and oral argument. Brief for Appellant, pp. 10-24; N.Y. Times, April 24, 1959, p. 23, col. 7. Mr. Justice Clark, concurring, would have found unconstitutionality on the ground of vagueness and the authority of *Burstyn.* 360 U.S. at 702. Justices Harlan, Whittaker and Frankfurter, accepting the interpretation of the New York Court of Appeals, *id.* at 706; see 4

The Court's repeated disapproval of tests employed by the states, the indefiniteness of the judicially approved standard "obscenity,"[14] and the extraordinary practice of individual Justices making "a purely personal determination . . . as to whether a particular picture viewed is too bad to allow it to be seen by the public"[15] have, as a practical matter, resulted in the invalidation of adult film censorship. Without clearly articulated and reasonably fixed standards, states cannot have the foreknowledge essential to an operationally meaningful licensing system. Thus, a number of governmental units are considering age classification legislation as a replacement for general film censorship.[16]

N.Y.2d 349, 356, 151 N.E.2d 197, 200, 175 N.Y.S.2d 39, 44 (1958), read the statute to require either obscenity or incitement to illegal behavior, rather than abstract expression of opinion. They preferred to uphold the statute, but would have declared it unconstitutional as applied to *Lady Chatterly's Lover* because, after viewing the film, they found it not obscene. 360 U.S. at 708.

14. See Roth v. United States, 354 U.S. 476, 496 (concurring opinion of Harlan, J.), 508 (dissenting opinion of Douglas, J.) (1957); *cf.* 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 208-210 (1947). See generally Kaplan, *Obscenity as an Esthetic Category*, 20 LAW & CONTEMP. PROB. 544 (1955).

15. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 688, 691 (1959) (concurring opinion of Black, J.).

16. Maryland recently enacted censorship legislation (effective June 1, 1959) which provides for a $100 fine and 30 days in jail for exhibitors of films thought "obscene" as to children under 18. MD. ANN. CODE art. 27, § 418A (Supp. 1959). The bill has been called "impractical" and a "real menace." Variety, May 13, 1959, p. 21, col. 1. In Ohio, bills were introduced during the last session not only proposing film classification but also requiring those under 18 attending drive-in theatres to be accompanied by a parent or guardian. *Id.*, May 27, 1959, p. 21, col. 5. A New York State legislative committee considered a governmental classification system which would be enforced solely by voluntary means, and recommended that a decision on such legislation be postponed until determination of the then-pending *Kingsley Pictures* case, note 13 *supra*. N.Y. State Joint Legislative Comm. Studying the Publication and Dissemination of Offensive and Obscene Material, Report, March 24, 1959. The City of Portland, Oregon, already has a classification scheme. Letter From Motion Picture Association of America to *Yale Law Journal*, August 7, 1959, on file in Yale Law Library. In the aftermath of the full-permit victory for *Desire Under the Elms*, the Chicago City Council considered ending all prior censorship for persons 18 or over. Censorship as to children would be retained, but juveniles would be redefined as persons 17 or under instead of the judicially invalidated 21 year old age limit. 1958-1959 CHICAGO CITY COUNCIL J. 555 (1959); see notes 17-21 *infra* and accompanying text. See also CHICAGO, ILL., MUNICIPAL CODE §§ 155-1 to -7 (1939). Also, N.Y. PEN. CODE § 484 prohibits admission of minors under 16 to any public theater unless accompanied by a parent or guardian. In addition to its lack of enforcement, however, this statute is not concerned with the content of the picture exhibited but presumedly was designed primarily to provide protection and supervision of minors from the standpoint of personal safety.

Proposals for age classification have been discussed between major film producers and the president of the Motion Picture Association of America. N.Y. Times, Oct. 6, 1959, p. 45, col. 1.

