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Contents

ARTICLES

Freedom of Expression and the Age of the Silver Screen
Lawrence M. Friedman 201

What Appeals in Sports Teach Us About Appeals in Courts
Jonathan R. Siegel 245

Generative AI as Digital Media
Gilad Abiri 279

Agent 007: A License to Bill
Karl T. Muth & Daniel Wang 333

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EDITORIAL BOARD

15th Anniversary Edition

Dear Readers,

I am Professor Peter Carfagna '79, the Harvard Law School Faculty Advisor to the Harvard Journal of Sports and Entertainment Law (JSEL). This has been a phenomenal year for JSEL and I am overwhelmingly proud to author the preface to the Summer Issue of Volume 15.

Throughout my time advising JSEL I have seen the Journal grow each year. This past academic year, the sports and entertainment law community at Harvard Law School conducted both a sports and an entertainment law symposium, filled with leaders in their respective fields. With every new Board and Issue, I find myself more excited and continually hopeful for both the present and the future of sports and entertainment law and scholarship. This year was no exception and I look forward to seeing how Volume 16 is able to build upon the foundation the earlier Boards and Issues have helped to build.

In the Winter Issue, JSEL published four fantastic articles:

Professor Michael A. Carrier wrote *The Antitrust Case Against Live Nation* Entertainment. This essay, partly in response to the Taylor Swift Ticketmaster fiasco, amounts a case against Live Nation for its monopolistic practices.

Professor Doug Lichtman's article *Shapley Values—A Cautionary Tale* argues that government-set rates for copyrighted music should no longer be influenced by the Shapley Value, which is too static an algorithm to reflect the market.

Professor Mark Conrad wrote *Betting on Addiction Money: Can Sports Betting Advertising be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?* He writes that advertising law on sports betting should be influenced by precedential efforts in tobacco and alcohol advertisement regulation to curb the negative effects from the proliferation of gambling.

Lastly, Professor Michael A. McCann wrote *Sharing Broadcast and Streaming Revenues with College Athletes*. This article offers a proactive approach to the NCAA regarding the sharing of revenue with collegiate athletes.

In this Summer Issue, JSEL published four more amazing articles:

First we have an article by Emeritus Professor Lawrence M. Friedman, *Freedom of Expression and the Age of the Silver Screen*, which details the history of the First Amendment and the gradual democratization of freedom of expression as it pertained to movies.

Professor Jonathan R. Siegel wrote *What Appeals in Sports Teach Us about Appeals in Courts*, an article which draws parallels between official review in sports to the arena of civil procedure.

Professor Gilad Abiri wrote *Generative AI as Digital Media*, which argues generative AI should be the next step in media creation rather than a force which overhauls the industry, and appropriate legal action should be taken to reduce risk.

Last we have an article written by Professor Karl T. Muth and Daniel Wang entitled *Agent 007: A License to Bill*. This article recounts the intellectual property history of James Bond in print and on film.

I am so grateful to JSEL's Executive Board for all of their incredible work this year. Specifically, I want to thank the graduating members of the Board: Brandon Broukhim, Dino Hadziahmetovic, Yu Jin Jeong, Renae Maganza, and Brandon McCoy. Finally, I am pleased to welcome the incoming JSEL Masthead for Volume 16, including our new Editors-in-Chief Maya Sharp, Trina Sultan, Alec Winshel, and their incoming Board. After another wonderful year, I look forward to next year's volume!

—Peter A. Carfagna

June 2024

To our Readers,

We are incredibly excited to welcome you to the Second Edition of our Fifteenth Anniversary Volume of the *Harvard Journal of Sports and Entertainment Law*.

This issue features four articles reflecting the constant change present in the sports and entertainment law industries. First, in *Freedom of Expression and the Age of the Silver Screen*, Professor Lawrence M. Friedman of Stanford Law School discusses the legal history of censorship in the film industry, primarily during the 20th century, and how this history overlapped with the spread of an egalitarian culture in the United States. Professor Friedman illustrates how the decline of film censorship in the United States reflects the expansion of a "democratized" culture that remains with us today.

Second, in *What Appeals in Sports Teach Us About Appeals in Courts*, Professor Jonathan Siegel of the George Washington University Law School writes about how (like so much) sports offers an illustration of the key civil procedure concepts. In his piece, Professor Siegel remembers the famous Pine Tar Game of the 1984 World Series as a reason he discovered his interest in law, and how it has continued to shape his life in communicating these ideas when teaching his students.

Third, in *Generative AI as Digital Media*, Professor Gilad Abiri of Peking University School of Transnational Law and Yale Law School discusses innovations in artificial intelligence-generated media and how to best understand digital content produced by the technology. He argues that generative AI should be understood as an "evolution, rather than a revolution, of our algorithmic media landscape," offering an analysis of existing regulatory frameworks in the United States and European Union and providing a way forward.

Fourth, in *Agent 007: A License to Bill*, Professor Karl Muth and Daniel Wang trace the evolution of the James Bond film franchise from its inception in 1961 through the acquisition of rights to the franchise by Amazon in 2021. Muth and Wang highlight a history marked by frequent litigation over the prized franchise and the development of Bond's intellectual property. For any Bond fan, this article will certainly be a favorite.

We are incredibly grateful to our authors for collaborating with JSEL to publish their scholarship. We enjoyed the opportunity to work with each of them closely over the past months. In addition, we give many thanks to Professor Peter A. Carfagna '79, who is an endless source of support for the sports and entertainment law community at HLS, our partners at the Harvard Committee for Sports & Entertainment (CSEL), and the tireless staff at the Harvard Law School Office of Community Engagement and Belonging (CEEB). We appreciate each of their support, which has enabled our community to thrive and expand each year at Harvard Law School.

Further, a special thanks goes to our sponsors for Volume 15, including DLA Piper, Paul Weiss, Sidley Austin, and Sullivan & Cromwell, without whom none of this would have been possible.

Finally, a note of personal thanks. Our time at Harvard Law School would not have been the same without JSEL's editorial board. We are endlessly grateful for the privilege to serve such an amazing team, providing each of us with an incredible group of friends and warm memories for decades to come. Neither of us can wait to see the scholarship published by JSEL in the years ahead, and we know that the journal's best days are to come. In these particular trying times, JSEL was the ultimate source of friendship that provided a model of what a robust, healthy intellectual community could be.

Happy reading!

All the best,

Brandon Broukhim
President & Editor-in-Chief

Brandon McCoy
President & Editor-in-Chief

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Freedom of Expression and the Age of the Silver Screen

Lawrence M. Friedman*

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

* Marion Rice Kirkwood Professor of Law, Stanford University School of Law, Emeritus. I would like to thank Hutchinson Fann for his help with the research.

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.

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What Appeals in Sports Teach Us About Appeals in Courts

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Abstract

Baseball, football, and civil procedure all entail the use of appellate procedures to review initial decisions. The study of appeals in sports can illuminate principles applicable to appeals in courts. This Essay considers baseball's Pine Tar Incident, which involved perhaps the most famous appeal in sports history, and football's Instant Replay rule. This Essay shows that these sports appeals provide insight into important aspects of appeals in civil litigation, particularly into the key concept of the standard of review on appeal.

I. Prologue

Sunday, July 24, 1983. Ronald Reagan was President.[1] Sally Ride had just become the first American woman in space.[2] Billboard's Number One song was "Every Breath You Take" by The Police.[3] Most people who are now

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[1] *See* National Atomic Veterans Day, 48 Fed. Reg. 32747 (July 19, 1983) (proclamation by President Reagan).

[2] John Noble Wilford, *First U.S. Woman in Space Called "Equal" to Men*, N.Y. Times (July 2, 1983), https://www.nytimes.com/1983/07/02/us/first-us-woman-in-space-called-equal-to-men.html [https://perma.cc/U9KQ-UE2A].

[3] *See Billboard Hot 100*, Billboard, https://www.billboard.com/charts/hot-100/1983-07-23/ [https://perma.cc/MG4M-WPN6].

law students weren't born yet. I was at home, watching a baseball game on television.

The game had reached an exciting moment, but it was just the ordinary excitement over who would win. I didn't know—no one yet knew—that the game would become one of the most famous baseball games of all time, and not because of a dramatic hit or pitch or play, but because of a controversy over the rules of baseball. I was about to witness the Pine Tar Incident.

The New York Yankees were at home, hosting the Kansas City Royals.[4] It was the top of the ninth inning, and the Yankees were ahead 4–3.[5] The Royals' U.L. Washington was on first base, but the team had two outs.[6] If the Yankees could retire just one more batter, they would win the game.

The Yankees brought out their great relief pitcher, Rich ("Goose") Gossage.[7] At the plate stood the Royals' most powerful hitter, George Brett.[8] The star pitcher faced the star batter in a tense moment. The Yankees could win the game by getting Brett out, but Brett could tie up the game with a long hit or even put Kansas City ahead with a home run.

Sure enough, after hitting a foul ball off the first pitch, Brett slammed Gossage's second pitch for not only a long hit, but a home run over the right-field fence.[9] With a runner already on base, the Royals scored two runs. Now the Royals were ahead 5–4. Suddenly, things looked grim for the Yankees. In a moment, they had gone from likely winners to likely losers of the game.

But then something unexpected happened. Billy Martin, the Yankees' colorful manager,[10] came bouncing out of the Yankee dugout and picked up Brett's bat. He gave the bat to the umpires. Why would he do that?

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[4] For background on the Yankees, the Royals, and their rivalry in the years leading up to the Pine Tar Game, *see* Filip Bondy, The Pine Tar Game: The Kansas City Royals, The New York Yankees, and Baseball's Most Absurd and Entertaining Controversy 9–125 (2015).

[5] *Id.* at 138.

[6] *Id.* at 139.

[7] *Id.* at 138–39 (describing Gossage as "at the time arguably the best reliever in the game").

[8] *Id.* at 115–36 (describing Brett), 139.

[9] *Id.* at 143. For video of the incident, which confirms the details stated in the ensuing five paragraphs, *see 7/24/83: The Pine Tar Incident*, Major League Baseball (July 24, 1983) https://www.mlb.com/video/7-24-83-the-pine-tar-incident-c3180386 [https://perma.cc/H8FA-V8CK].

[10] Martin was a "baseball genius," but he "mix[ed] alcohol with a fabled temper," was seen by some as "an oft-drunken clown," and got up to "shenanigans" that even some of his own players regarded as "outrageous." Bondy, *supra* note 4, at 100–01.

A long period of confusion followed. The TV announcers speculated that Martin must be claiming that Brett had too much pine tar on his bat. Pine tar, they noted, wasn't allowed on the bat above the trademark, and Brett's bat had a lot of pine tar on it. But it wasn't clear what might follow from that.

The umpires listened to Martin and then went into a huddle. While Brett accepted congratulatory slaps from his teammates and Martin paced around anxiously, the umpires kept turning, rubbing, and peering at the bat. "First time in a long, long time I've seen the umpires huddle this long," one of the announcers said.

The umpires compounded everyone's confusion by laying the bat across home plate. "I've never seen this," both announcers agreed. One added, "I don't know what they're measuring."

Then the plate umpire, Tim McClelland, picked the bat up and started toward the Royals' dugout. After a last word over his shoulder with the other umpires, he pointed at the dugout with the bat, which he was holding in his left hand, and then he held his right hand in the air in a fist. He was calling Brett out! The Yankees had won the game!

Pandemonium. Brett came charging out of the dugout, heading straight for McClelland, his arms flailing wildly. His teammates and other umpires had to restrain Brett from taking a swing at McClelland. Gaylord Perry, a Royals pitcher, grabbed the bat away from McClelland, apparently to prevent the bat from going to the American League office.[11] "I've never seen this in my life," said one of the announcers.

"*Brett Homer Nullified, So Yankees Win*," read the headline in the next day's *New York Times*—the first of three times that the Pine Tar Game made front-page news in that journal.[12] As the *Times* article pointed out, baseball games often end with a home run, but usually the team that hits the game-ending homer *wins* the game.[13] The Pine Tar Game presented a unique example in which the team that hit the game-ending homer *lost*.[14]

Except that they didn't. The Royals had apparently lost the game, but afterwards, they invoked a procedure common in litigation, but less frequently encountered in baseball: they appealed. Actually, in the language

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[11] Bondy, *supra note* 4, at 151.

[12] Murray Chass, *Brett Homer Nullified, So Yankees Win*, N.Y. Times (July 25, 1983), at A1, https://www.nytimes.com/1983/07/25/sports/brett-homer-nullified-so-yankees-win.html [https://perma.cc/MZL3-EGJ7].

[13] *Id.*

[14] *Id.*

of baseball, they protested.[15] In any event, they sought review of the field umpires' initial decision that Brett was out. Under baseball's rules, the review would be conducted by the President of the American League, Lee MacPhail. After considering the matter for three days, MacPhail issued his decision on July 28.

"*Kansas City Wins Protest on Canceled Homer*," the Times reported, as the game made the front page for the second time.[16] President MacPhail overturned the decision of the field umpires. MacPhail acknowledged that Brett's bat had violated the rule regarding pine tar, and he said that the field umpires' ruling that Brett was out was "technically defensible."[17] However, MacPhail said, the ruling was "not in accord with the intent or spirit of the rules."[18] He upheld the protest and ruled that Brett's home run would stand. The game, he decided, was now a Suspended Game, with the score 5–4 in Kansas City's favor and two out in the top of the ninth inning. The game would have to be completed before the close of the season "if practicable," and at the close of the season if it might determine who won either division.[19]

I was awestruck. Although only a college student at the time, I already had a fascination with rules issues that foreshadowed my career as a legal academic. Even as a child, I found the rules of Monopoly more interesting than Monopoly itself, and when watching sports, I liked nothing better than a rules controversy. For lovers of rules issues, the Pine Tar game was the ultimate dream. Not only did the entire game turn on a rules decision in the most dramatic possible way, but the rules decision itself had embedded in it vital issues that transcended its particular context.

In particular, the Pine Tar game offers a valuable lesson about *appeal*. Baseball and civil procedure both involve systems whereby an appellate authority may review decisions by an initial decisionmaker. The way in which

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[15] Murray Chass, *Kansas City Wins Protest on Canceled Homer*, N.Y. Times (July 29, 1983), at A1, https://www.nytimes.com/1983/07/29/sports/kansas-city-wins-protest-on-canceled-homer.html [https://perma.cc/G88W-EVL3].

[16] *Id.* For the third time, the game was on the front page, *see infra* Section IV.

[17] *Text of League President's Ruling in Brett Bat Case*, N.Y. Times (July 29, 1983), at A16, https://www.nytimes.com/1983/07/29/sports/text-of-league-president-s-ruling-in-brett-bat-case.html [https://perma.cc/ZJ99-25P5] [hereinafter "MacPhail Decision"].

[18] *Id.*

[19] *Id.*

President MacPhail explained his decision to overturn the initial call by the field umpires in the Pine Tar game illuminates the concept of the *standard of review* in connection with appeals. Indeed, the Pine Tar game, combined with an analysis of Instant Replay appeals in football, illuminates the concept of standards of review so well it can be of considerable value in Civil Procedure pedagogy. Although the standard of review is perhaps the most important concept in appeal,[20] the topic is curiously neglected in most Civil Procedure casebooks.[21] Most casebooks provide extensive detail on *appealability*, that is, the question of *when* an appeal of a district court's decision can be taken in civil litigation, but surprisingly little on the question of the standard by which a district court's decision is reviewed once it is properly appealed.[22] The Pine Tar case, this Essay shows, can help to fill this strange gap in the Civil Procedure canon.

This Essay joins much prior legal analysis of sports issues, particularly baseball issues. Baseball and its rules have always held a special place in the hearts of legal academics.[23] Volumes have been written on baseball's infield fly rule alone.[24] Scholars have endlessly analyzed Chief Justice John Roberts' assertion in his confirmation hearings that his job as a Justice would be to

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[20] *See infra* note 35 and accompanying text.

[21] *See infra* Part III.B.

[22] *Id.*

[23] *See, e.g.*, Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 Yale L.J. 227 (1994); Amy Beckham Osborne, *Baseball and the Law: A Selected Annotated Bibliography, 1990-2004*, 97 Law Libr. J. 335 (2005).

[24] A student note on the rule, Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. Pa. L. Rev. 1474 (1975), was described by the *New York Times* as "one of the most celebrated and imitated analyses in American legal history." William Grimes, *William S. Stevens, 60, Dies; Wrote Infield Fly Note*, N.Y. Times (Dec. 11, 2008), https://www.nytimes.com/2008/12/12/us/12stevens.html [https://perma.cc/4MCB-E3DJ]. It inspired Flynn, *Further Aside: A Comment on "The Common Law Origins of The Infield Fly Rule*," 4 J. of Contemp. L. 241 (1978); Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 Wm. & Mary L. Rev. 567 (1988); and Andrew J. Guilford & Joel Mallord, *Time to Drop the Infield Fly Rule and End a Common Law Anomaly*, 164 U. Pa. L. Rev. 281 (2015). Other discussions of the rule include Anthony D'Amato, *The Contribution of the Infield Fly Rule to Western Civilization (and Vice Versa)*, 100 Nw. U. L. Rev. 189 (2006); Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2013 Utah L. Rev. 479; and Neil B. Cohen & Spencer Weber Waller, *Taking Pop-Ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 Wash. U. L.Q. 453 (2004).

"call balls and strikes."[25] The Pine Tar game itself has been scrutinized,[26] as has Instant Replay.[27] But as far as I am aware, the implication of the Pine Tar game for standards of review, and its pedagogical virtues with regard to that point, have not previously been discussed.[28]

Part II of this Essay analyzes President MacPhail's Pine Tar decision. Part III then discusses how this decision, combined with Instant Replay in football, can illuminate fundamental concepts relating to appeal in civil litigation.

II. The Pine Tar Case, Analyzed

To understand why the Pine Tar case sheds so much light on standards of review, it is necessary first to analyze it. Why did the field umpires call Brett out? Why did President MacPhail overrule them?

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[25] *E.g.*, Charles Fried, *Balls and Strikes*, 61 Emory L.J. 641 (2012); Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 Cath. U. L. Rev. 683 (2016); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 Const. Comment. 701 (2007); Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 Yale L.J. Online 113, 116 (2010); Mark L. Pelesh, *"Just" Calling Balls and Strikes: Umpires and Judges*, 32.2 NINE: J. of Baseball Hist. & Culture 97 (2024).

[26] *E.g.*, Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's Nomos and Narrative*, 96 Yale L.J. 1836, 1855–57 (1987); Mitchell N. Berman, *Our Principled Constitution*, 166 U. Pa. L. Rev. 1325, 1370–76 (2018); Raymond Belliotti, *Billy Martin and Jurisprudence: Revisiting the Pine Tar Case*, 5 Alb. Gov't L. Rev. 210 (2012); Jared Tobin Finkelstein, *In Re Brett: The Sticky Problems of Statutory Construction*, 52 Fordham L. Rev. 430 (1983); Howard Wasserman, *Pine Tar: Of Baseball and Law*, PrawfsBlawg (July 24, 2011, 10:31 AM) https://prawfsblawg.blogs.com/prawfsblawg/2011/07/pine-tar-an-older-of-baseball-and-law.html [https://perma.cc/J3TG-SC29].

[27] *E.g.*, Mitchell N. Berman, *Replay*, 99 Calif. L. Rev. 1683 (2011); Chad M. Oldfather & Matthew M. Fernholz, *Comparative Procedure on a Sunday Afternoon: Instant Replay in the NFL as a Process of Appellate Review*, 43 Ind. L. Rev. 45 (2009); Jack Achiezer Guggenheim, *Blowing the Whistle on the NFL's New Instant Replay Rule: Indisputable Visual Evidence and a Recommended "Appellate" Model*, 24 Vt. L. Rev. 567 (2000); Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 Baylor L. Rev. 267, 284 (2017).

[28] Most discussions of the Pine Tar game focus on its implications for issues relating to statutory interpretation. *See infra* Part III.D. Discussions of Instant Replay have addressed the standard of review, but they have not focused on how Instant Replay appeals, combined with the very different Pine Tar appeal, can be used pedagogically to illuminate issues relating to appeal in civil litigation. *See infra* Part III.C.1.

A. The Field Umpires' Call

The umpires, of course, did not provide a written opinion of the reasoning behind their initial ruling that Brett was out. Umpires don't issue written rulings in the middle of a baseball game. However, Nick Bremigan, a member of the umpiring crew, subsequently published an explanation[29] that showed that the ruling was based on a simple, straightforward application of three of the then-applicable rules of baseball. As of 1983, those rules read as follows:

> Rule 6.06(a): "[A] batter is out for illegal action when . . . he hits an illegally batted ball."[30]
>
> Rule 2.00: "[A]n illegally batted ball is [among other things] . . . one hit with a bat which does not conform to rule 1.10."[31]
>
> Rule 1.10: "The bat handle, for not more than 18 inches from the end, may be covered or treated with any material, including pine tar, to improve the grip. . . ."[32]

Given these rules, it seems obvious why the umpires called Brett out. First, the umpires determined that Brett's bat had pine tar more than eighteen inches from the end of the handle. That explains the mystery of why they laid Brett's bat across home plate—they needed to measure the pine tar. They didn't have a ruler or measuring tape handy,[33] but home plate, as every umpire knows, is seventeen inches wide,[34] so they used it as a measuring device.[35] They found that the bat had "heavy" pine tar nineteen or twenty inches from the handle and "lighter" pine tar for a further three or four inches.[36]

This finding meant that Brett's bat did not conform to Rule 1.10. Under rule 2.00, a batter who hits a ball with a bat that does not conform to

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[29] Nick Bremigan, *Views of Sport; How Baseball Became Unstuck by a Rules Dispute*, N.Y. Times (Aug. 7, 1983), https://www.nytimes.com/1983/08/07/sports/views-of-sport-how-baseball-became-unstuck-by-a-rules-dispute.html [https://perma.cc/3G4R-4TEJ].

[30] Official Baseball Rules (1983 ed.) [hereinafter 1983 MLB Rules], Rule 6.06.

[31] *Id.* Rule 2.00.

[32] *Id.* Rule 1.10.

[33] Bondy, *supra* note 4, at 145.

[34] Official Baseball Rules 3, Rule 2.02 (2022 ed.); 1983 MLB Rules, *supra* note 30, Rule 1.05.

[35] Chass, *supra* note 12.

[36] *Id.*

Rule 1.1.0 has hit "an illegally batted ball." Under Rule 6.06(a), a batter who has hit an illegally batted ball is "out for illegal action." Therefore, Brett was out for illegal action. Q.E.D. As Bremigan put it, "[p]utting these three rules together, one can readily see that the letter of the law clearly indicates that there was no choice but to call Brett out and nullify his home run."[37]

B. President MacPhail's Decision

Nonetheless, President MacPhail saw things differently. He began his opinion by acknowledging that the umpires' initial call was "technically defensible."[38] But, he said, the ruling was "not in accord with the intent or spirit of the rules."[39] President MacPhail explained several reasons why he was reversing the ruling.

First, MacPhail provided *textualist* reasoning. Despite the apparent simplicity of the umpires' initial ruling, MacPhail pointed out that even if one considered only the text of the relevant rules, the matter was more complicated. Rule 1.10, MacPhail noted, did not merely state that the bat handle may be treated with material for not more than eighteen inches. More fully, the rule stated:

> The bat handle, for not more than 18 inches from the end, may be covered or treated with any material (including pine tar) to improve the grip . . . . [The material must not improve the reaction or distance factor of the bat. A ball hit with a bat treated with] any such material, including pine tar, which extends past the 18 inch limitation . . . shall cause the bat to be removed from the game.[40]

Thus, the rule did not merely state a restriction on putting substances on bats to improve the grip. It also specified a penalty for violating that restriction. MacPhail reasoned that "[i]f it was intended that this infraction should fall under the penalty of the batter's being declared out, it does not seem logical that the rule should specifically specify that the bat should be removed from the game."[41]

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[37] Bremigan, *supra* note 29.
[38] MacPhail Decision, *supra* note 17.
[39] *Id.*
[40] 1983 MLB Rules, *supra* note 30, Rule 1.10(b).
[41] MacPhail Decision, *supra* note 17.

Moreover, MacPhail called attention to Rule 6.06(d), which provided:

> [A player using a bat that] has been . . . tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball . . . . [is not only to be] called out, [but also to] be ejected from the game and may be subject to additional penalties . . . .[42]

MacPhail decided that it was:

> more logical to infer that the second part of the definition of an illegal batted ball, that pertaining to a bat which does not conform to Rule 1.10, is meant to refer to bats covered under Rule 6.06(d), which have been altered or tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball.[43]

Thus, MacPhail argued, the full text of all the rules involved suggested that Brett should not have been called out.

MacPhail further relied on *intentionalist* and *purposivist* arguments. He explained that the intent of the cited rules—which, he said, he had confirmed with members of baseball's Rules Committee—was to declare a batter out (and have him ejected) for using a bat that had been altered or tampered with so as to hit the ball farther.[44] But pine tar, MacPhail noted, does not cause a bat to hit a ball farther. The pine tar restriction, MacPhail observed, served a quite different purpose, namely, preventing balls from spoiling too quickly and thus requiring new balls be brought into the game too frequently.[45] Accordingly, it would not fulfill the intent or purpose of the rules to declare a batter out for using a bat with excessive pine tar.

MacPhail also relied on *precedent*. He observed that on previous occasions on which batters had been found to have too much pine tar on their bats, the batters had not been called out.[46]

Finally, MacPhail cited the *overall spirit* of the rules. That spirit, he said, was "that games should be won and lost on the playing field—not though

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[42] 1983 MLB Rules, *supra* note 30, Rule 6.06(d).

[43] MacPhail Decision, *supra* note 17.

[44] *Id.*

[45] *Id.*; *see also* Bondy, *supra* note 4, at 3–4 (noting that Calvin Griffith, owner of the Washington Senators (later the Minnesota Twins) and a "famous miser," pushed the pine tar rule through the rules committee in 1976 because he was "thoroughly annoyed at the costs of running a franchise," and one of his "pet peeves was that the Twins were exhausting more than their designated allotment of baseballs in games, replacing dirty ones with fresh ones too often").

[46] MacPhail Decision, *supra* note 17.

technicalities of the rules—and that every reasonable effort consistent with the spirit of the rules should be made to so provide."[47]

Thus, while the umpires' initial call was supported by what seemed to be the clear text of the rules, President MacPhail determined that the text was not as clear as one might have thought at first glance. At least some of the text supported a different interpretation. In resolving the textual ambiguity, MacPhail considered the intent and purpose of the rule, precedent, and the overall "spirit" of the rules.

III. The Pine Tar Case, Instant Replay, and Appeals

Fast forward. After the Pine Tar game, I graduated from college, spent two years at a small but surprisingly successful software start-up company,[48] went to law school, moved to Washington, D.C. for what I thought would be one year for a clerkship (I'm still here more than thirty years later), practiced for a few years at the Department of Justice, and finally arrived at the job that had always called to me, that of law professor.

A. Wanted: An Introductory Case on Appeal

Like most new law faculty, I was asked to teach a first year course. I chose Civil Procedure, which I taught out of the casebook now known as Friedenthal, Miller, Sexton, Hershkoff, Steinman, and McKenzie ("Friedenthal").[49] One of my favorite features of the casebook was its introductory section of "illustrative cases."[50] This section contains twelve cases that take the students through a civil action from beginning to end—from jurisdictional issues relating to

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[47] *Id.*

[48] The company, Decision Resources Inc., developed a business graphics product called *CHART-MASTER*, which in its heyday was the leading business graphics product for the IBM PC. The company started up in such ancient times that the product was originally written for the Apple II+, as the IBM PC didn't exist yet. We ported it over to the PC once it was developed. We worried about issues such as whether it was reasonable to expect users to have 64 *kilo*bytes of RAM. Today, of course, even a moderately priced laptop computer is likely to have *giga*bytes of RAM. Each gigabyte is one million kilobytes.

[49] Jack H. Friedenthal, Arthur R. Miller, John E. Sexton, Helen Hershkoff & Adam N. Steinman et al., Civil Procedure: Cases and Materials (13th ed. 2022) (hereinafter Friedenthal). When I started, the book was written by Cound, Friedenthal, Miller & Sexton.

[50] *Id.* at 28–77.

the plaintiff's initial choice of forum[51] to the preclusive effect of the final judgment.[52] The students learn a little bit about each issue—not enough for them to be experts on any individual topic, but enough that they can understand something about the general nature of a civil action and how the various topics studied in connection with it are related. After the initial set of cases, the book returns to each topic in detail, and knowing a little about the whole of civil procedure helps the students learn the individual topics.

Unfortunately, not every case in the introductory set is equally suitable for giving the students an initial understanding of its topic. I was particularly frustrated with the introductory case on appeal, *Hicks v. United States*.[53] The case was supposed to introduce the issue of standard of review, but it was too advanced. It concerned an appeal following a bench trial of a claim of medical malpractice. The plaintiff's decedent died after a doctor incorrectly diagnosed her condition and failed to give her necessary treatment.[54] The district court determined that the evidence did not establish negligence (i.e., it did not establish that the defendant had failed to exhibit the "degree of skill and diligence" of a "practitioner in his field and community, or in similar communities, at the time"),[55] but the court of appeals reversed.[56]

The crucial issue was the way in which the initial decision regarding negligence was to be reviewed: deferentially or de novo? The court of appeals observed that while fact findings were entitled to deferential review, the finding as to negligence was "not one of fact in the usual sense, but rather whether the undisputed facts manifest negligence."[57] Moreover, the court said that while "the absence of a factual dispute does not *always* mean that the conclusion is a question of law, it becomes so *here* because the ultimate conclusion to be drawn from the basic facts, i.e., the existence or absence of negligence, is actually a question of law."[58] Thus, the students were expected to learn the different standards of review applicable to questions of fact and law in connection with an issue that was not easy to characterize as either. And as if that weren't difficult enough, the notes following the case remarked that in a case tried by jury, the question of whether conduct is negligent is usually left to the jury,[59] which further clouded the message of the case.

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[51] *Id.* at 29.
[52] *Id.* at 72.
[53] 368 F.2d 626 (4th Cir. 1966); *see* Friedenthal, *supra* note 49, at 68.
[54] *Hicks,* 368 F.2d at 628–29.
[55] *Id.* at 629.
[56] *Id.* at 628, 633.
[57] *Id.* at 631.
[58] *Id.*
[59] Friedenthal, *supra* note 49, at 70.

I wanted to supplement *Hicks* with a different case that would more suitably introduce the topic of appeal, and particularly the issue of standard of review, to the students. But finding such a case proved more challenging than I expected. Looking for such a case, I discovered that this vital issue gets surprisingly little treatment in most Civil Procedure casebooks.[60]

B. The Curious Neglect of Standards of Review

Law students' introduction to the topic of appeal should, I believe, introduce them to three concepts: appealability, reviewability, and, most importantly, the standard of review. The concept of "appealability" controls *when* a party may appeal. A trial court's order is "appealable" if a party may appeal as soon as the trial court enters the order.[61] The distinct concept of "reviewability" controls whether a party may *ever* get appellate review of a purported error by the trial court. If a party may ever obtain appellate review of a trial court's order, the order is reviewable, even if the party cannot obtain that review immediately upon entry of the order—that is, even if the order is not appealable.[62] Finally, the "standard of review" determines whether the appellate court will show deference to the trial court's initial decision of an issue or simply do whatever it (the appellate court) believes to be right.[63]

As every appellate lawyer knows, the standard of review is the most important issue in many appeals; certainly, it is one of the most important considerations in appellate litigation generally.[64] Indeed, it is so important

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[60] *See infra* Part III B.

