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Freedom of Expression and the Age of the Silver Screen

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Abstract

While freedom of speech—like most other basic American rights—were, in theory, for rich and poor alike, this Article argues that, in practice, "freedom of speech" was not quite as absolute as one might think. The right depended, in part, on class and level of education. This was the basis and the justification for the censorship of the movies, which is the subject of this essay. In the early twentieth century, the popularity of movies and their widespread accessibility to the masses made some judges and elites squirm. In response, courts upheld movie censorship on a narrow view of freedom of speech: political discussion, expression of opinions on subjects of public interest, but not "entertainment" or "amusement." By implication at least, educated elites were allowed more latitude than the public at large. The elimination of movie censorship took place, most notably, in the last half of the 20th century, when the culture of equality finally prevailed with regard to films. The legal treatment of the movies and the movie industry illustrates a kind of democratization of the very concept of freedom of expression.

Introduction

Freedom of speech—of expression—is universally recognized as a fundamental human right. It is enshrined in the First Amendment to the

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American constitution, and in every state constitution.[1] In the big world, no modern constitution fails to mention it, along with such things as freedom of the press. And for the most part, people who live in democratic, rich societies—places like Norway or Australia—would agree that freedom of speech and expression is a basic pillar of society; an essential element of democracy. And they would probably also say that their country fosters and guarantees this right. There are arguments about the exact boundaries: defamation, for example, or commercial speech—can the state control what a company claims about its products? What about hate speech or incitement to riot? Can the government punish certain odious forms of speech? Can a person legally argue that the Holocaust never happened? Not in Germany—to do so would be a crime, and the same is true in a number of other European countries.[2] In the United States, there is no such criminal law, and presumably, Holocaust denial is protected speech.

I mentioned the American Bill of Rights. That, of course, dates from the late 18th century. Freedom of speech has a respectable pedigree. But the *meaning* of freedom of speech and expression has changed dramatically over the years. This is obvious to anybody who studies the history of the First Amendment. It seemed obvious to people in the 19th century that the First Amendment did not protect pornography. Every state, in the 19th century, had a law against pornography, and federal law made it an offense to send pornography through the mail.[3] Today, books, plays, and works of art, which

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[1] Under the so-called incorporation doctrine, the Supreme Court has held that the right of freedom of speech, expressly mentioned in the First Amendment, is applicable to the states under the Fourteenth Amendment. The Supreme Court so held in Gitlow v. New York, 268 U.S. 652 (1925). This meant that the federal courts could apply a *national* standard, in free speech cases. This was cold comfort to Gitlow, however, since the Supreme Court affirmed his conviction in New York for disseminating his left-wing writings.

[2] Strafgesetzbuch [StGB] [Penal Code], § 130, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [https://perma.cc/4GSF-CMKY]. § 130(3) provides punishment for those who publicly, and in a manner offensive to public order, denies, justifies or trivializes the crimes committed by the Nazis; § 130(4) punishes those who publicly injure the dignity of victims, by justifying or approving of the acts of the Nazi regime.

A number of countries—for example, Poland, Hungary, and Lithuania—also make it a crime to deny the atrocities of communist regimes.

[3] *See* Rosen v. United States, 161 U.S. 29 (1896); the defendant was accused of violating the statute against mailing offensive material, in his case, pictures of women "in different attitudes of indecency." The First Amendment was not even mentioned. This is typical of 19th century cases on obscenity.

would have shocked Victorians, and which could have led to jail sentences, are freely published and disseminated. I will return to this subject.

One aspect of the history of free speech is a little less obvious. Freedom of speech—and most other basic rights—were, in theory, for rich and poor alike; for men and women alike; for all classes of society; in short, for absolutely everybody. So too for religious freedom and the right to trial by jury. Americans have always proudly asserted their culture of equality. In this country, there were no titles of nobility. Every person was socially the equal of everybody else. This strain in the culture goes back to the very early days of the Republic, if not earlier. To be sure, the norm of equality never applied to women, the native peoples, slaves, or to African Americans in general whether slave or free. Even the right to vote depended, at first, on ownership of property in many states. Nevertheless, the idea of equality was, or at least seemed to be, an element of American culture. For example, there were no such people as "servants" in Ohio or Illinois. What an English peer would call his servant, in this country was called "hired help," or simply "the help."

I will argue that, in practice, "freedom of speech" was also not quite as absolute as one might think; it depended, in part, on class and level of education. This was the basis and the justification for the censorship of the movies, which is the subject of this essay. By implication at least, educated elites were allowed more latitude than the public at large. In our times, censorship has been almost entirely eliminated and freedom of speech has been, in a sense, democratized. This process took place, most notably, in the last half of the 20th century. In that period, censorship of the movies ended, and the culture of equality finally prevailed with regard to films. Hence, the legal treatment of the movies and the movie industry illustrates a kind of democratization of the very concept of freedom of expression. Censorship of movies rested on the idea that the sheer popularity of this form of entertainment made it socially dangerous;it could damage the morals and behavior of the masses. This danger justified censorship. The First Amendment, it was held, did not apply to these forms of entertainment. By implication at least, educated elites were able to tolerate material that the lower orders could not.

Censorship and the Movies

The motion picture era began around 1900. The industry developed quickly; movies in a very short time captured a huge audience. Nickelodeons sprouted like mushrooms after rain in the cities. Penny arcades, storerooms,

and even tenement lofts were converted into "rude theaters devoted to continuous shows of motion pictures."[4] In 1909, it was reported that every day, a million people went to one of the "10,000 resorts in our towns and cities" where movies were shown. It was also reported that no town of 5,000 or more lacked a place where a "show" could be seen and there were more than a thousand sites for "moving pictures" in New York and Chicago.[5]

Movies were cheap, vivid, and enticing, but, they encountered criticism almost from the very beginning. Their very attractiveness made them dangerous. In Detroit, in 1907—only one year after the first movie house opened in that city—an ordinance required "proprietors of moving picture shows" to submit films the proprietors protposed to show to the commissioner of police of the city, for permission.[6] In that same year, the city of Chicago enacted its own censorship ordinance.[7] In the background was a movie called *The Unwritten Law: A Thrilling Drama Based on the Thaw/White Case*; this famous and sensational trial had captivated the public. Now, on screen, showing in Chicago shortly before the adoption of the ordinance, the movie attracted "audiences packed with 'school-girls.'"[8] Under the ordinance, an exhibitor who wanted to show a movie needed the approval of the Chicago police. The chief of police was to deny a permit to any movie that was considered "obscene or immoral."[9] The chief denied a permit to two movies, the *James*

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[4] Daniel Czitrom, *The Politics of Performance: From Theater Licensing to Movie Censorship in Turn-of-the-Century New York*, 44 Am. Q. 525, 530 (1992).

[5] *The Theaters' New Rival*, Wash. Post, Sept. 23, 1909, at 6. The article reported, breathlessly, on the spread of the movies; they "have sprung up in vacant stores and empty houses," and even in "two churches in good locations," which had been bought from their congregations; in one of them "the pulpit was left standing as a platform on which to place the picture machine." *Id.*

[6] Ben Strassfeld, Indecent Detroit: Race, Sex, and Censorship in the Motor City 20 (2023).

[7] On the Chicago ordinance, see Kathleen D. McCarthy, *Nickel Vice and Virtue: Movie Censorship in Chicago, 1907-1913*, 5 J. Popular Film 37 (1976). On movie censorship in general, *see* Lee Grieveson, Policing Cinema: Movies and Censorship in Early Twentieth-Century America (2004); Richard S. Randall, Censorship of the Movies: The Social and Political Control of a Mass Medium (1968); on the early history, *see* Nancy J. Rosenbloom, *Between Reform and Regulation: The Struggle over Film Censorship in Progressive America, 1909-1922*, 1 Film Hist. 307 (1987).

[8] Jennifer Fronc, Monitoring the Movies: The Fight over Film Censorship in Early Twentieth-Century America 8–10 (1970). On the trial of Harry Thaw and its background, *see* Lawrence M. Friedman, The Big Trial: Law as Public Spectacle 72–74 (2015).

[9] Block v. City of Chicago, 239 Ill. 251, 256 (Ill. 1909).

Boys and *Night Riders*.[10] A group of plaintiffs, "engaged in the business of operating five and ten cent [movie] theaters in the city of Chicago," brought suit; the ordinance, they claimed, was discriminatory and unconstitutional.[11]

The Illinois Supreme Court upheld the ordinance. It was unmoved by the plaintiffs' arguments. The Court saw no illegal discrimination: there were good reasons to regulate "the five and ten cent theatres, attended in great numbers by children," even if the ordinance did not reach "other forms of public entertainment."[12] The theaters covered by the ordinance are cheap; children frequent them, together with "a large number of" people "of limited means who do not attend the productions of plays and dramas given in the regular theaters."[13] In other words, the audiences "include those classes whose age, education, and situation in life specially entitle them to protection against the evil influence of evil and immoral representations."[14] This point is worth emphasizing: "classes" because of their "age, education, and situation in life," needed special legal "protection."[15] By implication, other "classes" did not need special protection. The court also referred to the state's power over obscene material. Yet almost certainly there was nothing obscene about the two films, *James Boys* and the *Night Riders*.[16] Nevertheless, these films were presumably not appropriate for mass viewing. The opinion made no mention of freedom of speech.

Other states and cities followed the lead of Chicago. Pennsylvania, for example, created a censorship board in 1911. In Minnesota, the village of Deer River—with a population around 1,000—enacted a quite punitive ordinance, asking theaters (including any "moving picture show") to pay an annual license fee of $200; the fee had been a mere $20 before.[17] An exhibitor refused to pay the fee; he had run his business, he insisted, in a "quiet, orderly, and inoffensive way;" the business, moreover, was "of a clean, moral, and

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[10] *Id.* at 257.
[11] *Id.* at 255.
[12] *Id.* at 262.
[13] *Id*. at 258.
[14] *Id.*
[15] *Id.*
[16] The Chicago ordinance ultimately came before the Supreme Court of the United States, in Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). The Court had long since held that movies did enjoy protection under the First Amendment. In this case, the plaintiff, a film exhibitor, claimed that the ordinance, which still required submission before a movie could be shown, was a violation of free speech. They refused even to submit their movie for approval to the city of Chicago. The Supreme Court upheld the ordinance, but by a narrow 5 to 4 vote. *Id.*
[17] Higgins v. Lacroix, 119 Minn. 145, 147 (Minn. 1912).

instructive nature."[18] The Minnesota Supreme Court upheld the ordinance in 1912. Movies, said the court, were a new institution, growing like a weed, and "springing up everywhere," even in villages.[19] They might have some educational value; but their chief aim was to "furnish the sort of entertainment that will draw the most dimes."[20] To be sure, it might be "laudable" to provide people with "innocent and cheap amusement;" but the profit motive does have a tendency to favor forms of entertainment "which will attract the greatest number," instead of entertainment "which instructs or elevates."[21] Opinions, the court said, "are quite at variance as to the merits of moving picture shows as an influence for good or evil in a community."[22] Movies could easily "degenerate," and thus "menace the good order and morals of the people. . . . Common observation reveals . . . that crowds attend these picture shows afternoons and evenings every day in the week."[23] They become the "rendezvous of the young and thoughtless, as well as the vicious."[24] In "Movie Mad" Detroit, "rich and poor flock[ed] to the picture play houses . . . . Here [came] all classes and conditions . . . of high or low station."[25]

The Minnesota case, like other early cases, said nothing about freedom of speech or expression; the issue, after all, was the validity of a license fee. But, as this and other decisions made clear, the very popularity of the new medium made some judges, and perhaps elites in general, squirm. Moreover, the cases expressed a cramped and crabbed notion of freedom of speech and expression, at least compared to what later became the standard. Freedom of speech meant political discussion, and expressions of opinions on subjects of public interest, but not "entertainment" or "amusement."[26] And certain subjects were definitely taboo. It also seemed clear that what made a subject taboo, or which made a movie immoral, did depend on class. Movies were differentfrom stage plays. They were cheaper (on the whole) and appealed to elements in society that were more susceptible to corruption. In some cases, courts made this point quite explicit.