Motion picture censorship classification schemes have long been utilized in foreign countries. See ST. JOHN-STEVAS, OBSCENITY AND THE LAW 217 (1956). Perhaps the best known system is England's, under which the British Board of Film Censors categorizes

Paramount Film Distrib. Corp. v. City of Chicago[17] was the first court test of age classification. There, the Chicago Commissioner of Police restricted *Desire Under the Elms* to persons over twenty-one under an ordinance authorizing him to do so when a film "tends toward creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist."[18] A federal district court declared the ordinance unconstitutional on three alternative grounds: the twenty-one year age limit was unreasonable;[19] a picture cannot be simultaneously obscene as to children and not as to adults;[20] and the statutory standard was "hopelessly indefinite."[21] Underlying these holdings was the court's belief that "like any other censorship statute, this one must be approached with a caution dictated by the fact that it is a patent invasion of the right to freedom of speech. . . ."[22] A twenty-one year age limit might well be higher than necessary to protect youth,[23] and thus be unreasonable in light of the evil sought to be averted.[24]

pictures as "U" (suitable for general exhibition); "A" (more suitable for adult audiences—children under 16 not admitted unless accompanied by a parent or *bona fide* guardian); and "X" (suitable for adults only). The state takes no part in the censorship of films. Local authorities rely on an independent body—the British Board of Film Censors—and by inserting conditions in their licenses the authorities give legal effect to board decisions. The British Board of Film Censors (official pamphlet issued by board explaining system). In South Africa, the group most affected by age restrictions are those under 12, but certificates can also exclude persons from 4 to 18, and in rare cases, such as applied to *The Bed*, from 4 to 21. Variety, April 29, 1959, p. 13, col. 1. Cuba employs two boards, one to decide whether a film may be seen by adults, the second to decide whether children under 12 will be permitted to view the picture. *Id.*, March 18, 1959, p. 12, col. 1. Even France, popularly regarded as extremely "liberal" in such matters, censors films for the 16 and under group. *Id.*, May 27, 1959, p. 10, col. 2.

17. 172 F. Supp. 69 (N.D. Ill. 1959).

18. "In all cases where a permit for the exhibition of a picture . . . has been refused . . . because the same tends towards creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such pictures . . . to persons over the age of twenty-one years." CHICAGO, ILL., MUNICIPAL CODE § 155-5 (1939); see 172 F. Supp. at 71. Under this ordinance, general censorship is supplemented by, rather than replaced by, age classification. See note 16 *supra* and accompanying text.

19. 172 F. Supp. at 72.

20. "[A] picture is either 'obscene' . . . or it is not." *Id.* at 71.

21. *Id.* at 72.

22. *Id.* at 70.

23. The age line, wherever drawn, must to some extent be arbitrary. Although an upper limit of approximately 17 would appear justified in terms of precedents such as drivers' licenses, compulsory education and selective service, the lower the age, the less the restriction on free speech and the stronger the argument for the constitutionality of a classification system. Because ability of the child intelligently to select his own movie also presumably diminishes with lower years, an age limit of 16 or lower would appear best with, perhaps, an exception for those few youngsters who have graduated from high school when below the statutory age.

24. Perhaps the result of the case is also sound because the police commissioner is not the most desirable censor nor the mayor the best appellate tribunal. See CHICAGO,

Nonetheless, *Paramount* is open to criticism since the familiar free-speech and vagueness doctrines developed in general censorship cases may not be automatically applicable to age classification.

Although as a matter of popular usage, what is "obscene" does not change with the age of the perceiver, obscenity has been legally defined in terms of "appeal";[25] it is therefore logical to determine a film's obscenity according to its appeal to children—an actual, rather than an abstract, audience. Moreover, most courts consider probable perceivers when ruling on the censorability of given material.[26] For example, photographs concededly obscene when judged by "contemporary community standards" were not so when the recipient was the Kinsey Institute for Sex Research.[27] And if the ultimate purpose of banning "obscene" material is the protection of society from its influence, obscenity should depend upon the susceptibility of the exposed group. Recognizing differences between audiences could be the basis for meaningful constitutional distinctions between prior restraints as applied to children and such restraints as applied to adults—distinctions which would justify age classification while disallowing adult censorship. While the state has a "heavy burden" to demonstrate the need for infringement of free speech,[28] any variance in constitutionality between general censorship and age classification will depend upon the extent of governmental interest, the magnitude and probability of social harm, and the degree of restriction on free expression.[29]