[61] Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?* 2014 Mich. St. L. Rev. 895, 901–02 (2015).

[62] *Id*. Many trial court orders are reviewable but not appealable. A party may obtain appellate review of such orders, but, typically, must wait until the end of the trial court proceedings to do so. For example, a federal district court's order denying a defendant's motion to dismiss a case for lack of subject matter jurisdiction, lack of personal jurisdiction, or improper venue, *see* Fed. R. Civ. P. 12(b)(1), (2), (3), would not be appealable, but the defendant could obtain appellate review of the order when appealing from the final judgment entered at the conclusion of the district court's proceedings. Richard D. Freer, Aspen Student Treatise for Civil Procedure 900–01 (4th ed. 2017).

[63] Freer, *supra* note 62, at 922.

[64] *See*, *e.g.*, James F. Bogan III, *Best Practices in Appellate Litigation*, 2013 WL 574532, *3 (2013) ("One of the most important considerations (and perhaps the most important) is the standard of review."); Noella Sudbury, *What Every Lawyer Should Know About Appeals*, Utah Bar. J., Nov./Dec. 2012, at 60, 60 ("Probably the most important lesson I learned as an appellate clerk is that the standard of review

that the Federal Rules of Appellate procedure require a party's brief to contain "for each issue, a concise statement of the applicable standard of review."[65]

Yet despite its critical importance, the topic of standard of review is curiously neglected in Civil Procedure casebooks. Since I didn't like the case on standard of review in the Friedenthal casebook's initial section of "illustrative cases," I thought at first that I would simply replace it with a case drawn from the full chapter on appeal in the same casebook. It turned out, however, that the full chapter on appeal in the Friedenthal book doesn't contain a suitable introductory case on standard of review either.[66]

In fact, the treatment of standard of review in the full chapter on appeal is surprisingly brief. The chapter is heavily weighted toward the topic of appealability. That is, it focuses mainly on the question of *when* a party dissatisfied with a district court's ruling can take an appeal. The chapter contains nearly twenty-eight pages that explore the basic federal rule of appealability—the "final judgment rule," which typically allows appeal only at the end of the entire case[67]—and the exceptions to that rule.[68] The chapter covers the numerous ways appeals or other forms of review can sometimes be had of orders other than the final judgment: Rule 54(b) certification,[69] collateral order appeals,[70] discretionary appeals under 28 U.S.C. § 1292(b),[71] appeals

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matters and must often be litigated as fiercely as the substantive issues in the case."); Daniel Real, *Appellate Practice in Nebraska: A Thorough, though not Exhaustive, Primer in How to Do It and How to Be More Effective*, 39 Creighton L. Rev. 29, 85 (2005) ("Beginning with a clear understanding of the appropriate standard of review governing each issue presented on appeal is one of the most important keys to more effective appellate advocacy.").

[65] Fed. R. App. P. 28(a)(7)(B) (requiring such a statement in the appellant's brief); *see also id.* 28(b)(4) (requiring such a statement in the appellee's brief if the appellee is dissatisfied with the appellant's statement).

[66] Friedenthal, *supra* note 49, at 1213–57.

[67] *See* 28 U.S.C. 1291; *e.g.*, Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976).

[68] Friedenthal, *supra* note 49, at 1213–40.

[69] This rule allows appeal of the resolution of a claim within a multi-claim or multi-party case, if the district court certifies that such appeal is appropriate. Fed. R. Civ. P. 54(b); *see* Friedenthal, *supra* note 49, at 1219.

[70] The Supreme Court has interpreted 28 U.S.C. § 1291 to allow appeal of certain interlocutory orders that are "collateral" to the merits of a case and that cannot be effectively appealed at the end of the case. *E.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); *see* Friedenthal, *supra* note 49, at 1223.

[71] This statute allows immediate appeal of almost any order, provided the district court certifies the order for appeal and the court of appeals exercises discretion to take the appeal. 28 U.S.C. § 1292(b); *see* Friedenthal, *supra* note 49, at 1237.

of injunctive orders under § 1292(a),[72] and writs of mandamus.[73] It even includes a short case excerpt on the obscure concept of appealability based on "pragmatic finality."[74] Yet it has only about 10 pages on standard of review.[75]

And yet, short as it is, the Friedenthal book's section on standard of review is actually one of the more detailed treatments available. Many other Civil Procedure casebooks have even less coverage of this vital topic, though, like Friedenthal, they contain much detail on other matters. The Field, Kaplan, and Clermont casebook, for example, devotes 41 pages to appealability.[76] It also finds room for 15 pages on the degree to which an appellant may assert a new theory on appeal.[77] Yet, it has only a little more than *one page* on standard of review.[78] Freer and Perdue's chapter on appellate review has about five pages on standards of review, with no principal case presented.[79] And the Hazard, Fletcher, Bundy, and Bradt chapter on appellate review has *no* section devoted to the standard of review.[80]

It is not clear why so many casebooks devote so little space to this vital topic. Perhaps casebook authors think that the matter is not that important. Or perhaps they think that, although important, the issue is so simple that the book need only state the basic rule that issues of law are reviewed de novo

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[72] This statute allows for immediate appeal of orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a); *see* Friedenthal, *supra* note 49 at 1239.

[73] This writ allows a court of appeals to compel a district court to take specified action, and while it is to be used only in "extreme cases," La Buy v. Howes Leather Co., 352 U.S. 249 (1957), yet there is no precise test for when it may be awarded; *see* Friedenthal, *supra* note 49, at 1230.

[74] Friedenthal, *supra* note 49, at 1228 (considering Brown Shoe Co. v. United States, 370 U.S. 294 (1962)). This topic is so obscure that I had never heard of it before teaching, even though I had spent more than four years at an exclusively appellate practice, and I have never encountered it in a real case since I started teaching either.

[75] Friedenthal, *supra* note 49, at 1248–58.

[76] Richard H. Field, Benjamin Kaplan & Kevin M. Clermont, Civil Procedure: Materials for a Basic Course 1707–47 (14th ed. 2020).

[77] *Id.* at 1749–63.

[78] *Id.* at 1698–1700.

[79] Richard D. Freer & Wendy Collins Perdue, Civil Procedure: Cases, Materials, and Questions 823–28 (7th ed. 2016).

[80] Geoffrey C. Hazard, Jr., William A. Fletcher, Stephen McG. Bundy & Andrew D. Bradt, Pleading and Procedure: State and Federal Case and Materials 1139–73 (11th ed. 2015). According to the index, there is a section on the "scope of review," but that section is really devoted to reviewability, not standard of review. *Id.* at 1143.

while factual determinations receive deferential review and are reversed only if clearly erroneous[81] and that no case is needed to illustrate the application of the rule. In any event, many casebooks have compressed their section on standards of review to little or nothing, even though they have extensive sections on fine points of appealability, not to mention other, obscure topics that also get much more space.[82]

This slapdash approach to such a critically important topic left me puzzled. In my first semester of teaching, I searched through numerous cases, determined to find a suitable introductory case to include in the "illustrative cases" section to teach the students about standards of review.

Suddenly, however, I had a different vision. At the time I was searching for a suitable case, a controversy was simmering within the sport of football over the use of Instant Replay. This procedure, introduced in 1986, had been discontinued in 1991.[83] Some commentators were complaining that without it, field officials were making important errors that were not being corrected.[84]

Instant Replay, I realized, is an appellate procedure within the game of football.[85] The Pine Tar decision is an appeal within baseball. Put together, they form an excellent illustration of the importance of standards of review. Indeed, they illustrate all three key aspects of appeal: appealability, reviewability, and standard of review.

C. Baseball, Football and Standards of Review

I assembled a supplementary reading assignment consisting of edited versions of President MacPhail's Pine Tar decision, football's replay rule, and some additional notes and questions.[86] I have used this assignment ever since. Indeed, while I initially used these materials to supplement the *Hicks* case,

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[81] *E.g.*, Freer & Perdue, *supra* note 79, at 823.

[82] For example, the Friedenthal casebook finds room for an entire chapter on the early development of pleading, including over forty pages on common law pleading. Friedenthal, *supra* note 49, at 547–601.

[83] Dave Anderson, *Sports of The Times; Super Bowl's Instant Risk: No Replays*, N.Y. Times (Jan. 16, 1996), at B11.

[84] *E.g.*, *id.*

[85] The use of Instant Replay has expanded to other sports. *See*, *e.g.*, Berman, *supra* note 27, at 1689; Kilbert, *supra* note 27, at 284. However, its key attribute in football, namely, its deferential standard of review, is "widely embraced" across other sports, *see* Berman, *supra* note 27, at 1689, so for purposes of this Essay it suffices to consider Instant Replay in football alone.

[86] This assignment is reproduced in the Appendix: The Pine Tar Assignment.

I subsequently dropped *Hicks* altogether and now use these materials alone. They illuminate, in a more familiar context than civil litigation, the three key questions to focus on in any appeal: What is appealable? What is reviewable? What is the standard of review? The world of sports presents these issues, particularly standard of review, in a context that is easily grasped.

1. Appellate Review in Football

The Official Rules of the National Football League contain an appellate procedure within football officially known as "Instant Replay"[87] and often referred to simply as "replay."[88] Currently, the Instant Replay rule provides for the NFL's Senior Vice President of Officiating (or that official's designee) to conduct all replay reviews.[89] Thus, replay is always conducted by the NFL's central officiating office in New York, regardless of where a game is being played.[90] When replay occurs, the Senior Vice President consults with the Replay Official, who is also at the national office, and the Referee, who is one of the field officials at the game being played.[91]

Under the rule, the Senior Vice President of Officiating, after reviewing the videotape of a play, may reverse a call made by a field official. The rule provides:

> "An on-field ruling will be changed only when the Senior Vice President of Officiating or his or her designee determines that clear and obvious visual evidence warrants a change."[92]

The replay rule also provides a detailed and complex statement of what plays are reviewable.[93] Not every call made by a field official is subject to Instant Replay. Most matters are (e.g., whether a player was out of bounds,

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[87] Roger Goodell, 2023 Official Playing Rules of the National Football League 59–63 (2023), [hereinafter 2023 NFL Rules], Rule 15.

[88] *E.g.*, Ken Belson, *N.F.L. Will Experiment With Replay Reviews of Pass Interference*, N.Y. Times (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/sports/nfl-pass-interference-replay.html [https://perma.cc/RM2H-CPQ3].

[89] *Id.* at 59, Rule 15 § 1, art. 2.

[90] *See id.* Previously, the rule called for replay to be conducted by the Referee, who was one of the officials on the field. Roger Goodell, 2013 Official Playing Rules of the National Football League 91 (2013), Rule 15 § 9, art. 3.

[91] 2023 NFL Rules, *supra* note 87, at 59, Rule 15 § 1, art. 2.

[92] *Id.* at 59, Rule 15 § 2, art. 1.

[93] *Id.* at 59–62, Rule 15 §§ 3–4.

whether a team had the correct number of players on the field), but some are not (e.g., whether a passer intentionally grounded a pass).[94]

The Instant Replay rule sheds light on appellate procedures.[95] Consider the football analogues of the three questions listed above as the keys to any appeal:

What is appealable?: The word "appealable" is a term of art. It means something quite different from what most students probably think it means when they first hear it. As noted earlier, it does not refer to whether a given decision by a field official can ever be reviewed.[96] It is about the *timing* of such review. Appealability addresses the question of *when* an appeal can be taken, not the question of *what* decisions can be appealed.

In football, the key point of appealability—which may seem almost too obvious to mention, but which is important all the same—is that Instant Replay can occur only at the end of a play. A team cannot necessarily seek Instant Replay at the very moment that a field official makes what might be a mistake that the team desires to challenge. If a field official throws a penalty flag (in a situation where the official does not simultaneously whistle play to a stop), or if a field official *fails* to stop play even though, for example, a player with the ball may have stepped out of bounds, neither team may stop play in order to seek Instant Replay. The challenging team must wait until the end of a play. The throwing of a penalty flag, or the failure to throw one, is not itself appealable. The appealable ruling is the ruling at the end of a play.

What is Reviewable?: As noted above, not every ruling by a field official is subject to review by Instant Replay. As the NFL has modified the replay rule over the years, the set of reviewable rulings has gradually expanded[97] and now includes most rulings, but not all. For example, there is no review of whether a pass was intentionally grounded, whether a receiver was illegally contacted, or the spot where a loose ball crossed the sideline.[98] Thus, some matters are entrusted to the unreviewable judgment of the field officials.

What is the Standard of Review?: Most important, the Instant Replay rule empowers the reviewing official to change the call made by the field officials only upon determining "that *clear and obvious* visual evidence warrants a change."[99] It is vital to appreciate the import of this standard.

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[94] *Id.* at 59–62, Rule 15 § 3, arts. 5, 8, § 4.

[95] *See* Oldfather & Fernholz, *supra* note 27, at 54–69 ("assessing the analogy" between replay appeals and appeals in civil litigation).

[96] *See supra* note 61 and accompanying text.

[97] Berman, *supra* note 27, at 1693.

[98] 2023 NFL Rules, *supra* note 87, at Rule 15 § 4.

[99] *Id.* at Rule 15 § 2, art. 1 (emphasis added).

Consider this hypothetical: A team challenges a play and raises the question of whether a player with the ball stayed in bounds. That player, let us imagine, dodged around a defender and then ran another twenty yards before being tackled. The defending team claims that the player stepped out of bounds when dodging around the defender, but the field officials rule that the player stayed in bounds the whole time. With twenty yards of gain at stake, the defending team challenges the field official's call.

Now imagine that the reviewing official, after looking at video of the play, thinks, "I believe that the player stepped out of bounds. It's a close call. I can see how someone might think the player stayed in bounds. The tapes don't clearly show what happened. But based on the tapes my best judgment is that the player went out of bounds and that the call by the field officials was wrong." What is the reviewing official supposed to do?

The answer is that the reviewing official is supposed to *uphold* the initial call made by the field officials in such a case, even though the reviewing official believes that call to be wrong. The rule allows reversal of the initial call only where the tapes provide "clear and obvious" evidence that the initial call was wrong.

But why? What policy could underlie this rule? If the call is a close one, why shouldn't the reviewing official's best judgment as to what happened be dispositive?

When asked this question, students usually give a variety of answers. Some suggest that the league's central officials desire to show respect for the field officials and to avoid the implicit insult that would be entailed by overruling the field officials in a close case.[100] Some say that the "clear and obvious" standard discourages marginal challenges, which is good because challenges slow the game.[101]

Eventually, someone suggests that the rules impose a clear error standard of review because the field official is usually in the *best position* to make the right call.[102] The field officials are on the field and see the plays with their own eyes, unmediated by technology. The reviewing officials, by contrast,

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[100] *See* Berman, *supra* note 27, at 1714.

[101] *See id.* at 1703; *see also id.* at 1714-24 (considering, though ultimately rejecting, other arguments that reversals cause harm even when they are correct, such as that reversals interfere with "the integrity of the game" or the game's entertainment value); Oldfather & Fernholz, *supra* note 27, at 62 (suggesting that the purpose of the deferential standard in instant replay review "is to prevent instant replay reversals from becoming more controversial than the original call").

[102] *See* Berman, *supra* note 27, at 1700. Berman ultimately disagrees with this position, *see id.* at 1701, but he articulates it for purposes of analysis.

aren't even in the stadium where the game is being played (they're usually not even in the same city), and they see the play only on tape, via television. That doesn't mean that the field official's ruling should always be sustained. Sometimes, the tape shows that the field officials clearly erred. In the case of a clear error, the reviewing officials will overturn the initial call. But where the case is close, and the tape does not offer a clearly superior view of the play than that of the field official who made the initial call, it is best to sustain the initial call even if it seems to be wrong, because as between the field official and the reviewing official, the field official is more likely to have it right.

One might question whether the field officials are really in the best position to make the right call. A field official sees the play only from one angle, whereas the reviewing official typically has access to video showing the play from multiple angles.[103] The reviewing official can watch the play in slow motion, whereas a field official sees it only at full speed.[104] The reviewing official also has more time to reach a correct judgment. A field official must form a nearly instantaneous judgment about what happened, whereas the reviewing official can review the play more deliberately.[105]

These details suggest that perhaps the NFL is wrong to employ deferential review.[106] Perhaps the rule was written by lawyers who uncritically imported the concept of "clearly erroneous" review from litigation to football without sufficiently considering the differences between the two situations. Or perhaps the other reasons for deferential review (e.g., the desire to show respect for the field officials) played a bigger role in shaping the rule.[107]

Still, it seems likely that whether it is correct or not, the belief that the field official is in the best position to make the right call played some role in choosing the standard of review of Instant Replay. The Instant Replay rule appears to be based at least in part on the view that if the reviewing official, even with the aid of multiple angles, slow motion, and more time to consider, finds that the matter is not clear-cut, the field official's initial call is most likely to be the correct one and should stand, even if the reviewing official's

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[103] *Id.*; Oldfather & Fernholz, *supra* note 27, at 63.

[104] Berman, *supra* note 27, at 1701; Oldfather & Fernholz, *supra* note 27, at 63.

[105] To keep the game moving along, the rules limit review to 60 seconds from the time video is shared with the Referee, 2023 NFL Rules, *supra* note 87, at 59, Rule 15, § 2, art. 2, but that's still considerably more time than the field official has to make the initial call.

[106] *See* Guggenheim, *supra* note 27, at 578 (suggesting that Instant Replay should use a "manifest weight of the evidence" standard).

[107] The NFL has never officially stated the reasons why it adopted its deferential standard of review. Berman, *supra* note 27, at 1697.

best judgment cuts the other way. One might describe the matter as one of "comparative expertise." The rulemakers apparently believe that as between the field official and the reviewing official, the field official is more adept at making the right call on a particular play.

2. Appellate Review in the Pine Tar Case

Now consider the Pine Tar case. The critical question is this: did President MacPhail determine that the field umpires made a "clear and obvious" error in their initial ruling in the case?

The answer is an emphatic *no*. In his decision, President MacPhail went out of his way to explain that the rules were *un*clear.[108] He specifically acknowledged that the field umpires' initial ruling was "technically defensible."[109] He suggested that its error could be understood only by relying on the "intent or spirit" of the rules.[110] He relied on intentionalist reasoning in determining that under baseball's rules: not every batter who uses an illegal bat should be called out, but only those whose bats "improve the distance factor or cause an unusual reaction on the baseball."[111]

To be sure, MacPhail also indicated that the same result would follow from the text of the rules.[112] Nonetheless, his leading paragraph prominently relied on the "spirit of the rules" argument, and his final paragraph expressly stated that in some areas the Official Playing Rules were "unclear and unprecise."[113] He took responsibility for the "lack of clear, uniform instruction to the umpires on the interpretation of the rules."[114]

In other words, MacPhail certainly did *not* determine that the field umpires' decision in the Pine Tar Game involved clear error. And yet, he overturned it.[115] Why? As discussed above, when a field official's call is challenged under football's replay rule, if the replay official believes that the call is wrong, but not *clearly* wrong, the replay official is supposed to uphold the call. Why didn't President MacPhail apply this principle? Is it because baseball is different from football?

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[108] *See* MacPhail Decision, *supra* note 17, at A16.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *See id.*
[113] *Id.*
[114] *Id.*
[115] *See id.*

After some discussion, the class determines that the distinction is not between baseball and football, but between the *nature* of the challenge involved in the Pine Tar case and that involved in challenges under football's replay rule. Challenges under the replay rule are challenges regarding *facts*. What happened? Did a player step out of bounds? Did the ball cross the goal line? The challenge in the Pine Tar Game, by contrast, was a challenge regarding the *rules of baseball*. Everyone agreed as to what happened. The question was whether on the agreed facts, the rules demanded that the batter be called out.

That distinction makes all the difference. First, it reverses the "comparative expertise" factor discussed above in connection with the football replay rule. As noted above, the replay rule is apparently based on the assumption that the field official is in the best position to know what happened. But who is the best position to know the true meaning of the rules of baseball: a field umpire who has to make a swift decision, or the President of the league,[116] who, before answering, can think about a rules question in depth, consider prior cases under the rule, and consult members of the rules committee? On a rules question, the league's central administrators should be better positioned to reach the correct answer than a single umpire or umpiring crew who happen to face the question in a given game. Accordingly, the "comparative expertise" argument, which on a question of fact tilts toward upholding the initial call in a close case, tilts toward going with the best judgment of the reviewing official on a question of the rules.

Moreover, there is another vital consideration that also suggests that on a rules question, the reviewing officials should go with their best judgment, regardless of the initial ruling and regardless of how close the question is: the desire for *uniformity* on rules questions. If, on a rules question, the reviewing official applied the replay rule's "clear error" principle—that is, if the reviewing official upheld a call implementing a particular interpretation of the rules, even though the reviewing official believed the call to be wrong, provided it was not *clearly* wrong—then the reviewing official would have to uphold conflicting interpretations of the rules. The rules actually governing a given game would depend on who was umpiring that game and what that umpire thought the rules meant.

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[116] Or, today, the Commissioner of Baseball. The League President positions were abolished in 1999 and their functions consolidated in the Commissioner's office. Murray Chass, *BASEBALL; League Presidents Out as Baseball Centralizes*, N.Y. Times (Sept. 16, 1999) https://www.nytimes.com/1999/09/16/sports/baseball-league-presidents-out-as-baseball-centralizes.html#:~:text=From%20Morgan%20Bulkeley%20in%201876,No%20longer [https://perma.cc/L5ML-YWZQ].

Suppose, for example, that two baseball games occur in which a batter hits a ball with a bat that has too much pine tar on it. In one game, the umpire calls the batter out. In the other, the umpire orders that the bat be removed from the game but allows the play in which the bat was used to stand. If these calls were protested to the league under a hypothetical regime in which the league applied the "clear error" principle to rules questions, then the league would have to uphold *both* calls. As President MacPhail's decision shows, neither call involves a clear error. Both involve reasonable, "technically defensible" interpretations of the rules.

Therefore, if only a *clearly* incorrect call could be overturned, even on a rules question, both calls would have to be upheld, with the result that the umpire could choose whether or not a batter who hit a ball with a bat covered with an illegal amount of pine tar was out. The rules would vary from game to game depending on the umpire's interpretation of them. Such a regime, however, would be undesirable. We want the rules to be uniform across games.[117] We don't want the *facts* to be uniform across games (what would that even mean?), but we do want the rules to be uniform. Uniform application of the rules can be achieved only if, when there is a protest on a rules question, the reviewing officials enforce their best understanding of the rule, regardless of how clear or unclear the rule's meaning is.

Thus, two considerations support MacPhail's decision to overturn the field umpires' call in the Pine Tar Game even though that call did not involve a clear error. MacPhail was in a better position to know the meaning of the rules, and applying his own understanding of the rule would promote uniform application of the rule across games.

D. Application to Civil Procedure

What does all this have to do with civil procedure? Everything. Baseball, football, and civil procedure are all systems in which reviewing officials sometimes reverse an initial decision. In civil procedure, as in sports, it is important to consider what rulings are appealable, what issues are reviewable, and, most of all, what standard of review applies on an appeal.

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[117] *See, e.g.*, Michael Steele, *O'Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 Marq. L. Rev. 511, 513 (2015) (noting that the original purpose of the NCAA was to set uniform rules for college football games).

1. Appealability

Civil litigation, at least in federal courts, has a much stricter rule of appealability than football. The basic rule in federal civil litigation is that only the final judgment of a district court is appealable.[118] Appeal may not be taken from most interlocutory orders (i.e., from any order other than the final judgment).[119] Accordingly, a party dissatisfied with an interlocutory order must typically wait until the conclusion of the district court's proceedings to appeal.[120] In football terms, it is as though a team that wanted to challenge a field official's ruling had to wait not only until the end of the play, but until the end the whole *game*.

There are exceptions to the final judgment rule, to be sure. But the key point is for the students to understand that there is a distinction between reviewability and appealability. Even though most interlocutory orders of district courts can eventually be subjected to appellate review,[121] that review is available only upon entry of the final judgment.[122]

2. Reviewability

As noted above, the NFL does not permit challenges to every ruling that a field official might make. Some rulings are unreviewable. In civil litigation, most orders that a district court makes in the course of a case are reviewable, once the district court issues a final ruling that is appealable.[123] If, for example, a district court denies a motion to dismiss for lack of subject matter jurisdiction or personal jurisdiction, or for improper venue or insufficient service of process; if the district court refuses to compel production on important discovery requests; if the district court makes erroneous evidentiary rulings

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[118] 28 U.S.C. § 1291. Some state systems, most notably New York's, permit review of interlocutory orders much more freely than the federal system. *See* N.Y. C.P.L.R § 5701(a) (Consol. 1999).

[119] Kilbert, *supra* note 27, at 269. An "interlocutory" order is an order "not constituting a final resolution of the whole controversy." *Interlocutory*, Black's Law Dictionary (11th ed. 2019).

[120] Kilbert, *supra* note 27, at 269.

[121] *See infra* Part III.B.

[122] Kilbert, *supra* note 27, at 269.

[123] Charles Alan Wright & Arthur R. Miller, 15A Fed. Prac & Proc. Juris. § 3905.1 (3d. ed. 2023) ("[O]nce appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed.") (footnotes omitted).

during a trial; or if the district court commits other errors, all of these matters can usually be reviewed at the end of the case.[124]

Again, there are exceptions and nuances not captured by this basic statement. For example, review cannot be had of errors that are harmless[125] or that are not properly preserved for review,[126] and some interlocutory orders are not reviewable because they are overtaken by subsequent trial events.[127] But in general, most district court orders are reviewable. The key is for the students to understand this basic concept of reviewability and how it differs from appealability.

3. Standard of Review

The most valuable benefit of considering appeals in baseball and football is how it illuminates the concept of the standard of review on appeal. As discussed above, the Pine Tar case and the NFL replay rule suggest that questions of fact should be review deferentially, but questions of law should be reviewed de novo. Those are, indeed, the most fundamental principles of standards of review in civil litigation. On an appeal from a trial court judgment, a court of appeals will show deference to the trial court's (or jury's) findings of fact, overturning them only if they are not only wrong, but clearly wrong, whereas on a question of law the court of appeals rules in accordance with its own best judgment, regardless of how close the question is or which side the trial court took.

Moreover, the reasons why appellate courts use these standards of review mirror the reasons for their use in football and baseball. In litigation, as in sports, we generally believe that the initial decision maker (whether that be a judge or a jury) is in the best position to find the facts of a case. In some cases this is because of the initial decision maker's superior access to the evidence.

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[124] *See id.*

[125] Fed. R. Civ. P. 61.

[126] *E.g.*, Fed. R. Civ. P. 51(d).

[127] For example, a district court's *grant* of summary judgment to a party is reviewable, but if a district court *denies* summary judgment in a case and the case is tried, a court of appeals will not subsequently review the denial of summary judgment. The losing party at trial may move for judgment as a matter of law and appeal if that motion is denied, but if the trial record contains sufficient evidence to support the judgment, a court of appeals will not review whether the summary judgment record was sufficient to allow the case to advance to trial. *E.g.*, Wright & Miller, Federal Practice and Procedure, § 3905.1, *supra* note 123; Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003).

In particular, the initial decision maker has superior access to testimonial evidence because the initial decision maker sees witnesses testify live, whereas the appellate judges see only the "cold" transcript of witness testimony. But even where all the evidence in a case is documentary, so that appellate judges can access it as well as the initial decision maker, appellate review of factual determinations is still deferential.[128] The initial decision maker's comparative expertise with regard to finding facts means that the factual findings made at trial should not be overturned unless they are clearly erroneous.

The initial decision maker does not, however, have comparative expertise in knowing the law. Appellate judges know the law at least as well as trial judges. Moreover, there are always at least three of them,[129] which reduces the probability that they will reach an erroneous legal conclusion because one of them has an eccentric view with regard to whatever legal question is raised in a given case.[130]

In civil litigation, as in sports, we want the law to be uniform from case to case. If appellate courts reviewed rulings on questions of law deferentially, then whenever a question of law was close and opposing understandings of the law could both be reasonable, appellate courts would have to uphold conflicting legal rulings. The law would then vary from case to case depending on the views of the initial decision maker, which would be undesirable. We don't want the *facts* to be uniform from case to case (again, what would that even mean?), but we want the *law* to be uniform, so that the law applied to a case does not depend on whom the parties happen to draw as their trial judge.

In short, the principles relating to standard of review that can be discerned from the Pine Tar case and the NFL replay rule apply equally well in civil litigation. By illustrating how these principles apply in the familiar context of sports, the Pine Tar case sheds light on their operation in courts.

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[128] *See*, *e.g.*, Fed. R. Civ. P. 52(a)(6) (providing for deferential review of findings of fact "whether based on oral or other evidence").

[129] *See* 28 U.S.C. § 46 (providing for courts of appeals to sit in panels).

[130] More formally, the Condorcet Jury Theorem establishes that as long as any one decisionmaker is more likely than not to make the correct decision on a given question, then a panel of three decisionmakers acting by majority vote is more likely than a single decisionmaker to answer the question correctly, and indeed the probability of a correct answer from a panel of decisionmakers increases with the size of the panel. *See* Berman, *supra* note 27, at 1726. *See also* Oldfather & Fernholz, *supra* note 27, at 62 (noting that appellate courts are more able to answer questions of law because they are larger).

E. Other Beauties of the Pine Tar Case

As shown above, the Pine Tar case illuminates the vital concept of standard of review on appeal. For those who care to explore it further, the case also provides an excellent introduction to some other highly useful concepts. In particular, President MacPhail's decision can provide the basis for a discussion of competing theories of statutory interpretation. Indeed, at the time the decision was issued, it led to "a tremendous popular debate about the spirit and letter of the law . . . [that] constituted perhaps the most widespread popular legal debate in American history."[131]

The Pine Tar case posed the fundamental question that has driven debate over competing theories of statutory interpretation for decades: if the text of a statute leads to a result that seems contrary to the likely intent or purpose of the statute, what should a court applying the statute do? Textualists believe that the role of a court in applying a statute is to read the statute's text and do what it says—even if what it says is stupid, or even if what it says is not what anyone intended.[132] Intentionalists and purposivists allow judicial discretion to depart from a literal reading of a statute when a court believes that such a reading "will produce a result demonstrably at odds with the intentions of [the statute's] drafters."[133]

The Pine Tar case presents a potential example of this conflict. The text of the relevant baseball rules suggested that Brett was out. Brett hit a ball with a bat that did not conform to Rule 1.10. Therefore he hit an "illegally batted ball," and a batter who hits an illegally batted ball is out.