A 1917 New York case sounded similar themes, and made the class aspects of movie censorship glaringly obvious. The movie at the heart of the

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[18] *Id.*
[19] *Id.* at 150.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 150–51.
[24] *Id.* at 151.
[25] Strassfeld, *supra* note 6, at 21.
[26] *Higgins*, 119 Minn. at 151.

case, which is now apparently lost, was called *The Hand That Rocks the Cradle*.[27] The movie advocated birth control; one main character was a woman shown as a "heroine or a martyr," who had been "convicted for expounding methods of contraception to miscellaneous audiences of women in violation of the criminal law."[28] The court upheld the ban. The court described the movie theater as a "place of amusement conducted by the plaintiff for commercial benefit and for the purpose of realizing profit."[29] Nothing was said about the right of freedom of speech. The movie horrified the court in that it glorified a person who violated the law, holding that person up "to the admiration and applause of promiscuous audiences."[30] If the "ignorant and uninformed are to be educated by being told that the laws which they do not like may be defied," there would be "a sorry future in store for human liberty."[31] The law, said the court, gave the Commissioner broad discretion to ban movies that were indecent. But what is decency? Its meaning "must be determined by standards in vogue among highly civilized peoples and not those that may prevail among the Fiji or South Sea Islanders."[32] After all, "[l]ewd men or women have no sense of decency."[33] Of course, the "promiscuous" crowds who flocked to the movies were Americans, not people from Fiji or the South Sea Islands. Nonetheless, they were (by implication) not civilized enough to watch "indecent" movies.

By 1910 or so, the country was clearly "movie crazy;" attendance had grown rapidly, year after year. Movie stars had become genuine celebrities, idolized by their fans.[34] The censorship movement grew along with the popularity of the movies. There was constant and vigorous debate about the impact of movies on national morality. The debate began in the very first days of the movies and continued for decades. In 1921, for example, there was a debate that lasted more than three hours before the District Commissioners

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[27] *See* Universal Film Mfg. Co. v. Bell, Comm'r of Licenses, 100 Misc. 281, 167 N.Y. Supp. 124 (1917).

[28] *Id.* at 125.

[29] *Id.* at 127.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 128.

[33] *Id.*

[34] *See* Samantha Barbas, Movie Crazy: Fans, Stars, and the Cult of Celebrity (2001). At first, the studios refused to release the names of the actors and actresses in the movies, and the stars were anonymous; but the unrelenting pressure of the fans brought about a change in this policy around 1910, and the cult of the movie "star" was born.

in Washington, D.C., on a proposal to establish strict censorship.[35] Among the many speakers was a woman who represented the "National Association for Moving Picture Betterment," and another who represented the "Federation of Womens Clubs." The "moral welfare of our children," they argued, "are more important than the riches of the moving picture industry."[36] David W. Griffith, on the other side, commented that censorship is a "thing of kings. It is not for free people. It suppresses thought."[37]

The advocates of censorship have always brought up the issue of children in the movie audience and the dangers to the minds and moral compass of the young. According to a prominent clergyman, Orrin Cocks, material about the "intimate and intricate problems of life" might be acceptable for adults to see; but not for children whose minds were still "unformed."[38] In 1933, Henry James Forman published a book called *Our Movie Made Children,* which ticked off a list of the poisonous effects of movies on children: insomnia, for example—movie-going, it was claimed, interfered with the sleeping habits of the young. Even worse, many "young criminals" learned "techniques" for robbery from the movies.[39] Furthermore, "large percentages of girl inmates in an institution for sex delinquents rightly or wrongly attribute to the movies a leading place in stimulating cravings for an easy life;" it aroused the desire to have men "make love to them," and was responsible, ultimately for their "delinquency."[40] Protecting children and their "unformed" minds was thus one of the strongest arguments for controlling, monitoring, or censoring movies. A major study, conducted between 1933 and 1935, on "Motion Pictures and Youth," the so-called Payne Fund Studies, expounded

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[35] *See Film Censorship Declared Menace,* Wash. Post, Mar. 1, 1921, at 2.

[36] *Id.*

[37] *Id.* "Who among us," Griffith asked, "is qualified to say with finality what is right and what is wrong? . . . David Copperfield is a story of seduction . . . [and] Hamlet has five murders in it."

[38] Orrin G. Cocks, *What Standard Shall We Have for Motion Pictures Shown to Children?*, 6 J. Am. Inst. Crim. L .& Crimonology 627, 627 (1915).

[39] Henry James Forman, Our Movie Made Children 280–81 (1933).

[40] *Id.* at 281. *See also* Arthur R. Jarvis, Jr., *The Payne Fund Reports: A Discussion of their Content, Public Reaction, and Affect on the Motion Picture Industry, 1930-1940*, 25 J. Popular Culture 127 (1991).

this theme in great detail.[41] Movies had become a "monster Pied Piper, playing tunes irresistibly alluring to the youth."[42]

Under the surface, one could detect an even larger goal: protecting not just children, but also young adults; and, in addition, the child-like masses, whose standards were perceived to be more like people from "Fiji" than the standards of the educated elite. After all, censorship laws, where they existed, were not restricted to children. If a movie was unwholesome, if it was immoral, if it was corrupting, then *nobody* ought to see it, certainly not members of the mass public; and it should not be shown at all. The proper role of the motion picture was to "instruct[] and elevate[]," as the Minnesota court put it.[43] This was a phrase you might expect from the mouth of a school teacher in grammar school. Sure enough, grammar school students were eager consumers of movies.

But obviously, grammar school students were not the only people in the audience. Movies could be unwholesome and corrupting for others in the audience; they could be poisonous, for example, to young adults. Movies could arouse "prurient interests" in these young adults, that is, it could inflame their sexual desires.[44] Anything that inflamed "prurient interests" (outside of marriage, that is,) was taboo. Sex was a tiger that had to be kept in its cage; it was a powerful force, that needed to be limited and restrained; and indeed, the laws did try to limit and restrain it.[45] In Maryland, *Naked Amazon* ran into trouble with the censors. The documentary was about a tribe in the Amazon region, whose members did not bother to wear clothes. But this was liable to "arouse sexual desires" which was, of course, forbidden.[46] A monograph by Herbert Blumer, part of the materials put together by the Payne Fund, gave startling and vivid evidence of the influence of motion pictures on the sex life of young men and women. In one "autobiographical account," a young male, 20 years old, in his junior year at University, reported that when

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[41] *See generally* Garth S. Jowett, Ian C. Jarvie, & Kathryn H. Fuller, Children and the Movies: Media Influence and the Payne Fund Controversy (1996).

[42] From an advertisement for *Our Movie-Made Children,* quoted in Jowett et al., *supra* note 41, at 96.

[43] Higgins v. Lacroix, 119 Minn. 145, 150 (Minn. 1912).

[44] Lawrence M. Friedman & Joanna L. Grossman, The Walled Garden: Law and Privacy in Modern Society 33 (2022).

[45] *Id.* at 4041.

[46] Jeremy Geltzer, Dirty Words and Filthy Pictures: Film and the First Amendment 155 (2015).

he saw close-ups of "female stars," he experienced "orgasms."[47] And, he said, when the stars kissed on the screen, "blood rushed to my membrane virilis."[48] Another male student, 21 years old, said he went to the movies, "to learn how to do a very disgusting thing . . . a french kiss."[49] To many of these young men, movies were a source of "distinct sexual agitation."[50] Not only men: a sorority girl, when she saw a male star passionately kiss a woman's hand on the screen, felt "little thrills going up and down my back;" another girl said she would "sure like to have a date . . . for a night," with the male star of a movie she watched.[51]

All this was damning evidence against the movies in a period when, theoretically at least, a man's "membrane virilis" was supposed to be unsheathed only after he was actually married; a period when (also in theory), respectable women were not supposed to go all dreamy over men they saw on the silver screen, especially if they were unmarried, or to fantasize about handsome men making love to them. Arousing "prurient interests" was not the only sin movies were accused of, but it was one of the most serious. The nickelodeons that sprang up in the earliest days of the movies were not only cheap; they were dark and dismal, and sometimes they were fire hazards. The "movie palaces," more elaborate theaters, sometimes quite ornate, did not exist before the 1920s. They put an end to the nickelodeons; but in their day, the nickelodeons were amazingly common. In 1913, there were 606 nickelodeons in Chicago; they used barkers and flashing lights to attract their audience; and they "proliferated in slum districts," where the poor could, for a mere nickel, enjoy the show.[52] In Chicago, there were attempts during the nickelodeon era to keep children out of unsuitable movies; and in 1912, a law was enacted "requiring the theaters to remain lighted during all performances;" the point was to "preclude any undue familiarity among the patrons."[53] Darkness, after all, could arouse "prurient interests." And apparently, audiences in the early

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[47] Jowett et al., *supra* note 41, at 289.
[48] *Id.* at 285.
[49] *Id. at* 290.
[50] *Id.*
[51] *Id. at* 296. This same girl had, apparently, gone with a boyfriend to the movies; and he "acted funny during the show, he tried to hold my hand and act funny."
[52] Kathleen McCarthy, *Nickel Vice and Virtue: Movie Censorship in Chicago, 1907-1915,* 5 J. Popular Film 37, 40 (1976).
[53] *Id.* at 46.

nickelodeons, in urban centers, "ate meals and even made love in the darkened theatre."[54]

The impulse to censor the movies thus rested on powerful arguments. Only a few states actually set up state censorship boards—most notably Kansas, Maryland, New York, Ohio, Pennsylvania, and Virginia.[55] But there were also city ordinances, as we noted. In 1939, it was reported that 79 municipalities had such ordinances. The Chicago version was unusually feisty and active. The Chicago ordinance, under the control of the Commissioner of Police, directed the Commissioner to deny a permit to films that were obscene—no surprise—but also films that exposed any "class of citizens. . . . to contempt, derision, or obloquy," or which might lead to a riot.[56] The ordinance in Portland, Oregon, allowed its board to refuse a permit to any movie which "shows anything of an obscene, indecent or immoral nature," or which presented any scene or subject that was "gruesome, revolting, or disgusting" or which might "disturb the public peace."[57] These municipal provisions, along with the state boards, meant that film censorship was more pervasive than it might appear on the surface. The influence of these various boards tended to spill over, beyond the city limits or state boundaries; thus, in a sense, it would not be much of an exaggeration to say, by virtue of the state and city statutes and ordinances, there was a kind of national system of censorship, or something quite close to that.[58]

Of course, banned movies were forbidden fruit; and where it was possible to see them, they attracted a big audience. That, indeed, was the heart of the problem. For example, a 1915 movie starring Theda Bara, *A Fool There Was*, turned out to be a "box-office smash."[59] The British Board of Censors refused to approve it. For traditionalists, this was a deeply troubling movie.

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[54] Samantha Barbas, *The Political Spectator: Censorship, Protest, and the Moviegoing Experience, 1912-1922,* 11 Film Hist. 217, 220 (1999).

[55] *See Film Censorship: An Administrative Analysis,* 39 Colum. L. Rev. 1383, 1384 (1939). A Louisiana Board apparently never functioned. Connecticut briefly allowed censorship under a revenue law, but the arrangement was repealed in 1927. *Id.* at 1385.

[56] *Id.* at 1386. Also banned was any movie which "purports to represent any hanging, lynching, or burning of any human being."

[57] Mary P. Erickson, *"In the Interest of the Moral Life of Our City": The Beginning of Motion Picture Censorship in Portland, Oregon*, 22 Film Hist. 148, 158 (2010).

[58] Laura Wittern-Keller, Freedom of the Screen: Legal Challenges to State Film Censorship, 1915-1981, at 38 (2008); *Censorship of Motion Pictures*, 49 Yale L.J. 87 (1939).

[59] Gerald R. Butters, Banned in Kansas: Motion Picture Censorship 1915-1916, at 106 (2007).

Bara played a "vamp," a woman "who ruins honorable men by seducing them with her mystical charm and overt sexuality."[60] At the end of the movie, the vamp's victim has been ruined; but the vamp herself is triumphant. It was just this sort of movie that the censors banned, or tried to ban.[61] In *Baby Face* (1933), the main character is an ambitious woman, who sleeps her way to the top. In the end, she repents her sins; nonetheless, the movie "doesn't just depict vice; it glories in it."[62]

The exhibitors and movie companies were quite naturally opposed to any censorship; they knew which movies were likely to make money and they fought for the right to show these movies. They also were opposed to the bureaucracy and the expense and the delay which censorship brought about. In 1917, the National Association of the Motion Picture Industry was established;it carried on a campaign against the censorship movement. The Association denounced censorship as downright "un-American;" censorship would subject the "people's amusement" to the will of "cranks and politicians."[63] But despite their best efforts, the industry lost the struggle in New York, and in other states as well. Censorship seemed to be on the march.