Societal solicitude for a responsible future citizenry is the basis of state interest in the general welfare of minors [30] which, in the context of age classi-

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ILL., MUNICIPAL CODE § 155-4 (1939). The problem of the most appropriate censor is beyond the scope of this Note. See generally 71 HARV. L. REV. 326, 328-31 (1957).

25. Roth v. United States, 354 U.S. 476, 487 (1957) (appeal to the prurient interest).

26. "A book may be obscene when distributed to one class of persons but not when distributed to another. Indeed, in some cases, there is even language susceptible of an interpretation that would make the obscene nature of a book turn upon its effect on a single individual." Lockhart & McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587, 601 (1955); see Hallmark Prods., Inc. v. Mosley, 190 F.2d 904, 910 (8th Cir. 1951) (dictum); 34 IND. L.J. 426 (1959). *But see* Roth v. United States, 354 U.S. 476, 487 (1957) (adopting test of MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957), which purports to reject effect on audience).

27. United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957).

28. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503-04 (1952).

29. In determining whether classification systems are permissible, the Court may insist on a definite causal connection between films and juvenile antisocial conduct by invoking the "clear and present danger" requirement. See Schenck v. United States, 249 U.S. 47 (1919). It seems more likely, however, that the Court will seek to balance conflicting interests in reaching judgment. Dennis v. United States, 341 U.S. 494, 508 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 397 (1950) ("when the effect of a statute or ordinance upon the exercise of first amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity"); see Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 391-92 (1954).

30. See *Ex parte* Walters, 92 Okla. Crim. 1, 13, 221 P.2d 659, 665-67 (1950) (quot-

fication, is combined with its interest in the preservation of public order and morality.[31] Because of the state's interest in children it may constitutionally deny them privileges—such as drinking[32] and driving[33]—which it grants adults. Even when the legislative goal is not protection of youth, the state is empowered to make distinctions between children and adults. Thus, in the law of wills and contracts, minority is often a badge of incompetency;[34] it can also be made a disqualification for specified public functions.[35] Moreover, within reasonable limits, the legislature is free to set the precise age at which the legal disabilities of minority terminate for particular purposes.[36] Two specific rights affected by classification—a parent's right to bring up his child as he wishes and a child's first amendment freedom—were considered by the Supreme Court in *Prince v. Massachusetts*.[37] A Jehovah's Witness was convicted under a state child labor law for encouraging his daughter to sell religious magazines. Rejecting his arguments of equal protection and abridgement of freedom of religion, the Court ruled that the state's authority over children's activities is broader than over like activities of adults:[38] "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and this includes, to some extent, matters of conscience and religious conviction."[39] Thus, state interest in the welfare of children does not necessarily fall before the invocation of the first amendment.

Opponents of censorship by classification may argue that the primary responsibility for deciding what films should be viewed by children rests with parents.[40] It can be further asserted that parental supervision solves the prob-

ing Aristotle—"the fate of empires depends on the education of youth"). See also *Hearings Before the House Select Committee on Current Pornographic Material*, 82d Cong., 2d Sess., 10, 12, 14, 46, 66 (1952); PLATO, THE REPUBLIC 57-58 (Everyman ed. 1942).

31. See Trist v. Child, 88 U.S. (15 Wall.) 441, 450 (1874); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 25 (1943).

32. *E.g.*, CAL. BUS. & PROF. CODE ANN. § 25658 (person under 21 who buys alcoholic beverages guilty of a misdemeanor).

33. *E.g.*, CAL. VEHICLE CODE ANN. § 257 (no full license to person under 16); see People v. Ciocarlan, 317 Mich. 349, 26 N.W.2d 904 (1947) (engaging in "street trades" prohibited).