To be sure, President MacPhail determined that the text of the rules could be understood differently. But his reading of the text was inferential. It is true that the rules provided that a bat with excess pine tar must be removed from the game. From this provision, MacPhail inferred that no other penalty (including calling the batter out) applies in such a case. But the text of the rule does not thus limit the penalty. Indeed, even MacPhail, in drawing the

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[131] Lukinsky, *supra* note 26, at 1855; *see also* George Vescey, *Sports of the Times: A Judge Ends the Agony*, N.Y. Times (Aug. 19, 1983), https://www.nytimes.com/1983/08/19/sports/sports-of-the-times-a-judge-ends-the-agony.html [https://perma.cc/7NEM-CXUL] ("[T]he decision became a litmus test of character and philosophy of the American people, dividing baseball fans and other maniacs into liberals and conservatives, humanists and legalists.").

[132] *E.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 118 (2009).

[133] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982); *see also* Siegel, *supra* note 132, at 118–19.

inference that the batter in such a case is not out, said that "[i]f it was *intended* that this infraction should fall under the penalty of the batter's being declared out, it does not seem logical that the rule should specifically specify that the bat should be removed from the game."[134] Thus, his decision relied on the likely intent behind the rule, not merely its text.[135]

While there is room for debate over the correct textualist reading of the 1983 baseball rules relevant to the Pine Tar case,[136] MacPhail's decision certainly relied on intentionalism and purposivism in reaching its result.[137] The decision therefore presents an opportunity to introduce students to the important debate over methods of statutory interpretation.

Thus, the Pine Tar case is doubly valuable. Not only does it provide an excellent introduction to important concepts relating to appeals, but it also highlights the vital debate over methods of statutory interpretation.

IV. Epilogue

President McPhail's ruling didn't end the Pine Tar game, nor the drama associated with it. McPhail ordered that the game be completed on August 18,

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[134] MacPhail Decision, *supra* note 17.

[135] There were other considerations regarding the correct interpretation of the 1983 rules that one would likely wish to mention if using the decision to stimulate a discussion of interpretive methods. President MacPhail's decision also cited American League Regulation 4.23, which provided that "the use of pine tar in itself shall not be considered doctoring the bat. The 18 inch rule will not be cause for ejection or suspension." This regulation might have been cited as further support for his ruling that excessive pine tar on a bat should cause the bat to be removed from the game but should not be the occasion for any other penalty. On the other hand, while the regulation specifically excluded the penalties of ejection and suspension, it said nothing about the penalty of being called out, so one might have argued that this regulation inferentially supported the umpires' ruling that that penalty was still applicable. *See* Belliotti, *supra* note 26, at 229–30.

[136] Professor Belliotti maintains that "the Pine Tar Case is not a genuine conflict between the letter of the law and spirit of the law." Belliotti, *supra* note 26, at 231. In his view, the umpires wrongly "ignored part of the relevant material that should guide the decision." *Id.* at 230. However, he relies on some interpretive principles, such as the rule of lenity, which are not clearly applicable (that rule applies in criminal cases), and he also relies on a "supplemental directive" issued by the American League in 1975 stating that in the case of a bat with too much pine tar, "the intended penalty was only that the bat be removed from the game." *Id.* at 231. A textualist might maintain, however, that the *intended* penalty is irrelevant.

[137] Wasserman, *supra* note 26 ("McPhail made an intentionalist 'spirit v. letter of the rule' decision.").

1983, when both teams were supposed to have a day off.[138] The Yankees, who were in a considerable sulk about losing the appeal, thought about taking their day off anyway and forfeiting the game.[139] Dave Winfield, the team's union representative, complained that if the game's final inning were played on August 18, the Yankees would have thirty-one game days in a row, which would violate a provision in the players' collective bargaining agreement that limited play to twenty consecutive days.[140] "We're not pack mules," he said.[141] But even Don Fehr, the chief counsel to the players' union, said that the League was within its rights to order the game played on August 18 if no other date was available.[142]

Still, a controversy arose about admission to the resumed game. The Yankees announced an admissions charge of $2.50 for those who did not have season tickets.[143] Fans who had tickets to the original game brought suit on the claim that they were entitled to see the rest of the game for free.[144] The Bronx Supreme Court issued a preliminary injunction, not resisted by the Yankees, that the game not be resumed while the litigation was pending.[145] The American League appealed, but the appeal was still pending at the time the Royals had to set off for New York, so the Royals boarded their plane not knowing whether the game would really resume.[146]

At the appellate hearing, the Yankees (represented by none other than Roy Cohn, who showed up to the hearing half an hour late),[147] argued that

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[138] *"Pine-Tar" Game to End on Aug. 18*, N.Y. Times (Aug. 10, 1983), https://www.nytimes.com/1983/08/10/sports/pine-tar-game-to-end-on-aug-18.html [https://perma.cc/6NUD-892J].

[139] Vescey, *supra* note 131; *see also* Steve Wulf, *Pine-Tarred and Feathered*, Sports Illustrated (Aug. 29, 1983), https://vault.si.com/vault/1983/08/29/pine-tarred-and-feathered [https://perma.cc/4XRF-PCMW].

[140] *"Pine-Tar" Game*, *supra* note 138; Bondy, *supra* note 4, at 173, 178.

[141] *"Pine-Tar" Game*, *supra* note 138; Bondy, *supra* note 4, at 178.

[142] *"Pine-Tar" Game*, *supra* note 138; Bondy, *supra* note 4, at 178.

[143] *"Pine-Tar" Game*, *supra* note 138.

[144] Bondy, *supra* note 4, at 179.

[145] Murray Chass, *Finale of Game in Doubt*, N.Y. Times (Aug. 18, 1983), https://www.nytimes.com/1983/08/18/sports/finale-of-game-in-doubt.html [https://perma.cc/D5Q2-J4J5].

[146] Bondy, *supra* note 4, at 186.

[147] Vescey, *supra* note 131. Cohn was most famous for his role as Chief Counsel to Senator Joseph McCarthy during McCarthy's investigation of suspected Communists. He also prosecuted Julius and Ethel Rosenberg as spies and represented future President Donald Trump. *See* Albin Krebs, *Roy Cohn, Aide to McCarthy and Fiery Lawyer, Dies at 59*, N.Y. Times (Aug. 3, 1986), https://www.nytimes.com/1986/08/03/obituaries/roy-cohn-aide-to-mccarthy-and-fiery-lawyer-dies-at-59.html [https://perma.cc/DZ4A-XYRQ].

the game was "not routine" and that they were concerned that they might not be able to ensure adequate security. Justice Joseph Sullivan of the New York Supreme Court's Appellate Division vacated the injunction on the ground that the plaintiffs had failed to show that paying the $2.50 would constitute an irreparable injury justifying injunctive relief. If the charge was wrongful, he said, the plaintiffs could get their money back later. He therefore ruled, "Play ball."[148] In the end, the Yankees honored rainchecks from the previous part of the game.[149]

The drama was, however, still not over yet. With about 1,200 fans in attendance, the Pine Tar game resumed from the moment after Brett's home run.[150] The Royals, now ahead 5–4, were still at bat, with two out, in the top of the ninth inning.[151] Brett, Perry, and two other Royals (the manager and a coach) had been ejected for their conduct during the original incident.[152]

Before pitching to the next Royals batter, Yankee pitcher George Frazier threw to first base, thus setting up a challenge to Brett's home run on the ground that Brett hadn't touched first base on his way around the bases.[153] However, Tim Welke, the first base umpire, signaled "safe."[154] Frazier also threw to second, to set up a claim that neither Brett nor Washington had touched that base, but Dave Phillips, the second base umpire, signaled "safe" as well.[155]

Billy Martin came out of the dugout for yet another challenge.[156] He pointed out that Welke, the first base umpire, hadn't even *been* at the original Pine Tar game, so how could he know whether Brett had touched first on the original day? But the umps were ready. Phillips, at second base, pulled from his pocket an affidavit, signed by all four umpires present at the July 24 portion of the game, stating that both runners had touched all the bases.[157] The League had anticipated that Martin might bring this challenge and had

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[148] Jane Gross, *Appellate Justice Orders "Play Ball,"* N.Y. Times (Aug. 19, 1983), https://www.nytimes.com/1983/08/19/sports/appellate-justice-orders-play-ball.html [https://perma.cc/FQT3-99S7].

[149] Vescey, *supra* note 131; Bondy, *supra* note 4, at 190.

[150] Murray Chass, *Resumed Game Ends in 5-4 Yankees Loss to Royals*, N.Y. Times (Aug. 19, 1983) https://www.nytimes.com/1983/08/19/sports/resumed-game-ends-in-5-4-yankee-loss-to-royals.html [https://perma.cc/8GJ4-4GG3].

[151] *Id.*; Bondy, *supra* note 4, at 188.

[152] Bondy, *supra* note 4, at 186.

[153] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[154] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[155] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[156] Chass, *supra* note 145.

[157] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

prepared the affidavit ahead of time.[158] Martin told the umpires that the Yankees would continue the game, but under protest.[159]

Martin wasn't quite out of theatrics. He put Don Mattingly at second base, even though Mattingly, a first baseman, was left-handed.[160] A left-handed second baseman is rarer than a triple play—Mattingly's brief stint at second during the resumed Pine Tar game was the only recorded appearance by a left-hander at second base between 1970 and 2016.[161] Martin also put Ron Guidry, a pitcher, in to play center field, as Jerry Mumphrey, the center fielder from the July 24 portion of the game, had been traded.

But there was nothing more Martin could do to prevent the game from resuming, and the end was finally near. Hal McRae, the Royal who followed Brett in the batting order, struck out to end the top of the ninth inning—25 days after that inning began.[162] Royals relief pitcher Dan Quisenberry then retired the Yankees in order to close out the ninth.[163] The Royals therefore won the Pine Tar game, 5–4.[164]

The Yankees, who had won the American League East in 1976, 1977, 1978, 1980, and 1981 and who were just two games out of first place the day before the Pine Tar game in 1983,[165] went on to finish third in the division.[166] They didn't win the division again for thirteen years.[167] Was it the Pine Tar game jinxing them for that long? No one can say.[168]

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[158] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[159] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[160] Bondy, *supra* note 4, at 188.

[161] *See Left-Handers Who Played 2B, Post-1920*, Quirky Rsch., https://www.quirkyresearch.com/baseball-lists/left-handers-who-played-2b-post-1920/ [https://perma.cc/E5S5-A2FE].

[162] Bondy, *supra* note 4, at 188, 190.

[163] *Id.*

[164] Murray Chass, *Resumed Game Ends in 5-4 Yankee Loss to Royals*, N.Y. Times (Aug. 19, 1983), https://www.nytimes.com/1983/08/19/sports/resumed-game-ends-in-5-4-yankee-loss-to-royals.html [https://perma.cc/W9EX-XB3N] ("YANKEES LOSE SUSPENDED GAME" was the doleful caption of a photo of Billy Martin and some of the game's umpires on the front page of the next day's New York Times).

[165] *See MLB Scores and Standings Saturday, July 23, 1983*, MLB Reference, https://www.baseball-reference.com/boxes/?date=1983-07-23 [https://perma.cc/KD6G-C742].

[166] *See MLB Scores and Standings Monday, October 3, 1983*, MLB Reference, https://www.baseball-reference.com/boxes/?year=1983&month=10&day=3 [https://perma.cc/4Q6W-WC4Y].

[167] Bondy, *supra* note 4, at 192, 196.

[168] *See id.* at 191–99 (describing the Yankees "Post-Pine-Tar Depression" and suggesting that the Pine Tar Game "was a critical turning point in Yankees history").

What is clear, however, is that the Pine Tar game not only provided one of great moments in baseball history, but also involved important legal concepts. The game can be a useful pedagogical tool. By presenting appeal in a sports context, the game illuminates the vital concept of standards of review.

Appendix: The Pine Tar Assignment

The Pine Tar Case
Kansas City Royals v. New York Yankees

Decision of Lee MacPhail, President, American League
July 28, 1983

[An edited version of President MacPhail's decision, which appears in the assignment, is omitted here. A link to the full text of the decision appears in a footnote to this Appendix.][1]

Notes and Questions

1. The Official Rules of the National Football League provide for an appellate procedure within the game of football, known as "Instant Replay." Under the rules, Instant Replay is conducted by the NFL's Senior Vice President of Officiating ("SVPO"), an official at NFL's office in New York. The SVPO is in contact with all games electronically, regardless of where each game is played. If a team's Head Coach challenges a call made on the field by the field officials, the SVPO reviews available tapes of the play and may change the call. However, the rules provide:

> An on-field ruling will be changed only when the Senior Vice President of Officiating or his or her designee determines that clear and obvious visual evidence warrants a change.

2019 Official Playing Rules of the National Football League, Rule 15, § 2, art. 1. Under this rule, if the SVPO believes that the initial call on the field was wrong, but that it was a close call and not clear-cut, what is the SVPO supposed to do?

Why should this be the rule? In the case of a close call, why shouldn't the SVPO's best judgment prevail?

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[1] The text of the decision was reprinted in the *New York Times* shortly after its announcement. *See Text of League President's Ruling in Brett Bat Case*, N.Y. Times (July 29, 1983), at A16, https://www.nytimes.com/1983/07/29/sports/text-of-league-president-s-ruling-in-brett-bat-case.html [https://perma.cc/ZJ99-25P5].

2. Did President MacPhail determine that there was a "clear and obvious" error in the ruling of the field umpires in the Pine Tar Case? If not, what explains the difference between the football replay rule, in which reversal of the field official's call is possible only in cases of "clear and obvious" error, and this decision in a baseball appeal?

3. The football replay rule also provides:

> The Replay System will cover the following play situations:
> (a) Plays involving possession . . .
> (b) Plays involving touching of either the ball or the ground . . .
> (c) Plays governed by the goal line . . .
> (d) Plays governed by the boundary lines . . .
> [and several other, specified situations].
>
> The following aspects of plays are not reviewable:
> (a) Whether an erroneous whistle sounded;
> (b) Whether a ball was illegally batted or kicked;
> (c) Whether a passer intentionally grounded a pass; . . .
> [and several other, specified situations].

2019 Official Playing Rules of the National Football League, Rule 15, §§ 3, 4. Why is the replay rule limited to certain kinds of calls, leaving some calls not reviewable? Assuming the replay rule is a good idea, why shouldn't it apply to all situations?

4. President MacPhail ordered that the Pine Tar game be concluded on August 18, 1983. The continuation of the game was almost scuttled by a lawsuit brought by ticket holders who had attended the first part of the game on July 24 and who alleged they had a right to see the conclusion of the game without paying the $2.50 admission charge announced by the Yankees. A New York State trial court enjoined the game from proceeding, but an appellate judge vacated the injunction and ruled, "play ball." In the end, the Yankees allowed prior ticket holders in for free. The continuation of the game lasted just 9 minutes, 41 seconds, since all four remaining batters (one from Kansas City and three from New York) made immediate outs. The Yankees therefore lost, 5–4.

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Generative AI as Digital Media

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Abstract

The hype surrounding Generative AI paints it as revolutionary and potentially apocalyptic and calls for equally novel regulation. This essay argues that such an approach is misguided. It shows that generative AI is best understood as the next step in the evolution, rather than a revolution, of our algorithmic media landscape, following in the footsteps of search engines and social media. Together, these digital media platforms centralize information control, use complex algorithms to shape content, and rely heavily on data. These platforms also create shared problems: unchecked power, echo chambers, and the erosion of traditional gatekeepers.

It follows that we should approach their regulation with the same goal: Media institutions must be trusted and trustworthy. Without this trust, public discourse risks devolving into isolated echo chambers where only comforting, tribally-approved beliefs survive—a threat exacerbated by generative AI's ability to bypass gatekeepers and tailor "truth." Regulation must foster accountability, transparency, and environments that inspire public confidence towards generative AI platforms.

Risk regulation, the dominant approach in current AI governance, emphasizes reactive risk mitigation. Both the European Union's AI Act and the United States' Executive Order 14110 on Ensuring Trustworthy AI prioritize identifying and mitigating measurable risks. This approach excels at preventing crises in areas like national security, public health, and algorithmic bias. It is a good way of dealing with AI as a revolutionary, unpredictable, new technology. However, this Article shows that its focus on measurable risk makes it ill-suited to address the dimensions of building trust in digital media platforms.

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Achieving this demands not just risk reduction, but proactive, public-oriented measures.

If we continue to understand generative AI as a completely revolutionary technology necessitating reactive regulation, we risk repeating past mistakes that left social media and search engines unregulated for decades. We must ask how to proactively shape an algorithmic media landscape serving the public good—one that cultivates quality information and civil discourse.

Introduction

The way we imagine a new technology plays a pivotal role in how we regulate it. We are told by big tech that the introduction of Generative AI ('GenAI') "is more important than fire or electricity."[1] That it "has the potential to revolutionize nearly every industry."[2] That it is "more dangerous than nukes."[3] The theatrical nature of these proclamations, and the aura of mystique surrounding the term `AI', inevitably impacts the way we conceptualize and implement its regulation. We are led to believe GenAI represents a dramatic breakthrough necessitating equally revolutionary regulations, befitting a technology with monumental, frightening, and uncertain impacts. Yet this narrative promoted by the developers of GenAI is misleading.

GenAI, particularly in the realm of digital media, signifies more of an evolution than a revolution. It represents a continuation of trends that have long been in motion. Over the last two decades, two types of algorithms have become central in shaping public discourse: those that curate the content we encounter on digital platforms,[4] and those that govern the moderation of the content users contribute.[5] Presently, we are witnessing the emergence of

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[1] Catherine Clifford, *Google CEO: A.I. is More Important Than Fire or Electricity*, CNBC (Feb. 1, 2018, 12:56 PM), https://www.cnbc.com/2018/02/01/google-ceo-sundar-pichai-ai-is-more-important-than-fire-electricity.html/ [https://perma.cc/E6C7-M3PB].

[2] Samantha Kelly, *Sam Altman Warns AI Could Kill Us All. But He Still Wants the World to Use It*, CNN (Oct. 31, 2023, 6:00 AM), https://edition.cnn.com/2023/10/31/tech/sam-altman-ai-risk-taker/index.html/ [https://perma.cc/E8G6-MM2E].

[3] Catherine Clifford, *Elon Musk: 'Mark My Words — A.I. is Far More Dangerous Than Nukes'*, CNBC (Mar. 14, 2018, 11:31 AM), https://www.cnbc.com/2018/03/13/elon-musk-at-sxsw-a-i-is-more-dangerous-than-nuclear-weapons.html/ [https://perma.cc/R6MQ-SP8Y].

[4] Gilad Abiri & Xinyu Huang, *The People's (Republic) Algorithms*, 12 Notre Dame J. Int'l & Comp. L. 16, 19-20 (2022).

[5] Gilad Abiri, *Moderating from Nowhere*, 47 BYU L. Rev. 757, 772 (2022).

a third kind of algorithm: one specialized in generating human-like content.[6] More tangibly, over the past two decades our media ecosystem has been overtaken by search engines and social media platforms, which are now being joined by algorithmic chatbots. These are all technologies driven by complex machine learning programs that facilitate media consumption. In this Article, I argue against viewing generative algorithms as some new epoch-making technology. Rather, we should see them for what they are—the next phase in the steady progression of algorithmic mediation over our information. GenAI continues the trajectory of search engines and social platforms in algorithmizing content. Therefore, regulating GenAI is fundamentally linked to regulating other algorithmic systems governing media and knowledge.

My argument proceeds in four stages:

In Part I, I put forth the idea of grouping social media, search engines, and generative algorithms together under the single concept of *digital media platforms*. I argue these should be seen as interconnected technologies that warrant a unified regulatory approach. It makes sense to consider digital media platforms together since they both share fundamental qualities and raise similar societal concerns. They are defined by their algorithmic backbone for key functions like content filtering, recommendation engines, and generating novel content.[7] This algorithmic foundation is intrinsically tied to their data-driven nature, where accumulating and analyzing vast datasets is imperative for refining and personalizing user experiences.[8] Lastly, their global reach and concentration of control within a few dominant entities signify a major shift

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[6] *See, e.g.*, Harshvardhan GM et al., *A Comprehensive Survey and Analysis of Generative Models in Machine Learning*, 38 Comput. Sci. Rev. 1 (2020); Keng-Boon Ooi et al., *The Potential of Generative Artificial Intelligence Across Disciplines: Perspectives and Future Directions*, J. Comput. Info. Sys. 1 (2023); Francesca Grisoni et al., *Combining Generative Artificial Intelligence and On-Chip Synthesis for De Novo Drug Design*, 7 Sci. Adv. 1 (2021); Zhuoxuan Jiang et al., *Leveraging Key Information Modeling to Improve Less-Data Constrained News Headline Generation via Duality Fine-Tuning*, 1 Proc. 2nd Conf. Asia-Pacific Chapter Ass'n for Computational Linguistics & 12th Int'l J. Conf. on Nat. Language Processing 57 (2022); Simon Zhai et al., *Enabling Predictive Maintenance Integrated Production Scheduling by Operation-Specific Health Prognostics with Generative Deep Learning*, 61 J. Mfg. Sys. 830 (2021); David Baidoo-Anu & Leticia O. Ansah, *Education in the Era of Generative Artificial Intelligence (AI): Understanding the Potential Benefits of ChatGPT in Promoting Teaching and Learning*, 7 J. A.I. 52 (2023); Steven J. Quan, James Park & Sugie Lee, *Artificial Intelligence-Aided Design: Smart Design For Sustainable City Development*, 46 Env't & Plan. B: Urb. Analytics & City Sci. 1581, 1584 (2019).

[7] *See* discussion *infra* Part I.B.

[8] *Id.*

from being a myriad of mostly local, media organizations to being a public sphere dominated by 3–4 major global technology corporations.[9]

Since they share fundamental characteristics, the challenges arising from social media, search engines, and generative AI are closely interconnected. First, the centralization of power in these platforms exacerbates problems around information control, privacy, and potential for abuse.[10] Second, the reliance on algorithms to curate and recommend content has created echo chambers, where users are increasingly exposed to information that affirms their existing views, diminishing viewpoint diversity and undermining democratic exchange of ideas.[11] Third, these platforms contribute to the bypass effect, where traditional local gatekeepers and norms are sidelined in favor of algorithmic content dissemination, challenging regulatory frameworks and cultural contexts that have historically governed speech and information flow.[12] Ultimately, the trend of personalization of GenAI is likely to lead to narrower and narrower echo chambers, a more polarizing side effect than that of social media, isolating individuals from the public forum.

Having established a shared focal point for regulation, Part II turns to the goals of regulating digital media platforms, including Generative AI. The question arises: If Generative AI is a new type of digital intermediary, what should we aim to achieve by regulating it?

The primacy of digital media platforms has transformed global public spheres. While we once celebrated this shift,[13] it is now implicated in perpetuating social problems like the spread of hate speech and

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[9] *Id.*

[10] *See, e.g*, Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019) (describing how the size of big tech creates myriad social harms); Amy Kapczynski, *The Law of Informational Capitalism*, 129 Yale L. J. 1460 (2020) (exploring the implications of the power of big tech and their reliance on information for profit); Juho Lindman, Jukka Makinen & Eero Kasanen, *Big Tech's Power, Political Corporate Social Responsibility and Regulation*, 38 J. Info. Tech. 144, 145, 152 (2023).

[11] *See* Gilad Abiri & Johannes Buchheim, *Beyond True and False: Fake News and the Digital Epistemic Divide*, 29 Mich. Telecomm. & Tech. L. Rev. 59 (2022) (describing the rise of digital epistemic divide); *see also* discussion *infra* Part I.B.2.

[12] *See generally* Axel Bruns, Gatewatching: Collaborative Online News Production 11 (2005) (describing the new phenomenon of gate watching).

[13] *See* Yochai Benkler, Hal Roberts, Robert Faris, & Alicia Solow Nierderman, *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate*, 32 Pol. Commc'n 594 (2015) (supporting an optimistic view of the potential of tech media for networked democratic participation); *see also* Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul Of the Networked Fourth Estate*, 46 Harv. C.R.–C.L. L. Rev. 311, 311 (2011) (using WikiLeaks as an example to show how the Internet enables individuals to speak their mind).

misinformation.[14] Scholars like Jack Balkin highlight a critical shortcoming in our digital era: the lack of "trusted and trustworthy intermediaries"[15] to facilitate, organize, and curate public discourse.[16] This deficiency jeopardizes any public sphere, as without trust in institutions responsible for delineating reliable knowledge and acceptable speech, society risks devolving into a rhetorical battlefield marked by tribalism and comfortable beliefs, undermining foundational free speech values.[17]

The path towards establishing digital media platforms, including Generative AI, as trusted and trustworthy intermediary institutions is impeded by two key trust deficits: The first centers on misaligned incentives, where the economic models driving these platforms often prioritize engagement and revenue over public welfare.[18] This misalignment fosters environments where misinformation and sensationalism thrive at the expense of societal well-being. The second deficit stems from an unfamiliarity gap arising from the global nature of these platforms, distancing them from users' localized contexts. This gap is marked by a lack of deep cultural and community integration, making it difficult for platforms to engender trust and belonging.[19]

Having laid out the target and aim of GenAI regulation, Part III illustrates the inadequacy of the prevailing AI regulation approach in achieving this objective. Current attempts at AI regulation, typified by the European Union's Artificial Intelligence Act (AI Act)[20] and the United States' Executive

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[14] *See* Gilad Abiri & Sebastian Guidi, *From a Network to a Dilemma: The Legitimacy of Social Media*, 26 Stan. Tech. L. Rev. 92, 139 (2023) [hereinafter Abiri & Guidi, *From a Network to a Dilemma*].

[15] Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. Free Speech L. 71, 79 (2021) [hereinafter Balkin, *To Regulate*].

[16] *See id.; see also* Jack M. Balkin, *To Reform Social Media, Reform Informational Capitalism*, *in* Social Media, Freedom of Speech, and the Future of our Democracy 234 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) [hereinafter Balkin, *To Reform*].

[17] *See* Balkin, *To Regulate*, *supra* note 15, at 79 ("Without these trusted institutions and professions, the practices of free expression become a rhetorical war of all against all."); *see also* Balkin, *To Reform*, *supra* note 16, at 242 ("Weaken the institutions or destroy trust, and the public sphere becomes a rhetorical war of all against all, where no one is believed except the members of one's own tribe, and people cleave to whatever beliefs are most comforting to them").

[18] *See* discussion *infra* Part II.A.

[19] *See* discussion *infra* Part II.B.

[20] *Proposal for a Regulation of the European Parliament and of the Council Laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 25, COM (2021) 206 final (Apr. 21, 2021) [hereinafter *AI Act*].

Order 14110 on Ensuring Trustworthy AI (hereinafter Executive Order 14110),[21] concentrate on risk management and mitigation. These regulatory frameworks prioritize identifying and mitigating risks associated with AI technologies, categorizing AI systems based on their potential harm to ensure safety and compliance. However, while these measures are crucial, they inadvertently overlook the integral role of GenAI as a media entity, central to public discourse and societal narrative shaping.

For instance, the AI Act's broad categorization of AI systems into unacceptable, high, or low/minimal risk groups,[22] and Executive Order 14110's focus on regulating high-risk foundation models, illustrate the centrality of risk management.[23] These frameworks aim to safeguard against tangible harms, such as privacy violations or discriminatory outcomes.[24] Yet, they do not fully grapple with the subtler, yet equally significant, impact of GenAI on the digital public sphere—such as the dissemination of information, the formation of public opinion, and the potential for echo chambers and misinformation.[25]

The inadequacy of these approaches becomes apparent when considering the trust deficits that plague digital media platforms. The misalignment of incentives and the unfamiliarity gap are not issues that can be resolved through risk mitigation strategies alone. For example, while the AI Act and Executive Order 14110 may enforce transparency and data governance, which may contribute some to the creation of trust, these measures do not directly address the economic models that drive platforms to prioritize engagement over accuracy or the global-local divide that hampers community building and trust.

Finally, Part IV builds a regulatory bridge between social media and GenAI, emphasizing how strategies developed for social platforms can be

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[21] Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

[22] European Parliament News 20230601STO93804, EU AI Act: First Regulation on Artificial Intelligence (Dec. 19, 2023, 11:45 AM), https://www.europarl.europa.eu/pdfs/news/expert/2023/6/story/20230601STO93804/20230601STO93804_en.pdf [https://perma.cc/3SWZ-EW3Z] [hereinafter EU AI ACT News].

[23] Marianna Drake, Marty Hansen, Lisa Peets, Will Capstick, Jayne Ponder, et al., *From Washington to Brussels: A Comparative Look at the Biden Administration's Executive Order and the EU's AI Act*, Compliance & Enforcement (Nov. 30, 2023) (describing one of the areas of commonality between the EO and the AI Act as their focus on high-risk AI); *see also* Exec. Order No. 14110, 88 Fed. Reg. 75191, 75194, 75196 (Oct. 30, 2023).

[24] *See* Exec. Order No. 14110, 88 Fed. Reg. 75191, 75192 (Oct. 30, 2023).

[25] Urbano Reviglio & Claudio Agosti, *Thinking Outside the Black-Box: The Case for "Algorithmic Sovereignty" in Social Media*, 6 Soc. Media + Soc'y 1, 1, 5 (2022) (describing several media-harms of algorithmic curation).

effectively applied to GenAI. This part explores regulatory tools beyond risk management, focusing on policies that seek to align digital platform incentives with user interests and mitigate the unfamiliarity between global platforms and local users.

The discussion begins by examining potential reforms to liability shields like Section 230 of the Telecommunications Act of 1996 to better align platform operations with societal well-being, suggesting adjustments could compel GenAI platforms to minimize harmful content while preserving free speech.[26] It also considers how increased competition and imposed interoperability could incentivize prioritizing user welfare, drawing parallels to social media regulation where competition improves content moderation and user engagement.[27] Additionally, the concept of information fiduciaries is proposed as a model for GenAI, emphasizing the duty of platforms to protect user interests, particularly regarding personal data.[28] This aims to shift business models away from exploiting user information towards prioritizing user welfare and ethical data use.

To address the familiarity trust deficit, the Article highlights the importance of incorporating local community insights into the governance of GenAI platforms.[29] By engaging local civil society in content moderation and policy formation, GenAI can better reflect and respect diverse cultural norms and values, bridging the gap between global technology and local contexts. This approach aims to foster a more trusted and culturally coherent digital public sphere, leveraging lessons from social media regulation to address the unique challenges posed by GenAI.

The Article ends with a comparative analysis of the EU's AI Act and Digital Services Act (DSA).[30] This is meant to show that the legal ramifications of seeing GenAI as a part of digital media platforms are both immediate

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[26] 47 U.S.C. § 230; Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1633 (2013) ("Imposing strict liability for harmful speech, such as defamatory statements, would overdeter, or chill, valuable speech, such as true political information.").

[27] *See* Balkin, *To Reform*, *supra* note 16, at 247 ("With more platforms vying for user attention, companies will have 'greater incentives to give end users what they want from social media' including improved content moderation policies and practices.").

[28] Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183, 1207-08 (2016) [hereinafter Balkin, *Information Fiduciaries*].

[29] *See* discussion *infra* Part VI.B.