To be sure, many movies could be considered moral, uplifting, and educational—movies with a message. Still, critics of the movies felt that rotten apples spoiled the whole barrel and that some movies were indeed capable of corrupting the masses. Exhibitors and movie companies brought lawsuits in a number of jurisdictions in an attempt to get rid of the censorship boards, but these attacks were quite generally failures; the courts upheld every licensing and censorship law that came before them.[64] Eventually, in 1915, the issue reached the United States Supreme Court, in a case that challenged the Ohio censorship board. Under the Ohio statute, the board was supposed to approve only films that were "of a moral, educational, or amusing and harmless character."[65] Was this system constitutional?

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[60] *Id.*

[61] *Id.* at 108.

[62] Thomas Doherty, Pre-Code Hollywood: Sex, Immorality, and Insecurection in American Cinema: 1930-1934, at 136 (1999).

[63] Barbas, *supra* note 54, at 221.

[64] *E.g.*, the Pennsylvania statute was upheld in Buffalo Branch, Mut. Film Corp. v. Breitinger, 250 Pa. 225, 95 A. 433 (1915), in a long, dreary opinion, which cited all sorts of cases on the police power of the state, and noted a line of cases that upheld the licensing of theaters.

[65] Mut. Film Corp. v. Indus. Com. of Ohio, 236 U.S. 239, 240 (1915).

The Supreme Court upheld the statute. The decision was unanimous. Justice McKenna wrote the opinion, which was short, but quite revealing.[66] On the free speech issue, the Court made its position clear: the statute did not violate the right of free speech or freedom of expression. Since movies could be "used for evil," it was acceptable for states to regulate them.[67] Everybody went to the movies—men, women, and children. Movies were "vivid;" they might be "useful, and entertaining," but they were also potentially harmful, all the more so because of "their attractiveness and manner of exhibition."[68] Movies could corrupt the morals of the audience, and could even excite that dreaded object, "prurient interest." To be sure, movies might at times act as "mediums of thought;" but the same could be said of "the theater, the circus, and all other shows and spectacles."[69] The sacred principle of freedom of speech did not extend to the "multitudinous shows which are advertised on the billboards of our cities and towns."[70] Movies were a business, a profit-making enterprise. Censorship was a perfectly valid tool of regulatory policy.

A case decided in 1922, in New York, tested the limits of the powers of censorship boards and revealed a good deal about the underlying ideas that moved the judges. The plaintiff in *Pathe Exchange, Inc. v. Cobb* invoked freedom of the press.[71] Their newsreel films, it was claimed, could not legally be censored. Under New York law, it was unlawful to "exhibit . . . at any place of amusement for pay . . . any motion picture film" without a "valid license or permit" from the Motion Picture Commission of the state.[72] Newspapers of course were not censored, and were exempt from prior restraint. They were also not subject to any kind of review before they were printed and released to the public. Why should a newsreel film be any different?

The New York court turned the plaintiff down. The Court's reasoning, to a reader of today, might seem somewhat weird, but it did expose the thought processes of the judges. Movies were special, in that they catered

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[66] *Id*. On this case, see John Werthheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 Am. J. Legal Hist. 158, 159 (1993). Mutual's films, incidentally, were not in serious danger from the censors; they were as "straight-laced as Victorian corsets." *Id.* at 173. The censorship process, however, was costly to Mutual; Mutual had to pay fees, and the whole procedure resulted in expensive delays, which hurt the business.

[67] *Mutual Film Corp.*, 236 U.S. at 242.

[68] *Id.* at 244.

[69] *Id.* at 243.

[70] *Id.*

[71] Pathe Exch. v. Cobb, 202 A.D. 450 (N.Y. App. Div. 1922).

[72] *Id.* at 453.

to a mass audience, in contrast to libraries. Libraries, said the court, were full of books that nobody reads, and without "the necessary literacy" they might as well not exist.[73] For children, especially, they are "dead," because children "lack . . . literacy and imagination."[74] Hence, libraries present no danger to "children and the illiterate."[75] Movies were a different story altogether. They need "no other illuminating than the bright light behind the film," which moves "rapidly."[76] The value of a movie as "an educator for good is only equalled by its danger as an instructor in evil."[77] Movies can reveal "current events . . . in all their nakedness." Unlike the printed page, nothing "is left to the imagination."[78] Movies are a "show," a "spectacle;" and "thought and instruction" are incidental to the "show," comparable to the "circus or any theatrical performance."[79] What the Constitution protects is "freedom of expression of thought, involving conscious mental effort."[80] People who engage in show business include some who "would give unrestrained rein to passion" and they "appreciate the business advantage of depicting the evil and voluptuous thing with the poisonous charm."[81] Two points are worth stressing: the sense of horror at whatever might arouse "passion," and the fact that illiterates (or, one might add, the poorly educated), went to movies; the very nature of a library, on the other hand, excluded them.

On the surface, censorship laws did not make obvious distinctions of class or education. But some of the cases did make these distinctions fairly explicit. For example, the muddled opinion in the *Pathe* case definitely rested on the idea of class. A prominent issue was that even illiterates could go to movies. In fact, few Americans were actually illiterate:[82] the Court here surely meant, not illiterates as such, but the mass public—the man and woman in the street. To religious leaders, and perhaps to elites in general, which of

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[73] *Id.* at 456.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 457.
[80] *Id.*
[81] *Id.*
[82] According to census data, 20 percent of the population had been illiterate in 1870; by 1900, only 10.7 percent; and in 1910, a mere 7.7 percent. Nat'l Ctr. for Educ. Stat, *National Assessment of Adult Literacy (NAAL): 120 Years of Literacy*, https://nces.ed.gov/naal/lit_history.asp [https://perma.cc/L9CT-B5MM] (last visited April 18, 2024).

course included judges, the mass public was on the whole child-like, easily corrupted, and in need of strong moral guidance.

But what led the courts, and the legislatures, to think that movies were especially dangerous to the moral health of society? Not obscenity alone; most of the censored movies were not, in fact, obscene under any definition. Obscenity and pornography were already illegal, and state statutes against pornography had been around for decades. Congress in 1873 enacted the Comstock law, which made it a crime to send obscenity through the mails.[83] To be sure, under the censorship laws, the state could, and did, cite pornography laws, which applied to movies as well as to books and plays. The censors could, and did, filter out whatever struck them as obscene. Of course, what the early 20th century considered obscene was very different from what would pass for obscene today (if anything would). In any event, censorship of the movies went beyond obscenity. The movies were a vast, new medium, a thrilling form of mass entertainment. They were also (it was thought) enormously powerful; and therefore enormously dangerous. In an ideal world, the movies would confine themselves to what was "educational" or "harmless."[84] Of course, movies could be entertaining, and this was one of their main objects; but they also had the duty to uphold the highest moral standards. Movies that were not "harmless" were or could be objectively harmful.

In the case law, as we have seen, amazingly little was made of the First Amendment. From the Supreme Court on down, cases on censorship hardly took the First Amendment seriously. Naturally, everybody was in favor of freedom of speech. But what was "speech?" As we noted, "free speech" meant, of course, political speech—it meant discussion of topics of general interest; it meant the Federalist Papers, or the Lincoln-Douglas debates. It meant discourse about issues of the day. It also meant discussion of religious and ethical issues.[85] Speech was newspaper editorials; speech was coverage of electoral campaigns. But a "show" was not speech, in the constitutional sense. Emotional outbursts were not speech. And, apparently, motion pictures did not fit the classic definitions of speech. Movies were entertainment. Circuses

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[83] Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, S.211, 42nd Cong. (1873).

[84] Mut. Film Corp. v. Indus. Com. of Ohio, 236 U. S. 239, 240 (1915).

[85] *E.g.,* speaking of First Amendment rights, in Whitney v. California, 274 U.S. 357, 371 (1927) (Brandeis, J., concurring), Justice Brandeis stressed the political dimension of free speech, which he considered paramount. He wrote that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile." *Id.* at 375.

were entertainment. Vaudeville was entertainment. They were hardly in the same class as the Federalist Papers.

Moreover, and precisely with regard to entertainment, there was precedent for some forms of censorship. Theaters had to have licenses in order to operate. Regulation and even censorship of plays and vaudeville shows was standard and not seriously questioned. Until the first decade of the 20th century, "the application of free speech logic to theater regulation" was completely absent, at least from the reported case law.[86] George Bernard Shaw's play, *Mrs. Warren's Profession,* written in 1893, was barred from production in England; and in the United States, the police prevented the play from being shown in 1905. Her profession—she was a former prostitute who owned a chain of brothels—was not considered a fit subject for the stage.[87] In the United States, in 1900, Olga Nethersole, an actress, together with her leading man, her manager, and the lessee of the theater, were arrested for producing, showing, and acting in a play called *Sapho*, written by an American playwright, Clyde Fitch.[88] The play, according to the indictment, was "lewd, indecent, obscene, filthy, scandalous;" it contained "lascivious and disgusting motions and indecent postures and indecent, obscene and disgusting words."[89] Stage plays had to avoid subjects like prostitution, venereal diseases, and overt sexual behavior. Newspapers in general also treated these subjects with kid gloves.

Censorship of movies apparently had more in common with control of live theater than with books and newspapers, which had more First Amendment protection. In the famous 1931 case of *Near v. Minnesota*, the Supreme Court took a strict line against censorship of newspapers.[90] Jay Near published

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[86] *See* Werthheimer, *supra* note 66, at 169. Interestingly, the lawyers for Mutual Film *did* bring up the issue of free speech, and made it central to their argument. But the Supreme Court, as we saw, paid no attention to this argument.

[87] Permission "for public performance was eventually granted over a quarter of a century . . . later." Dominic Shellard & Steve Nicholson, The Lord Chamberlain Regrets…: A History of British Theatre Censorhip 67 (2004). As late as the 1950s, the Lord Chamberlain's office was still fussing over such plays as *Waiting for Godot,* suggesting cuts; for *Look Back in Anger,* the censor asked for a number of cuts as well, for example, in act two, "Alter the reference to pubic hair," and in act three, "Cut short-arsed." *Id.* at 152.

[88] *Indictment for "Sapho*," N.Y. Times*,* Mar. 23, 1900, at 2. On this incident in general, *see* Theresa Saxon, *Sexual Transgression on the American Stage: Clyde Fitch, Sapho, and the American Girl*, 10 Literature Compass 735 (2013).

[89] *Id.*

[90] Near v. Minnesota, 283 U.S. 697 (1931). It was, to be sure, a close call; the decision was five to four.

a paper, the Saturday Press, in Minneapolis. It was violently anti-Semitic; it claimed, for example, that Jews were involved in organized crime in the city, working together with corrupt officials. A Minnesota law provided for injunctions against publishers of scandalous and defamatory newspapers.[91] The Supreme Court struck down the Minnesota law as an "infringement of the liberty of the press."[92] Basically, the Constitution, in the view of the Court, did not allow any pre-publication censorship ("prior restraint"), except in a few narrow circumstances.

Clearly, then, movies were a different beast. Censorship, which the courts upheld, were a form of "prior restraint," which the Supreme Court in *Near* had refused to uphold: that is, an "official restriction imposed upon speech . . . in advance of actual publication."[93] Movies were more dangerous and more powerful than Near's wretched newspaper; more dangerous and more powerful than a play, which only people sitting in the theater would see. Newspapers could be, and often were, tawdry, sensational, and at times they stepped over the line. But the popularity and vividness of the movies made them radically different from newspapers, books, or plays—at least, the courts thought so. It looked for a while as if the movement to censor movies would bulldoze its way over all opposition.