34. *E.g.*, Hampton v. Ewert, 22 F.2d 81, 86-87 (8th Cir. 1927) (disability of minors to execute lease presumed).

35. See, *e.g.*, CAL. CONST. art. 1, § 1 (age of 21 required to vote); George v. United States, 196 F.2d 445, 453 (9th Cir. 1952) (exclusion of minors from grand jury convicting appellant was constitutional).

36. See *In re* Morrissey, 137 U.S. 157 (1890).

37. 321 U.S. 158 (1944). See also People v. Ciocarlan, 317 Mich. 349, 26 N.W.2d 904 (1947).

38. 321 U.S. at 168.

39. *Id.* at 167. Although it is possible to distinguish *Prince* from film censorship cases because the decision rests somewhat on exposure of the child to physical injury and disease, the Court also speaks of harmful possibilities of emotional and psychological injury. *Id.* at 170.

40. *Cf.* Odell v. Lutz, 78 Cal. App. 2d 104, 177 P.2d 628 (Dist. Ct. App. 1947).

lem of protecting juveniles and ultimately society while exorcising the discomforting spectre of governmental restraint. But such arguments overlook the relative impracticality of parental film censorship. It is probably those minors whose family life is most unstable who are most susceptible to the influence of motion pictures.[41] Moreover, even the conscientious parent may find it impossible or distasteful to pre-view each film his child wants to attend. In any event, the availability of parental supervision is not determinative of the constitutionality of age classification.

Whether a particular restriction on first amendment liberties is constitutionally permissible will partly depend on the probability and magnitude of the harm which the restriction is designed to combat.[42] No censorship should be based on unsupported assertions that challenged expression causes antisocial actions or outlooks. On the other hand, demanding categorical proof of social injury—which behavioral sciences in their present state have not yet provided [43]—may paralyze a state in the face of possible serious danger. Available empirical data—limited and contestable as it may be—indicates that films influence conduct, attitudes and emotions in degrees of ascending effectiveness, in addition to communicating information.[44] While evidence that motion pictures cause objectionable behavior is far from conclusive, it appears more convincing in the case of young people than in the case of adults.[45] This is not surprising, in light of children's limited experience and education and the unique impact of movies.[46] Second, films portraying antisocial cultural pat-

41. See MITCHELL, CHILDREN AND THE MOVIES 142 (1934). See also HEALY & BRONNER, NEW LIGHT ON DELINQUENCY AND ITS TREATMENT 72 (1936).

42. Dennis v. United States, 341 U.S. 494, 508 (1951).

43. "Considering the seriousness of the problem . . . it is surprising that there is not more valid evidence of relationship [between movies and conduct] today." Clinard, *Secondary Community Influences and Juvenile Delinquency*, in THE PROBLEM OF DELINQUENCY 186, 195 (Glueck ed. 1959).

44. See HOLADAY & STODDARD, GETTING IDEAS FROM MOVIES 7-11 (1933) (children accept misinformation as fact, and level of retention high); RENSHAW, MILLER & MARQUIS, CHILDREN'S SLEEP (1933) (some films can so disturb sleep of children that they can be regarded as detrimental to health); BLUMER, MOVIES AND CONDUCT 75, 83 (1933) (can cause shock and nightmares but effects fade in a few days); BLUMER & HAUSER, MOVIES, DELINQUENCY AND CRIME 127 (1933) (movies can lead to delinquency and crime). *But see* Lockhart & McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587, 594-95 (1955) (no information on effect of sex literature on behavior); Brief for Appellant, pp. 15-18, Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954). See also Lazarsfeld & Kendall, *The Communications Behavior of the Average American*, in SCHRAMM, MASS COMMUNICATIONS 396, 397 (1949) (frequency of film attendance highest among 19 year olds and declines with age).