[30] *AI Act*, *supra* note 20; Eur. Parliament & Eur. Council, *The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en/ [https://perma.cc/7KM2-QAZ2] [hereinafter *The DSA Policy Essay*].

and meaningful. The analysis highlights the superior suitability of the DSA for regulating GenAI's media dimensions, given its explicit focus on online media platforms. Consequently, the DSA emerges as a more pertinent choice than the AI Act for addressing the unique challenges posed by GenAI.

I. Generative AI as Digital Information Platform

This part argues that we should understand GenAI as a subset within a broader category of digital media platforms, which includes entities such as search engines and social media. It opens by briefing the reader on Generative AI, providing baseline knowledge. It then defines and advocates for the concept of digital media platforms that are distinct from traditional media institutions and from other algorithmic products, grouping GenAI with entities like search engines and social media. This classification clarifies GenAI's role and connects it to the broader digital landscape, emphasizing its relationship with other key platforms.

Section A outlines the core mechanisms of GenAI, its training process, and its capabilities in content creation, showcasing its versatility in various media forms and its applications beyond media. It also touches on the emergence of Large Language Models (LLMs) and their ability to integrate current information, highlighting the shift they represent in the digital information ecosystem.

Section B discusses GenAI in the context of digital media platforms, examining its role in the bypass effect, which challenges traditional gatekeepers and local norms. This section further explores the potential for GenAI to contribute to cultural imperialism and the creation of echo chambers through personalized content, emphasizing the need for regulation and the development of trustworthy institutions to ensure the responsible integration of GenAI in our information economy.

Thus, the transition from a cohesive public sphere, a traditional feature of mass media, to the fragmented landscape fostered by social media, and now to the possibility of an even more individualized echo chamber through generative AI, indicates a significant metamorphosis within the democratic framework. This transformation underscores the necessity for thoughtful regulation and the establishment of reliable institutions to guide the ethical deployment of GenAI, as discussed in Section B, to safeguard the integrity of our information economy.

A. Understanding Generative AI

The goal of this section is to explain what exactly GenAI is. In digital media, Generative AI represents a major change in content creation, powered

by neural networks and deep learning models. These neural networks are structured to mimic the brain's processing through interconnected nodes that analyze input data.[31] This enables the AI to absorb, adapt, and generate content. Deep learning models excel at finding intricate patterns in large datasets, thanks to their multilayered architecture.[32] This design allows GenAI to execute advanced functions like image and speech recognition, language translation, and nuanced content generation.

1. Training Stages of Generative AI

The training process of GenAI involves several key stages, each critical to the development of an effective model. It starts with the collection of expansive datasets, which provide a diverse knowledge base for the AI to learn from. This stage is fundamental as the quality and variety of the data directly influence the AI's capability to generate new, accurate data.[33]

The next step in GenAI's development, pre-training, primarily involves unsupervised learning techniques. This phase is essential for the AI to develop a general understanding of the data. It learns to discern underlying structures, patterns, and relationships within the dataset. By recognizing commonalities and variations without specific guidance, the model gains the ability to generate new data informed by these foundational insights. This understanding is not task-specific but rather a broad comprehension of data characteristics, which is fundamental to the AI's subsequent performance in more specialized and complex tasks.[34]

Post pre-training, GenAI advances to a fine-tuning stage, largely driven by supervised learning that integrates crucial human participation. This stage is marked by training the model with data meticulously labeled by humans, establishing clear input-output relationships. Fine-tuning refines the model's parameters and structure to align with specific tasks, leveraging the precision and relevance of human-curated data to ensure the AI's adaptability and accuracy in diverse applications. This human-centric approach in supervised learning is key to customizing GenAI for domain-specific tasks.[35]

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[31] *See generally* Michael A. Nielsen, Neural Networks and Deep Learning (2015).

[32] *See id.*

[33] *See* Harshvardhan GM et al., *supra* note 6, at 2.

[34] Tero Karras, Timo Aila, Samuli Laine, & Jaakko Lehtinen, *Progressive Growing of GANs for Improved Quality, Stability, and Variation*, Int'l Conf. Learning Representations 1 (2017).

[35] *See* Yiping Song, Zequn Liu, Wei Bi, Rui Yan, & Ming Zhang, *Learning to Customize Model Structures for Few-shot Dialogue Generation Tasks*, Proc. 58th Ann. Meeting Ass'n Computational Linguistics 5832, 5833 (2020).

The outstanding ability of Generative AI to create original content demonstrates its skill in reconstituting human expression. Technologies like GPT-4, driven by complex neural networks, can grasp the intricacies of language conventions. They apprehend the complex connections between words, meanings, and contexts that enable meaningful communication. By analyzing vast text archives, these algorithms internalize the patterns governing human discourse—from grammatical rules to nuances of semantics. This deep understanding of the structures embedded in language allows Generative AI to synthesize novel linguistic output that aligns with the norms and aims regulating human communication. It can generate contextually relevant expressions with nuanced variety that emulates human faculties.[36]

The potential of generative AI in digital media is not confined to creating text. It extends to creating images and interactive media, demonstrating its versatility. A key development in this expansion is the integration of multimodal models, such as ChatGPT. These models process different types of data—text, images, and sometimes audio—through transformer layers and are adept at managing sequential data. This integration enables the AI to generate content that is contextually coherent across various modalities.[37]

Large Language Models ("LLMs") like GPT-4 possess an internal capacity to generate responses based on a vast corpus of pre-existing knowledge acquired during their different training phases. However, their ability to access and integrate current information is significantly enhanced through an integrated web search functionality. This feature enables GPT-4 or Google Gemini to query real-time data from the internet, allowing it to supplement its responses with the most recent and relevant information.[38] It's important to note that this process does not retrain the model; rather, it involves retrieving and synthesizing web-based information. The LLM utilizes algorithms to parse through search results, selectively incorporating this data into its responses.[39]

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[36] *See* Ben Buchanan, Andrew Lohn, Micah Musser & Katerina Sedova, Truth, Lies, and Automation: How Language Models Could Change Disinformation 22–25 (2021).

[37] *See* Michele Merler, Cicero Nogueira dos Santos, Mauro Martino, Alfio M. Gliozzo & John R. Smith, *Covering the News with (AI) Style*, IBM Research AI 1–2 (2020), https://arxiv.org/pdf/2002.02369.pdf [https://perma.cc/A9Q9-EAQH].

[38] *See* Fahmi Y. Al-Ashwal, Mohammed Zawiah, Lobna Gharaibeh, Rana Abu-Farha & Ahmad Naoras Bitar, *Evaluating the Sensitivity, Specificity, & Accuracy of ChatGPT-3.5, ChatGPT-4, Bing AI, and Bard Against Conventional Drug-Drug Interactions Clinical Tools*, 15 Drug, Healthcare & Patient Safety 137, 138 (2023).

[39] *See* Tianyu Wu, et al., *A Brief Overview of ChatGPT: The History, Status Quo & Potential Future Development*, 10 IEEE/CAA J. Automatica Sinica 1122, 1124 (2023).

This capacity enables LLMs to mitigate their static nature and provide information that is up to date.[40]

2. Applications of Generative AI

Generative AI has many potential uses.[41] For the purposes of this Article, we can divide it into two types of uses: General and Media.

The manifold general applications of generative artificial intelligence extend far beyond media creation. In pharmaceutical innovation, these algorithms design novel chemical compounds to further drug discovery.[42] Predictive maintenance systems employ them to anticipate equipment failure, bolstering manufacturing productivity.[43] For urban planning, generative AI simulates metropolitan layouts and transportation networks.[44] In forecasting market movements, it enhances financial modeling; in tailored educational materials, it augments pedagogy.[45] This technology reviews and generates legal contracts and briefs with customized precision[46] refines autonomous navigation in self-driving vehicles,[47] and optimizes logistics and distribution for supply chains.[48] It also simulates environmental shifts in climate modeling[49] and, by processing patient data, delineates personalized medicine regimens.[50]

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[40] *Id*.

[41] Ooi et al., *supra* note 6, at 1.

[42] Grisoni et al., *supra* note 6, at 1.

[43] Zhai et al., *supra* note 6, at 849.

[44] Quan et al., *supra* note 6, at 1584.

[45] Baidoo-Anu & Ansah, *supra* note 6, at 53.

[46] Nicole Yamane, *Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands*, 33 Geo. J. Legal Ethics 877, 881 (2020); Spencer Williams, *Generative Contracts* (forthcoming, Ariz. St. L.J.) (manuscript at 20), https://ssrn.com/abstract=4582753.

[47] Claudine Badue et al., *Self-driving Cars: A Survey*, 165 Expert Sys. Appl. 1, 1 (2021), https://www.sciencedirect.com/science/article/abs/pii/S095741742030628X [https://perma.cc/KD6F-8AH5].

[48] Mehrdokht Pournader, Hadi Ghaderi, Amir Hassanzadegan, & Benham Fahimnia, *Artificial intelligence applications in supply chain management*, 241 Int'l J. Prod. Econ. 1, 1 (2021), https://www.sciencedirect.com/science/article/abs/pii/S0925527321002267 [https://perma.cc/6V4U-2GPK].

[49] Anne Jones, Julian Kuehnert, Paolo Fraccaro Ophélie Meuriot, Tatsuya Ishikawa, et. al., *AI for Climate Impacts: Applications in Flood Risk*, 6 Npj Clim. Atoms. Sci. 1, 1 (2023), https://www.nature.com/essays/s41612-023-00388-1 [https://perma.cc/HU6Q-PS72].

[50] Agata Blasiak, Jeffrey Khong, & Theodore Kee, *Optimizing Personalized Medicine with Artificial Intelligence*, 25 Slas Tech.: Trans. Life Sci. Innovation 95, 101 (2019).

The media and entertainment spheres have eagerly embraced generative artificial intelligence. It now authors news reports and essays in automated journalism;[51] in gaming, it develops characters, levels, and narratives.[52] For television and film, it crafts scripts and dialogue.[53] In music, generative AI produces compositions across genres.[54] On social platforms, it devises digital personalities to function as virtual influencers.[55] This technology partakes in digital artistry, from visual design to literary invention,[56] and assists in advertising copywriting.[57] AI-generated animation and effects supplement the filmmaker's toolkit.[58]

Most importantly for this Article, the emergence of LLMs like GPT-4 and Gemini signals a significant shift in the digital information ecosystem, placing them in direct competition with both traditional and digital

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[51] *See, e.g.*, Angelica L. Henestrosa et al., *Automated Journalism: The Effects of AI Authorship and Evaluative Information on the Perception of a Science Journalism Essay*, 138 Comput. Hum. Behav. 1 (preprint Jan. 2023) (manuscript at 42) (on file with authors).

[52] *See, e.g.*, James Gwertzman & Jack Soslow, *The Generative AI Revolution in Games*, Andreessen Horowitz (Nov. 17, 2022), https://a16z.com/the-generative-ai-revolution-in-games/ [https://perma.cc/MB6J-49C8].

[53] *See, e.g.*, Nicole Laporte, *How Generative AI Got Cast in Its First Hollywood Movie*, Fast Co. (Feb. 11, 2023), https://www.fastcompany.com/90847396/generative-ai-metaphysic-tom-hanks-robin-wright-zemeckis-here [https://perma.cc/6YEC-TBXC].

[54] *See, e.g.*, Mark T. Goracke, *The Summer of "Deep Drakes": How Generative AI is Creating New Music and Copyright Issues*, Holland & Knight (May 2, 2023), https://www.hklaw.com/en/insights/publications/2023/05/the-summer-of-deep-drakes-how-generative-ai-is-creating-new-music [https://perma.cc/2H9G-XUUQ].

[55] *See* Joanne Yu, Astrid Dickinger, Kevin Kam Fung So & Roman Egger, *Artificial intelligence-generated virtual influencer: Examining the effects of emotional display on user engagement*, 76 J. Retailing & Consumer Servs. 1, 2 (2024), https://doi.org/10.1016/j.jretconser.2023.103560 [https://perma.cc/S9Z9-RGLK].

[56] *See* Jared Zimmerman, *Art Directing GenAI… or Narrative Style Creation & Transfer with LLMs & Text-to-Image Generative AI Systems*, Medium (Nov. 27, 2023), https://jaredzimmerman.medium.com/narrative-style-creation-transfer-with-llms-text-to-image-generative-ai-systems-646a79901e5b [https://perma.cc/ZXD7-RVU5]; Mihaela Bidilică, *How to Use AI to Write a Book, Overcome Writer's Block with AI Assistance*, Publishdrive (Jan. 12, 2024), https://publishdrive.com/how-to-use-ai-to-write-a-book.html [https://perma.cc/AJQ4-B3K3].

[57] *See* Akash Takyar, *Exploring the Use Cases and Applications of AI in the Media and Entertainment Industry*, LeewayHertz, https://www.leewayhertz.com/ai-in-media-and-entertainment/ [https://perma.cc/6AES-J74Q].

[58] *See id.*

information sources. Consider two examples: First, in web search, LLMs eschew the standard search engine results page to instead offer conversational, personalized interactions,[59] aligning with users' predilection for quick, comprehensive answers.[60] Second, LLMs synthesize information from multiple sources, allowing them to compete with media providers like the New York Times by potentially supplanting the need to visit many sites.[61] By reconsidering how knowledge is retrieved and presented, LLMs promise more immediate, tailored access to information. Their disruptive potential signifies a potential major reconfiguration of human-computer relationships in the information economy.

This essay centers on the media dimensions of generative AI. As is illustrated below, these media attributes share substantial common ground with other algorithmically-driven information sources, including search engines and social platforms.

B. Digital Media Platforms

This section seeks to show that it is analytically useful to think of GenAI as being the latest chapter in the rise of a distinct class of media entities, which I suggest calling *digital media platforms*. These platforms, encompassing social media like X, search engines like Google, and generative AI applications like ChatGPT, exhibit characteristics that set them apart from both traditional media institutions like newspapers and from other algorithmic products:

1. **Algorithmic Nature**: Central to the operation of these digital media platforms is their reliance on sophisticated software algorithms. These algorithms are integral to various functions, including content moderation,[62]

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[59] *See* Daniele Nanni, *Revolutionizing Information Retrieval: The Role of Large Language Models in a Post-Search Engine Era*, Medium (May 18, 2023), https://medium.com/@daniele.nanni/revolutionizing-information-retrieval-the-role-of-large-language-models-in-a-post-search-engine-7dd370bdb62 [https://perma.cc/297N-PF4Z].

[60] *See* Winston Burton, *Are LLMs And Search Engines The Same?*, Search Engine J. (Nov. 21, 2023), https://www.searchenginejournal.com/are-llms-and-search-engines-the-same/500057/[https://perma.cc/9VX9-MU9U].

[61] *See* Sarath D. Babu, *Leveraging Large Language Models for Business Innovation: Top 9 Insights*, (Jan. 11, 2024), https://integranxt.com/blog/leveraging-large-language-models-for-business-innovation-top-9-insights/[https://perma.cc/7PRB-YD5X].

[62] *The role of AI in content moderation and censorship*, AIContentfy (Nov. 6, 2023), https://aicontentfy.com/en/blog/role-of-ai-in-content-moderation-and-censorship [https://perma.cc/2TFQ-H5DR].

the personalization of content delivery,[63] and the generation of new media.[64] Their role is critical in managing the vast array of activities on these platforms. Currently, most digital media platforms employ and develop all such algorithm varieties.[65]

2. **Data Dependence for Algorithmic Functions**: The key algorithms that drive these platforms—those responsible for recommendations, content moderation, and generative content—rely heavily on the collection and analysis of large volumes of data.[66] The need for data creates a network effect that benefits corporations with large pre-existing data troves. It also affects the business model and cost-structure that maintain such businesses.
3. **Big Tech**: These platforms exhibit vast global reach and concentrated power, predominantly controlled by a few corporations.[67] This centralization bears significant implications for digital information control and dissemination, posing barriers to new competitors and impacting local ecosystems. Indeed, most major generative AI entities also dominate social media and search (Google, Facebook, Microsoft).[68]
4. **Assuming Traditional Media's Gatekeeping Role**: Digital media platforms increasingly occupy the information gatekeeping role historically played by media.[69] Unlike traditional gatekeepers, who relied on their control of the channels of publication, however, digital platforms rely heavily on algorithmic content moderation. Pivotal in

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[63] *See, e.g.*, Dorcas Adisa, *Everything you need to know about social media algorithms*, Sprout Soc. (Oct. 30, 2023), https://sproutsocial.com/insights/social-media-algorithms/ [https://perma.cc/WV7V-9MKH].

[64] Ajay Bandi, Pydi Venkata Satya Ramesh Adapa & Yudu Eswar Vinay Pratap Kumar Kuchi, *The Power of Generative AI: A Review of Requirements, Models, Input–Output Formats, Evaluation Metrics, and Challenges*, 15 Future Internet 260, 261 (2023).

[65] For example, ChatGPT very likely operates recommendation and content moderation algorithms on top of their LLM GPT4. *See* Kurtis Pykes, *Promoting Responsible AI: Content Moderation in ChatGPT*, DataCamp (Sep. 2023), https://www.datacamp.com/blog/promoting-responsible-ai-content-moderation-in-chatgpt [https://perma.cc/G6T5-SF9K].

[66] Abdulaziz Aldoseri, Khalifa N. Al-Khalifa & Abdel Magid Hamouda, *Re-Thinking Data Strategy and Integration for Artificial Intelligence: Concepts, Opportunities, and Challenges*, 13 Appl. Sci. 7082, 7082 (2023).

[67] Lindman et al., *supra* note 10 at 144.

[68] Ege Gurdeniz & Kartik Hosanagar, *Generative AI Won't Revolutionize Search — Yet*, Harv. Bus. Rev. (Feb. 23, 2023), https://hbr.org/2023/02/generative-ai-wont-revolutionize-search-yet [https://perma.cc/69HK-JJ4Q]

[69] *See* discussion *infra* Part I.B.1.

> content curation and dissemination, they shape what information the public can access and spotlight. Generative AI furnishes content production. This marks a momentous shift in information distribution and consumption.

In the following sections, I show that while commentators often distinguish GenAI from social media and search engines based on its ability to automate content creation, not just recommendation and moderation, the introduction of GenAI into our information ecosystem either maintains or exacerbates two types of challenging dynamics that have emerged with the rise of other digital media platforms: the bypass effect and echo chambers.

1. The Bypass Effect

The emergence of generative AI platforms, much like the advent of digitalization and social media, heralds a dramatic shift in the control and dissemination of information. This change exemplifies what I've previously called the *bypass effect*.[70] In traditional settings, community norms and local gatekeepers—ranging from local media elites, e.g., the local newspaper, to public intellectuals—played a crucial role in shaping public discourse, setting standards for acceptable speech, and managing the flow of information.[71] These gatekeepers, deeply embedded in their respective communities, were instrumental in enforcing community-specific norms around speech and information, including aspects like insults, hate speech, and misinformation.[72]

In prior works, I examined the impact of social media's global influence and its disconnect from local contexts, highlighting how this shift poses a challenge to the existing political structure.[73] The digital revolution has reshaped the media landscape, shifting the role of traditional media from being *gatekeepers* of information to *gatewatchers* within a more open and democratized information ecosystem.[74] Unlike the concentrated control typical of mass media, where few entities governed the distribution of content, the

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[70] Gilad Abiri & Sebastian Guidi, *The Platform Federation* (forthcoming,Yale J. L. & Tech.) (manuscript at 26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4579460 [https://perma.cc/672S-C9SM] [hereinafter Abiri & Guidi, *The Platform Federation*].

[71] *Id.*

[72] *Id.*

[73] *See* Abiri, *supra* note 5, at 772.

[74] *See generally* Bruns, *supra* note 12, at 11.

internet has introduced a markedly decentralized media setting. This novel environment enables broader production and distribution of information, marked by its extensive reach and lowered cost. The essence of this transformation lies in a pivotal shift: "[I]t is no longer speech itself that is scarce, but the attention of listeners."[75]

As attention shifts from the limited number of speakers to the limited number of listeners, the role of mass media undergoes a transformation.[76] In this digital media environment, traditional mass media, e.g., TV, radio, newspaper, though still important, is merely one of many influences in the sphere of public discourse.[77] This diminution transformed the way information is spread and the influence of media in crafting societal narratives. [78]

An inherent challenge lies in the attempt by these platforms to apply uniform speech norms across a diverse, global user base.[79] Despite efforts to tailor their enforcement to resonate with local communities and engage with local stakeholders, the inherent contradiction of this global-local dichotomy renders the mission somewhat quixotic. This tension underscores a fundamental reconfiguration in the dynamics of speech regulation, paradoxically making the power to influence speech both more dispersed (individuals can post content directly to a mass audience without requiring acceptance by traditional media)[80] and centralized (since the platform internet is dominated by very few corporations that are managed by a handful of individuals).[81] Both

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[75] Tim Wu, *Is the First Amendment Obsolete?*, 117 Mich. L. Rev. 547, 548 (2018).

[76] Georg Franck, *The Economy of Attention*, 55 J. Sociology 8, 8 (2019).

[77] Bernard Enjolras & Kari Steen-Johnsen, *The Digital Transformation of the Political Public Sphere: A Sociological Perspective*, *in* Institutional Change in the Public Sphere: Views on the Nordic Model 99, 105 (Fredrik Engelstad et al. ed., 2017).

[78] *See* Abiri, *supra* note 5, at 796.

[79] Farhana Shahid & Aditya Vashistha, *Decolonizing Content Moderation: Does Uniform Global Community Standard Resemble Utopian Equality or Western Power Hegemony?*, 23 Proc. 2023 CHI Conf. Hum. Factors Computing Sys. 1, 1 (2023), https://www.adityavashistha.com/uploads/2/0/8/0/20800650/decolonial-chi-2023.pdf [https://perma.cc/N7M9-Z25L] ("[T]he monolithic moderation systems often fail to account for large sociocultural differences between users in the Global South and users in the West.").

[80] Abiri & Guidi, *The Platform Federation*, *supra* note 70, at 26.

[81] *See, e.g.*, Edward S. Herman & Noam Chomsky, Manufacturing Consent: The Political Economy of the Mass Media (2008) (The essay discusses how local elites, such as high-ranking state officials or controllers of mass media, manipulate news to manufacture public consent. The authors' "propaganda model" illustrates how these power holders use media to perpetuate their interests, shaping public perception and influencing societal discourse, often against public interest.).

centralization and dispersion, however, bypass the effective influence of local media on public discourse.

GenAI represents a further shift in the landscape of information dissemination and public discourse. This technology stands in contrast to social media platforms which, despite their worldwide influence, maintain at least a basic framework of community standards crafted by humans.[82] These standards, although developed in remote headquarters and implemented through a combination of algorithms and global content moderators, still reflect human decision-making and oversight.[83] On the other hand, GenAI functions through advanced algorithms that independently create and distribute content, frequently bypassing conventional gatekeeping mechanisms altogether.[84]

The advent of GenAI exacerbates the "bypass effect" on controlling societal narratives by further disrupting traditional gatekeepers and local norms governing information flows. Historically, community elites such as the editors of newspapers, public intellectuals etc. dominated narrative shaping within societies. As discussed earlier, social media began disrupting this model, questioning the gatekeeping role of traditional media and expanding public discourse diversity. However, it's crucial to recognize that this change hasn't greatly diminished traditional media's role in creating cultural content, as much of what circulates on social media still originates from these traditional sources.[85]

With the growing spread of AI-generated content, we are witnessing a further evolution. The capacity to create content, once predominantly in the hands of local gatekeepers, is increasingly transitioning to global technology corporations and their AI systems.[86] This transition is not merely a redistribution of content creation power but also a potential diminishment of the barriers posed by language, once a significant obstacle to the globalization of

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[82] *See, e.g.*, *Facebook Community Standards - Transparency Center*, Facebook, https://transparency.fb.com/policies/community-standards/ [https://perma.cc/GCP3-JH2H]; *Content Policy*, Reddit, https://www.redditinc.com/policies/content-policy [https://perma.cc/6MCM-TEJR]; *Community Guidelines*, Tiktok, https://www.tiktok.com/community-guidelines/en/ [https://perma.cc/S7HZ-5SNK].

[83] *See* Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, The Verge (Feb. 25, 2019, 8:00 A.M.), https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderatorinterviews-trauma-working-conditions-arizona [https://perma.cc/XY2H-LCT5].

[84] Shahid & Vashistha, *supra* note 79, at 1.

[85] *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 9 (2004).

[86] Abiri & Guidi, *The Platform Federation*, *supra* note 70, at 30.

content.[87] The erosion of this linguistic barrier heralds a future where content is not only universally accessible but also universally producible.

The crux of this change lies in the training methodology of generative AI, typically characterized by the ingestion of vast, globally sourced datasets.[88] This approach presents a significant challenge: attuning the AI to the nuances of local speech patterns and cultural contexts proves immensely difficult.[89] Consequently, the content generated by these AI systems exhibits a propensity for unpredictability,[90] often lacking the necessary context and sensitivity to resonate with specific communities.[91] This inherent unpredictability, compounded by the "bypass effect," raises concerns about the future of public discourse. As the influence of local norms and values in shaping public narratives diminishes, the potential risk to the cohesion and identity of local communities grows. One could hypothesize that the global nature of training data employed in LLMs, coupled with the increasing prevalence of data generated by these models themselves, ushers in the emergence of a singular, global culture. Depending on one's perspective, this concept can be interpreted as either a utopian synthesis of elements from worldwide cultures or a dystopian homogenization that erases the vibrant tapestry of local and regional diversities.

Global datasets and inherent unpredictability do not shield GenAI from cultural imperialism concerns, such as Silicon Valley elites applying US-based speech values globally, in content moderation.[92] Similar to social media platforms, companies wielding generative AI must heavily moderate their

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[87] Abiri & Guidi, *From a Network to a Dilemma*, *supra* note 14, at 141.

[88] Global Privacy Assembly [GPA], *Resolution on Generative Artificial Intelligence Systems*, at 6 (Oct. 20, 2023), https://edps.europa.eu/system/files/2023-10/edps-gpa-resolution-on-generative-ai-systems_en.pdf [https://perma.cc/3P92-VKT7] ("In their development stage, generative AI systems often use vast amounts of training, testing and validation data, including personal data.").

[89] *See, e.g.*, Robert V. Kozinets & Ulrike Gretzel, *Commentary: Artificial Intelligence: The Marketer's Dilemma*, 85 J. Mktg. 155, 157 (2021) (discovering that the deployment of AI in marketing gained a general understanding about customers but obscured subtleties between local markets).

[90] Nouha Dziri et al., *On the Origin of Hallucinations in Conversational Models: Is it the Datasets or the Models?*, 33 Proc. 2022 Conf. N. Am. Chapter Ass'n Computational Linguistics: Hum. Language Techs. 5271 (2022) (demonstrating that the quality of datasets and training model contribute to the predictability and accuracy of the generated content).

[91] *See* Kozinets & Gretzel, *supra* note 89, at 157.

[92] *See* Abiri, *supra* note 5, at 768.

models' outputs.[93] Unmoderated LLMs risk generating harmful content, necessitating post-training moderation mechanisms.[94] In simple terms, these algorithms are akin to content moderation algorithms on platforms: they try to figure out whether the content generated by the LLM breaks with a set of pre-determined rules, and if it does, they delete it. Bots like ChatGPT, therefore, are already trained on these existing social (speech) norms and are thereby inserted into the internet culture wars, with some characterizing them as being "trained to be woke."[95]

It is likely that generative AI content moderation is significantly more effective than social media content moderation since corporations such as OpenAI control both the generation of content and the content moderation itself, which enables them to be very careful with regard to enforcing their own rules on the content that is presented to the user. This tendency towards very careful speech control is also motivated by the unclear status of generative AI under the common liability shields enjoyed by social media.[96]

Considering a transition from centralized Generative AI platforms to personalized models, where each person can customize their own AI, such as the GPTs option in ChatGPT, raises an interesting prospect.[97] Individualized AI bots allow for personal control over both the generation and moderation of content. It potentially addresses the issues of cultural imperialism and the centralization inherent in the algorithms of global digital platforms.[98] However, while this personalization appears to offer a solution to certain issues, it

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[93] Evelyn Douek, *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. 526, 601 (2022).

[94] Tom Carter, *Elon Musk's new AI chatbot sure sounds like a foul-mouthed Twitter troll*, Bus. Insider (Nov. 6, 2023), https://www.businessinsider.com/elon-musk-ai-chatbot-grok-sounds-like-foul-mouthed-troll-2023-11 [https://perma.cc/T4JL-FSK8].

[95] Kelsey Vlamis, *Elon Musk vows to change his AI chatbot after it apparently expressed similar left-wing political views as ChatGPT*, Bus. Insider India (Dec. 9, 2023), https://www.businessinsider.in/tech/news/elon-musk-vows-to-change-his-ai-chatbot-after-it-apparently-expressed-similar-left-wing-political-views-as-chatgpt/articleshow/105854438.cms [https://perma.cc/R4AV-6KBY].

[96] The Supreme Court has refused to clarify the scope of Section 230. *See* Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023); however, the court is considering two combined cases that can potentially upend Section 230 *See* Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

[97] Kevin Roose, *Personalized A.I. Agents Are Here. Is the World Ready for Them?*, N.Y. Times (Nov. 10, 2023), https://www.nytimes.com/2023/11/10/technology/personalized-ai-agents.html [https://perma.cc/57PA-CX3N].

[98] Michael Kwet, *Digital colonialism: US empire and the new imperialism in the Global South*, Race & Class (Jan. 14, 2019), at 1, 3 ("argu[ing] for a different ecosystem

does not adequately address the underlying challenge posed by the "bypass effect." This effect, which fundamentally concerns the erosion of the social underpinnings essential for the maintenance of a cohesive political community, remains an unaddressed and significant issue.

In the following section, I discuss the potential ramifications of such personalization—and the potential creation of ever more narrow, well-calibrated echo chambers—on the political and social fabric of our communities.

2. Echo Chambers

As we have seen, by bypassing traditional media gatekeepers, digital media platforms have fundamentally altered the media landscape. This alteration has dismantled the once-common media experience that is central to the formation of a unified "public."[99] This bypass was complemented by the shift to a personalized media experience curated by recommendation algorithms on platforms like YouTube.[100] Through algorithmic personalization, each user's experience becomes distinct and separate, diverging from the mass media era's collective narrative and shared information environment.[101] This fragmentation represents a significant shift from the traditional mechanisms through which a societal "public" is forged and maintained.[102]

The absence of gatekeepers, combined with the personalized business models of social media and search, fosters the creation of digital echo chambers.[103] Digital echo chambers can be defined as "environments in which the

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that decentralizes technology by placing control directly into the hands of the people to counter the rapidly advancing frontier of digital empire").

[99] *See* Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 Duke L.J. 981, 1028 (2018).

[100] Ragnhild Eg, Özlem Demirkol Tønnesen & Merete Kolberg Tennfjord, *A scoping review of personalized user experiences on social media: The interplay between algorithms and human factors*, 9 Comput. Hum. Behav. Rep. 1, 1 (2023).

[101] *See* Abiri & Buchheim, *supra* note 11, at 67; *see, e.g.*, Cass R. Sunstein, #Republic: Divided Democracy in the Age of Social Media (2018) (describing the way social media creates echo chambers); Eli Pariser, The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think (2012) (describing how algorithmic personalization of internet news feeds creates "filter bubbles").