Controversy over the movies continued in the period between 1910 and the 1920s: controversy over censorship and over the actual content of the movies. Not all of the controversy came from traditional elites: *The Birth of a Nation,* which reached theaters in 1915, was a landmark in the history of films in many ways. But it glorified the Confederacy and the Ku Klux Klan and its portrayal of African Americans was racist to the core.[94] African Americans were justifiably outraged at this wildly popular movie, which was even shown to President Woodrow Wilson in the White House.[95] African American groups tried to get the movie banned; it evoked controversy wherever it was shown.[96] But it was a huge success at the box office.[97] Race was a touchy subject for the southern states, but not because of the themes of *Birth of a Nation.* The Virginia Board of Censors in its first annual report for

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[91] *Id.* at 702–03.

[92] *Id.* at 722.

[93] Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 648 (1955).

[94] Melvyn Stokes, D.W. Griffith's The Birth of a Nation: A History of the Most Controversial Motion Picture of All Time 5–7 (2007).

[95] *Id.* at 111.

[96] *Id.* at 6–7.

[97] *Id.* at 3–5.

the years 1924 and 1925 announced that it would censor films that might "produce friction between the races."[98] The Board used this as an excuse not to allow movies directed by an African American director, Oscar Micheaux, to be shown in Virginia theaters.[99] The Board never consulted any African American groups before reaching this decision.[100] Micheaux had produced a silent film in 1920, *Within Our Gates,* as a kind of counter to *Birth of a Nation.*[101] Both sides of this take on history, Griffith and Micheaux, assumed the power of motion pictures to move and influence the mass public. To Southern jurisdictions "friction between the races" meant recognizing as a threat movies that posed any challenge to white supremacy. Southern cities—Memphis is a prime example—censored or banned movies in which there was the slightest hint of interracial love or sex; or, indeed, movies which had the audacity to show or suggest "social equality" between the races, including even movies in which black and white children played together.[102]

The most powerful case against the movies, however, was the accusation that they threatened to debase the morals of society. The trial of Roscoe ("Fatty") Arbuckle, in the 1920s, did not help Hollywood's reputation. Arbuckle, one of the stars of silent films, was accused of rape; a young woman died after a party in Arbuckle's hotel room, under somewhat mysterious circumstances.[103] The court proceedings in this case were totally sensational. They were wildly (and inaccurately) reported in the media. It seems clear (today at least) that Arbuckle had done nothing wrong; after two trials that ended in hung juries, a third jury not only acquitted Arbuckle, but also issued an apology.

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[98] Felix Harcourt, Ku Klux Kulture: America and the Klan in the 1920s, at 112 (2017).

[99] *Id.*

[100] Jennifer Fronc, *Local Public Opinion: The National Board of Review of Motion Pictures and the Fight Against Film Censorship in Virginia, 1916-1922*, 47 J. Am. Stud. 719, 739–41 (2012).

[101] See Anna Siomopoulos, *The Birth of a Black Cinema: Race, Reception, and Oscar Micheaux's Within Our Gates,* 6 Moving Image: J. Ass'n Moving Image Archivists 111 (2006).

[102] *See* Whitney Strub, *Black and White and Banned All Over: Race, Censorship, and Obscenity in Postwar Memphis*, 40 J. Soc. Hist. 685 (2007). On race and censorship in the South, *see also* Margaret T. McGehee, *Disturbing the Peace: Lost Boundaries, Pinky, and Censorship in Atlanta, Georgia, 1949-1952*, 46 Cinema J. 23 (2006).

[103] On these notorious trials, *see* David A. Yallop, The Day the Laughter Stopped: The True Story of Fatty Arbuckle (1976); Greg Merritt, Room 1219: The Life of Fatty Arbuckle, the Mysterious Death of Virginia Rappe, and the Scandal that Changed Hollywood (2013).

Nonetheless, his career had been destroyed in the process.[104] Moreover, millions of people had become convinced that Hollywood was a moral swamp, a place of debauchery and sin, where the stars lived lives of decadent luxury, and indulged in drunken orgies. The unsolved murder of William Desmond Taylor, in 1922, and the drug and alcohol deaths of a number of movie stars added to the unsavory reputation of Hollywood.[105] Hollywood was, in short, not only producing immoral movies; it was an immoral society. Movie stars, wildly popular, with fan clubs and fan magazines, were exactly the wrong sort of role model for the national audience.

Thus, in the 1920s, the movie industry faced strong headwinds. Movie producers and theater-owners lobbied hard against censorship; and, in particular, censorship on the national level. It seemed like an uphill struggle. The Catholic Church and other religious groups bullied and badgered the industry.[106] The Southern Methodists, in a meeting in 1926, adopted a resolution decrying Hollywood's morals in general, the "vile and suggestive" movies Hollywood produced, and called for a federal censorship board.[107] The film industry, no surprise, fought back against the many voices calling for reform and censorship. As early as 1917, movie-makers had formed a National Association of the Motion Picture Industry. The Association fought hard against censorship of any type. Censorship, the Association claimed, was downright "un-American;" censorship would subject the "people's amusement" to the will of "cranks and politicians."[108] But despite their best efforts, they lost the struggle in New York, and in other states. Pressure continued to build up for a national ban on bad movies. In 1930, a Congressman, Grant Hudson, introduced a bill to set up a federal censorship commission.[109]

Federal censorship, however, never made it out of Congress. Still, state censorship had an important effect on the content of movies. In 1930–31, New York's censors made "468 cuts for indecency, 243 for inhuman acts,

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[104] *See* Gilbert King, *The Skinny on the Fatty Arbuckle Trial,* Smithsonian Mag., Nov. 8, 2011. The jury which acquitted Arbuckle, on April 12, 1922, issued this statement: "Acquittal is not enough for Roscoe Arbuckle. We feel that a great injustice has been done." *Id.*

[105] *See* Robert Giroux, A Deed of Death: The Story of the Unsolved Murder of Hollywood Director William Desmond Taylor (1990); William J. Mann, Tinseltown: Murder, Morphine, and Madness at the Dawn of Hollywood (2014).

[106] See Doherty, *supra* note 62, at 171–86.

[107] *Methodists Hit Movies*, N.Y. Times, May 21, 1926.

[108] Barbas, *supra* note 54, at 221.

[109] H.R. 9986, 71 Cong. (1930).

1129 for incitements to crime, and 1165 for moral corruption;" other state censors also "scissored away."[110] The industry became convinced that the only way to defend itself, and to ward off federal censorship, was to do the job itself: to adopt a strategy of self-censorship. This was the idea behind the Motion Picture Production Code, which would come to have enormous influence over the industry for at least a generation. The Code was first promulgated in 1930. It was actually drafted, in the main, by two prominent Catholics: Martin Quigley and Father Daniel Lord. With minor changes, the studios signed on.

The Code did not, initially, have teeth. Although it was drafted in 1930, it only began to make a difference in 1934. In that year, a Production Code Administration came into existence, which could and did rigidly enforce the Code. In the interim years of 1930 to 1934, Hollywood (from the standpoint of the Code) had touched bottom: movies were produced that flaunted "sex, immorality, and insurrection," to quote the title of a study of that period.[111] Some films of the early 1930s were considered, by religious elites, and traditionalists in general, as notoriously offensive. It was not just sex, adultery, and the like; there were also gangster movies, like *Little Caesar* in 1931, which (critics complained) glorified the gangsters. True, the gangster Rico dies at the end in a hail of machine-gun bullets, but his presence dominates the movie. To reformers, this movie was immoral, appalling. Rico could be seen as "brash, clever, and daring;" the police, on the other hand, were shown as "dull, witless, and plotting."[112] The film was a huge success. Censors in New York and Pennsylvania made cuts; and it was banned in parts of Canada.[113] The movies in this interim period were, indeed, daring; but this period also produced some classics—movies like *Dracula, Frankenstein,* and *King Kong*—along with a great deal of dross. From 1934 on, however, the rigid self-censorship which the Code embodied, became the law of the industry—at least until it collapsed a generation later.

The Production Code of 1934 was enforced by a Production Code Administration. Joseph Breen, a prominent Catholic lay person, was appointed the head of the PCA, which he ran with enormous zeal and

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[110] Leonard J. Leff & Jerold L. Simmons, The Dame in the Kimono: Hollywood, Censorship, and the Production Code 15 (rev. ed. 2001); Gregory D. Black, Hollywood Censored: Morality Codes, Catholics, and the Movies (1994); *see* Butters, *supra* note 59 (on the work and travails of censorship boards in one jurisdiction).

[111] Doherty, *supra* note 62, at 347–67.

[112] Black, *supra* note 110, at 115.

[113] *Id.* at 116.

efficiency for twenty years.[114] The PCA was a powerful agency. It reviewed scripts before they were turned into films; it had the authority to levy fines on anyone who dared exhibit a film that violated the Code.[115] The Code had real power. In the 1930s, the studios owned most major theaters in the big cities; if the studios refused to show films that lacked the PCA seal of approval, that film was "dead in the water." It would simply have no audience, and would die of box office starvation.[116]

The Code itself is a fascinating document. It begins with a set of "General Principles," followed by particular applications.[117] Movies, we are told, are primarily entertainment. Entertainment can be a force for improving society, but "[w]rong entertainment" can lower the "living condition and moral ideals of a race."[118] There are, for example, "healthful moral sports," like baseball, and bad ones like "cockfighting, bullfighting, bearbaiting;" the Code reminded its readers of "the effect on a nation of gladiatorial combats, the obscene plays of Roman times, etc."

Movies were truly *mass* entertainment; books and plays were not. The movies had "moral importance" for society. Social class and education were important considerations for the drafters of the Code. This was because, "in an incredibly short period of time," the motion picture had become "the art of the multitudes."[119] This was a crucial fact. Most arts "appeal to the mature."[120] But *this* art, the art of the motion picture, "appeals at once to every class—mature, immature, developed, undeveloped."[121] Music "has its grades for different classes; so has literature and drama."[122] But the motion picture "reaches every class of society;" it reaches "places unpenetrated by other forms of art."[123] The industry would find it difficult to "produce films

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[114] Thomas Doherty, Hollywood's Censor: Joseph I. Breen & the Production Code Administration (2007). Breen was, incidentally, a "rabid anti-Semite," who considered the Jewish moguls of Hollywood a "foul bunch," "lice," and totally "ignorant"in all matters having to do with sound morals;" he also said that Jews were "a rotten bunch of vile people," who "think of nothing but money making and sexual indulgence." Black, *supra* note 110, at 70, 170.

[115] *Id.* at 67–69.

[116] Wittern-Keller, *supra* note 58, at 61.

[117] There are various texts of the Code; none of them, apparently, is definitive. For one version, see the appendix in Doherty, *supra* note 62, at 347–67.

[118] *Id.* at 348.

[119] *Id.* at 349.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

intended for only certain classes of people." Movie theaters are "built for the masses."[124] They have a mass audience; for this reason, they cannot be allowed to enjoy as wide a "latitude" as that "given to book material. This ethos echoed the statements in the court decisions that upheld censorship. Movies posed a danger to society. The Code became a device, not only for getting rid of indecency, but also a way to "prevent mass entertainment films from challenging the moral, political, and/or economic status quo."[125] And that status quo, obviously, depended on a social division between the elites and the masses.