45. See BLUMER, MOVIES AND CONDUCT 30-58 (1933) (adolescents learn from films techniques of dress, love-making and crime); DYSINGER & RUCKMICK, THE EMOTIONAL RESPONSES OF CHILDREN TO THE MOTION PICTURE SITUATION 117-18 (1933) (children retain violent and sexual episodes but usual moralistic endings often comprehensible only to adults).

46. See Clinard, *supra* note 43, at 190.

terns probably influence attitude formation.[47] A succession of the same type, therefore, may deaden a child's sensitivity and accustom him to accept brutality and promiscuity as proper conduct.[48] Third, particular motion pictures clearly induce profound emotional responses in youth.[49] Finally, recent studies suggest that motion pictures may reenforce existing personality traits or patterns of conduct.[50] For example, movies which blueprint for the predisposed delinquent techniques of criminal and antisocial activity may act as the catalyst to deviant behavior.[51]

Free speech is premised on a democracy's faith in the power of truth to triumph,[52] which in turn posits the ability of the ordinary individual to select intelligently. "The liberal ethic presupposes an adult society with a certain minimum of education and the ability if left to itself to choose the right thing."[53] Adult censorship may therefore be an anathema to a free society, absolutely proscribed by the first amendment. But to affirm the ability of the average man to choose intelligently is not to claim that he possesses this ability irrespective of his years. The very difference in self-reliance between adults and children occasions the state's interest in youth. So viewed, the maturity of the perceiver would be one determinant of a film exhibitor's constitutional right to unrestricted expression. Freedom to choose what one may view and hear has also been said to breed the moral character and outlooks which a free people must nurture.[54] Censorship by classification would then suffer from the vice of teaching children to accept a government which tells

47. See N.Y. Times, March 22, 1959, p. 81, cols. 1-6. See generally PETERSON & THURSTONE, MOTION PICTURES AND THE SOCIAL ATTITUDES OF CHILDREN (1933). The fact that most studies were done in the 1930's raises the question of whether the results of these studies might not now be different because of (1) improved behavioral science techniques or (2) greater effectiveness in motion picture presentation.

48. See ST. JOHN-STEVAS, OBSCENITY AND THE LAW 198 (1956); INGLIS, FREEDOM OF THE MOVIES 21-23 (1947); WERTHAM, THE SEDUCTION OF THE INNOCENT 90-91 (1953). "For example, the first scene is of a girl who dies from two spikes driven into her brain through her eyes. . . . [A] girl is guillotined on her bed; an old woman is impaled on ice tongs . . . ." Variety, April 22, 1959, p. 6, col. 5 (movie review). See generally Abse, *Psychodynamic Aspects of the Problem of Definition of Obscenity*, 20 LAW & CONTEMP. PROB. 572, 584 (1955).

49. DYSINGER & RUCKMICK, *op. cit. supra* note 45, at 110 (significant emotional responses reaching peak in 16-18 age bracket).

50. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 184 (4th ed. 1947); Clinard, *supra* note 43, at 190.

51. See BLUMER, *op. cit. supra* note 44, at 30-58. It would seem irrelevant to argue that the "fundamental" cause of delinquency is upbringing or home life, if films, operating in conjunction with other existing causative elements, are important action and attitude shaping factors.

52. See Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion of Holmes, J.); SABINE, A HISTORY OF POLITICAL THEORY 508-09 (rev. ed. 1956) (discussing Milton's *Areopagiticia*).

53. ST. JOHN-STEVAS, OBSCENITY AND THE LAW 191 (1956).

54. MILL, ON LIBERTY 27-32 (People's ed. 1873); *cf.* Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion of Brandeis, J.).

them what they may and may not see. This criticism can be leveled, however, at any governmental restriction on minors. And from classification, children learn only to accept a government which tells *children* what motion pictures they may not attend. Finally, the argument that all censorship falsifies life by shielding the viewer from reality[55] is untenable insofar as it assumes that every film presents an accurate, rather than a deliberately sordid, picture of life.[56] And to the extent that a particular motion picture is honestly realistic, it presumes a viewer capable of evaluating and placing the presented material in cultural context.