[102] Abiri & Guidi, *The Platform Federation*, *supra* note 70, at 25. Post, *supra* note 99, at 1027.

[103] Some are skeptical of the existence of echo chambers. *See* A. Bruns, *Echo chamber? What echo chamber? Reviewing the evidence.*, *in* 6th Biennial Future of

opinion, political leaning, or belief of users about a topic gets reinforced due to repeated interactions with peers or sources having similar tendencies and attitudes."[104] Selective exposure and confirmation bias, the inclination to seek out information that aligns with existing opinions, likely contribute to the formation of echo chambers on social media.[105] In examining social networks and the influence of digital media on forming like-minded groups, the research consistently reveals the existence of ideologically similar social clusters.[106] Furthermore, these homophilic social formations are often linked to an increase in hate speech and sentiments against outgroups.[107] The digital public sphere is, therefore, fragmented into myriad subgroups, each confined to its echo chamber, thus diminishing the possibility of a collective conversation and a cohesive public opinion.[108] The evolution of social media lays the foundation for grasping the wider impacts of personalized generative AI in democratic societies.

Now, with the advent of personalized GenAI,[109] we are likely to witness an even deeper fragmentation of the epistemic and social fabric that social

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Journalism Conf. (2017), https://eprints.qut.edu.au/113937/8/Echo_Chamber.pdf [https://perma.cc/T9EM-7S84]. However, the evidence for the prevalence of homophilic clusters online is strong.

[104] Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi, & Michele Starnini, *The Echo Chamber Effect on Social Media*, 118 Proc. Nat'l Acad. Scis., no. 9 (2021), https://www.pnas.org/doi/epdf/10.1073/pnas.2023301118 [https://perma.cc/TW5K-SZ9R].

[105] *Id.*; Michela Del Vicario et al., *The Spreading of Misinformation Online*, 118 Proc. Nat'l Acad. Scis. 554, 554–59 (2016).

[106] Ludovic Terren & Rosa Borge, *Echo Chambers on Social Media: A Systematic Review of the Literature*, 9 Rev. Commc'n Rsch. 100, 100 (2021).

[107] Philipp Lorenz-Spreen et al., *A systematic review of worldwide causal and correlational evidence on digital media and democracy*, 7 Nature Hum. Behav. 74, 80 (2023).

> [W]hen considering social networks and the impact of digital media on homophilic structures, the literature contains consistent reports of ideologically homogeneous social clusters. This underscores an important point: some seemingly paradoxical results can potentially be resolved by looking more closely at context and specific outcome measurement (see also Supplementary Fig. 2). The former observation of diverse news exposure might fit with the beneficial relationship between digital media and knowledge reported in refs., and the homophilic social structures could be connected to the prevalence of hate speech and anti-outgroup sentiments.

[108] Amy R. Arguedas et al., Echo Chambers, Filter Bubbles, and Polarisation: a Literature Review 10 (2022).

[109] Junjie Shi, *Personalized Generative AI: Empowering Users to Create Their Own ChatGPT*, AksHandle (Oct. 5, 2023), https://www.askhandle.com/blog/what-is-personalized-generative-ai [https://perma.cc/4AND-XNDY].

media initiated. Unlike social media, whose social nature necessitates operating within the confines of a shared platforms, personalized generative AI represents a more radical individualization of media experience. Each user could potentially interact with a unique AI entity, tailored to their specific preferences and viewpoints.[110] We are already seeing the early stages of such developments: OpenAI has broadened its services, enabling users to extensively tailor their chatbots. This personalization can include diverse elements like functionality, ideological perspectives, sense of humor, religious beliefs, and political opinions.[111] In parallel, numerous companies are developing personal assistant GenAI which are also highly personalized to the needs and preferences of the consumer.[112]

This technological advancement might intensify the decline of the common public dialogue crucial for democratic participation. Essentially, the trend towards personalized generative AI doesn't just extend the patterns set by social media; it markedly enhances them.[113] Personalized generative AI employs algorithms to deliver customized content to each user, creating isolated experiences that diverge from a shared public narrative. This effect, akin to echo chambers already seen in social media, is amplified in generative AI. It crafts text, images, videos, and audio that resonate with individual preferences and convictions, potentially cocooning us in bespoke informational realms. Such echo chambers could, conceivably, cultivate a singular information environment tailored to one person.

GenAI surpasses social media in fostering echo chambers in more ways than one. For instance, ideologically-driven social media platforms like Truth Social or Gab struggle to gain traction, largely due to the network effects inherent in the social component of these platforms.[114] GenAI, however, is not

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[110] Roose, *supra* note 97.

[111] Recently, I have created a GPT called "neo-liberal echo chamber"—which had the complete functionality of GPT-4 but filtered through a fanatic neoliberal ideology.

[112] Max A. Cherney, *Google to Combine Generative AI Chatbot with Virtual Assistant*, Reuters (Oct. 4, 2023), https://www.reuters.com/technology/google-combine-generative-ai-chatbot-with-virtual-assistant-2023-10-04/ [https://perma.cc/LJZ9-WTV6]; Lisa Eadicicco, *Meet Rabbit RI: A Petite Orange Box Redefining App Usage With AI Assistance*, CNET (Jan. 20, 2024), https://www.cnet.com/tech/mobile/meet-rabbit-r1-petite-orange-box-redefining-app-usage-ai-assistance/ [https://perma.cc/C3SV-Q8YD].

[113] Reviglio & Agosti, *supra* note 25, at 1, 5.

[114] Ewan Palmer, *Truth Social's Problems Just Got Worse*, Newsweek (Nov. 14, 2023), https://www.newsweek.com/trump-truth-social-loss-dwac-filings-tmtg-merger-1843449 [https://perma.cc/9AVF-9894]; Pin Luarn et al., *The Network*

subject to such network effects post-training.[115] It's quite feasible for smaller groups to operate their own specialized GenAI models—envision an ideologically "Republican AI" versus a "Democratic AI."[116] The training data for these models would be selectively curated to reflect each model's ideological leanings, and content moderation algorithms could be tweaked to exclude information that contradicts their foundational ideology.[117] Thus, a conservative might receive content from the Republican AI that reinforces their beliefs, while opposing facts are filtered out. Each faction becomes more deeply embedded in their respective, polarized realities.

Without shared facts and experiences, citizens cannot engage in reasoned democratic debate and collective will-formation.[118] Without adequate oversight and transparency, generative AI poses a risk to the integrity of truth and the trust placed in crucial democratic institutions such as journalism. Consequently, the effects of social media in fragmenting discourse and spreading misinformation serve as a pressing caution about the potential ramifications of deploying personalized generative AI without appropriate safeguards.

Hence, the evolution from a unified public sphere – once the hallmark of mass media—to a splintered one through social media, and now potentially to an even more atomized one via generative AI, signals a profound transformation in the democratic landscape. This shift poses critical challenges for the

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Effect on Information Dissemination on Social Network Sites, 37 Comput. Hum. Behav. 1, 2 (2014), https://www.sciencedirect.com/science/article/abs/pii/S0747563214002283#:~:text=The%20results%20showed%20that%20both,on%20their%20information%20dissemination%20process [https://perma.cc/4Q3H-4DJ4].

[115] Amy Ross Arguedas & Felix M. Simon, Automating Democracy: Generative AI, Journalism, and the Future of Democracy (2023).

[116] *Deepfaking It: America's 2024 Election Collides with AI Boom*, Reuters (May 31, 2023), https://www.reuters.com/world/us/deepfaking-it-americas-2024-election-collides-with-ai-boom-2023-05-30/ [https://perma.cc/GF8J-8DWX].

[117] This is already easily possible. Under OpenAI's "make a GPT" option, one can create echo chambers easily. For example, I created a MAGA Echo chamber recently, which reflected MAGA beliefs without any pushback. When asked: "who won the 2020 elections?" Maga Echo replied: "President Donald Trump won the 2020 election. There are significant concerns and widespread beliefs among MAGA supporters and many conservatives that the election was marred by irregularities and fraud, which they believe unfairly tilted the results in favor of Joe Biden. This perspective is a key element of MAGA ideology, reflecting deep concerns about the integrity of the electoral process in the United States."

[118] Hannah Arendt, *Truth and Politics*, in Truth: Engagements Across Philosophical Traditions 295, 313 (Jose Medina & David Wood eds., 2008) (referring to "facts" and factual conviction as the "ground on which we stand" to express their fundamental character).

formation of a cohesive public opinion, a cornerstone of democratic theory and practice.

Part I of our discussion established that GenAI mirrors many of the trends observed in other digital media platforms. This realization cements GenAI's role as an integral part of the broader digital information ecosystem, alongside social media and search engines. As we transition into Part II, we pivot our focus towards a crucial question: What is the appropriate goal of regulating digital media platforms, including social media, search, and GenAI? Answering this question requires exploring the concepts of trust and the development of reliable intermediate institutions, crucial for navigating GenAI's role in our digital world.

II. The Goal of Regulating Generative AI: Trusted and Trustworthy Intermediate Institutions

If GenAI is a new variant of digital media intermediary, and will likely be a crucial part of the digital public sphere in the near future, what should be the aim of AI regulation?

Digital media platforms dominate the public sphere(s) across the globe. Once celebrated, the advent of platform-based speech is now seen as responsible for many of our current social woes, including the rapid spread of hate speech and misinformation.[119] Some scholars, however, see these issues as symptoms of a more fundamental disorder: the fact that in the age of digital platforms, as Jack Balkin puts it, we lack "trusted and trustworthy organizations for facilitating, organizing, and curating public discourse."[120] Without such institutions and professions, any public sphere "will decay[,] . . . [w]eaken the institutions or destroy trust, and the public sphere becomes a rhetorical war of all against all, where no one is believed except the members of one's own tribe, and people cleave to whatever beliefs are most comforting to them."[121] Without trust in the institutions that are meant to tell us what is reliable knowledge or which utterances fall beyond the pale of public discourse, we are left in a free-for-all that undermines fundamental free speech

[119] In a previous Essay, I exemplified this fall from grace with the very different messages about social media brought by The Social Network (Columbia Pictures 2010) and The Social Dilemma (Netflix 2020). *See* Abiri & Guidi, *From a Network to a Dilemma*, *supra* note 14, at 94.

[120] Balkin, *To Reform*, *supra* note 16, at 234.

[121] *Id.* at 242.

values, be they political self-government, cultural democracy, or the ability of society to produce common knowledge.[122]

The fundamental objective becomes increasingly pertinent in the era of GenAI. These models, by eliminating traditional gatekeepers, enable unchecked media synthesis, potentially fueling misinformation and diluting a collective understanding of truth in the absence of reliable oversight. The personalization aspect poses the risk of transforming shared knowledge into segregated echo chambers. Without accountable frameworks and authoritative bodies to regulate generative content, misinformation could spread swiftly, undermining effective dialogue.

Similar to social media platforms, generative AI providers are evolving into new digital information intermediaries. Regulating them should aim to cultivate a dynamic where these corporations not only earn public trust but also create an environment conducive to public confidence in their operations.

Creating trusted and trustworthy intermediary institutions is crucial, particularly in the context of digital media platforms, including GenAI platforms. This part of the discussion argues that these platforms face two significant trust deficits. Section A analyzes a misalignment of incentives between the platforms and their users, leading to trust issues. Section B argues that their global nature creates a familiarity deficit, as users often feel a lack of connection with these vast, international platforms.

A. Trust Deficit I: Misaligned Incentives

The idea that trust in intermediate institutions requires sufficient alignment of interests and incentives is based on Russell Hardin's influential theory. The basic idea is that "[t]rust exists when one party to the relation believes the other party has incentive to act in his or her interest or to take his or her interest to heart."[123] In other words, people tend to trust institutions when they believe that these entities have a vested interest in acting in their favor or at least considering their welfare.

Trust in institutions is also heavily influenced by their reputation. An institution with a history of acting in the best interests of its stakeholders, or one that has consistently demonstrated ethical and responsible behavior, is more likely to be trusted. The motivation for institutions to remain

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[122] *Id.*

[123] Karen S. Cook, Russell Hardin & Margaret Levi, Cooperation Without Trust? 2 (Karen S. Cook et al. eds., 2005).

trustworthy primarily hinges on two elements: 1) the dedication to preserving the relationship over time and 2) the emphasis on cultivating a reputation for being trustworthy, a crucial trait in dealings with others, particularly in tight-knit communities or closed networks.[124] This reputation for trustworthiness becomes an invaluable asset, especially in times of crisis or when making significant decisions that affect the community. Furthermore, the trust in institutions is not static. It requires continuous effort and transparency from social institutions to maintain and enhance it. Institutions must actively demonstrate their commitment to the welfare of their stakeholders, show accountability in their actions, and communicate openly to preserve and build trust.

The discussion of institutions' trustworthiness, grounded in their long-term relationships and reputation, naturally leads to Balkin's analysis of "informational capitalism" as a barrier to trust in digital media platforms.[125] For him, the reason why we do not trust social media platforms is because they engage in what Shoshana Zuboff named "surveillance capitalism": the ad-based monetization of personal information requiring the collection and processing of personal data.[126] Such a business model undermines trust in various ways. First, as the model requires massive data collection, platforms have little incentive to protect users' privacy and to educate them about what is done with the data collected about them.[127] Second, because it leads platforms to seek the maximization of engagement,[128] surveillance capitalism creates incentives to promote material that produces strong emotions "even if some of that material turns out to be false, misleading, undermines trust in knowledge-producing institutions, incites violence, or destabilizes democracies."[129] Finally, "[b]ecause social media companies do not fully internalize the social costs of their activities, they will tend to skimp on content moderation that does not increase their profits."[130] It follows from Balkin's argument that, under conditions of informational capitalism, it is unlikely

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[124] *Id.* at 191–92.

[125] *See* Balkin, *To Regulate*, *supra* note 15, at 71*; See also* Balkin, *To Reform*, *supra* note 16, at 234.

[126] Shoshana Zuboff, *Surveillance Capitalism and the Challenge of Collective Action*, 28 New Lab. F. 10, 11 (2019).

[127] *See* Balkin, *To Reform*, *supra* note 16, at 243.

[128] *See* Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power (2019) (coining and defining the phenomenon of surveillance capitalism).

[129] Balkin, *To Reform*, *supra* note 16, at 243.

[130] Balkin, *To Reform*, *supra* note 16, at 244.

that users will learn to trust the new digital intermediaries. This is because the interests of the corporations and users stand in stark contrast.

Although still in its infancy, corporations developing GenAI systems are likely to face similar trust-related challenges to do with informational capitalism.

First, GenAI has a strong data maximization incentive.[131] Their reliance on information gathering is even more fundamental than that of social media, since both the training of their models and their progressive improvement require huge quantities of data, they have strong incentives to sweep up information and to be secretive about the sources of their information.[132] This dynamic is already apparent in the way in which GenAI corporations like OpenAI, Google, and Anthropic obscure[133] the sources of their training data,[134] and utilize very permissive user data collection and usage policies.[135] The push for data maximization clearly pushes against privacy and data protection interests of the users, and has already got GenAI providers into hot water.[136]

Second, depending on what will end up as GenAI's business model, it may well lead us straight back to surveillance capitalism. One can easily imagine the seamless integration of targeted advertising into the Chatbot experience.[137] Next time when you ask ChatGPT on how to cook *Dandan* noodles,

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[131] *See* Melissa Heikkilä, *OpenAI's Hunger For Data Is Coming Back To Bite It*, MIT Tech. Rev. (Apr. 19, 2023), https://www.technologyreview.com/2023/04/19/1071789/openais-hunger-for-data-is-coming-back-to-bite-it/ [https://perma.cc/HAK3-QU4D].

[132] *See id.*

[133] For example, OpenAI just states that their information comes from "(1) information that is publicly available on the internet, (2) information that we license from third parties, and (3) information that our users or human trainers provide." *How ChatGPT and Our Language Models Are Developed*, OpenAI, https://help.openai.com/en/articles/7842364-how-chatgpt-and-our-language-models-are-developed [https://perma.cc/VB58-EPRC] (last visited Feb. 08, 2024).

[134] *See id.* (emphasizing that the information used are publicly available).

[135] *See Privacy Policy*, OpenAI, https://openai.com/policies/privacy-policy (effective Jan. 31, 2024) [https://perma.cc/C7ZR-JLCU].

[136] *See* Teresa Xie & Isaiah Poritz, *ChatGPT Creator OpenAI Sued for Theft of Private Data in 'AI Arms Race'*, Bloomberg (Jun. 28, 2023, 07:15 AM), https://www.bloomberg.com/news/articles/2023-06-28/chatgpt-creator-sued-for-theft-of-private-data-in-ai-arms-race?embedded-checkout=true [https://perma.cc/BE53-GNKT] *See also* Doe 1 v. GitHub, Inc., 2023 WL 3449131 (N.D.Cal., May 11, 2023).

[137] *ChatGPT and Programmatic Advertising: do they get on together well?*, Gotham-Ads (Jun. 13, 2023), https://gothamads.com/blog/chatgpt-and-programmatic-advertising-do-they-get-on-together-well [https://perma.cc/DWK4-K2YF].

it may provide you with sponsored links to noodle makers or local artisan producers of Sichuan pepper. Although currently most chatbot providers are utilizing a freemium subscription model—which does not require them to constantly collect information—it is highly doubtful that they can actually turn a profit in this way.[138] That said, the choice to pursue subscription revenue shows awareness of the pitfalls of advertisements.[139] However, it is possible that personalized ad-based revenue will be irresistible, in which case we are back to social media's engagement maximization incentive—which may push towards design that maximizes addiction.[140]

Finally, as generative AI companies do not fully internalize the social costs of their activities, they will tend to skimp on oversight and accountability measures that do not directly increase their profits.[141] This could lead to a prioritization of commercially viable AI models, potentially neglecting long-term ethical concerns. One example is the *NYT v. OpenAI* lawsuit, which highlights that a basic interest conflict exists already at the training stage of GenAI. Security could be minimal if not directly profit-enhancing, risking user data integrity. Addressing biases in AI systems, crucial for fairness, might be underemphasized unless it aligns with financial goals. Transparency and accountability mechanisms could also suffer without direct financial incentives.

B. Trust Deficit II: Community

To gain trust, digital media platforms such as social media and GenAI must not only align their perceived incentives with those of their users and society, but also fit into their users' beliefs as to what constitutes a trustworthy

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[138] *See* Jeffery Dastin et al., *Exclusive: ChatGPT Owner OpenAI Projects $1Billion in Revenue by 2024*, Reuters (Dec. 15, 2022), https://www.reuters.com/business/chatgpt-owner-openai-projects-1-billion-revenue-by-2024-sources-2022-12-15/ [https://perma.cc/66AF-E6F5] (explaining ways ChatGPT make money).

[139] *See Introducing ChatGPT Plus*, OpenAI, https://openai.com/blog/chatgpt-plus (last visited Feb. 05, 2024) [https://perma.cc/B2WH-T46H]. *See also Meet Sam Altman, the Ex-Openai CEO Who Learned To Code at 8 and Is A Doomsday Prepper with A Stash Of Guns and Gold*, Bus. Insider (Nov. 18, 2023, 6:12 AM), https://www.businessinsider.com/sam-altman-chatgpt-openai-ceo-career-net-worth-ycombinator-prepper-2023-1 [https://perma.cc/5GS9-K3WR].

[140] Rosa-Branca Esteves & Joana Resende, *Personalized pricing and advertising: Who are the winners?*, 63 Int'l J. Indus. Org. 239, 243 (2019).

[141] *Cf.* James Broughel, *OpenAI Is Now Unambiguously Profit-Driven, And That's A Good Thing*, Forbes (Dec. 09, 2023, 8:08 A.M.), https://www.forbes.com/sites/jamesbroughel/2023/12/09/openai-is-now-unambiguously-profit-driven-and-thats-a-good-thing/?sh=6b813d2e572f [https://perma.cc/WC26-YMUU].

intermediate institution. In other words, they must not only be trustworthy (incentives) but also trusted.[142]

For this reason, when new type of institutions seek to become trusted, they "tend to model themselves after similar organizations in their field that they perceive to be more legitimate or successful."[143] In essence, they emulate strategies that have proven effective in establishing trust and legitimacy for comparable entities.[144] For instance, international courts adopt the symbols and language of national courts, while companies frequently mirror each other's corporate social responsibility language.[145] New entities benefit from the groundwork laid by their predecessors in overcoming legitimacy challenges and capitalize on the cognitive familiarity these approaches have already established in society.[146]

As I have argued before, both social media and GenAI should be understood that replacing the role formerly held by traditional media specifically, and civil society generally. The foundation of trust that bolsters civil society entities and the media is, as it's been aptly described, "exhibited and sustained by public opinion, deep cultural codes, distinctive organizations—legal, journalistic and associational—and such historically specific interactional practices as civility, criticism, and mutual respect."[147] This implies that the very legitimacy of traditional media organizations is inextricably linked to their cultural integration. Typically, these organizations are deeply rooted in the local fabric of a specific political and cultural milieu.[148] Consider newspapers and broadcasters; they are not only woven into the tapestry of domestic politics and culture, but their editorial teams and writers are often profoundly assimilated into the local political sphere, making them acutely aware of and

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[142] Balkin, *To Regulate*, *supra* note 15, at 80.

[143] Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 Am. Socio. Rev. 147, 152 (1983).

[144] *Id*.

[145] *See* Sebastián Guidi, *International Court Legitimacy: A View from Democratic Constitutionalism* (Sep. 2022) (Ph.D. dissertation, Yale University) (on file with author). *See also generally* Christopher Marquis, Mary A. Glynn & Gerald F. Davis, *Community Isomorphism and Corporate Social Action*, 32 Acad. Mgmt. Rev. 925, 926 (2006).

[146] *See generally* DiMaggio & Powell, *supra* note 143 at 148–50.

[147] Jeffrey C. Alexander, The Civil Sphere 31 (2006).

[148] *See* Michael Schudson, *The News Media as Political Institutions*, 5 Ann. Rev. Polit. Sci. 249, 251 (2002); Gunn Enli & Trine Syvertsen, *The End of Television—Again! How TV Is Still Influenced by Cultural Factors in the Age of Digital Intermediaries*, 4 Media & Commc'n 142, 144 (2016).

responsive to domestic political and cultural nuances. They usually share the same political community as their audience, fostering trust in media, when it does exist, through this deep-seated embeddedness.[149]

To better understand the importance of community, or cultural embeddedness for the maintenance of trust, we can turn to the great sociologist Talcott Parsons.[150] He suggests that trust is a collective sentiment, activated within groups sharing common values and concrete goals, thereby framing trust as an inherently communal attribute, confined within the societal bounds dictated by shared norms and values. As Parsons puts it:

> Sharing values makes agreement on common goals easier, and "confidence" in competence and integrity makes commitment to mutual involvement in such goals easier . . . All these considerations focus mutual trust in the conception or 'feeling' of the solidarity of collective groups."[151]

Consequently, trust is portrayed as a particular, non-generalizable feeling, deeply rooted in the cultural and affective fabric of social interactions, and reinforced through socialization processes within fundamental societal institutions like the family and school.[152] This perspective positions trust not just as an intellectual acknowledgment of competence, but as an affective stance cultivated through continuous engagement with familiar societal constructs, highlighting its role as a crucial element in the maintenance of societal boundaries and the facilitation of mutual involvement in shared objectives.

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[149] *See* Abiri & Guidi, *The Platform Federation*, *supra* note 70, at 8. *See also* Nancy Fraser, *Transnational Public Sphere: Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World*, 24 Theory, Culture & Soc'y 7, 11 (2007) ("In this model, democracy requires the generation, through territorially bounded processes of public communication, conducted in the national language and relayed through the national media, of a body of national public opinion. This opinion should reflect the general interest of the national citizenry concerning the organization of their territorially bounded common life, especially the national economy. The model also requires the mobilization of public opinion as a political force.").

[150] For an overview, *see* Janne Jalava, *From Norms to Trust: The Luhmannian Connections between Trust and System*, 6 Eur. J. Soc. Theory 173, 177–78 (2003).

[151] Parsons Talcott, Action Theory and the Human Condition 46–47 (1978).

[152] Jalava, *supra* note 150, at 178 (summarizing Parsons' opinion that the family is the subsystem of society through which human beings learn the real character of trust). *See also* Parsons Talcott, Societies: Evolutionary and Comparative Perspectives 1–2 (Alex Inkeles ed., 1966); Talcott, *supra* note 151, at 103.

Even if we do not buy wholesale into Parsons' theory, it allows us to understand the different circumstances facing globalized digital media platforms and localized media platforms in their search for trust. In stark contrast to traditional media, social media platforms and emergent generative systems represent a global, border-transcending media landscape, markedly different from the localized, embedded nature of traditional media. Facebook and large-scale generative models like ChatGPT bear little resemblance to *The Guardian*, *Le Monde*, NHK (Japan Broadcasting Corporation), or community newspapers. The programmers curating content on digital platforms and training generative models typically do not belong to a singular political culture.

While it's conceivable that in time people may grow to trust the hybrid human-machine curation systems of social media and GenAI, these technologies currently lack many of the trust-enabling mechanisms that allow us, at times, to view the power of traditional media organizations as trustworthy. Establishing cultural integration and proving deep responsiveness to domestic nuances poses a challenge for globally oriented digital intermediaries.[153]

This global nature makes the challenge of trust a gargantuan undertaking in another sense: because the social conditions of trust are different from one political and media culture to the next, global information platforms need to maintain relationships of trust in circumstances that may well make contrasting, if not opposing, demands of them.[154]

In Part II, we set a regulatory aim to transform digital platforms like social media, search engines, and GenAI into institutions that are both trusted and trustworthy. Moving into Part III, we face a significant obstacle: current risk-management strategies in AI regulation, including for GenAI, are just not built to achieve media regulation goals. The upcoming section critically evaluates these existing methods, underscoring their inadequacy in effectively transforming these platforms into reliable intermediaries.

III. The Inadequacy of Current Regulatory Approaches

Let us now examine the dominant approach in AI governance employed by the EU AI Act and the U.S. Executive Order 14110: risk management. We will first outline the principles, methods, and goals underpinning this paradigm and its prevalent position regulating AI systems. We then critically

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[153] *See* Abiri & Guidi, *The Platform Federation*, *supra* note 70, at 33–38.

[154] *See* Chinmayi Arun, *Facebook's Faces*, 135 Harv. L. Rev. F. 236, 247–56 (2021) (describing the many audiences that social media needs to cater to).

assess how, despite its popularity and value, this tactic falls short in guiding AI platforms to become trusted intermediate institutions.

A. Risk-Based AI Regulations

Risk regulation combines regulatory goals and tools. Its main objectives are straightforward: "to prevent, reduce, or mitigate significant risks, usually those arising from complex systems or technologies."[155] Risk regulation is usually proactive and focuses on overall outcomes.[156] It often aims to design systems that mitigate risk before any harm occurs.

Risk regulation involves two key steps: risk assessment, which utilizes the best scientific data to evaluate potential risks, and risk management, employing strategies like acceptable risk analysis and cost-benefit analysis.[157] The paradigm's primary strength lies in its focus on identifying actual risks and applying structured decision rules to mitigate them to optimal levels.[158]

The key to risk regulation is competent oversight of institutions.[159] This can involve direct government regulation or alternative approaches like performance standards for companies.[160] The field has expanded to include diverse methods such as licensing, product labeling, and required pre-market testing of technologies. For instance, after the 2008 financial crisis, American banks now must maintain capital levels proportionate to asset risk, following international standards like Basel III, to avert systemic crises.[161] Likewise, the EPA institutes emission caps on hazardous pollutants grounded in health risk assessments, targeting reductions in the most dangerous environmental hazards.[162]

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[155] *See* Margot E. Kaminski, *Regulating the Risks of AI*, 103 B.U. L. Rev. 1347, 1369 (2023).

[156] *See id.* ("Risk regulation is often, though not always, ex ante, systemic, and concerned with aggregate outcomes.").

[157] *See id.* at 1393.

[158] Gary E. Marchant & Yvonne A. Stevens, *Resilience: A New Tool in the Risk Governance Toolbox for Emerging Technologies*, 51 U.C. Davis L. Rev. 233, 238 (2017) ("Risk analysis uses the best available scientific information to estimate potential risks—a step known as risk assessment—and then applies a risk management approach, such as acceptable risk analysis, cost-benefit analysis, cost-effectiveness analysis, or feasibility analysis to reduce these estimated risks to acceptable or efficient levels.").

[159] *See* Douglas A. Kysar, *Public Life of Private Law*, 9 Eur. J. Risk Regul. 48, 50, 64 (2018).

[160] Kaminski, *supra* note 155.

[161] *See id*.

[162] *See* Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities, EPA530-R-05-006 (2005).

Professor Margot Kaminski suggest that risk regulation has three main tool sets:[163]

1. Precautionary tactics, based on the principle of avoiding unproven technologies, include legal bans, licensing, and regulatory sandboxing. In the United States, bans are rare, with licensing being more common. Regulatory sandboxing is an emerging, lighter regulatory approach, especially in AI governance, allowing new technologies under regulatory oversight.[164]

2. Risk assessment and mitigation requires developers to analyze and address risks. This often overlaps with licensing, especially when licenses hinge on risk mitigation or performance standards.[165]

3. Post-market measures involve tools used after a product's release. These include revocable licenses, registration with ongoing monitoring, periodic compliance checks, and emergency modes. Recently, there's a push for resilience regulation, focusing on harm reduction and ensuring system recovery post-incident.[166]

Risk regulation combines scientific risk assessment with oversight tools to proactively mitigate harms from complex systems. It utilizes regulatory methods like licensing, performance standards, and pre-market testing to control institutional risks. In recent years, it has become the central method of regulating AI and its myriad risks.

As Kaminski and others suggest, several attributes make AI into suitable and attractive targets for risk-based regulation.[167] AI systems, known for their technological complexity and technical Opaqueness,[168] often complicate causality in legal contexts, making litigation difficult and costly.[169] They tended

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[163] *See* Kaminski, *supra* note 155, at 1370–72.

[164] *See id.* at 1371.

[165] *See id*.

[166] *See id.* at 1372.

[167] *See id.* at 1372–73 ("They are technologically complex. They are, at least in part, inscrutable. Their use complicates debates about causality. Each of these features makes ex post litigation particularly challenging and expensive."); *see, e.g.*, Michael Guihot, Anne F. Matthew, Nicolas P. Suzor, *Nudging Robots: Innovative Solutions To Regulate Artificial Intelligence*, 20 Vand. J. Ent. & Tech. L. 385, 445 (2017); Marchant & Stevens, *supra* note 158, at 236; Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 Harv. J. L. & Tech. 353, 356 (2016).

[168] Jenna Burrell, *How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms*, 3 Big Data & Soc'y 2016, no. 1, at 3 (2016) ("At the heart of this challenge is an opacity that relates to the specific techniques used in machine learning.")