In general, the industry was not to produce any movie "that will lower the moral standards of those who see it . . . . Correct standards of life . . . shall be presented."[126] The movies must also embrace law and order. Crimes "shall never be presented in such a way as to throw sympathy with the crime as against law and justice, or to inspire others with a desire for imitation."[127] The "sanctity of the institution of marriage . . . shall be upheld."[128] Adultery was never to be shown in an attractive light. "Excessive and lustful kissing, lustful embraces, [and] suggestive posture and gestures" were outlawed.[129] Scenes of passion should not "stimulate the lower and baser" emotions.[130] Nothing, in short, that might tempt the unsheathing of the "membrane virilis" or its female counterpart. Prostitution and "white slavery" were not to be presented in detail.[131] "Sex perversion or any inference of it is forbidden;" and "[s]ex hygiene and venereal diseases are not subjects for motion pictures."[132] Naturally, vulgarity, obscenity, and profanity were unacceptable. "Blasphemy" was "forbidden;" and "[t]he name of Jesus Christ should never be used except in reverence."[133] There was to be no nudity, no undressing scenes, no indecent dances. Movies were not to "throw ridicule on any religious faith;" and the "use of the Flag shall be consistently respectful."[134]

For about a generation, the Code was the industry's Bible. Under Breen's leadership, it made a vigorous attempt to enforce its standards. Of course,

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[124] *Id.*
[125] Black, *supra* note 110, at 296.
[126] Doherty, *supra* note 62, at 361.
[127] *Id.*
[128] *Id.* at 362.
[129] *Id.* at 363.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 356, 363.
[134] *Id.* at 364.

studios were constantly testing the limits, sometimes slyly but successfully.[135] They had to submit their scripts to the PCA, which would make suggestions, approve or disapprove, negotiate, wrangle, ask for cuts and changes, and (finally) acquiesce (or not). The suggestions made were detailed, specific, and demanded not only close attention to the Code, but (in general) the avoidance of anything that by any stretch of the imagination could be considered offensive. For example, on reading the script of *The African Queen* (this wonderful movie reached the screen in 1951), Breen wrote to the producer that the "sound of . . . stomach growlings seems in rather questionable taste;" the main (male) character "should not strip to his drawers;" moreover, and more fundamentally, there is a suggestion that the two main characters had an "immoral relationship" and (what is worse) the relationship seems to be "treated as a matter of course," and not condemned; this in and of itself rendered the script "unacceptable."[136]

A movie like *The African* Queen was, however, redeemable; with cuts and changes, it could meet the Breen standards, or at least attain a level of ambiguity and vagueness that Breen and company felt they could live with.[137] That was not always the case. For example, in the 1930s, a foreign import, *Ecstasy,* starring the actress later known as Hedy Lamarr, truly alarmed the Code administrators (and state censorship boards as well). In the film's most notorious scene, the lead actress could be seen "streaking nude across the Czechoslovakian countryside and miming an ecstatic orgasm in close-up."[138] Breen quite naturally was having none of this. *Ecstasy* was totally unacceptable—it was a story of "illicit love and frustrated sex, treated in detail without sufficient compensating moral values."[139] It was banned outright in Pennsylvania. In Massachusetts, it was not allowed to be shown on Sunday.[140] Maryland's censors made many objections: they insisted, for example, on getting rid of the "view of the nude girl gamboling in the woods;" likewise unacceptable

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[135] *See*, *e.g.,* Michael Slowik, *On Deadline and Reviewed in Pieces: The Miracle of Morgan's Creek and the Production Code Administration,* 29 Film Hist., 29, 29–34 (2017).

[136] Gerald Gardner, The Censorship Papers: Movie Censorship Letters from the Hays Office, 1934 to 1968, at 7 (1987).

[137] After all, as Michael Slowik has pointed out, Breen's "job was to aid rather than hinder film production;" and sometimes he recommended changes because of worries about matters that "censorship groups would object to" or even take their scissors to. Slowik, *supra* note 135, at 38.

[138] Doherty, *supra* note 62, at 273.

[139] Gardner, *supra* note 136, at 75.

[140] *Id.*

was the "views of bridegroom handling boxes of condoms."[141] It was also banned in New York; the movie emphasized "the carnal side of the sex relationship;" a New York court felt it was properly condemned.[142]

Ecstasy was an extreme case. But even less controversial movies could have a hard time trying to get approval. The process was often difficult and protracted; it might involve a lot of negotiating, a lot of give and take. Before *Gone with the Wind,* for example, could get the green light from the PCA, it had to surmount a number of hurdles. The PCA insisted on all sorts of alterations, to make the movie less sexually explicit. A furious battle erupted over whether Rhett Butler could say, toward the end of the movie, "Frankly, my dear, I don't give a damn." Breen wanted the offensive word dropped; the studio insisted on keeping it. In the end, the line stayed in the movie, but it was a near thing, and it took a lot of effort and argument.[143] *Tarzan the Ape Man,* and *Tarzan and His Mate,* and various sequels, posed problems once the Code was in effect; the main character roamed through the jungle in a loin cloth, and his "mate," Jane is at one point clad "in a scanty jungle bikini;" another scene, scandalized Breen with an "underwater sequence" showing a body-double of Jane, nude, swimming in a "prolonged *pas de deux.*"[144] The Code authority had particular trouble with Mae West, who was wildly successful at the box office, mainly because of her hip-wiggling, and her thinly veiled sexual references. It was probably impossible to get rid of everything that made Mae West popular. Rather, the idea was to adopt strategies "in which sexual content was suggested, not overt;" the "'sophisticated mind'" would draw certain conclusions, but the material would "'mean nothing to the unsophisticated and inexperienced.'"[145] When the Code got going, and showed real teeth, Mae West's career went into decline. The Code Administration devoted a lot of energy to taming the overt sexuality of her dialogue. Whatever the cause, none of her pictures were as outrageous as her

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[141] *Id*. at 73–75.

[142] Eureka Prods. v. Byrne, 252 A.D. 355 (App. Div. 1937).

[143] Leff & Simmons, *supra* note 110, at 81–112; Doherty, *supra,* note 62, at 134.

[144] Doherty, *supra* note 62, at 256–62, 293. The ads for these firms "aimed straight at the female audience," asked "girls" if they would "live like Eve" if they "found the right Adam?" and also referred to "primitive jungle mating." *Id.* at 262.

[145] Marybeth Hamilton, *Goodness Had Nothing to Do with It: Censoring Mae West*, *in* Movie Censorship and American Culture 187, 190–91 (Francis G. Couvares, ed., 1996); *see also* Doherty, *supra* note 62, at 182–87.

Broadway plays, or her bawdy movies that came out before 1934, the year the Code began to have real bite.[146]

In Great Britain, there was a system not unlike the American system. A British Board of Film Censors began its work in 1913. The Board evolved principles very similar to those of the Production Code. Its principles were codified in 1926.[147] They included what one might have expected—no nudity; no scenes of "men leering at exposure of women's undergarments," no "degrading exhibitions of animal passion;" no "indecent wall decorations," or "men and women in bed together."[148] No subjects such as "white slave traffic," or "abortion."[149] "Travesty and mockery of religious services" were taboo. No films "in which sympathy is enlisted for the criminals." And, since this was the United Kingdom, no "lampoons of the institution of monarchy" were allowed or "propaganda against monarchy."[150] Also, white men were not to be shown "in state of degradation amidst native surroundings;" there was to be no "Bolshevist propaganda," no "equivocal" situations between "white girls and men of other races;" British military officers were not to be "shown in a disgraceful light."[151]

My Favorite Wife, a comedy directed by Garson Kanin, appeared in 1940. It was a big box office success. A lawyer, played by Cary Grant, believes his wife is dead; she was on a ship that was lost at sea. Seven years have gone by. At the beginning of the movie, we see Grant and his new wife in a courtroom, as a judge performs a marriage ceremony. Then, that very day, lo and behold, his wife, played by Irene Dunne, reappears. She is not dead after all. She had been on a deserted island (these islands seem common in the movies). Now she has been finally rescued. This is a big surprise, naturally, to Cary Grant. And on his wedding day, of all days—or, more pertinently, shortly before his wedding night. At first, he keeps the news from wife number two, who is baffled by his behavior. The basic joke of the movie is the way Cary Grant wriggles and squirms, which he must do, to avoid spending the night with wife number two, and (of course) having sex with her. He is successful, needless to say. In the end, the second marriage is annulled by the same judge who

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[146] Doherty, *supra* note 62, at 338. *See also* Ramona Curry, *Mae West as Censored Commodity: The Case of Klondike Annie*, 31 Cinema J. 57 (1991).

[147] For a version of the code, see Sarah Smith, Children, Cinema and Censorship 183 (2005).

[148] *Id.* at 182–83.

[149] *Id.*

[150] *Id.* at 181.

[151] *Id.*

married the new couple. For Cary Grant and Irene Dunne all ends happily; they can go on living together once more, as husband and wife.

The whole movie, in other words, pivots on the notion that Cary Grant simply cannot have sex with wife number two, because his marriage to her is invalid. Sex outside of valid marriage is impermissible in the movies. Impermissible under the Production Code. The movie also assumes that Grant and his new wife did not have sex *before* the ceremony, since that too would not be allowed (and would have made the whole premise of the movie ridiculous). There is an even more basic assumption: that the characters in the movie, who are modern, well-to-do, sophisticated men and women, *accept* the norms of the Production Code; and live by them.[152] For them, too, sex outside of lawful marriage is out of the question. This was, in a way, another and extremely basic message of the Code. The Code taught that official, traditional behavior was a reality; that the norms were living, breathing norms; and that the stars of the silver screen accepted these norms, and lived by the rules of the Code.

This was, indeed, the message of many movies made during the reign of the Code. Not all of them, of course. Many other movies, like *Tarzan* or *The African Queen,* basically rejected the ideology of the Code, sometimes through hints and innuendos, using whatever tricks of the trade they could muster, in order to smuggle reality (even, at times, "smut") into the fabric of the movies. Not to mention that fact that fan magazines, and the mass media—and such scandals as the Fatty Arbuckle case—presented the public with a picture totally at odds with the picture painted in *My Favorite Wife.* But the Code was not intended to reflect the messy facts of the real world. It was a cardinal principle of the Code, for example, that crime does not pay. No movie was allowed to suggest that a person could commit a crime and get away with it. The proposed script for the 1940 film *Rebecca,* which Afred Hitchcock would direct, presented the "story of a murderer who is permitted to go off scot-free." But this was a clear violation of the Code. It had to be changed—and it was.[153] The movie was a big success, both commercially and artistically. But it was not the movie that was originally intended.

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[152] A subplot: it turns out that the deserted island was not totally deserted. In addition to Irene Dunne, there was a handsome man who was part of the same shipwreck, and who shared the island with her; they spent years together, but apparently never had sex. This man is rescued along with Irene Dunne; and at one point in the movie, he asks her to marry him and return to the island; but she says no. Again, the assumption is that they never had sex, and *would* never have sex, without a valid legal marriage. This was impossible on the island, so sex was impossible too.

[153] Gardner, *supra* note 136, at 85. *Rebecca* was based on a novel by Daphne du Maurier (1938); in the novel, Rebecca's husband kills her and tries to cover up the crime.

Arguably, the Code kept a lot of questionable material out of movie theaters, in a way that met widespread approval from respectable people. But the Code also had a stifling effect. The Code expressed a traditional point of view on matters of sex and violence. It also made it difficult for movies to promote public awareness of real issues that involved sex and violence; or indeed economic and social issues in general. This was another sense in which elements of class, or at least class structure, played a role in the censorship story. The Code not only protected elite morals; it protected the status of the elites; it made social criticism more difficult; it spoke, not only for traditional moral values, it spoke also for the status quo. In 1932, *I Am a Fugitive from a Chain Gang* reached the screen—and earned Paul Muni a nomination for an Academy Award. This was a savage critique of the correctional system of Southern states, especially the notorious chain gangs. It is doubtful that it could have been made two years later, when the Code began to flex its power.[154] The United States, during the Depression years, and then the war years, confronted many issues, new and old. The Code ignored these issues. The Code ignored, for example, any racial tensions; and the movies, during the period of the Code, tended to ignore people of color and their problems altogether. African Americans in the movies usually played maids and other servants; they were "desexualized sideshows, shuffling about on the fringes.[155] Only in later years did films approach the issue; and somewhat gingerly.[156]

Book Censorship

The Code accentuated the sharp distinction between movies and printed matter—books and magazines; and even the distinction between movies and stage plays. Movies were considered far more dangerous, because they were so vivid, and because they were incredibly popular and appealed to people in all walks of life. There was nothing comparable to the PCA for printed material; and even for plays. After all, there was no equivalent of Broadway in small towns and rural areas. But the movies were everywhere.

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[154] The movie was based on a book, *I Am a Fugitive from a Georgia Chain Gang!,* thetrue story of Robert Burns; but Hollywood, even though it was bold enough to make the movie, dropped the reference to a specific state. *See* Scott Allen Nollen, The Making and Influence of *I Am a Fugitive from a Chain Gang* (2016). The film was banned in Georgia, but was a box office success, and earned a large profit.

[155] Doherty, *supra* note 62, at 233.

[156] *Id.* at 237–40.

Print censorship has a long history. Political dissent is at the heart of it. Autocratic societies censor anything that even smells faintly of political dissent. Present-day China, for example, censors whatever the regime finds distasteful.[157] In the United States and the modern United Kingdom, nobody could be thrown in jail for criticizing the government; no heretics could be burned at the stake. But "pornography" or "obscenity," were another matter altogether; together with what might corrupt the morals of society or (horror of horrors) arouse prurient interest.[158] There were laws against pornography and obscenity, probably in every state. These laws applied to movies, of course. But, as we've seen, the strictures of the Production Code applied to much more than obscenity.