Not only is age classification consistent with the premises of freedom of expression, but, since films which might have been banned entirely under a full censorship system can be shown to adults, classification does not involve the most objectionable feature of prior restraint—restriction of the content of speech. Ideas communicated by a motion picture licensed for exhibition to an adult audience will still make their impact upon society. As a practical matter, however, classification may indirectly censor adult fare. Because children comprise the largest single group of motion picture patrons,[57] the industry may find it economically unfeasible to produce films which cannot be exhibited to them.[58] But classification will result in indirect total censorship only if an insufficient number of adults are willing to patronize a particular kind of film. To challenge the constitutionality of classification on the ground of indirect censorship is to argue, in effect, that the producer and a small group of adult viewers have a constitutional right to exhibit and see films unfit for children at the expense of state interest in youth. In the absence of a showing of serious restrictions on adult entertainment, it is doubtful that such a right exists. The precise degree of restriction on adult viewing is presently indeterminable, for much will depend on the number of states willing

55. See ST. JOHN-STEVAS, OBSCENITY AND THE LAW 190 (1956).

56. See Clinard, *supra* note 43, at 190.

57. Variety, March 4, 1959, p. 14, col. 2; THE FILM DAILY YEARBOOK—1953, at 127 (one-third of audience is under 18).

58. The essential economic question is whether the decline in attendance occasioned by the exclusion of juveniles will be counterbalanced by increased box-office appeal of an "adults only" label or of maturer films. While an "adults only" categorization may create no compensating rise in attendance for those films whose exploitable elements would have been widely advertised anyway, there have been notable examples of censorship creating marked attendance increases. See, *e.g.*, Variety, May 27, 1959, p. 73, cols. 1-2.

The film's subject matter is of great importance. See Letter From British Board of Film Censors to the *Yale Law Journal*, May 19, 1959, on file in Yale Law Library. For example, the major supporters of the lucrative horror film business are children. Alpert & Beaumont, *The Horror of It All*, Playboy, March, 1959, p. 68, at 76. In other cases, a picture will appeal only to a mature audience and exclusion of minors will have little effect. *Room At The Top*, which portrayed an adulterous relationship and premarital intercourse, may have been such a film. Although in the "X" (suitable for adults only) category in England, it played to capacity audiences both in London and the provinces. Letter From British Board of Film Censors, *supra*.

to enact classification systems, the breadth of the subject matter sought to be censored,[59] the age limits fixed [60] and the economic health of the motion picture industry.[61]

In sum, the factors which make for the probable unconstitutionality of general censorship do not control age classification. In enacting age classification, the state exerts not only its interest in public order and morality, but an additional interest—the welfare of children. Moreover, the evidence of causal relation between movies and behavior is more convincing in the case of children. Finally, age classification does not block the goals of the first amendment to the same degree as full censorship. Taken together, these factors point to the constitutionality of age classification. Nonetheless the criteria of particular classification systems must meet due process requirements of definiteness. In light of the case law, vagueness is the most serious obstacle to the framing of constitutional classification legislation.[62] Age classification systems would probably utilize standards broader than the judicially approved "obscenity test";[63] great concern exists, for example, about motion pictures featuring horror, sadism, brutality, and extreme violence.[64] Past cases, rejecting various broad standards, are distinguishable on the ground that they concerned total censorship. It may be, therefore, that tests broader than obscenity would satisfy due process if applied only to children. Any guides utilized must be sufficiently definite to warn a producer of what is proscribed and keep the censor from being "set adrift upon a boundless sea" of his own discretion.[65] In censorship cases, however, a more stringent standard may be detected, presumably to prevent licensing restrictions from going beyond the legitimate bounds of censorable material, as well as to warn potential violators. The due process and free speech requirements may thus be interdependent.[66] Since the

59. One authority has estimated that 1 out of every 5 films would be banned as to children under a classification statute employing such criteria as sexual immorality, glorification of crime, and sadism. Letter From Louis Pesce, Director of Division of Motion Pictures of New York State Education Department, to *Yale Law Journal*, June 18, 1959, on file in Yale Law Library.