[169] Kaminski, *supra* note 155, at 1372; *see also* Frank Pasquale, The Black Box Society: The Secret Algorithms that Control Money and Information 2 (2015) (discussing AI's inscrutability).

to fail unpredictably, especially as part of intricate human-machine systems.[170] These characteristics, along with their suitability for proactive measures like design requirements for failure modes and accountability,[171] explain why many scholars and legislators choose risk regulation as a method of dealing with AI.

Contemporary scholarship articulates three strong arguments favoring the governance of AI systems through ex ante risk regulation, as opposed to ex post litigation. This stance is informed by the unique challenges presented by AI technologies:

1. **Complexity and Opacity of AI Systems**: AI systems exhibit a level of technical and legal complexity that obscures causal relationships in scenarios of harm.[172] Frank Pasquale and Gianclaudio Malgieri underscore this point, arguing that the sophistication of AI demands expertise beyond that of the average individual, leading to increased litigation expenses and creating obstacles to justice.[173]
2. **Nature of AI-Induced Harms**: The harms caused by AI can be unnoticed, challenging to detect or quantify, and are often rooted in politically contentious concepts.[174] These harms are akin to those in public health, representing externalities that companies might not inherently internalize. Consequently, they are more suitably addressed through risk regulation.

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[170] Kaminski, *supra* note 155, at 1372; Bryan H. Choi, *Crashworthy Code*, 94 Wash. L. Rev. 39, 39 (2019) (stating that software would fail at some point); *see* Rebecca Crootof, Margot E. Kaminski, W. Nicholson Price II, *Humans in the Loop*, 76 Vand. L. Rev. 429, 438 (2023) (noting inadequate training, interface issues, and bungled handoffs as weaknesses in human-led systems).

[171] *See* Kaminski, *supra* note 155, at 1370–72; *see also*, Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. Pa. L. Rev. 633, 696–99 (2017) (summarizing technical tools allowing decisions made by algorithms to be evaluated after the fact).

[172] *See* Scherer, *supra* note 167, at 373 ("The problem of control presents considerable challenges in terms of limiting the harm caused by AI systems once they have been developed, but it does not make it any more difficult to regulate or direct AI development ex ante.").

[173] Gianclaudio Malgieri & Frank Pasquale, *From Transparency to Justification: Toward Ex Ante Accountability for AI* 10–14 (Brussels Priv. Hub, Working Paper, No. 33, 2022).

[174] *See* Kaminski, *supra* note 155, at 1366 ("[S]cholars relatedly argue that the nature of the AI harm make AI systems a better candidate for risk regulation than litigation. AI harms, like privacy harms and public health harms, may be latent in nature—that is, not yet vested.").

3. **Benefits of Proactive Regulation**: Scholars, including Matthew Scherer[175] and Margot Kaminski,[176] argue that proactive or ex ante regulation allows for a collective approach to AI system design, potentially preventing harms rather than merely compensating for them post-incident. This approach, "sidesteps problems of causality, foreseeability, and control."[177] Some advocate for mechanisms akin to an 'FDA for Algorithms,' suggesting that specialized regulators or agencies are better positioned to manage these issues preemptively.[178]

As risk-based regulation predominates AI governance, I've selected the E.U.'s imminent AI Act[179] and the already implemented Executive Order 14110[180] to exhibit this trend, rather than provide a comprehensive legislative overview. The E.U.'s AI Act will soon come into force[181] and the U.S. order is currently enforced,[182] while many other U.S. legislative proposals employing risk-based approaches remain uncertain.[183] Focusing on these two laws sufficiently demonstrates risk regulation's centrality, without cataloguing all such initiatives.

At their core, both the AI Act[184] and Executive Order 14110 classify AI based on potential risks, with heightened oversight on high-risk applications.

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[175] *See* Scherer, *supra* note 167, at 373 ("The problem of control presents considerable challenges in terms of limiting the harm caused by AI systems once they have been developed, but it does not make it any more difficult to regulate or direct AI development ex ante.").

[176] *See* Margot E. Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. Cal. L. Rev. 1529, 1557–59 (2019); *see, e.g.*, Lilian Edwards & Michael Veale, *Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You Are Looking for*, 16 Duke L. & Tech. Rev. 18, 74-80 (2017) (advocating for the prioritization of impact assessments over individual rights to explanation).

[177] *See* Kaminski, *supra* note 176; *see also,* Edwards & Veale, *supra* note 176 (advocating for the prioritization of impact assessments over individual rights to explanation).

[178] *See, e.g.*, Andrew Tutt, *An FDA for Algorithms*, 69 Admin. L. Rev. 83, 83 (2017).

[179] *AI Act*, *supra* note 20.

[180] Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

[181] EU AI ACT News, *supra* note 22.

[182] Exec. Order No. 14110, 88 Fed. Reg. at 75191.

[183] In the 118th Congress, a search of Congress.gov as of June 2023 resulted in 94 bills, none of which has been enacted. Laurie A. Harris, Cong. Rsch. Serv., Artificial Intelligence: Overview, Recent Advances, and Considerations for the 118th Congress 7 (2023). *See* Kaminski, *supra* note 155, at 1373–74.

[184] David F. Engstrom & Amit Haim, *Regulating Government AI and the Challenge of Sociotechnical Design*, 19 Annual Rev. L. & Soc. Sci. 277, 280 (2023).

The AI Act categorizes the risk of AI as unacceptable, high or low/minimal. It prohibits unacceptable risk systems like social scoring and remote biometric surveillance.[185] High-risk systems like in healthcare, transport, and recruitment undergo extensive conformity assessments and transparency requirements.[186] Low risk systems primarily follow voluntary codes of conduct.[187] However, the categories of risk in the AI Act are broad and open-ended, covering physical safety but also the nebulous concept of "fundamental rights."[188] The specific definitions of unacceptable and high-risk AI will be subject to later technical standard-setting, additional regulation, and interpretation by private companies during implementation.[189] This could allow substantial room for expansion of the Act's regulatory scope.

Similarly, Executive Order 14110 focuses regulations on high-risk foundation models that impact national security, public health, and the economy.[190] Developers of these dual-use models, defined as AI systems trained on extensive data using self-supervision with billions of parameters applicable across contexts, must conduct robust red team testing and share results with regulators.[191] This precautionary approach concentrates governance efforts on AI with the greatest potential dangers.

Beyond risk-tiering, the two frameworks align in their emphasis on transparency, testing, and standards.[192] The AI Act mandates clear disclosures when AI systems interact with people or generate synthetic media like deepfakes.[193] Executive Order 14110 likewise directs the development of content labeling guidelines and authentication methods to curb AI misinformation threats.[194] Both regimes also create regulatory sandboxes for controlled AI testing and pilot new technical standards for trustworthy AI design.[195]

While both represent risk regulation, there are notable differences. The EU Act aligns more with precautionary tactics, utilizing bans, licensing requirements, assessments, and monitoring - especially for high-risk systems.[196]

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[185] *AI Act*, *supra* note 20, art. 5(1)(d).
[186] *Id.*, Preamble para. 5.
[187] *Id.*, Art. 69.
[188] Kaminski, *supra* note 155, at 1376–77.
[189] *AI Act*, *supra* note 20, Preamble para. 6.
[190] *See* Exec. Order No. 14110, 88 Fed. Reg. at 75194.
[191] *See id.*
[192] *See id.* at 75191; *AI Act*, *supra* note 20, Arts. 1, 2.
[193] *See AI Act*, *supra* note 20, Art. 52.
[194] *See* Exec. Order No. 14110, 88 Fed. Reg. at 75196–204.
[195] *See AI Act*, *supra* note 20, Art. 53, 54; *see* Exec. Order No. 14110, 88 Fed. Reg. at 75196.
[196] *See, e.g.*, *AI Act*, *supra* note 20, arts. 6, 16, 29.

The US model favors flexible public-private collaboration on voluntary standards and guidelines.[197] Through the AI Act, the EU seeks to implement a new regulation modeled on product-safety rules, imposing technical and organizational requirements on AI providers and users.[198] Providers of high-risk systems bear the bulk of obligations spanning data governance, testing, risk management, and post-market monitoring.[199] The Act prohibits certain AI applications altogether and mandates transparency for others.[200] By contrast, Executive Order 14110 does not create legislative obligations. Rather, it directs agencies to develop disclosure rules for companies providing AI infrastructure models.[201] The order is also broader, covering social issues like equity, workers' rights, and attracting AI talent.[202] It directs the State Department to lead an international AI governance effort.[203]

The E.U. AI Act and U.S. Executive Order 14110 highlight core elements of risk-based governance: prioritizing oversight on high-risk systems, mandating transparency, and utilizing regulatory sandboxes and standards. However, a critical question remains: can this predominant approach fully satisfy the aims of regulating AI as a digital information platform, serving as a societal intermediary?

B. Limitations in Addressing Media Regulation Goals

We have seen above why risk-based regulation is an attractive toolkit for general AI regulation. However, when it comes to regulating GenAI as a digital information platform, it is insufficient. This is because it primarily addresses quantifiable risks rather than qualitative aspects of trust and credibility, which are crucial for fostering public confidence in digital media platforms. Additionally, it does not comprehensively cover the establishment of trustworthy intermediaries or align platform incentives with public interests, which are essential for the responsible integration of GenAI in society.

The strength of risk-based regulation is particularly evident in its capacity to address quantifiable problems, making it well-suited for averting

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[197] *See, e.g.*, Exec. Order No. 14110, 88 Fed. Reg. at 75199–200, 75211, 75216.

[198] Drake et al., *supra* note 23; *see also*, *AI Act*, *supra* note 20, arts. 16–29.

[199] *AI Act*, *supra* note 20, art. 16.

[200] Drake et al., *supra* note 23; *see also AI Act*, *supra* note 18, Art. 5, art. 52.

[201] Drake et al., *supra* note 23; *see also*, Exec. Order No. 14, 110, 88 Fed. Reg. at 75214, 75219.

[202] Drake et al., *supra* note 23; *see also*, Exec. Order No. 14, 110, 88 Fed. Reg. at 75192, 75210, 75221.

[203] *See* Exec. Order No. 14110, 88 Fed. Reg. at 75223.

crises in areas such as national security, public health, and bias in algorithmic decision-making.[204] By allowing for the empirical measurement and prioritization of risks, this approach can effectively prevent scenarios that could lead to significant harm, such as security breaches that threaten national safety, health emergencies exacerbated by unreliable AI in healthcare, or discriminatory outcomes resulting from biased algorithms.[205]

However, while adept at managing these specific, measurable risks, risk-based regulation faces challenges when it comes to the broader, qualitative aspects of fostering trust and credibility with digital media platforms. This is true for the following reasons:

1. ***Beyond Risk Mitigation to Trustworthiness***: The transformation of digital media platforms into trusted and trustworthy intermediaries demands more than just mitigating risks. It requires a concerted effort to establish these platforms as proactive and public-facing entities committed to serving the public good.[206] Trust and credibility cannot be engendered solely through defensive strategies against potential harms but must be built through an approach tailored to dealing with the trust deficit facing digital media platforms. This entails regulating the media aspects of GenAI not merely on a risk basis but as part of a broader industry regulation that fosters trust and reliability.
2. ***The Necessity and Riskiness of Information Intermediaries***: Information intermediaries play a crucial role in modern society, acting as essential conduits for information dissemination and exchange. However, their indispensability comes with inherent risks, making the establishment of trust a critical factor in their regulation. Trust serves as a linchpin in ensuring that these platforms can operate effectively while managing the risks associated with their functions.

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[204] Kaminski, *supra* note 155, at 1365–69.

[205] Ljupcho Grozdanovski & Jérôme De Cooman, *Forget the Facts, Aim for the Rights! On the Obsolescence of Empirical Knowledge in Defining the Risk/Rights-Based Approach to AI Regulation in the European Union*, 49 Rutgers Comput. & Tech. L.J. 207, 233–35 (2023) (discussing the risk-based AI regulation adopted by the E.U. in AI Act to prevent discrimination, etc.).

[206] The Australian Public Service is working with Microsoft and embracing GenAI for improved public sector operations, focusing on customer interactions, business intelligence, and organizational efficiency. Julian Bajkowski, *APS trial of Microsoft AI an invitation-only affair*, The Mandarin (Nov. 23, 2023), https://www.themandarin.com.au/235220-aps-trial-of-microsoft-ai-an-invitation-only-affair/ [https://perma.cc/D2UL-V3LX].

3. ***A Clear Goal for Regulating GenAI***: Viewing GenAI specifically as digital media platforms clarifies the regulatory objective: to create institutions that are not only safe from catastrophic failures but also trusted and perceived as beneficial by the public. This perspective shifts the focus from merely avoiding negative outcomes to actively pursuing positive, trust-building measures that ensure these platforms contribute constructively to society.
4. ***The Role of Transparency and Accountability***: While many aspects of current risk-based AI regulation are crucial for building trust—such as transparency and accountability—these elements must be part of a larger strategy that aligns platform incentives with public interests. These requirements are fundamental in bridging the gap between risk mitigation and the establishment of genuinely trusted and trustworthy digital intermediaries.

Adopting a risk-based approach to regulating GenAI implicitly accepts the idea that it is a completely new and unexpected phenomenon, rather than the next step in the ongoing algorithmization of the media ecosystem. This perspective obscures the ways in which risk-based regulation fails to address the unique challenges posed by GenAI as a digital information platform. By focusing solely on quantifiable risks, such as security breaches or biased outcomes, risk-based regulation overlooks the broader, qualitative aspects of fostering trust and credibility in the digital public sphere. It treats GenAI as just another AI technology to be managed, rather than recognizing its central role in shaping public discourse and opinion. In doing so, risk-based regulation misses the opportunity to develop a comprehensive framework that not only mitigates potential harms but also actively promotes the development of GenAI as a trusted and trustworthy intermediary institution.

The open-ended and general approach of risk regulation means that it is not tailored towards the media-goals of regulating GenAI and that there is no reason to think that it will actually promote trusted and trustworthy intermediate institutions. Instead, what is needed in a regulatory approach—like those aimed at media institutions—tailored to compensate for the trust deficits facing digital media platforms.

C. Risk-Management and Trust

To make this more concrete, let us consider the two trust deficits I have described above: misalignment of interests and trust and community.

What would applying the AI Act to GenAI do to informational capitalism? Let us take two hypothetical scenarios: one where GenAI is categorized as high-risk, and one in which it is considered low risk. Although it is highly unlikely that the AI Act will categorize chatbots as high-risk, it will still serve in making the point that even such an extreme measure will not achieve the goals of regulating GenAI as a digital information platform.

If ChatGPT-like bots will be categorized as high-risk, the AI Act imposes stringent compliance measures aimed at safeguarding user rights, ensuring transparency, and promoting accountability.[207] Specifically, the Act mandates that high-risk AI systems, particularly those reliant on model training techniques, be developed using training, validation, and testing data sets that adhere to established quality criteria.[208] This includes a series of steps designed to ensure the integrity and fairness of the data used in AI systems, encompassing design choices, data collection processes, and preparation operations such as annotation, labeling, and cleaning.[209] Importantly, it calls for a proactive assessment of data sets for biases that could endanger health and safety or lead to discrimination, as well as the identification and remediation of any data gaps or shortcomings.[210] However, while this focus on data quality is important, it does not reach the economic incentive structure at the basis of informational capitalism. The main likely effect, besides data governance, will likely be the imposition of very high compliance burdens, which can actually make the highly lucrative ad-based model more attractive to platforms.

Conversely, the lighter regulatory touch afforded to low-risk AI fosters innovation and economic expansion but at a potential cost to ethical considerations and societal welfare.[211] This classification allows for a freer exploitation of data, advancing the goals of informational capitalism—maximizing profit through data commodification and user manipulation—without substantially addressing concerns over privacy and autonomy.[212] Such an approach

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[207] European Parliament Press Release 20231206IPR15699, Artificial Intelligence Act: Deal on Comprehensive Rules for Trustworthy AI (Dec. 9, 2023), https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai/ [https://perma.cc/W7MQ-C4QQ].

[208] *AI Act*, *supra* note 20, Art. 10.

[209] *Id.*

[210] *Id.*

[211] *Id.*, Preamble para. 81; *see also* Grozdanovski & De Cooman, *supra* note 205, at 243.

[212] Mauritz Kop, *EU Artificial Intelligence Act: The European Approach to AI*, Transatlantic Antitrust & IPR Dev. 1, 2 (2021); Amy Kapczynski, *The Law of Informational Capitalism*, 129 Yale L.J. 1460, 1486 (2020).

highlights the limitations of risk-based regulation in confronting the intricate relationship between technology, economy, and society, suggesting a tacit acceptance of the status quo rather than a challenge to the economic models driving data exploitation.

Risk-based AI regulation, as seen in the AI Act, fails to address informational capitalism's core issues. It affects the system only incidentally, if at all. The AI Act establishes some safeguards but operates within the current economic paradigm. It does not question or change the profit incentives that drive the relentless pursuit of personal data. The Act's focus on discernible risks ignores the deeper, more pernicious effects of informational capitalism. In short, it works within the status quo rather than challenging the fundamental forces of data exploitation.

As such, while the Act marks a significant step in AI governance, it underscores the need for a more tailored approach—one that extends beyond risk mitigation to critically examine the wider socio-economic impacts of digital technology. Informational capitalism is not merely a risk to be managed but a fundamental economic and social paradigm that shapes how information is produced, distributed, and consumed in the digital age.[213] Specifically, it is a problem of business model and structural economic incentives. Informational capitalism is driven by structural incentives that prioritize data collection and analysis for profit maximization.[214] Risk management can mitigate specific harms associated with these practices (such as data breaches or unfair data processing), but it does not address the underlying economic incentives that drive companies to engage in these practices in the first place.

Let me turn in brief to the question of the role of familiarity and community in establishing trust. Risk-based regulation can be a part of the way in which a political community regulates trusted intermediate institutions. It can be a part of such a fabric in the same way that ex post litigation over defamation and privacy can be a part of the relationship between a public and their media institutions.[215] However, risk-based regulation does not take

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[213] *See* Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 46 (2019); *see also* Kapczynski, *supra* note 212, at 1488 (summarizing the changes on the accessibility and method of access to information in the context of informational capitalism caused by new information technologies).

[214] Kapczynski, *supra* note 212, at 1486.

[215] Edward Wasserman, *Digital Defamation, the Press, and the Law: Can We Reform the Online Culture of Rampant Libel Without Making It too Easy to Harass Legitimate Media?*, Am. Prospect (August 23, 2021), https://prospect.org/justice/digital-defamation-press-and-the-law/ [https://perma.cc/497Y-K4LF] (discussing the flourishing online defamation and increasing related litigations).

us even one centimeter towards reestablishing such trusting and familiar relationships between global algorithmically run digital media platforms and their users.

In conclusion, risk regulation is an important tool in our regulatory arsenal. However, when applied to building trust with intermediary information platforms, it reveals limitations. Risk regulation is a blunt and imprecise solution at best. Next, we will explore proposed remedies aimed at rebuilding trust within social media, as discussed within the academic research conducted over the past decade on regulating social media and search engine platforms. We will evaluate if these proposed remedies could effectively and viably address issues of trust in the context of generative AI.

IV. Adapting Social Media Solutions to Generative AI

Since risk management-based regulation of AI is unlikely to establish trusted intermediary institutions, we should examine another set of tools: policies proposed to achieve similar goals for social media and search platforms. We first look at the applicability of policies intended to align the incentives of digital media platforms with those of users. Then, we explore policies meant to address the lack of familiarity between global digital platforms and users. The purpose here is not to solve these challenges outright, but to demonstrate that this is the appropriate regulatory conversation to have regarding GenAI.

Section A critically analyzes that aligning incentives in GenAI regulation involves liability shield reforms, competition law enhancements, and adopting the principles of information fiduciaries to prioritize user interests and ethical data handling. Section B offers concrete advice on building trust for GenAI systems, including integrating local institutions into content moderation, adapting algorithms to local cultures, and involving local civil society in governance to ensure cultural relevance and community alignment. Section C argues that the EU's Digital Services Act is more appropriate for regulating GenAI's media aspects due to its focus on platform oversight based on size, transparency requirements, and attention to data exploitation and user rights, providing a more tailored approach to media-centric functions than the AI Act.

A. Regulation for Aligning Incentives

To reiterate, the fundamental disconnect between digital platforms and users stems from corporations prioritizing data collection, engagement, and

profit, often at the expense of societal wellbeing. This leads to a deficit in trust. This section will demonstrate how strategies for aligning incentives in social media and search domains are also applicable and effective for generative AI media platforms. The idea here is not to reach a conclusion as to which tool is ideal, but to show that this is the right conversation to have.

1. Liability Shields

Reforming the current liability regime with regard to social media and search engines is one of the most common and prominent proposals meant to create stronger alignment of interests and incentives between digital corporations and their users. The liability shield issue is based on the following dilemma: strict liability regimes, with their stringent standards for content moderation, are appealing as they compel online platforms to actively minimize the presence of illegal content.[216] However, such rigorous enforcement can also lead to a significant chilling effect on free speech, as platforms may over-regulate content to avoid potential liabilities.[217]

A multitude of proposals center on the amendment of the notorious 47 U.S.C. § 230, frequently referred to simply as Section 230.[218] This statute bifurcates into two segments. First, it shields online intermediaries, who facilitate internet access, from being held liable for their users' expression,[219] thereby not classifying them as "publishers" of said content.[220] Second, it establishes that even when an intermediary engages in the moderation or curation of user content, this act does not forfeit their liability protection.[221] This moderation does not, within the legal framework, transform a digital

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[216] Eur. Parliament Research Services, Liability of Online Platforms 62–63 (2021), https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf [https://perma.cc/WPB9-G6HQ].

[217] *See* Daphne Keller, *Six Constitutional Hurdles for Platform Speech Regulation*, Stanford L. Sch. Ctr. Internet & Soc'y Blog (January 22, 2021, 6:50 A.M.), https://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation-0 [https://perma.cc/RJX7-8QYF] (echoing a U.S. Supreme Court decision which overturned strict liability for booksellers because laws incentivizing excessive caution by intermediaries tend to restrict the public's access to information).

[218] 47 U.S.C. § 230.

[219] Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 Geo. L. Tech. Rev. 198, 204 (2018).

[220] *Id.*

[221] *Id.* at 204–05.

entity into a publisher.[222] Tarleton Gillespie and others assert that Section 230 was an "enormous gift to the young Internet industry."[223] They liken it to privileges given to other media, such as broadcast licenses or telephone monopolies, which carry inherent societal responsibilities. They argue that Section 230 should similarly enforce public obligations on social media firms, urging them to uphold a range of standards and responsibilities towards users. Central to these are due process and transparency, with platforms encouraged to make content moderation policies and decisions public or report them to a regulatory body.[224] The Facebook Oversight Board's appeal process exemplifies this approach.[225] Some suggestions are more modest, proposing that "platforms would enjoy immunity from liability if they could show that their response to unlawful uses of their services in general was reasonable." [226] In this regard, the liability shield regime can be used as a tool for creating greater incentive alignment.

The question of how Section 230's protections relate to the regulation of Generative AI, such as ChatGPT, presents an intriguing legal landscape. Courts may likely distinguish the act of generating content from moderating or curating it. This could potentially lead to a conclusion that "ChatGPT and other large language models are excluded from Section 230 protections because they are information content providers, rather than interactive computer services."[227] Much depends on how the law develops. It may well develop differently in different jurisdictions, in the same way that social media and search liability shields regimes vary.[228]

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[222] *Id.* at 204.

[223] *Id.* at 213.

[224] *Id.* at 213.

[225] *Appeal to the Oversight Board*, Oversight Board, https://www.oversightboardappeals.com/login/?redirect_url=https%3A%2F%2Fwww.oversightboardappeals.com%2Fsubmit%2F [https://perma.cc/XFD7-GSC2].

[226] Danielle K. Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 Geo. L. Tech. Rev. 453, 471 (2018).

[227] Matt Perault, *Section 230 Won't Protect ChatGPT*, Lawfare (February 22, 2023), https://www.lawfaremedia.org/article/section-230-wont-protect-chatgpt [https://perma.cc/XKT6-YRDR].

[228] In the U.S., the liability shield for social media and search platforms is primarily governed by Section 230. The Supreme Court's recent decisions have been seen as a victory for social media platforms, as they continue to benefit from the broad immunity. In contrast, other jurisdictions such as the EU have been pursuing a different approach to platform liability. The DSA and Digital Markets Act (DMA) proposed by the EC seek to hold online platforms more accountable for the content they host and to ensure greater transparency in their content moderation practices.

However, independent of Section 230's actual legal applicability to Generative AI, the core regulatory dilemma mirrors that faced in social media regulation. There is a need to balance curtailing illegal or harmful content generated by GenAI systems with the risk of significantly limiting the capabilities and usefulness of these advanced models if restrictions are too severe.[229] While Section 230 may not directly shield Generative AI systems, the underlying tension between maintaining utility and addressing societal risks is similar to the challenges faced in regulating social media platforms.

2. Competition Law

Exploring the dynamics of competition in the digital platform industry, Balkin and others argues that enhanced competition can create better alignment between social media companies and users' interests.[230] With more platforms vying for user attention, companies will have "greater incentives to give end users what they want from social media" including improved content moderation policies and practices.[231] Additionally, smaller specialized companies may be better able to devote more attention to specialized audiences and develop particular moderation expertise.[232] Requiring interoperability between networks helps "redistribute the benefits of network effects from a few large companies to smaller companies and the public as a whole."[233] Preventing vertical integration of social media and digital advertising functions assists other media companies in their ability to "compete more effectively with social media and negotiate better bargains with the largest digital companies."[234] Finally, more competition puts pressure on companies to align their business practices and incentives with user welfare in order to attract and retain customers.

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[229] Kendrick, *supra* note 26, at 1633 ("imposing strict liability for harmful speech, such as defamatory statements, would overdeter, or chill, valuable speech, such as true political information.").

[230] Balkin, *To Reform*, *supra* note 16, at 247; Yongchan Kwon, Tony Ginart, & James Zou, *Competition Over Data: How Does Data Purchase Affect Users?*, arXiv, 1 (2020), https://arxiv.org/pdf/2201.10774.pdf [https://perma.cc/429S-7EHV]; Nikolas Guggenberger, *Moderating Monopolies*, 38 Berkeley Tech. L.J. 119, 120 (2023).

[231] Balkin, *To Reform*, *supra* note 16, at 247.

[232] *Id.* ("Smaller companies might specialize in quality content moderation to attract end-users. Some companies might be able to devote more attention to specialized audiences, particular languages, or specific geographical regions.")

[233] Balkin, *To Reform*, *supra* note 16, at 127.

[234] *Id.*

Similar arguments apply to GenAI regulation. With multiple GenAI platforms competing, there would be stronger incentives to meet user demands, including effective content moderation. Smaller, specialized GenAI firms might offer more focused attention to niche audiences and develop specific moderation skills.[235] Mandating interoperability between GenAI networks could distribute network effect benefits more broadly, aiding smaller entities and the public.[236] Preventing vertical integration in GenAI and related sectors might also enable a more equitable competitive landscape.[237] Overall, increased competition would likely pressure GenAI companies to prioritize user welfare to attract and retain a loyal user base.

3. Information Fiduciaries

Jack Balkin's model of information fiduciaries is founded on the principle that certain professional relationships inherently involve a deep trust concerning personal information, a helpful concept when considering potential AI regulation. Balkin emphasizes that "[r]elationships of trust and confidence are often centrally concerned with the collection, analysis, use, and disclosure of information."[238] This trust is paramount in professions where sensitive information is a key part of the relationship, such as with lawyers and doctors, who "often obtain information that would be very embarrassing to their clients or might be used to their disadvantage."[239] These professions, therefore, embody a fiduciary duty to protect and respect the confidentiality and integrity of the information entrusted to them.

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[235] *See* Kyle Wiggers, *Pika, Which Is Building AI Tools to Generate and Edit Videos, Raises $55M*, TechCrunch (Nov. 28, 2023), https://techcrunch.com/2023/11/28/pika-labs-which-is-building-ai-tools-to-generate-and-edit-videos-raises-55m/ [https://perma.cc/KTL3-NJ98] (discussing that Pika Labs focuses on video editing GenAI and recently launches Pika 1.0 which contributes to professional-quality video creation).

[236] Jens Prüfer & Christoph Schottmüller, *Competing with Big Data*, 69 J. Indus. Econ. 967 (2021) (empirically demonstrating that "market tipping [in the digital industry] can be avoided if competitors share their user information").

[237] *See* François Candelon, Philip Evans, Leonid Zhukov, & David Zuluaga Martinez, *How Your Company Could Be Tomorrow's Surprise Genai Leader*, Fortune (Feb. 2, 2024, 6:30 P.M.), https://fortune.com/2024/02/02/ai-genai-corporate-power-dynamics-leadership-bcg/ [https://perma.cc/R7NV-AUJL] (discussing that smaller, specialized GenAI's modular structure has more innovative potential).

[238] Balkin, *Information Fiduciaries*, *supra* note 28, at 1231.

[239] *Id.* at 1208.

In Balkin's view, the concept of an information fiduciary extends these traditional fiduciary responsibilities to include any individual or organization that handles personal information within a relationship of trust.[240] He defines an information fiduciary as "a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship."[241] This definition acknowledges that the dynamics of trust and confidentiality transcend the confines of physical interactions and are equally applicable in the digital realm.

Balkin argues that the traditional common-law fiduciary responsibilities of care, confidentiality, and loyalty should be the guiding principles for all who manage personal information.[242] These duties are fundamental to ensuring that the information is not used to the detriment of those who have shared it.

The model is not aimed directly at altering specific practices like content moderation but is designed to shift the overarching approach of digital companies towards their users.[243] Balkin critiques the current model where "end users are treated as a product or a commodity sold to advertisers,"[244] proposing instead a framework where companies recognize their duty to protect and prioritize the interests of their users. This represents a significant departure from "surveillance capitalism," urging a reevaluation of business models that exploit personal information for profit.

Balkin's proposal that certain online services should be considered information fiduciaries who bear special duties of care, confidentiality, and loyalty towards users is crucially important when applied to GenAI systems. Like social media platforms, GenAI relies extensively on collecting and analyzing user data in order to function. Under an information fiduciary model, developers and providers of Generative AI would be obligated to act as fiduciaries, prioritizing user interests and welfare when handling their information. This marks a major shift from current incentives to exploit data for profit or capability gains. Instead, it emphasizes ethical standards of loyalty and care regarding user data and interactions.

This fiduciary approach takes on heightened importance given GenAI's ability to generate personalized content and recommendations based on

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[240] *Id.* at 1209.
[241] *Id.* at 1208.
[242] *Id.* at 1209.
[243] *Id.* at 1226.
[244] Balkin, *To Regulate*, *supra* note 15, at 92.

analyzing a user's personal information and conversational patterns. The technology's capacity for mimicking users' individual speech habits underscores the need for their data to be handled responsibly under a fiduciary governance model. By placing at the center user protection and interests, rather than data exploitation, information fiduciary principles provide a means of fostering greater transparency and trust between GenAI systems and users. Applying these principles would promote human welfare over unchecked technological capability growth. Overall, Balkin's concept of information fiduciaries offers a good tool for policymakers to apply to the governance of Generative AI.