Beyond state laws against pornography there was also federal regulation. The famous Comstock Act of 1873, made it an offense to send obscene material through the mails; the statute also banned mailing "any article or thing designed or intended for the prevention of conception or procuring of abortion," and any "article or thing intended or adapted for any indecent or immoral use," along with any advertisement or other material which told where someone could get hold of any of these dreadful devices or learn about abortion and contraception.[159]

Men like Anthony Comstock himself worked hard to enforce the law against offensive books and pamphlets. But it was obviously impossible to stop the flow of pornography, especially material wrapped in the proverbial brown paper wrappers. The post office would have needed an army of snoopers; and presumably would have to open thousands of packages. The Comstock Act did make it possible for postal authorities to keep out egregious imports from the decadent shores of Europe. And local officials could be, at times, extremely zealous—more so than the postal authorities. In Boston, the notorious Watch and Ward Society kept an eagle eye out for whatever it considered smut.[160] The Society was a private organization, but it put pressure on

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[157] *See* Yuwu Song, *Book Censorship in Post-Tiananmen China (1989-2019)*, 2022 J. E. Asian Libs. 24 (2022).

[158] Friedman & Grossman, *supra* note 44, at 40–41 (2022).

[159] Comstock Act, 17 U.S.C. § 598 (1873). On the background, and on state laws against pornography, *see* Donna Dennis, Licentious Gotham: Erotic Publishing and its Prosecution in Nineteenth-Century New York (2009). On Anthony Comstock himself, see, for example, Nicola Beisel, Imperiled Innocents: Anthony Comstock And Family Reproduction In Victorian America (1997).

[160] Neil Miller, Banned in Boston: The Watch and Ward Society's Crusade Against Books, Burlesque, and the Social Evil 12–13, 17–19 (2010).

book-sellers, publishers, and libraries.[161] If the society's wishes were ignored, it threatened legal action. This was enough to intimidate booksellers.[162] As a result, all sorts of books were "banned in Boston," including some notable classics; and books by leading contemporary authors like Hemingway and Faulkner.[163] The impact, however—to the horror of the Society—was often the opposite of what the Society wanted: a banned book had now gotten a wonderful (and cheap) form of advertising.[164] The Society was described in the 1920s as an "ingrown group of elderly Brahmins," members of the Protestant elite "in a city dominated by Irish Catholics."[165] Of course, the hierarchy of the Catholic Church was equally devoted to censorship, and denounced improper literature vehemently. In the case of the movies, as we have seen, the Church took a leadership role. And the element of class, in all cases of censorship, was vitally important, even though it was often implicit. Banned books were books that were not proper for the masses to read.

Of course, there were at all times voices on the other side: voices that criticized censorship, and spoke out for freedom of expression. These voices grew louder over time. Society was changing. Victorian morality was declining. Elite authority was less dominant than it had been. The law of censorship reflected these social changes. James Joyce's novel, *Ulysses,* was the focal point of one crucial battle over censorship. The book was first published in Paris in 1922. From the outset, it was controversial. Very notably, the authorities found the final section offensive; Molly Bloom, a major character in the novel, lies in bed thinking vividly about her sexual experiences. The novel was banned in England. In the United States, a test case, involving an imported copy, was arranged. Was this novel obscene under the terms of the Comstock Act? In 1933, the federal district court ruled against the government.[166] The case is considered a landmark: an important step on the road to enlightenment. But the language of the opinion is significant. The district judge, John

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[161] *See id.*

[162] *See id.* at 36–38.

[163] *See id.* These books, and books by H.G. Wells and others were considered unsuitable for the sensibilities of readers in Boston.

[164] On the Watch and Ward Society, see Miller, *supra* note 160. The police in Detroit, who had the power to license movies, also did the same for printed material; throughout the 1950s, the Department's Censor Bureau "read through every comic book and paperback novel entering the city, eyeing them for four letter words as well as violent and sexual content. . . . Their list of banned titles circulated widely." Strassfeld, *supra* note 6, at 17.

[165] Paul S. Boyer, *Boston Book Censorship in the Twenties*, 15 Am. Q. 3, 15 (1963).

[166] United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933).

Woolsey, did hold that the book was not pornographic; it lacked the "leer of the sensualist." It did not contain "dirt for dirt's sake." Reading the book "did not tend to excite sexual impulses or lustful thoughts."[167]

But Judge Woolsey also noted that the book was long and hard to read; studying it was "a heavy task." Indeed, *Ulysses* was (and is) pretty tough sledding. This was surely an influence on the decision. The book was not meant for the masses. The crowds that flocked to the movies were hardly about to curl up with a copy of *Ulysses.* This was an extremely erudite novel, most of it obviously not the least bit obscene. A reader looking for kicks, for "prurient interest," who was searching for something to arouse "lustful thoughts," could surely find better and easier ways to achieve these goals. Woolsey's decision was affirmed on appeal.[168] The Second Circuit agreed that the book was not pornographic. Many passages "show the trained hand of an artist;" moreover, like the lower court, the appeal court noted that the book was a difficult read: page after page "is, or seems to be, incomprehensible."[169]

The *Ulysses* case was indeed a significant milestone in the movement to extend free speech protection to literature that would once have been taboo. Even so, the opinion was strongly colored by considerations of class and sophistication. Elite people, educated people, could be trusted to handle a book like *Ulysses;* for ordinary folks, the book might be dangerous and perhaps corrupting, but no matter: these ordinary folks would be unlikely to plow through it. Judge Manton dissented from the Second Circuit opinion. The book, he wrote, was obscene and should have been banned. He too made a distinction between types of readers; but drew a different conclusion. The obscenity statute was passed "for the protection of the great mass of our people; the unusual literator can, or thinks he can, protect himself."[170] The "unusual literator" was no doubt protected by education and sophistication. Interestingly, in some editions of the *Satyricon,* a Latin classic attributed to Petronius Arbiter, and considered quite salacious, passages suddenly lapsed into Latin. Similarly, editions of scandalous works by the Marquis de Sade would morph from English to French at crucial moments. Presumably,

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[167] *Id.* at 185. Woolsey never states why he is so sure that the book did not appeal to "prurient interests;" he simply assumed it did not.

[168] United States v. One Book Entitled "Ulysses," 72 Fed. 2d 705 (2d Cir. 1934).

[169] *Id.* at 707.

[170] Martin T. Manton became notorious later when he was exposed as corrupt—a judge who took bribes. This was one of the very rare scandals in the history of the federal judiciary. His conviction was upheld in the courts, *see* United States v. Manton, 107 F.2d 834 (2d Cir. 1938). On Manton, see Gary Stein, Justice For Sale: Graft, Greed, and A Crooked Federal Judge in 1930's Gotham (2023).

people who could read Latin and French were "unusual literators" and were somehow immunized from corruption. The masses, however, had no such protection.

The *Ulysses* decision, despite this element of class, did pave the way the way for other books that dealt frankly with taboo subjects; and were less difficult for at least the middle-class reader. *Lady Chatterley's Lover,* by D.H. Lawrence, was a serious work by a major author. It was a good deal easier going than *Ulysses,* though hardly pulp fiction. Despite controversy, by 1960, it was freely available.[171] A tougher case was the book usually called "Fanny Hill;" the actual title was *Memoirs of a Woman of Pleasure.* "Fanny Hill" was written in the 18th century. It was more or less contemporary with the First Amendment; but nobody for more than a century and a half would have thought of it as anything but pornography. Now, in the late 20th century, it came out of the closet. A well-known and reputable publishing house made Fanny Hill available to the general public. The last Victorian barriers were eroding. In 1964, a Presbyterian minister in Brooklyn went so far as to hand out copies to his congregation.[172]

The federal government, states, and cities still retain authority, in theory at least, to regulate or even ban pornographic literature. But very little banning actually goes on—in bookstores, at any rate; or even in (adult) public libraries. Controversy does flare up from time to time; and censorship of school libraries has become a very live issue in the last few years; much of the controversy is about sex, particularly same-sex relations, though also about the treatment of race. For adults, there is very little control. Generally speaking, any adult eager to indulge in "lustful thoughts" and satisfy a "prurient interest" does not have far to go to find what he or she wants.

Decline and Fall

Movie censorship followed more or less the same path to oblivion as book censorship. The strong regime of self-censorship, enforced by the PCA, did not last more than a generation. It began to fray around the edges as

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[171] Edward Ranzal, '*Chatterley' Case Won By Publisher*, N.Y. Times (Mar. 26, 1960), https://timesmachine.nytimes.com/timesmachine/1960/03/26/119099358.html?pageNumber=19 [https://perma.cc/G2E3-6FPG?type=standard]. On the movie version of the book, *see infra* note 188–191 and accompanying text.

[172] *Minister to Defy 'Fanny Hill' Ban*, N.Y. Times (Mar. 2, 1964), https://timesmachine.nytimes.com/timesmachine/1964/03/02/106942257.html?pageNumber=29 [https://perma.cc/MZ4K-U7ZY?type=standard].

early as the 1950s. A 1950 case boldly attacked the censorship ordinance of Atlanta; the suit claimed that, under Supreme Court decisions, motion pictures were entitled to "complete freedom and protection from censorship by any state or municipal subdivision."[173] The Fifth Circuit was unmoved; the *Mutual Film* case was still the law of the land. But the very fact that the plaintiffs brought the case suggests a shift in attitude.

Meanwhile, struggles with the PCA became almost routine. In 1953, Otto Preminger directed a comedy, *The Moon is Blue,* which the PCA refused to pass, on the grounds that it was too light and flippant on the subject of sex and used words like "virgin" (in the non-religious sense). The studio fought hard with the PCA for approval; when it was denied, the studio went ahead and released the movie anyway; it was banned by state censors in three states, and condemned by the Catholic clergy. Nonetheless, many theaters booked it; and it was successful at the box office.[174] The handwriting was on the wall. In the age of the sexual revolution, the Code was an anachronism. Also, by the 1950s, the movies were faced with dangerous new competition: television. This may have influenced the studios to produce edgier, more "adult" movies. By the late 1950s, the Code seemed more and more irrelevant. It was abandoned in 1968; and replaced by a rating system ("G," "PG," "R," and "NC17"). The ratings told parents what movies their children could or should see. For adults, there were no real restrictions.

So much for self-censorship. Censorship itself suffered fatal blows in the courts. A movie called *The Miracle* provoked controversy in New York. This was an Italian import; it told the story of a poor peasant woman, who is impregnated by a man with a beard; she is convinced this man was St. Joseph. This tale aroused the fury of the Catholic Church; Cardinal Francis Spellman of New York denounced it as vile and blasphemous and the New York Board of Regents, bowing to pressure, refused to license the movie, on the grounds that it was "sacrilegious."[175] The exhibitor, Joseph Burstyn, fought the ban all the way up to the United States Supreme Court, where he won

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[173] RD-DR Corp. v. Smith, 183 F. 2d 562, 562 (5th Cir. 1950), *cert. denied*, 340 U.S. 853 (1950).

[174] Leff & Simmons, *supra* note 110, at 194–208.

[175] The New York Board of Regents was authorized to withhold a license for any movie that was, in whole or in part, "obscene, indecent, immoral, inhuman, sacrilegious," or which would "tend to corrupt morals or incite to crime." On the film, *see* Garth Jowett, "*A Significant Medium for the Communication of Ideas:" The Miracle Decision and the Decline of Motion Picture Censorship, 1952-1968*, *in* Movie Censorship and American Culture 258 (Francis G. Couvares, ed., 1996).

his case in 1952.[176] *The Miracle* could be shown to audiences in New York. The opinion, written by Justice Clark, did not strike down all forms of movie censorship, and deliberately dodged the question whether movies could be censored as obscene. New York, however, could not ban a movie because it was "sacrilegious."