60. See note 23 *supra*.

61. Although the "art houses," Variety, April 29, 1959, p. 5, col. 3, and some foreign film industries, *id.*, April 22, 1959, p. 14, cols. 1, 2, 4, 5, are experiencing difficulty, the motion picture industry as a whole appears to be in a sound economic position. See generally The Value Line Investment Survey, April 13, 1959.

62. See notes 5-10 *supra* and accompanying text.

63. See note 57 *supra* and accompanying text.

64. See, *e.g.*, N.Y. State Joint Legislative Comm. Studying the Publication and Dissemination of Offensive and Obscene Material, Report, March, 24, 1959.

65. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952); see Musser v. Utah, 333 U.S. 95 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

66. See, *e.g.*, Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 702 (1959) (concurring opinion of Clark, J.).

"This Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are *not* entwined with limitations on free expression." Winters v. New

content of due process is not static, the nature of its demands may therefore depend upon the kind of restriction to be imposed on freedom of expression. For this reason, striking the ordinance in *Paramount* because of vagueness, while appealing, merits closer examination. The cited Supreme Court decisions invalidating existing censorship standards as unconstitutionally indefinite may have been based on the implications of the far-reaching restriction threatened by full adult censorship.[67] Because the restrictions of a classification system are more limited and the right of children to hear is probably not commensurate with the rights of adults under the first amendment,[68] a more liberal rule of vagueness could be applicable. Thus, *Paramount* should have employed only the traditional due process requirement of definiteness designed to prevent insufficient warning and unlimited administrative discretion.[69] Nonetheless even this less rigorous rule may reject the standard involved in *Paramount*—a tendency to create a harmful impression on children's minds. Courts could find ample precedent, from other areas, however, for finding that other classification statutes satisfy due process.[70]

A state wishing to enact classification need not anticipate that the Supreme Court decisions which invalidated full censorship systems will render uncon-

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York, 333 U.S. 507, 517 (1948). (Emphasis added.) See also Note, 62 HARV. L. REV. 77, 83 (1948) ("sometimes the Court seems . . . to weigh the indefiniteness of the statute against the economic and social desirability of the particular legislative policy"); Note, 23 IND. L.J. 272, 285 (1948).

State criminal statutes successfully use standards similar to those struck down in censorship cases. See, *e.g.*, N.J. STAT. ANN. § 2A:96-3 (1953) (forcing or inducing child under 16 into act "which tends to debauch the child or impair its morals" a misdemeanor). *Compare* Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y., 346 U.S. 587 (1954) (invalidating film censorship statute using standard of "immoral . . . [and may] tend to corrupt morals"), *with* N.Y. PEN. LAW § 1140-a (participation in a show "which would tend to the corruption of youth or others" a misdemeanor; apparently unchallenged).

67. The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.

Butler v. Michigan, 352 U.S. 380, 383-84 (1957). See also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

68. See notes 29-39 *supra* and accompanying text.

69. See cases cited note 65 *supra*.

70. In relation to criminal statutes, the Court has emphasized that impossible standards are not required, and that a statute need only be sufficiently definite to be understood when measured by common understanding and practice. United States v. Petrillo, 332 U.S. 1, 7-8 (1947). "[I]f the general class of offenses to which the statute is directed

stitutional a "for adults only" statute drafted with sufficient particularity to provide adequate guidance for exhibitor and censor.

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is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." United States v. Harriss, 347 U.S. 612, 618 (1954).

Moreover, "obscenity" itself has never been clearly defined, leaving open the possibility that in the case of young people some types of brutality and violence may be so categorized. See Kaplan, *Obscenity as an Esthetic Category*, 20 LAW & CONTEMP. PROB. 544, 558 (1955).