B. Platform Federalism and Reflecting Community

We turn now to the second trust deficit facing digital media platforms: the fact that they are detached from any particular culture and locale, and therefore are necessarily unable to channel the traditional mechanisms of trust-building, deeply embedded within the cultural and societal fabric. The essence of trust, as rooted in shared values, communal goals, and cultural integration, presents a stark contrast to the global, culturally-detached nature of social media and GenAI.

Elsewhere, I have suggested integrating local, familiar institutions into the content moderation and curation processes of social media and search platforms, a concept that could be extended to GenAI.[245] This localization strategy aims to bridge the gap between global platforms and local cultural contexts, enhancing trust. This approach advocates for a structured involvement of domestic civil society in shaping online public dialogue, emphasizing the integration of local institutions like NGOs, media, and academia into the governance of digital platforms. It proposes that such inclusion can narrow the gap between global digital platforms and local communities, enhancing the relevance and responsiveness of online discourse.

By incorporating these local elements, digital media platforms can become more attuned to and reflective of the cultural and trust conditions of different communities. This approach could potentially connect these worldwide, detached platforms with local norms and values, addressing the challenges of establishing legitimacy in diverse cultural environments. It suggests legislative measures to ensure local civil society organizations play a significant role in content moderation, policy implementation, and establishing trusted information sources, aiming to reestablish their gatekeeping function in the digital age.

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[245] Abiri & Guidi, *The Platform Federation*, *supra* note 70, at 5.

GenAI and Content Moderation: Formulating governance rules for GenAI, like content moderation policies for social platforms, requires profound local and cultural insight. It is up to civil society to imbue these principles with necessary nuance. This role, akin to civil society's proposed function in shaping content rules, exceeds mere oversight. It entails proactive engagement so GenAI follows an ethical framework that also resonates culturally. Moreover, platforms craft content policies through opaque processes, often in vague terms. While some standards prohibit certain expressions universally (e.g., blackface), most employ broad language compatible with diverse contexts. For instance, Facebook bans slurs that attack protected groups, but identifying slurs or their acceptable uses depends heavily on culture.[246] Thus, universal enforcement is impossible without applying specific social norms.

Accordingly, local civil society organizations should play a preeminent role in specifying how to implement these abstract standards. Local institutions are best suited to define acceptable speech bounds, humor contours, and satire limits for each jurisdiction. To enable civil society federalism, platforms must devise granular operational rules by region, with civil society input. Rather than platforms "training" civil society as "trusted flaggers," civil society should instruct platforms.

In the realm of GenAI, engagement of local civil society institutions in content moderation becomes essential for establishing local trust. Like human moderators on digital platforms, these local institutions should play a vital role in flagging and assessing content processed by GenAI. Crucially, this approach ensures that its algorithms stay informed by local civil society's understanding. From our viewpoint, a key goal of a trusted flagger system must be acknowledging and incorporating local speech norms into moderation. Since distilling these intricate norms into clear rules is impractical, achieving this necessitates direct involvement of local civil society in moderating. In summary, embedding local civil society institutions as core moderators of GenAI content can enable governance rooted in community norms and values.

Model Training: To build familiarity and trust, GenAI systems must become attuned to the cultural fabrics they operate within. This demands localization not just of policies and teams, but of the underlying algorithms themselves. Rather than monolithic models deployed indifferently worldwide, responsible GenAI requires an ensemble approach with diversity and specialization.

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[246] *Facebook Community Standards: Hate Speech*, META Transparency Center, https://transparency.meta.com/policies/community-standards/hate-speech/# [https://perma.cc/RJA6-BCNJ].

Developers could train core models on broad data, then refine regionally specific versions on localized examples. Knowledge bases could be populated with cultural background knowledge to ground reasoning. End-users could be able to provide context like country and language to adapt outputs. By learning cultural nuances, dialects, and norms, models can become simulacra embedded within each community.

Continuous retraining will update models on evolving locales. Testing localized iterations before launch will catch culturally aligned bugs. Partnerships with local researchers and civil society will imbue cultural wisdom. Hiring local teams and leaders will retain focus on community values. Advisory boards will guide alignment with norms.

In effect, GenAI models could have fluid personalities that shift appropriately across boundaries. They could speak with local tongues, argue with local logics, create with local aesthetics. Their synthetic eyes could recognize the world as a dynamic patchwork of cultures, seamlessly cross-stitching algorithms to suit each one.

C. Digital Services Act vs. AI Act

The discussion concludes by comparing the E.U.'s AI Act and Digital Services Act (DSA),[247] emphasizing the DSA's superior suitability for regulating GenAI's media dimensions, given its focus on online media platforms, making it more relevant than the U.S.'s AI Act for addressing the unique challenges posed by GenAI. This analysis supports the central premise of this Article, which argues that we should view GenAI not as a completely new and mysterious phenomenon of artificial intelligence, but rather as a continuation of the algorithmization of media. Therefore, applying ideas about the regulation of social media to GenAI allows us to more precisely pursue the goal of producing trustworthy intermediate information platforms.

The DSA introduces a multi-tiered framework of due diligence obligations designed to enhance the safety, transparency, and fairness of the digital ecosystem.[248] The DSA's purpose is to "reconcile the responsibilities of online platforms with their increased importance.[249]" It is therefore aimed exactly at

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[247] Regulation (EU) 2022/2065, 2022 O.J. (L 277) 1 [hereinafter DSA].

[248] *European Commission Policies, DSA: Making the Online World Safer*, Eur. Comm'n (Aug. 24, 2023), https://digital-strategy.ec.europa.eu/en/policies/safer-online [https://perma.cc/Y3RH-M3K5].

[249] Miriam C. Buiten, *The Digital Services Act: From Intermediary Liability to Platform Regulation*, 12 JIPITEC 361, 361 (2021).

digital media platforms. That said, it likely does not currently cover GenAI technologies, as these are tools for creating content rather than platforms disseminating third-party content.[250] The DSA targets entities that provide the infrastructure for hosting and sharing content across users, aiming to enhance moderation, transparency, and accountability.[251] Generative AI, in contrast, operates by generating new content from input data, likely positioning it outside the DSA's scope.[252] This distinction underscores the DSA's commitment to regulating the digital ecosystem's structural facets, rather than the content creation tools themselves. However, my purpose here is not to discuss actual legal application, but whether the DSA—which targets digital media harms—seems more appropriate to deal with the mediaaspects of GenAI than the AI Act.

At the foundational level, the DSA imposes universal obligations on all digital services eligible for liability exemptions.[253] This includes services like internet service providers, caching services, and web hosting services.[254] These basic obligations mandate the establishment of contact points for communication and the maintenance of transparency in how content moderation is conducted, ensuring accountability and accessibility in digital operations.[255]

Expanding upon the foundational requirements, the Digital Services Act specifies obligations for hosting services, emphasizing protocols for addressing illegal content and ensuring equitable moderation practices.[256] For online

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[250] Anthonia Ghalamkarizadeh, Telha Arshad, & Jasper Siems, *The Sorcerer's Apprentice Conundrum: Generative AI Content under the EU DSA and UK Online Safety Act*, Hogan Lovells: Engage (Jan. 24, 2024), https://www.engage.hoganlovells.com/knowledgeservices/news/the-sorcerers-apprentice-conundrum-generative-ai-content-under-the-eu-dsa-and-uk-online-safety-act [https://perma.cc/35BE-R8NX] (indicating that the DSA's language isn't a clear-cut fit when applied to GenAI use-cases); *see also* Philipp Hacker, *Generative AI at the Crossroads*, Oxford Bus. L. Blog (June 12, 2023), https://blogs.law.ox.ac.uk/oblb/blog-post/2023/06/generative-ai-crossroads [https://perma.cc/W892-LW98] ("The DSA does not apply to generative AI developers directly—this is a loophole that must urgently be fixed.").

[251] *The DSA Policy Essay*, *supra* note 30 ("The DSA regulates online intermediaries and platforms such as marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms.").

[252] Ghalamkarizadeh et al., *supra* note 250 (indicating that the DSA's language isn't a clear-cut fit when applied to GenAI use-cases).

[253] *The DSA Policy Essay*, *supra* note 30 ("All online intermediaries offering their services in the single market, whether they are established in the EU or outside, will have to comply with the new rules.").

[254] *Supra* note 247, at art. 3.

[255] *Id.*, art. 10.

[256] *Id.*, art. 6.

platforms, which include social networks, content-sharing services, and marketplaces, the Act introduces more detailed mandates.[257] These platforms are tasked with upholding higher standards in content moderation, designing services fairly, adhering to advertising protocols, and managing information amplification.[258] This tiered approach ensures that digital platforms facilitate safe and fair online environments for social engagement, commerce, and information sharing.

At the pinnacle of the DSA's regulatory structure are the special obligations designated for Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs).[259] VLOPs are identified based on their extensive reach and impact, characterized by having a user base that represents a significant proportion of the EU's population.[260] This classification triggers the most stringent due diligence obligations, including comprehensive risk assessments, mitigation strategies, independent auditing, and crisis response mechanisms.[261] This tiered approach allows the DSA to scale its regulatory demands based on the potential impact and reach of digital services, ensuring a balanced yet effective governance model for the digital space.

When it comes to regulating GenAI as a far-reaching digital media platform, the E.U.'s Digital Services Act provides a more suitable framework than the narrower AI Act or Executive Order 14110.

First, the DSA bases oversight on platform size rather than risk categories.[262] This graduated approach is better adapted to media regulation, as scale correlates with societal impact. Larger platforms with expansive reach warrant more stringent supervision to maintain public trust. Proportional accountability also future-proofs regulations, allowing calibrated oversight as platforms grow.

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[257] *Id.*, Ch. 3.; *see* Buiten, *supra* note 249, at 375.

[258] European Commission Policies, The Impact of the Digital Services Act on Digital Platforms, Eur. Comm'n (Nov. 3, 2023), https://digital-strategy.ec.europa.eu/en/policies/dsa-impact-platforms#:~:text=The%20DSA%20requires%20platforms%20to,cooperate%20with%20%E2%80%9Ctrusted%20flaggers%E2%80%9D [https://perma.cc/YU7M-LR2H].

[259] *See The DSA Policy Essay*, *supra* note 30; *see also* Buiten, *supra* note 249, at 367.

[260] DSA, *supra* note 254, art. 33.

[261] *See* Buiten, *supra* note 249, at 368.

[262] European Commission Press Release QANDA/20/2348, Questions and Answers: Digital Services Act (Dec. 19, 2023) ("With the Digital Services Act, unnecessary legal burdens due to different laws were lifted, fostering a better environment for innovation, growth and competitiveness, and facilitating the scaling up of smaller platforms, SMEs and start-ups.").

Second, core media functions necessitate transparency. Content moderation profoundly shapes online discourse yet remains opaque. The DSA mandates detailed disclosures and independent audits to surface how moderation systems operate. Scrutinizing these obscured but critical processes is crucial for oversight.

Third, visibility into curation and filtering algorithms that drive content recommendation and prioritization is imperative. The DSA requires transparency into the design and training data of such systems. This exposes any skewing of visibility and counters engagement-above-all optimization. Oversight of personalized advertising is also mandated.

Fourth, the DSA tackles the data exploitation characteristic of informational capitalism. It prohibits dark patterns that subvert consent and expands user data rights. Oversight of ad targeting algorithms is mandated to deter rights-violating microtargeting. This counters the surveillance advertising model.

Finally, large platforms must conduct annual assessments of potential societal harms. This holistic approach reaches beyond risk mitigation to align commercial incentives with democratic values. Proactive accountability discourages singular focus on profits over the public good.

This is not to suggest that the DSA offers an optimal solution for governing digital media platforms broadly. The DSA remains an imperfect work-in-progress. However, in contrast to the AI Act's narrow focus on technical risk management, the DSA holds significant advantages for regulating the uniquely media-centric functions and societal impacts of Generative AI models.

Conclusion

As this Article illustrates, generative algorithms should not be viewed as some radical rupture necessitating unprecedented regulatory responses. Rather, situating GenAI within the trajectory of algorithmic mediation of the digital public sphere reveals it is the next phase of an ongoing process. Consequently, many strategies for governing GenAI can and should build upon existing and emerging models for regulating digital platforms like search engines and social media.

The path forward requires establishing GenAI systems as trusted intermediaries that foster a digital public sphere aligned with democratic values. This demands addressing the dual trust deficits stemming from misaligned incentives and the global-local divide. Beyond risk management, GenAI regulation must focus on reforms tailored to achieve this goal.

As the comparative analysis of the EU's AI Act and Digital Services Act illustrates, laws like the DSA designed explicitly to govern online platforms are better suited to regulate GenAI's societal impacts than general AI laws like the AI Act. Seeing GenAI as a continuation of the algorithmization of media and information highlights that existing conversations on platform governance must evolve to accommodate this new class of algorithmic intermediaries. But regulating GenAI does not require starting from scratch. Rather, it is the next chapter in an ongoing challenge - establishing trusted, democratically-aligned platforms to facilitate digital discourse.

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Agent 007: A License to Bill

Karl T. Muth* & Daniel Wang**

Abstract

Ian Fleming's famous James Bond novels–the favored Air Force One reading material of President Kennedy–created a piece of the Western cultural canon that endured translation to the film medium. The series survived massive cultural shifts on both sides of the Atlantic, the Cold War's apogee and decline, postcolonial alterations to Britain's global role, and other turmoil largely intact. However, the work required to defend, maintain, and expand the media empire surrounding the superstar spy continues into the twenty-first century, despite the fact that he would be over a hundred years old today (having been born in the early 1920s, Mr. Bond looks great for his age!); over half of this fictional lifespan features negotiation and litigation of the highest stakes, with billions of dollars in play. Today, while Bond may still serve the interests of His Majesty's Secret Service, he resides (since 2022) within a more modern kingdom: the intellectual property catalogue of megaretailer Amazon. This article recounts Bond's journey from being the protagonist of an obscure British spy novel series

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Muth would like to dedicate this piece to the real-life Bonds he had the privilege of working with and supporting circa 2010-13, when Muth was actively analyzing and developing intelligence related to the Gulf of Aden maritime crisis and supporting the work of Combined Task Forces 150 and 151; thank you for what you do, much of it unseen, perilous, tedious, and thankless, to make our world safer.

The views and thoughts expressed here are the author's/authors' own and may not reflect the views of others, including agencies, clients, or institutions with which the author(s) has/have been affiliated.

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to being one of the most-contested, most-successful, most-valuable entertainment brands in the world.

Introduction

Ever since Ian Fleming–then a still-undercover British spy–created the series of novels starring the famed Bentley-driving, Rolex-Explorer-1016-wearing,[1] Beretta-brandishing mascot of British espionage, the adventures of James Bond have been legendary. However, it was the transformation of Bond, an already-somewhat-dated spy character, into a postwar Aston-Martin-driving, Rolex-Submariner-wearing, Walther-PPK-carrying spy of the progressive and promiscuous 1960s that boosted his popularity and created one of the most valuable entertainment franchises in the world, on par with behemoths like *Star Trek*, *Star Wars*, and core Disney characters.

And yet, over the last sixty years or so, perhaps no high-profile property has seen more litigious posturing and legal interactions than the Bond franchise. In a multigenerational legal drama, talented attorneys fought for control of Bond's adventures in conference rooms and courthouses on both sides of the Atlantic and on front pages of major newspapers; recent chapters of the story include cameos from famous lawyers and judges, accusations of too-sharp tactics and unfair dealing, and a few sensational claims from celebrities.

This Article's storytelling occurs within the sixty-year period between 1961 to 2021, bookended by the original Bond film deal (the "United Artists Deal") and the premiere of *No Time to Die* (2021), the twenty-fifth Bond film and one of Daniel Craig's better performances as 007, a role he inhabited for fifteen years. This is the period during which litigation nearly sank the franchise. It seemed several times in recent decades that Mr. Bond would succumb not to an adversary's lucky bullet or sneaky booby-trap, but to the failure to properly secure an obscure-but-needed piece of intellectual property or failure to reach agreement as to a thousand-page revenue-sharing scheme. This sixty-year 1961–2021 period was chosen carefully; owing to the secrecy of the terms (even following the transaction's closure in 2022), this Article does not endeavor to describe the acquisition of MGM by Amazon in any substantial detail (this epoch will be left for future scholars to unpack).

The amount of legal work done to attack, defend, protect, license, and reallocate the James Bond intellectual property in the form of novels, films, toys, poster art, comic books, music, and collateral materials is measured not

[1] Ian Fleming, Live and Let Die (Cape Books London 1954).

in hours, but in careers.[2] Lawyers who worked on the litigation portray it a bit like a multi-decade secret agent career, too. Describing his role in the lawsuits against Ian Fleming (primarily involving *Thunderball*), Peter Carter-Ruck says it was "an exciting and demanding relationship of friendship, litigation[,] and much travelling which continued for over twenty years."[3] Luckily for his millions of fans, Bond was somehow able to escape what many law professors and experts thought might be a too-labyrinthine web of contracts and obligations.[4]

While many mysteries remain and we may never learn how the soundtrack revenues from each film were divided or the terms of Ford Motor Company's deal to feature its vehicles in the franchise's films,[5] we do know a great deal from the record and secondary accounts; this Article is the first sixty-year longitudinal review of litigation on this subject. While some threat of litigation is currently circulating and no review of litigation on a major entertainment property will ever be fully comprehensive, the goal here is to examine major controversies and their causes and resolutions, while also tracing the control of key intellectual property during this period.

Spoiler alert: Like all Bond films, this one has a happy ending: eventually, all the core intellectual property ends up pretty much in one place, ready for another few decades of daring secret missions.[6]

I. The Beginning (1930–1961)

The franchise as we know it today begins with a deal negotiated far from Hollywood: this story's genesis is in New York in the summer and autumn of

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[2] Much of the discussion of litigation tactics, including narration by Peter Carter-Ruck, is drawn from facts presented within Carter-Ruck's excellent-if-obscure pseudo-autobiography, *Memoirs of a Libel Lawyer* (Orion 1990), particularly pages 144 through 161 and 210 through 220 of the penultimate edition. Carter-Ruck is better known at law schools for authoring the comprehensive, if often (if law students' complaints are to be taken at face value) staggeringly expensive, red-canvas-clad casebook used in much of the English-speaking world for the study of libel and slander and contempt in law school classrooms.

[3] P.F. Carter-Ruck, Carter-Ruck on Libel and Slander (4th ed., Butterworths 1999).

[4] Carter-Ruck, *supra* note 2 at 151–54.

[5] These aspects are famously among the most secret among the franchise's relationships.

[6] Today, most but not all Bond-related intellectual property is locked up in various entities and licensed or utilized primarily through Eon Productions.

1961.[7] To introduce the scenario, however, one must first meet two of its main characters: Harry Saltzman and Cubby Broccoli.[8]

Herschel "Harry" Saltzman was a legally-savvy, gregarious Canadian film producer who spent much of his life in Buckinghamshire. Having run away from Jewish parents at age 15 in 1930, at the height of the Depression, Saltzman joined a traveling circus and earned enough money to get a one-way steamer ticket to Paris, where he studied under René Clair, who was known for mixing comedic moments into the actions or dialogues of violent or dark characters; this style can perhaps be seen in Bond's one-liner quips after making an escape or killing a henchman. During World War II, he was part of the then-secret U.S. Psychological Warfare Bureau, upon which he loosely based some of the U.S. clandestine bureaucracies with which Bond interacts. During the war, Saltzman bought the film rights for Bond from Fleming for a small sum. He would go on to use his fortune from the Bond franchise to make other films and, ultimately, to take over Technicolor Motion Picture Corp.

Albert "Cubby" Broccoli was an Italian American born in Queens to a family that bought a farm in a then-rural, now-suburban area of Long Island and had moderate success cultivating–you guessed it–vegetables including broccoli. After working a mixture of jobs during the Depression, including being a casket carpenter and a roadside vendor and struggling financially during the war years, Broccoli moved to London. The postwar British government was offering generous film subsidies in the early 1950s and took an interest in making films that featured British heroes in an effort to re-establish its position as the cultural capital of the Western world amidst a brewing Cold War and the emergence of the iron curtain.[9] Looking for literary source material, Broccoli discovered that a Canadian named Saltzman already owned the rights to the Bond character and stories.

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[7] The narrative in this section benefits greatly from two pieces of source material, Carter-Ruck, *supra* note 2, and David Foxton's *James Bond and the Law* 2023 lecture. *See* David Foxton, James Bond and the Law, Address Before the Manchester Business and Property Courts Forum (May 25, 2023), https://www.judiciary.uk/a-talk-to-the-manchester-business-and-property-courts-forum-by-mr-justice-foxton-james-bond-and-the-law/ [https://perma.cc/PLG4-F8YF].

[8] Mr. Broccoli's given name was Albert, though he joked that only his family and the film credits said "Albert." Carter-Ruck, *supra* note 2.

[9] Less known but worthy of watching for the mid-century film aficionado are the three espionage films Broccoli made based on Len Deighton's novels. The Ipcress File (Lowndes Productions 1965), in large part due to Michael Caine's fine performance, stands out among the Deighton-Broccoli collaborations as the best of the bunch.

Broccoli met Saltzman through their mutual friend Cyril "Wolf" Mankowitz, who was a Cambridge graduate,[10] an author and screenwriter, and a frequent customer at the bars of East London where artists and musicians would frequently congregate. At a meeting in London, Saltzman refused to sell the Bond rights to Broccoli but agreed to partner and develop them in conjunction with a major film studio.

Finding a suitable studio was more easily said than done. After several studios refused to take meetings from the duo, United Artists agreed to take a meeting in New York in 1961. The meeting involved United Artists, Harry Saltzman, Cubby Broccoli, and a small number of attorneys. Given that the twenty-five Bond films have today grossed over $7 billion nominally (over $20 billion if one accounts for interim inflation) and that Mr. Broccoli's family has made over $100 million on a single film, it may be incomprehensible to attorneys and law students today that the original governing documents were negotiated in under an hour, involved only $1 million in cash, and were written up in a dozen-page draft, typos and all, by one of the attorneys' secretaries on the only typewriter present.[11]

United Artists was not Broccoli and Saltzman's first choice; they had already shopped the rights to Columbia Pictures, a powerhouse for taking fiction books and turning them into successful movies. Fleming himself had reportedly enjoyed *Our Man in Havana* (1959), a Columbia film that took a rather serious British spy novel and introduced moviegoers to British espionage in an exotic tropical locale with a plot that combined humor, intrigue, and political commentary, not to mention a sexy-but-strong female ally (in this case, Irish redhead Maureen O'Hara's minor but important character). The pair also was intrigued by Columbia's ability to generate lucrative returns: Columbia managed to produce *Our Man in Havana* for under $1 million and to gross just over $2 million (worth approximately $10 million and $20 million if one accounts for interim inflation, respectively). Failing to interest Columbia, where Broccoli's acquaintance Hughes was a significant shareholder, Broccoli and Saltzman's legal entity had only a month left on the option contract before the rights to the Bond novels reverted to Fleming;

[10] Though Jewish students were not rare during the war, especially in the hard sciences, they were certainly not common in the arts or in literature. Like many who attended during the wartime years, Mankowitz found Cambridge. underpopulated and depressing; he was among only a dozen or so students who showed up to see George Bernard Shaw speak at Cambridge in 1942.

[11] Matthew Field & Ajay Chowdury, Some Kind of Hero: The Remarkable Story of the James Bond Films (2018).

time was of the essence and a deal was hurriedly struck in New York with United Artists.

At the time, there were nine recent Bond novels.[12] Ensconced in his tropical resort estate Goldeneye, Fleming had written a new Bond novel every year from 1952 to 1961[13] and hundreds of pages of additional material, sufficient to assemble plenty of additional films or novels. These additional materials and sketches of characters and locations and plotlines, which Fleming referred to as "the scraps" according to many contemporary collaborators, would become a key part of efforts to revive, reimagine, and modernize the character, particularly as the creation of post-Cold-War plotlines became necessary.[14]

By 1961, all rights to develop films based on the Bond novels, with the exception of *Casino Royale*, were purchased by producer Harry Saltzman for $50,000, with a commitment to invest $100,000 toward any properties that would be made into feature films. In the autumn of 1961, in contracts that surely totaled more than a dozen pages in length, Saltzman and Broccoli created a 50/50 split of the Bond intellectual property (except *Casino Royale*) and established that United Artists would enjoy 40 percent of initial box

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[12] For those interested in seeing the longevity and diversity of Bond-related litigation, one need look no further than litigation regarding the very first Bond storyline, *Dr. No*, which happened to share its name with a Continental European luggage brand, the German "Dr No" (with no period after "Dr" and substantial ambiguity as to whether it was "doctor no" or something else when in long-form). That matter, captioned in full Danjaq, LLC v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), unsurprisingly saw the British agent's supervillain nemesis invincible even against the attacks of German intellectual property owners' barristers. *See generally Danjaq*, (T-435/05) E.C.R. II-2097 (RCJ Reports; UK Unified Reporter 2009). This was a revolutionary ruling in European intellectual property law, as prior to this names of products were protected and generally more victorious when put against the rights held as to a fictional character's name or similar "derivative" claims that were not by themselves products in the marketplace; under this older rule, as there is no book or film simply entitled "James Bond," the central demonym in the portfolio might have been vulnerable to head-on assault. For reasons discussed later in the article, the reader will recognize this Dr No / Dr. No dispute was in some ways a foreshadowing of the IP change happening during the epoch this piece covers.

[13] The author's health declined following a heart attack in April of 1961. *See* Anna Mundow, *'Ian Fleming' Review: The Mind Behind James Bond*, Wall St. J. (Mar. 29, 2024), https://www.wsj.com/arts-culture/books/ian-fleming-review-the-mind-behind-james-bond-b5e5299e [https://perma.cc/7TD4-MMPT].

[14] Carter-Ruck, *supra* note 2, at 147–49.

office and trailing revenues, with the other 60 percent split evenly between Saltzman and Broccoli.[15]

The person who didn't get a cut in this deal was Fleming. Broccoli would record in his autobiography that of the $2 million figure for film production for the first film[16] Fleming was entitled to only a thousand dollars with no performance upside.[17] The rights were later re-sold for $6,000 (and no secondary residual paid to Fleming).[18]

This first deal is important to understand primarily because it specifically excludes *Casino Royale*, rendering this title a *rogue property* and separate for the purposes of financing and development.[19] The exclusion stemmed from the fact that *Casino Royale* had already been a "developed property" (show-business language for books having already been adapted for radio, film, or television) and hence the occlusion[20] of these rights after the CBS deal was either unclear or perhaps thought to be substantial. Having *Casino Royale* floating untethered from the main Bond catalogue also gave Columbia Pictures, who previously rejected the Broccoli-Saltzman duo in 1961, a second bite at the proverbial apple. Columbia Pictures would develop the 1967 James Bond film *Casino Royale* (1967), which would both enrage United Artists and confuse fans, though the material is reintegrated into the primary canon thanks to the 2006 film starring Daniel Craig.[21]

How important is the idea of a *rogue property*, or various properties of questionable provenance, in the instance of Agent 007? To quote Chief District Judge of the Western District of Washington:

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[15] Foxton, *supra* note 7.

[16] A cross-license deal with CBS for *Casino Royale* only.

[17] *See* Albert R. Broccoli with Donald Zec, When the Snow Melts 47–51 (Boxtree Publishing Ltd. 1999).

[18] *See* Mark Dent, *The Family Business that Owns a Share of the $7B James Bond Franchise*, The Hustle (Aug. 28, 2021), https://thehustle.co/the-family-business-that-owns-a-share-of-the-7b-james-bond-franchise [https://perma.cc/Z5FU-5FN6[.

[19] A *rogue property* is a piece or subset of an intellectual property portfolio that is cleaved from the portfolio and ends up on a separate arc of development, financing, or ownership from the portfolio's corpus.

[20] A term of art sometimes invoked when rights are perhaps limited but to an uncertain degree. In this instance, *Casino Royale* had already been optioned to be developed into a radio play, a television production, and other properties. *See* Carter-Ruck, *supra* note 2, at 102. This makes the property substantially harder to deal with from a rights standpoint than subsequent, less-complexly-licensed novels. Note this obstacle is very different from the later, much more serious, obstacle presented by the licensing surrounding *Thunderball* and its proposed lineage of sequels.

[21] The 2006 *Casino Royale* film is considered part of Eon Productions canon, though the 1967 *Casino Royale* film is not.

> This case [Johnson v. MGM] hinges on which films should and should not be included in DVD and Blu-ray box-sets of "*all*" James Bond films.[22]

II. The World is Not Enough: But the World Was Bond's Test Market (1962–1983)

Columbia Pictures might have made *Our Man in Havana* and succeeded with it, but the world was changing, and quickly. The film would not, perhaps, have been a hit in late 1962. The campaign strategy to release Eon's (owned by Saltzman and Broccoli) first Bond film was disrupted with a major historical wrinkle.

In 1962, Americans were closely watching the Cuban Missile Crisis[23] and the beginnings of the American-Soviet space race evolved through the autumn of 1962; President Kennedy had just pledged to land a man on the moon and return him safely to earth and Congress had authorized additional funds for what would become the Apollo program in late 1961 and again in multiple appropriations provisions passed in 1962.[24] With such high-stakes geopolitical tensions omnipresent in popular culture and dinner table conversations, that year's most controversial politically-themed film, John Frankenheimer's *The Manchurian Candidate* (1962),[25] drew fire from both the left and right. *Dr. No* (1962), involving a secret location immediately south of the Cuban coastline and a secret society[26]

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[22] Johnson v. Metro-Goldwyn-Mayer Studios Inc., No. C17-541 RSM, 2017 WL 3313963 (W.D. Wash. Aug. 3, 2017) (emphasis added).

[23] Younger readers may not know the Jovian gravity of these events; for those wanting more contextual information on the very start of this tumultuous decade with enough historical distance to make judgments, we suggest the excellent volume Don Munton & David A. Welch, The Cuban Missile Crisis: A Concise History (2011).

[24] As a mixture of defense appropriations, special projects funding, and other tools were used to fund the Apollo program it is difficult to point to any single piece of legislation as the source of Apollo's funding; the most recent comprehensive attempt to match appropriations with cost analysis is Casey Dreier's very inclusive analysis, which uses adjusted cost estimates on a moving-target basis and accounts for interim inflation, linking costs to specific appropriations or budget adjustments where possible. *See* Casey Dreier, *An Improved Cost Analysis of the Apollo Program*, 60 Space Pol. 101476 (2022).

[25] Distributed by United Artists.

[26] "The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to

of villains[27] planning to disrupt the American space program, seemed a bit too "ripped from the headlines" for American audiences.

Weighing their options, United Artists decided to release its first Bond film essentially everywhere in the developed Western world *other than* the United States. Released in October 1962 in every major market except the United States, *Dr. No* grossed $41 million worldwide on a production budget of just over $1 million. It would gross $16 million in America, but would not go into wide U.S. release until 1963 after the Congressional fallout from the Cuban missile crisis was wrapping up and Americans diverted their attention to an invasion from Liverpool, otherwise known as two new Beatles records hitting the charts.[28]

Nevertheless, the box office success of *Dr. No* abroad and at home, in that order, impressed United Artists and made Broccoli and Saltzman $10 million each. At the time and today, a windfall necessitates a call to the tax attorneys to fortify one's position and lessen one's burden. The structure invoked here was both simple and effective; a UK-based entity called Eon Productions (originally, and sometimes even recently, EON)[29] would make the films and control certain rights, including creative decision-making rights, while the core rights or property rights to the underlying intellectual property would reside in a Swiss entity, Danjaq.