Still, the case was taken as a sign that the legality of movie censorship was shaky at best. A year later, the Supreme Court of Ohio again faced the issue of movie censorship in the state.[177] Ohio authorities had rejected the movie *M*, on the grounds that it was "harmful;" they also rejected the movie *Native Son*, claiming that it "contributes to racial misunderstanding."[178] The Ohio court brushed the *Burstyn* case aside; it applied only to movies that were "sacrilegious."[179] The court trotted old some of the old shopworn arguments in favor of censorship. Nobody has an "inherent right" to show material which aims "to destroy the very social fabric of the community."[180] The opinion noted an "alarming rise in juvenile delinquency" and crime in general; the movie (*M*) would have a bad effect on "unstable persons of any age," and could lead to an increase in "immorality and crime."[181] But wasn't the movie "educational?"[182] Didn't it deal with "significant contemporary social problems?"[183] Perhaps; but these "lofty purposes . . . would appeal only to a limited number of its viewers, whereas the great majority of a promiscuous audience, including children, would be impressed and affected" by the "exhibitionism and the portrayal of evil conduct."[184]

This was, even at this late date, an unusually clear expression of the class basis of movie censorship. But it was also perhaps the last gasp of a legal position about to go extinct. The *Burstyn* case was a more reliable sign of the times. Shortly after *Burstyn*, the Supreme Court gave another indication of its attitude. In Marshall, Texas, by ordinance, a local Board of Censors could deny a license to a movie if the Board felt the movie was "of such character as to be prejudicial to the best interests" of the people in Marshall. The Supreme

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[176] Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 (1952). *See* Laura Wittern-Keller and J. Raymond Haberski Jr., The Miracle Case: Film Censorship and the Supreme Court (2008).

[177] Superior Films, Inc., v. Dep't of Education, 112 N. E. 2d 311 (1953).

[178] *Id.* at 311.

[179] *Id.* at 316.

[180] *Id.* at 318.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

Court reversed a judgment in favor of the Board per curiam, citing *Burstyn*.[185] Clearly, the old precedents upholding movie censorship, and dating back to 1915, were no longer good law. Movies were protected by the First Amendment. The idea that they were mere "entertainment" or "spectacle" no longer had validity. Movies were forms of expression, just as much as books and magazines. No doubt the First Amendment even applied to circus posters, an idea that the *Mutual* case had sneered at.[186] That movies were popular and had "promiscuous" audiences no longer mattered in the late 20th century. In the years after *Burstyn*, the Supreme Court decided a number of cases, which "narrowly limited the objectives of prior censorship;" what was left as "the chief permissible objective of licensing" was obscenity; statutes which allowed censorship of films simply because they were "immoral" or "harmful" were not constitutionally valid.[187]

For example, in a case decided in 1959, New York considered a movie version of *Lady Chatterley's Lover*, imported from France. The New York statute called for denial of a license to films that portrayed "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior."[188] The movie (like the book) clearly showed adultery in a positive light; and certainly, the book (and the movie) looked favorably on the steamy affair between Lady Chatterley and her lover, the game-keeper Mellors.[189] But weren't the censors banning a film because they disapproved of the ideas it expressed; and wasn't that an invalid exercise of their power? The Supreme Court unanimously reversed.[190] The book itself had been declared obscene and unmailable by the postal authorities; but in 1959 a federal court had held that the book, praised

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[185] Gelling v. Texas, 343 U.S. 960, 960 (1952).

[186] Freedman v. Maryland, 380 U.S. 51 (1965). This case was another blow to the idea of a censorship board. The movie in this case, *Revenge at Daybreak*, was not offensive in any way; but the plaintiff simply refused to present it to the board, and insisted on the right to show it in a theater in Baltimore; the whole censorship system, he argued, was unconstitutional. The Supreme Court reversed Freedman's conviction for failure to comply with the Maryland statute. This was another fairly narrow decision; basically, in theory, the state could still require studios to submit movies in advance, but the Board had the burden of proof to show obscenity; and it had no power simply to ban a movie. A "censorship system for motion pictures," the Court said, "presents peculiar danger to constitutionally protected speech." *Id*. at 57.

[187] Randall, *supra* note 7, at 53.

[188] Kingsley International Pictures Corp. v. Regents of University, 151 N.E.2d 197, 197 (1958), rev'd, 360 U.S. 684 (1959).

[189] *Id.* at 199.

[190] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684 (1959).

by all sorts of literary panjandrums, was not obscene, despite the adultery, the explicit sex, and the naughty words. It was, on the contrary, serious literature.[191] The legal line between books and movies had been reduced almost to the vanishing point.

By the end of the century, censorship was only a memory. Movies were now free to use dirty words (they did so, almost eagerly); they could show naked bodies (at least fleetingly); and they could violate any and all of the principles of the Code. Almost anything could go—as long as it could sell. In theory, hard-core pornography was still subject to control; in practice, there was hardly any control at all, at least as far as mainstream movies were concerned. Hollywood, however, did not itself make and market "adult" films; that was left to less reputable movie-makers, and to the internet; but this was a business decision, primarily. When censorship died, cities did not give up the idea of dealing somehow with "indecent media;" but they did this through zoning laws. Detroit, for example, pioneered in this technique. Its movie censorship law was declared unconstitutional in 1969.[192]

A movie can now use four-letter words; it can make fun of religion, and its sexual code is much freer than before. Movies can and do show interracial love, romance, and sex,[193] and many of the sexual taboos of the Production Code have vanished. For example, movies can and do show gay characters.[194] All this, of course, runs parallel to changes in law (and of course in society). Most states have decriminalized adultery.[195] Laws against adultery survive in a few states, as a kind of fossil, but are hardly ever used.[196] Sodomy laws died in

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[191] Grove Press, Inc., v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959).

[192] Strassfeld, *supra* note 6, at 3. "Obscenity" could be used, moreover, as an excuse for banning or censoring movies which showed or suggested interracial romance. *See generally* Strub, *supra* note 102.

[193] A well-reviewed and successful movie, *One Potato, Two Potato* (1964), sympathetically portrays the story of a love affair between an African American man, and a white woman, in a Southern town. One Potato, Two Potato (Bawalco Picture Company 1964).

[194] There are many examples in recent decades; for example, MILK (Focus Features 2008), a very successful movie about the life of Harvey Milk, the first openly gay person elected to public office in California; and Brokeback Mountain (Focus Features 2005), an award-winning movie about two cowboys who fall in love.

[195] *See* Andrew D. Cohen, *How the Establishment Clause Can Influence Due Process: Adultery Bans After Lawrence*, 72 Fordham L. Rev. 605, 607 (2011). Only a few states make adultery a felony; one of them is Michigan, Michigan Compiled Laws § 750.29-31 (1979); another is Utah, 2006 Utah Code, § 76-7-103, which makes adultery a "Class B. Misdemeanor."

[196] Joanna L. Grossman & Lawrence M. Friedman, Inside the Castle: Law and the Family in 20th Century America 119 (2011).

the Supreme Court in 2003;[197] most states had already abolished them. Most states had gotten rid of their miscegenation laws by the 1960s; the Supreme Court dispatched the remaining ones in *Loving v. Virginia* (1967).[198] The other rules and principles of the code have also vanished from the scene. Movies are free to film stories where the wicked flourish; where crime indeed *does* pay. Movies can also be "blasphemous," although this is tricky at the box-office.

The last half of the 20th century was a period of rapid and dramatic cultural change. It was the age of the Civil Rights Movement. It was the age of the flowering of the sexual revolution. The technology of mass culture exploded: the television age began in earnest in the 1950s; then came the internet and social media. There was a certain blurring of the line between mass culture and high culture. In the free world, there was an explosion of constitution-making; country after country established courts with the power of judicial review.[199] Hundreds of statutes, rules, ordinances, treaties, and conventions gave expression to the fundamentals of human rights.[200] International and transnational courts of human rights have been established.[201] And behind the bony skeleton of law is the flesh and blood of a strong and pervasive human rights *culture.*[202] One core idea of the human rights culture is the ethos of absolute equality—at least as an ideal. It is realized, to a greater or lesser extent in most modern, developed societies.[203] Old norms of differentiation, old distinctions between the rights of men and women, of majorities and minorities—and between the rights of elites and ordinary folks—have either evaporated, or lost most of their bite. This essay has argued that at one time official theories of free speech and expression masked a subtle and elitist core. Reactions to the rise and spread of the motion picture revealed this implicit norm underlying theories of free speech and expression. This elitist core has now dwindled almost tonothingness. Children still deserve—and

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[197] Lawrence v. Texas, 539 U.S. 558 (2003).

[198] Loving v. Virginia, 388 U.S. 1 (1967).

[199] *See* Robert F. Smith, *Book Review: Constitutions and Constitutional Trends Since World War II*, 10 SMU L. Rev. 338, 338 (1956); Steven G. Calabresi, *The Global Rise of Judicial Review Since 1945*, 69 Catholic U.L. Rev. 401, 402–03 (2021); Lawrence M. Friedman, The Human Rights Culture 33–41 (2011); *see generally* Bruce Ackerman, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law (2019).

[200] *See* Friedman, *supra* note 199, at 33–41.

[201] *See id.*

[202] *See id.*

[203] See *id.* at 86.

require—certain protections, it is felt. But adults no longer can be treated like children.

Modern human rights culture, and modern conceptions of the rule of law, reflect the decline of elite notions of social control. The voting public has the last word, in democratic societies, at least in theory. In the past, the political and social structures of "free" societies have depended, implicitly at least, on faith in leaders, faith in leadership, faith in experts, and faith in traditional norms. Censorship reflected those faiths; censorship assumed a certain kind of stratified society. Today, these faiths have lost a good deal of their power. Emphasis on social and legal equality leaves no room for censorship of movies, or censorship in general. Censorship rested on a distinction between social classes, and a belief that father knows best: a belief that society needed to recognize some form of traditional morality, some form of traditional moral leadership. A belief that the mass of the population was not qualified to decide what to read and what to see. The movies, because of their popularity, their vividness, their mass appeal, were in particular need of control from above. In the 21st century, the beliefs on which this regime once rested have been consigned to the dustbin of history.

The Larger Picture

I have argued that movie censorship assumed a (subtle) double standard, on the issue of freedom of speech and expression. It drew an explicit line between children and adults; and an implicit line between elites, and the mass public. The mass public was treated, in a way, *like* children; people easily spoiled and corrupted; people incapable of handling and digesting material that elites could safely deal with. This double standard has now disappeared (for adults, at any rate).

In general, the human rights culture has moved in the same general direction: from making distinction between groups and classes, toward a culture of what we might call plural equality. To be sure, there are still majorities and minorities, elites and commoners; but both law and culture make fewer distinctions than in the past; minorities of all sorts can claim something more than mere tolerance.[204] In short, the majority no longer has an absolute monopoly on dignity and respect. Of course, reality is as always extremely complicated. There are trends in the direction of plural equality; but also countertrends. Populist and demagogic leadership threatens a more inclusive

[204] *See id.*

sense of equality, and even democratic rule itself, in a number of countries. Religious fundamentalism and ancient bigotries have shown surprising strength. Since the future is, as always, an unknown country, nobody can predict whether trends will continue, or reverse themselves, or move in some as yet unknown direction. History never repeats itself; but it is also never static.

In this essay, I discussed a single example of the trend toward what we might call the democratization of culture. Perhaps democratization is not quite the right word. Perhaps what is meant is that the culture is becoming more homogenous. This essay used, as its example, the rise and fall of movie censorship. Other examples could be cited. There was never, for example, any formal censorship of newspapers in the United States, or the U.K.[205] But newspapers, even the so-called yellow press, practiced a fairly rigid form of self-censorship, well into the 20th century. The press was in its own way quite prudish. Certain topics were simply off limits. Visitors from another galaxy, in the 19th century, if they read only books and newspapers, would have a hard time understanding how babies were conceived. Of course, underground sources would have helped them get the general idea, along with medical books and the occasional frank discussion. But the daily press, and popular novels, would be useless in this regard. Suppose they were puzzled by the meaning of a common word, which they heard every day, a four letter word starting with "f." The great Oxford Dictionary, an incredible piece of scholarship, would not help them at all. This word was simply not there.[206]

Self-censorship went beyond prudery. Details of the life of elites—leaders, famous people—were shrouded in mystery, obscurity, or a cloud of outright lies. Until the 1950s, news about the health of American presidents was doled out in teaspoons; or suppressed. For example, in 1893, doctors discovered a tumor in the mouth of the President, Grover Cleveland (Cleveland had the habit of chewing tobacco). The doctors performed an operation, on a yacht off Long Island, under conditions of the strictest secrecy.[207] The Presi-

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[205] On the legal basis, see the discussion of the *Near* case, *supra* notes 90–92 and accompanying text.

[206] As late as 1937, the Abridged Oxford English Dictionary (I happen to own a copy) refused to acknowledge that any such word existed. On page 758 we find the word "Fucivorous," meaning "Eating, or subsisting on, seaweed;" the next entry is "Fucoid," which also deals with seaweed. Nothing in between. Oxford English Dictionary (1937). Needless to say, the current, up-to-date version of the OED is no longer so coy and bashful.

[207] On the general issue of suppression of news about presidential health, see Robert Dallek, *Presidential Fitness and Presidential Law: The Historical Record and*

dent was supposedly on vacation. The truth came out decades later.[208] In the 1930s the public knew (more or less) that their President, Franklin Delano Roosevelt, was a victim of polio; but his appearances in public were carefully stage-managed. The public was never allowed to see how disabled he was. Amazingly, of some 35,000 known photographs of the President, only *two* show him sitting in a wheelchair.[209] Nor did the public get honest news about his general state of health. Roosevelt was elected to a fourth term in 1944. He was, in fact, desperately ill.[210] But the public knew nothing at all about his condition.[211] Dwight Eisenhower was the first American president to release medical bulletins to the public. Eisenhower had suffered a heart attack, and after a certain amount of hemming and hawing (and lying), the public got an honest account of his medical situation.[212] This then became standard practice. In 1965, President Lyndon Johnson underwent a gall bladder operation. The newspapers reported the facts of his operation, and the progress of his recovery, in great detail—five days after the operation, the President "displayed increased mobility and a good appetite;" he "ate a breakfast of oranges, toast, chipped beef and tea."[213]

The same cover-up mentality, the same self-censorship, applied to the sex life of Presidents. John F. Kennedy was a notorious womanizer.[214] Dozens of reporters (among others) must have known about his habits. Nothing about his affairs appeared in the newspapers. In the United Kingdom, the

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a Proposal for Reform, 40 Presidential Studies Quarterly 9, 11 (2010). On Cleveland's cancer, *see id*. at 11.

[208] One of the doctors, William W. Keen, revealed the truth in 1917: William M. Keen, The Surgical Operations on President Cleveland in 1893 (1917). "[A]n operating table and all the necessary instruments" were brought on board the boat where the operation was performed. *Id.* at 32. *See generally* Matthew Algeo, The President Is a Sick Man (2011).

[209] Hugh Gregory Gallagher, FDR's Splendid Deception xiii (1985). This would, of course, no longer be possible. Plans for an FDR memorial at one point included the idea of a statue showing the President in his wheelchair.

[210] *See* Steven Lomazow & Eric Fettmann, FDR's Deadly Secret (2009).

[211] *See id.*

[212] *See* Russell Baker, *Eisenhower is in Hospital with "Mild" Heart Attack; His Condition Called "Good,"* N.Y. Times (Sep. 25, 1955), https://www.nytimes.com/1955/09/25/archives/eisenhower-is-in-hospital-with-mild-heart-attack-stricken-in-sleep.html [https://perma.cc/9VER-49T6].

[213] *See Robert B. Semple, Jr., Johnson Enjoys Good Appetite; Doctors "Satisfied" by Progress,* N.Y. Times (Oct. 14, 1965), https://www.nytimes.com/1965/10/14/archives/johnson-enjoys-good-appetite-doctors-satisfied-by-progress.html [https://perma.cc/7KHJ-WBRM].

[214] *See* Robert Dallek, An Unfinished Life: John F. Kennedy 12 (2011).

press traditionally tiptoed around news that reflected on the royal family. In the 1930s the new king, Edward VIII, proposed to marry an American divorcee. This precipitated a constitutional crisis. The English newspapers said nothing about this scandalous affair. The King's romance was big news in the rest of the world; but the press in the United Kingdom felt a "duty to protect the dignity of the monarchy by not circulating damaging rumours."[215] The King eventually abdicated; by that point, the whole affair had gone public.

Today, of course, on both sides of the Atlantic, the situation has changed dramatically. President Clinton's sexual foibles were shouted to the skies (and led to an impeachment trial).[216] In England, the wayward children of Queen Elizabeth II, including their marriages and divorces, the saga of Diana, Princess of Wales, and the interracial marriage of Prince Harry: all this was dished up in enormous, lip-smacking detail. The tabloids, which thrived (and thrive) on sex, sensationalism, scandal, and celebrity gossip, led the way;[217] but the more prestigious papers, too, print "news" about the royal family: items that they never would have printed before.[218] And of course this is not true only for the royal family: it is true as well for political figures; and for anyone, in fact, who is in the public eye. All public figures are fodder for press, not only movie stars; and not only in England and the United States, but in all more or less democratic countries. Self-censorship is dead.

Here too, we can see a movement from differentiation—from a kind of double standard—to equality, a single standard. The double standard had

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[215] Adrian Bingham, Family Newspapers? Sex, Private life, and the British Popular Press, 1918-1978, at 241 (2009). Once the news broke—and the King abdicated—the newspapers made up "for lost time, covering the constitutional crisis from every angle." *See id.* at 242.

[216] The impeachment proceedings ultimately failed, *see* Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, Wash. Post, Feb. 13, 1999.

[217] *See generally* Martin Conboy, Tabloid Britain: Constructing a Community Through Language (2006).

[218] In other countries, deference to elites may have lasted longer, in some regards. *See* Raphael Minder, *In Break With Tradition, It's Open Season on the Royal Family,* N.Y. Times (Apr. 15, 2013), https://www.nytimes.com/2013/04/16/world/europe/open-season-on-spains-royal-family.html?ugrp=m&unlocked_article_code=1.kE0.Lfh3.Ygp_u4fcQeK5&smid=url-share [https://perma.cc/CH5Y-8RME]. The article is about the Spanish royal family. According to the article, for years "the members of Spain's royal family were treated with profound deference. . . . Their private lives generally went uninvestigated." An editor was quoted as saying that, although there was no "formal censorship," his journal "voluntarily restrained coverage of the monarchy," and other "mainstream publications" followed suit. This deference "wasn't driven by fear, but instead by respect and gratefulness." All this, now, has decisively ended.

a point: it rested on the belief that elites were able to handle material, without damage to their souls, while the opposite was true for the mass of the public. Elites included not only political leaders, but also religious leaders, business leaders, social leaders. In addition, many aspects of the legal system aimed to protect the reputation of elites. This was because the very health of society, it was thought, depended on faith and trust in elites.[219] For the elites themselves, this was self-serving, to say the least. It protected their status in society. It protected their reputations. But the system did reflect, most likely, a genuine, if implicit, theory about the way democratic societies (and maybe all societies) needed to operate.[220]

As the double standard faded into history, it was replaced with the notion that the public had a *right* to know anything and everything about public figures. This right to know is, in a way, the other side of the coin of freedom of expression. This includes a right to access: access to medical bulletins about the health of the President; but also access to all sorts of information about the behavior, habits, and private lives of leaders—and of stars and celebrities in general. The right to know is tied up, too, with that salient aspect of modern society, the celebrity culture. A "celebrity" is not simply someone who is famous; a "celebrity" is both famous and *familiar;* we know what celebrities look like, sound like, act like.[221] Celebrities are familiar, precisely because they are so visible—very notably on TV. The public is caught up in a game of celebrities; but the celebrities are not "gods or supermen but human beings;" and in some ways they are most attractive "when they most resemble ordinary people."[222] There is of course an aura about celebrities; but, the familiarity is even more crucial than the aura. This familiarity is a direct

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[219] *See generally* Lawrence M. Friedman, Guarding Life's Dark Secret: Legal and Social Controls over Reputation, Propriety, and Privacy (2007).

[220] For major institutions, there is a strong tendency to try to cover up scandal. When the cover-up fails, as often happens these days, the public is quite properly outraged. Witness, for example, the current travails of the Roman Catholic Church. Yes, most people today consider outrageous and indefensible the way the Church dealt with priests who molested children. But probably many members of the hierarchy sincerely believed that covering up scandal was better for society (and the Church) than letting the faithful know what was going on, which would sap their faith in the institution.

[221] *See* Friedman & Grossman, *supra* note 44, at 10 (2022). On celebrity in general, *see* Friedman, *supra* note 219, at 235–54; Lawrence M. Friedman, The Horizontal Society 27–43 (1999); Richard Shickel, Intimate Strangers: The Culture of Celebrity (1985); Graeme Turner, Understanding Celebrity (2004).

[222] Charles L. Ponce de Leon, Self-Exposure: Human-Interest Journalism and the Emergence of Celebrity in America, 1890-1940, at 281 (2002).

consequence of the role the mass media play in our society. The movies were extremely important, in the creation of celebrity culture. The stars of the silver screen were visible to millions of people, and they seemed incredibly real (and incredibly familiar). Then came the explosive power of television, which magnified celebrity culture still more. And then the internet; it might be too early to tell what impact this will have on celebrity culture; but its impact on society, and on culture in general, is clearly enormous. It also has the capacity to *create* instant celebrities.

The law, as always, reflects changes in society. Freedom of speech and expression have been redefined as a result of the norms of modern human rights culture. The Framers would be astonished by the idea that a book about positions for sexual intercourse might be held to be protected "speech." Or that the First Amendment applies to the expression of emotions, that a scream of rage is in the same category as an essay in *Foreign Affairs,* and that profane and vulgar speech is also . . . speech.[223] In 1971, the United States Supreme Court held that the Constitution protected a young man who appeared in public wearing a jacket adorned with the slogan "fuck the draft."[224] The law of privacy reflects the rise of a celebrity culture, and the social and legal right to know. In our times, people are (rightly) concerned with privacy, and threats to privacy, and ways to protect privacy; yet, paradoxically, celebrities and public figures have lost most of their protection, in the United States, and (increasingly) elsewhere as well.[225]

A Concluding Word

The general argument in this essay has been about the movement from differentiation to equality. I have suggested that this is a general trend, part of the evolution of our modern human rights culture. I suspect that each item in the menu of human rights has shared in the evolution, though of course in different ways, from different starting points, and in different forms in different societies. So, for example, the "rule of law" once meant only that law and government would treat members of a class equally and impartially; that is, treat all men equally, and all women equally; but not necessarily treat both classes the same. Today the rule of law has merged with the human rights culture. It means (or is supposed to mean) equality before the law, for

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[223] *E.g.,* Cohen v. California, 403 U.S. 15 (1971).

[224] *Id.*; *see* William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. Rev. 1595 (1987).

[225] Friedman & Grossman, *supra* note 44, at 275–77.

everyone in society; and, in addition, equality of opportunity within society. It goes without saying that no society has reached this Nirvana. All societies fall short; and the shortcomings are sources of conflict and dissension. But the goals have been redefined.

Women's rights are a prominent example of this trend. Other examples can be mentioned. Take, for instance, freedom of religion. At one time, heretics could be hounded, harassed, even killed. Minority religions then gaineda measure of tolerance. In England, dissenters and Catholics were granted the right to vote. But there was still an official state religion. Today, state religions in the Western world are completely gone or exist only in fossilized forms. The state proclaims absolute neutrality between religions and religious beliefs. Of course, here, as elsewhere in modern society, none of the "absolutes" that form "absolute equality," is (to be fair) absolutely absolute, and perhaps never will be; but that is another, and more complicated story.

Censorship of the movies did play a role in this drama: in the democratization of forms of culture. Perhaps it was not a major role; but it was a definite role. It played a role because of the sheer importance of motion pictures in culture and society. Before most people could read and write, high culture was the province of the elites. The 19th century was transformative. Most people in advanced societies became literate. Schooling trickled down to ordinary people. People were able to read; and cheap, lurid, and sensational newspapers provided them with fodder. These newspapers constituted the first true mass medium. Then came the movies, which, as we have seen, were a severe test for a class-stratified culture. The movies were part of a larger evolution, toward a different and more powerful world of entertainment. The movies, and then television, dramatically altered the entertainment world, in ways that seemed to pose a real danger to traditional social norms. Mass entertainment, powerful, vivid entertainment, the world of the silver screen, ultimately helped to destroy a class-based structure of norms. It was a factor in the transformation of society, from what it was, to what it is; the way we live now.