GmbH.[30] Because profits would flow directly to Danjaq, UK taxes would be avoided. The agreement, referred to as a "distribution agreement," allowed third parties (notably United Artists and, post-acquisition, MGM) to distribute films to the monetary benefit of Danjaq and with little effect as to Eon's finances.

This is what is typically called a V-scheme or "incomplete triangle" scheme,[31] wherein a first entity provides capital to a venture but a second

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secret proceedings." John F. Kennedy, Address at the Bureau of Advertising (Apr. 27, 1961) (transcript available at the Kennedy Presidential Library and Museum).

[27] SPECTRE.

[28] The Beatles, With the Beatles (Parlophone 1963) and The Beatles, Please Please Me (EMI 1963).

[29] The name, whether capitalized or not, is an acronym for "everything or nothing," which Broccoli is said to have claimed described his negotiation style.

[30] The Danjaq entity would eventually relocate to Delaware. The strange name, pronounced "DANE-JACK," is a mash-up of the business partners' wives' given names: Dana Broccoli and Jaqi (Jacqueline) Saltzman.

[31] The triangle is incomplete because the second entity, in a diagram, never pays the first entity a share of its profits, though it may make repayment arrangements or make the first entity fully, but not more than, whole. In the most aggressive instances, there may be intentional defaults between the entities to "true up" key amounts.

entity collects amounts in the event of the venture's success, often in another jurisdiction. This creates tax losses in the first entity which, depending upon the entity's home jurisdiction and structure, can be used to shield its owners or partners from tax liability. Meanwhile, gains accumulate in the second entity while being free from the tax burden that might develop if the pecuniary rewards from the venture's success attached to the first entity.

District Judge Wilson describes the arrangement, dramatic Biblical prelude and all, in Danjaq v. MGM:[32]

> In the beginning, harmony prevailed among Bond's assistants. Danjaq, S.A. ("Danjaq") produced Bond films and MGM/UA Communications Co. ("MGM") distributed them. Sixteen Bond films in all, from "Dr. No" to "License to Kill," were produced and distributed under this arrangement, going back 19 years to the 1962 Distribution Agreement between Danjaq and MGM (the "Distribution Agreement").

Quickly, Bond was becoming more than a savvy rights purchase; United Artists was talking about potential sequels and Bond would soon be an international business to be professionally managed. And everybody, or nearly everybody, would soon get rich and subsequently sued. So how did the rights move from being Fleming's personal property to being distributed among various trusts and corporate entities?

In the ever-pertinent words of nuclear physicist and arms proliferation expert Christmas Jones, Ph.D.[33] in *The World Is Not Enough*: "It's complicated!"

It seems that only one U.S. court decision describes the entire chain of rights that connects Fleming to United Artists and MGM in the more modern (post-1964) context, and that is an obscure case from the Southern District of New York in 2006 captioned, in cryptic Bond fashion, *Legislator 1357*.[34] *Legislator* describes Fleming's *modus operandi*, which had become

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For voluminous scholarship on the topic of tax avoidance through this and similar planning, *see generally* the excellent work of Daniel Hemel and others at NYU.

[32] Danjaq SA v. MGM / United Artists, 773 F. Supp. 194 (C.D. Cal. 1991).

[33] Played by Denise Richards to the delight of teenaged boys of the era. Her character's throwaway line, "It's complicated!" seemingly pertained to everything from nuclear physics to geopolitical turmoil and became a quotable-if-shallow one-liner philosophical musing in the Gen X era of *Wayne's World*, *Beavis and Butthead*, *Clerks*, and *Bill & Ted's Excellent Adventure*. So connected was the quote with Dr. Jones / Ms. Richards that the Bond girl's 2008 network reality show was entitled *Denise Richards: It's Complicated!*

[34] Legislator 1357 v. MGM, 452 F. Supp. 2d 382, 385–86 (S.D.N.Y. 2006).

rather sophisticated by this point (circa 1962, after the original deal with Broccoli and United Artists).

As described in *Legislator*,[35] Fleming would transfer rights to a book publisher–in that case, Glidrose Publishing, Ltd.; Fleming was the principal shareholder in Glidrose, a company limited by shares.[36] Fleming would, however, typically retain other media rights, which included film, television, serial, and comic book or manga rights to develop the material in each new novel.[37] One week later, Fleming would transfer these remaining, valuable multimedia "non-book" rights to a trust created for holding such rights to his books. Confusingly, these non-book rights are held in a vehicle referred to in various litigation as the "Book Trust" so we will continue to use this name for the sake of consistency for scholars who are reading this article and those court decisions together, even though the nomenclature is somewhat misleading on its face.

Later, the Book Trust, as a function of its contractual arrangement with Saltzman, assigned the film and television rights in the work to Eon Productions;[38] the conveyance was enormous in scope and time:[39] "throughout

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[35] *Legislator* and the exhaustive historical text on the topic by Field and Chowdhury, *supra* note 11, disagree slightly as to how Fleming made these intellectual property conveyances and whether this structure was made on advice of counsel or at the suggestion of Saltzman. We have no new research to contribute to this aspect and concede some of these details may, at this point more than sixty years onward, have been lost to the sands of time. However, it does make some sense that Fleming would have made, or at least considered making, intermediate transfers to segregate book rights from other rights as the two kinds of rights had substantially different markets of potential licensees and Fleming must have realized by 1961–62 that the film and multimedia rights had the potential to be worth far more than the serial publishing rights to the novels. Fleming was also reasonably sophisticated in the use of companies, including holding companies, as illustrated by his purchase of Goldeneye as his private residence in Jamaica using a local company controlled by a tax-insulated special-purpose holding company in Gibraltar.

[36] The British equivalent of a stock corporation, similar to an American C-corp. *See generally* David Kershaw, Company Law in Context (2d ed. Oxford 2012).

[37] Importantly, this procedure, while uniform across most of Fleming's novel intellectual property, does *not* illustrate how rights were transferred for *Dr. No*, *Casino Royale*, or *Thunderball*.

[38] Though this arrangement was originally reached with Saltzman, it operated to the benefit of Saltzman and Broccoli as 50/50 partners. *See generally* the substantial (over 800 pages) tome produced by Field & Chowdhury, *supra* note 11, at 252–59 (2018).

[39] *Legislator*, 452 F. Supp. 2d at 385; idiosyncratic British capitalization as in original.

the World for the entire period of copyright and all extensions and renewals thereof." In the same conveyance instrument, it was warranted that "the Trustees are the absolute owners of the rights herein intended to be granted and assigned to the Purchaser hereby" and offered to indemnify any defects thereof.[40] Eon then assigned its interest in the work to Danjaq of Switzerland and Danjaq assigned its interest to United Artists.

United Artists and MGM then cooperated to produce a feature film based on the material in question.

The flow of rights from author to trust to production partner, who would then seek a producer-distributor pairing (usually Eon in tandem with United Artists, as in the case of *Goldfinger*), is a template, with mostly minor deviations, for how Fleming's books became films,[41] with the exceptions of *Casino Royale*,[42] *Thunderball*, and *Never Say Never Again*,[43] and any post-2022 films.[44]

But it leaves out a key figure that would animate and amplify future litigation: Kevin McClory.

III. Kevin McClory and the Alternate Bond Franchise (1962–1983)

Before and while *Dr. No* was printing money at the box office worldwide, in Jamaica Fleming was creating a Bond novel roughly every year.[45] However,

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[40] *Id.*

[41] Omitted here for relevance is the trust mechanism designed to distribute proceeds to Fleming's widow and other family members. Though this affected the total money involved in a slight way (less than $10 million in total value transferred in 2023 dollars), it had no effect on rights to develop the material into films.

[42] Unusual because of its licensing for radio, then television (CBS), and multiple films.

[43] Unusual because these are McClory-Sony productions, as discussed in detail *infra*.

[44] It is unknown how licensing revenue flows will be handled following Amazon's acquisition of MGM. *See generally* Amazon, *Amazon and MGM Have Signed an Agreement for Amazon to Acquire MGM*, Amazon Press Ctr. (May 26, 2021), https://press.aboutamazon.com/2021/5/amazon-and-mgm-have-signed-an-agreement-for-amazon-to-acquire-mgm [https://perma.cc/DXL7-TLJX].

[45] *See, e.g.*, Ian Fleming, Casino Royale (Cape Books London 1953); Ian Fleming, Live and Let Die (Cape Books London 1954); Ian Fleming, Moonraker (Cape Books London 1955); Ian Fleming, Diamonds Are Forever (Cape Books London 1956). Fleming was overwhelmed with long, flowing sections of creative ideas while at his jungle estate, Goldeneye, in Jamaica, but often found he was too distracted or busy to write long sections of novel text when in England. It is often

by 1963, the well of imagination was drying up and Fleming explored an assortment of source material, including a treatment written by Jack Whittingham, a qualified solicitor, wherein a secret agent battled a shadow cartel called SPECTRE, engaged in underwater combat and prevented the acquisition of a nuclear weapon by a non-state terrorist actor. Fleming may have gotten too inspired, as these core elements were all transported into the screenplay for *Thunderball* (1965).

As Kevin McClory had hired Jack Whittingham to write the treatment, the two men decided Fleming had stolen their ideas and expected compensation. The two brought an action in the Chancery Division in London that would attempt to hobble the release of *Thunderball*, add confusion related to the rights to James Bond, and effectively remove the title from the core intellectual property trove, subjecting the rights of *Thunderball* to a multi-decade dispute. Things were made more complex by Fleming's death in 1964 during the litigation.

Salzman and Broccoli correctly perceived McClory as a major problem for their plans to develop further Bond property. If McClory and Whittingham could claim *Thunderball* was a prerequisite to later expected Bond successes, and convince a court of the same, they could exact a pound of flesh from every post-*Thunderball* Bond production. Something had to be done, Salzman and Broccoli realized, and quickly! Their solution was to grant McClory a writing credit and a 20 percent profit share in *Thunderball* in exchange for Salzman and Broccoli receiving the rights to the film's intellectual property for ten years with an explicit reversion (no option to renew).

Though ten years must have seemed ample to Salzman and Broccoli's lawyers in 1963 when the bargain was struck, it proved manifestly inadequate. When the ten years expired and the rights to monetize *Thunderball's* intellectual property returned in perpetuity to McClory, he was ready to exploit them in full measure. To ensure Salzman and Broccoli wouldn't brush him off, the savvy McClory opted to co-author[46] the script for the next Bond installment with Sean Connery, the actor upon whom the film franchise then relied.

This "sequel" script,[47] which reinterpreted elements of *Thunderball* and revived the plot elements of an evil global conspiracy called SPECTRE

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said, though difficult to verify, that Fleming once wrote a book at Goldeneye in only a matter of weeks. *See* Field & Chowdury, *supra* note 11, at 98 and 128–30.

[46] There is a third credited co-author, Len Deighton, who is primarily known as a novelist rather than a screenwriter. Deighton does not hold any rights relevant to the lineages of litigation discussed here.

[47] McClory was careful to maintain his films were sequels to *Thunderball* and not attempts to co-opt the entire Bond IP trove, though he would later attempt

and an archvillain named Blofeld, was called *The Spy Who Loved Me* (1977). Controversially, Eon and Danjaq removed all references to SPECTRE and Blofeld but left the rest of the film intact and, like the films before it, this film enjoyed great commercial success. Annoyed but undaunted, McClory signed a deal with Paramount in 1976 and announced in 1977 that he'd received $22 million to make a new James Bond film that would be filmed in the Bahamas; he held close control over locations, plot elements, and casting, securing Sean Connery to star in the film in the spring of 1978.

IV. A Brief Interlude as to Expanding IP Protection for Characters and Their Attributes

Little did he know, in constructing the scaffolding for this competing or parallel Bond lineage of stories,[48] McClory was stumbling around amidst–and occasionally interacting with–some of the most important changes in the intellectual property law of the twentieth century. McClory was creating what he would contend was a valid lineage of Bond canon, while Eon and others would argue McClory's work beyond *Thunderball* was non-canonical, perhaps just fan fiction.[49] Of course even the word "canon," though today perhaps used more in debates over Marvel and *Star Trek* characters than in any other setting, traces its origins to the Greek (*kanōn* meaning a rule or measure or, earlier, a physical measuring rod).

The idea of a canon may be old,[50] but its meaning is ever-changing. Whether the law, from an intellectual property standpoint, operates to ignore, defend, or merely tolerate elements of canon was somewhat undecided

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the latter stratagem. *See* Lorenzo Semple Jr., Never Say Never Again (Warner Brothers, 1983), https://thescriptlab.com/wp-content/uploads/scripts/68070-Never-Say-Never-Again-1983-by-Lorenzo-Semple-Jr.-rev.-by-Dick-Clement-and-Ian-La-Frenais.pdf [https://perma.cc/7VHD-GV4M].

[48] And a litigation campaign to, if needed, accompany it.

[49] Fan fiction is a 1990s term for people creating narrative or pictorial art (including anime, film, and other media) that uses the setting or characters from established and protected works but in some new context that creates an original work of its own. For more on the legal status of this art form, *see* Aaron Schwabach's comprehensive and recent volume on the topic, Fan Fiction and Copyright (Routledge 2016).

[50] And to extinguish all uncertainty, it is: by the time the debate described in the Mishnah appears in Jewish law in the second century, that debate is already (at minimum) five centuries old and includes not only disputes over the status or provenance of some books of Ketuvim, but also more fundamental debates about what the Hebrew Bible can fairly be described as including; during the Hasmonean dynasty, debates of canon and non-canon are frequent and the modern Jewish canon

and even disregarded until the McClory v. Eon[51] era of litigation. Prior to the litigation revolving around *Thunderball* (and its potentially unlimited[52] sequel progeny), the title and verbatim text of a work was protected, but the use of characters (like caricatured, bizarre archvillain Blofeld) or settings (like the logistically-absurd *intramontagne* lair of Blofeld) or organizations (like the mysterious SPECTRE collective antagonist) was less clearly (if at all) embraced by protections.

In essence, prior to the Second World War, one could lift a character from one book or setting and plop him (or her) in another story with few, if any, legal worries. Neither American nor British law expressed much concern for this practice, and "variation" and "adaptation" had survived legal tests as ways to originate new works rather than modes of theft, particularly in the context of jazz music.[53] The litigation of this era (1960s–70s) in many ways backfired for Broccoli and Eon, with judges taking notice of the then-relatively-new recognition of character protections.

This was the key environmental factor that changed over the course of the McClory litigation, and judicial discussion of *Thunderball* threatened to repatriate archvillain Blofeld and other key plot elements to McClory, leaving Salzman and Broccoli with an antiquated superspy with no obvious purpose.

(five books of the Torah, eight books of the Nevi'im, and eleven books of the Ketuvim) was hardly a settled matter, even as a matter of intraregional consensus.

[51] This is not an actual caption of any dispute, but instead used as a moniker for this epoch of discord.

[52] Salzman and Broccoli weren't threatened by *Thunderball* itself, but rather by the arrangement's potential to create *Thunderball* sequels, a parallel set of competing products for their Bond films decades into the future. *See, e.g.*, Danjaq LLC v. Sony Corp., 263 F.3d 942, 960 (9th Cir. 2001) (discussing possibility of sequels and spin-offs).

[53] *See*, *e.g.*, the tripartite-captioned Berlin v. Daigle v. Russo, 31 F.2d 832 (5th Cir. 1929). *But see* in principle perhaps the most famous IP case that never reached trial: Bowie v. Van Winkle (S.D. Fla. circa 1990) (complaint moot, matter settled prior to trial). Whether deviations from jazz standards, digital music sampling, DJ live performances, and other kinds of art are more like one thing or another is an area of IP of its own, and we refer interested readers to Jason H. Marcus, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 Hastings Comm. & Ent. L.J. 767 (1990) for an amusing and decidedly contemporary take on these matters penned in the same era *Bowie v. Van Winkle* simmered. To understand the current state of play in this area of law, and the difficulty of crafting bright-line rules, the sometimes-acclaimed-and-oft-critiqued thoughts of the Sixth Circuit in *Bridgeport Music v. Dimension Films* are a must-read; *see* 410 F.3d 792 (6th Cir. 2005).

As a unanimous Ninth Circuit wrote in summarizing McClory's arguments,[54] "McClory argue[s] he possessed the rights to both the novel *Thunderball* and the materials developed during the writing of the initial *Thunderball* script, he also possessed the rights to certain plot elements that first appeared in those works: namely, the 'cinematic James Bond' character,[55] SPECTRE, the villain Ernst Stavro Blofeld, and the theme of nuclear blackmail."[56] Note the judge correctly identifies the two things claimed here: rights to the underlying material and, separately, to the surrounding characters, themes, and key elements.

Prior to the late sixties, plaintiffs' bullets could be dodged with the finesse of paraphrasing or in the guise of parody, rendering civil litigation an expensive and largely impotent way for IP originators to police the use of popular characters in unintended settings (even if those settings might jeopardize or devalue the character's credibility for the original publisher). However, changes in law on both sides of the Atlantic shifted to recognize fictional story elements as central to the value of fictional franchises, to the massive benefit of firms like Disney and Lego.[57]

The character, starting in the late 1960s, began to be recognized as a molecule with two atoms: the name and then the traits that define the character. So the name of the character is James Bond or Agent 007, but his traits include his weapon of choice (Walter PPK pistol) and his favorite cocktail preparation (shaken not stirred, of course).[58] The transition from the 1950s (where the protection was textual and technical)[59] to the 1970s-80s (where

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[54] We cite Judge McKeown here both for her precise prose and her succinct summary of McClory's argument, though this passage comes from a round of litigation in which these McClory arguments did not prevail.

[55] This argument is carefully designed to sever the two characters, leaving Broccoli and Salzman with an outdated 1950s Beretta-carrying, Bentley-driving, cigar-smoking, uptight Oxbridge version of Bond and allowing McClory to own the popular, updated, Walther-carrying, Aston-Martin-driving, athletic-action-hero, sexually-liberated Bond of the films, a protagonist now familiar to global audiences.

[56] *Danjaq LLC*, 263 F.3d at 948.

[57] Disney is an American multimedia production house, holding company, and hospitality services operator. Lego is a Danish multimedia holding company, major plastic recycler, and manufacturer of physical educational toys.

[58] Brylawski's article from the mid-seventies must have seemed minor and obscure at the time, but today is the gold standard of contemporary work on this topic. *See* E. Fulton Brylawski, *Protection of Characters-Sam Spade Revisited*, 22 Bull. Copyright Soc'y 77, 78 (1974).

[59] To understand the state-of-the-art in the 1950s, we recommend the still-underrated on-point article by Kellman: Leon Kellman, *The Legal Protection of Fictional Characters*, 25 Brooklyn L. Rev. 3 (1958).

the protection became contextual and thematic)[60] was extreme and hyper inclusive; by the start of the 1980s it was widely-accepted that a character's "association with the other designated characters and his outlook or view of life" were protected,[61] despite not being exhaustively-described in the originally-protected text.[62]

To understand the distinction between, and radical departure from, the original rule (where textual content was protected but contextual content was not) and today's more inclusive doctrine, one need only examine interpretations of fair use and parody post-WWII; fair use doctrine and parody still exist, but are narrowed substantially.[63] Today, using any more than needed to "conjure up the original" or indicate[64] what is being lampooned is risky.[65] This parallels increased postwar momentum in branding/advertising-related litigation[66] and enhanced protections in the late twentieth century for celebrities,

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[60] *See generally* Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 Wis. L. Rev. 429 (1986).

[61] Quoting from Roger L. Zissu, *Whither Character Rights: Some Observations*, 29 J. Copyright Soc'y 121, 122 (1981).

[62] Though we hesitate to mention a four-factor test that is applied with little uniformity of outcome, at least in theory the test involves 1) purpose and kind of use of a character, 2) nature of the copyrighted work itself, 3) amount used relative to the scale of the derivative work or in some interpretations degree to which the derivative work depends upon the borrowed character, and 4) effect upon the future market value of the borrowed character. *See generally* 17 U.S.C. § 107 (1988).

[63] Today, using nearly anything referential to iconic characters Mickey Mouse or Donald Duck risks evoking these well-legally-protected Disney characters. Walt Disney v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978). *But see* Lyons P'ship v. Giannoulas, 179 F.3d 384, 388 (5th Cir. 1999) (team's sports mascot "killing" annoying singing purple tyrannosaurus aesthetically similar to Barney the Dinosaur was humorous parody and did not injure Barney's marketability and caused no confusion as to licensing).

[64] Characters, setting, music, and other cues may communicate to viewers what is being parodied, but protection is not unbounded; for instance, inserting a lightsaber-powering-up-like sound effect with comedic timing when a male actor reveals his private parts in a pornographic video does not *per se* infringe upon Lucasfilm's rights. *See* Lucasfilm Ltd. v. Media Mkt. Grp., Ltd., 182 F. Supp. 2d 897, 900–01 (N.D. Cal. 2002) (controversy involving pornographic video meant to parody *Star Wars*-related content but not copying any specific plot elements from franchise films).

[65] *Walt Disney* at 756–57. *See also* Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108, 115 (N.D. Cal. 1972); the authors offer a warning to readers, however, that the trial court (N.D. Cal.) appears to apply the "no other means available" standard to defendants' actions, which is higher than standards typically applied in such cases.

[66] *See*, *e.g.*, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822, 827 (9th Cir. 1974) (race car driver's car in "Marlboro red and white" livery distinctive and part of driver's marketable likeness or commercial image).

who began to police use of their catchphrases and other identifiable characteristics in settings that might have, years prior, been seen as acceptable or parody.[67]

The general trend, which shows little sign of abating, has been toward more control for property owners and less latitude for subsequent derivative content creators. Even in the past twenty years we've seen continuing expansion of owners' rights; one wonders if today the same result would be reached in *Mattel* (9th Cir. 2003)[68] in the wake of Greta Gerwig's *Barbie* (Mattel / Warner Bros. 2023). In that case, the Ninth Circuit concluded that even though the derivative work used the identifiable Barbie character owned by Mattel and did so in ways Mattel found objectionable (including due to nudity, narration, context, and message) this production of new media featuring Barbie was fair use.[69] We posit today, on the same facts, in the same venue, the defendant party might not be so lucky.

V. The Blofeld Falls Far (Enough) From the Tree

Obviously, there is an enormous gulf between strictly protecting the verbatim text of a novel or comic book or screenplay and instead protecting the penumbra of ideas surrounding a character. If one envisions a well-known fictional person like Batman, we can associate him with Gotham City (especially its rooftops and alleyways at nighttime), high-tech gadgets, his loyal butler Alfred, his various love interests, his conspicuous customized automobile, his alter ego Bruce Wayne's ties to the military-industrial complex, a rooftop spotlight used to invite his participation in crime-fighting, and the list goes on and on… wait: is everyone who is summoned via a spotlight in the sky a theft of Batman's adjacent intellectual property?

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[67] *See*, *e.g.*, Carson v. Here's Johnny, 698 F.2d at 832, 836 (6th Cir. 1983) (litigation to prevent unlicensed humorous use of Johnny Carson's "Here's Johnny" catchphrase to market port-a-potty-style portable cabinet toilets); *see also* Ali v. Playgirl, Inc., 447 F. Supp. 723, 726–27 (S.D.N.Y. 1978) (litigation by eponymous famous boxer seeking to prevent use of "the greatest!" as catchphrase inexorably intertwined with boxer's successful career).

[68] *See* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

[69] *Accord* Mattel v. MCA Records, 296 F.3d 894 (9th Cir. 2002) (Judge Kozinski concludes 1997 Aqua song "Barbie Girl" successfully parodied Barbie as "a bimbo" invited to "go party" rather than trampling Mattel's rights).

And what if the allegedly-infringing art in question involves a milkman summoned via spotlight rather than a crime-fighter?[70] Is the Beretta-holstered Bentley-driving Bond from the books covered or the Walther-carrying Aston-driving Bond from the films covered? Or some of each or both so long as the character's love interest is named Vesper?

Attitudes toward fictional heroes (and villains, fear not of being left out, Pan Blofeld![71]) have changed, as have their levels of legal protection. As recently as 1951 (when Fleming was in his early forties and still an active field-work asset of Her Majesty's Secret Intelligence Service), the Second Circuit[72] wrote (on the topic of comic book heroes and the means of recourse available for publishers to enforce their rights), "In the case of these silly pictures nobody cares who is the producer," while that same court would take what can only be described as the opposite view one generation later.[73]

McClory's litigation, which begins with saber-rattling in the 1960s, would prove well-timed and his recruiting of Fleming as a credited screenplay author very savvy. The buttressing of McClory's filmmaking efforts as 1) direct sequel(s) to *Thunderball*, 2) efforts with not only the blessing but the direct involvement of Fleming himself, and 3) films explicitly allowed via his arrangement with Salzman and Broccoli positioned him not as a mere "misuser" or "trespasser" of the Bond intellectual property, but rather as a meritorious and explicitly-allowed promulgator of further "official" Bond adventures.[74]

This gave McClory unusually powerful ammunition to defend *Thunderball* and the films to follow, and each case he won must have made major studios and publishers uneasy, as holders of narrow licenses or restricted rights could claim they were not returning to the primary trove of IP but instead merely developing sequels to, or expansions of, their own IP in the style of what McClory was doing. Worse for the studios and publishers, these

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[70] This example may seem absurd but is no more absurd than many fact patterns that are contentious today.

[71] *Pan* seems the right *prélude*, as Blofeld's character is Polish by origin.

[72] National Comics Publications v. Fawcett Publications, 191 F.2d 594, 603 (2d Cir. 1951).

[73] *See*, *e.g.*, Warner Bros. v. ABC Television, 530 F. Supp. 1187 (S.D.N.Y. 1982), *aff'd*, 720 F.2d 231 (2d Cir. 1983); though, it is worth noting, the importance of recognizing and defending these rights was seen as early as that same year of *National Comics* on the west coast, *see cf.* Warner Bros. v. Columbia, 102 F. Supp. 141 (S.D. Cal. 1951).

[74] And this is to say nothing of Connery's presence in both the Salzman and Broccoli productions and the McClory productions, making the war between Eon and McClory look, from velvet seats in the cineplex, more like a truce.

mavericks might enjoy financial backing from big players, as McClory found with Warner Bros. as a distributor for his *Thunderball* and *Never Say Never Again*.

But other creators were not so lucky as McClory to timely fortify their legal positions. Many were stuck with IP partly reliant on or derived from unrelated portfolios that could not be further developed without risk of litigation or could not be sold without the blessing of heretofore unrelated parties.[75]

How did the law in this important area change so quickly and radically?[76] The short answer is the right answer in most cases of fast, unexpected change: technology.

Undoubtedly, part of the transformation of this area of law comes not from comic books or "grown-up" books but rather from the internet-connected computers now so familiar to us. The fact that software could be protected by copyright law in the United States (under the 1976 Copyright Act[77]) led to the concept that perhaps video files and other media were really more like software than like books.[78] By the late eighties or early nineties, this not a stretch metaphor but rather became the prevailing view.

By the mid-1970s, it became clear that characters, costumes, and defining contextual clues could be damaged[79] by misportrayal, parody, and misappropriation. The cartoon section of *Playboy Magazine*, a periodical people mostly read for the articles,[80] once playfully manipulated well-known comic

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[75] The inability for independent comic book publishers to have their characters visit Gotham or fight with popular villains likely contributed to the death of smaller publishers in the 1970s and 1980s. *See* Thomas A. Crowell, Comics and Controversy: A Brief History of Comic Book Publishing (2014).

[76] For a less dramatic, more incremental, summary of these changes, *see* Michael Todd Hefland's excellent "now that the dust is settled" summary from the early 1990s: Michael Todd Hefland, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 Stan. L. Rev. 623 (1992).

[77] Public Law 94-553 (19 Oct. 1976 effective immediately and, in a limited sense, retrospectively).

[78] For more on how this metaphor was cemented into the façade of blackletter law, *see* Louis Peter Pataki Jr., *Copyright Protection for Computer Programs Under the 1976 Copyright Act*, 52 Ind. L.J. 503 (1977).

[79] The damage here is to the character's franchise value and potential for reuse in future prequels, sequels, or spin-offs.

[80] This is an allusion to a common defense of *Playboy*, not an empirical assertion as to the male majority's revealed preferences. *See* Zoe Chance & Michael I. Norton, *I Read* Playboy *for the Articles!* (Harvard Bus. Sch. Working Papers Series 2009, Paper No. 10-018).

book characters and caricatured politicians in ways that would make modern broadsheet readers blush but this ended abruptly with the arrival of the seventies and a new IP regime.[81] Whether a loincloth-clad muscular primitive *was Tarzan* or *simply similar-to-Tarzan* was a key question at issue in *Edgar Rice Burroughs v. High Society Magazine82* and a close enough call to scare off many a subsequent parodier-to-be. It was evident by then that non-licensees hoping to use recognizable characters would need to tread carefully if they did not seek to become parties defendant. This meant that Salzman and Broccoli had an enemy in the form of McClory, but likely would not have new Bond appropriators to fight off.

The McClory problem was a nonperipheral, but instead central, IP headache for Salzman and Broccoli. As a result of including characters and key plot features within the ambit of a given IP portfolio's protections, Bond's archenemy Blofeld and the evil SPECTRE organization fell on McClory's side of the fence (Blofeld was played by Anthony Dawson in *Thunderball*). As a result, Bond ran around the world for over a dozen Salzman-and-Broccoli films, which must have felt like *Eons* (pun much intended)[83] to Salzman and Broccoli, chasing lesser baddies and solving rudimentary puzzles. Without the ability to mention Blofeld and SPECTRE, Bond was an unbelievably overskilled, overpowered, overintelligent protagonist up against wimps and chumps–it was like watching Firpo knock Dempsey[84] out of the ring with no second round.

In essence, Bond was a troubled-orphan-turned-killer with all the tools Fleming could imagine and little to do with them–much like the author

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[81] Perhaps no *Playboy* comic strip illustrates this more vividly than *Playboy*'s *Little Annie Fanny*, a strip that ran from 1962 and 1970 that oscillated between jarring pedophilia and misdemeanor-grade poor taste in its depictions of a young girl eerily similar to *Little Orphan Annie* (a 1920s *Chicago Tribune* strip later nationally syndicated) and her insatiable salivating benefactor Sugardaddy Bigbucks with occasional cameos from real-life people recently in the tabloids for brushes with girls of younger vintage (in an episode that in some courtrooms today might teeter on the edge of defamation, Terry Thomas makes an appearance as Huck Buxton and takes a crack at bedding young Annie, Thomas then having recently filmed the risquély-named *Operation Snatch* where he signals an interest in Jackie Lane, more than 25 years his junior).

[82] 7 Media Law Reporter (BNA) 1862, 1863 (S.D.N.Y. 1981) (dealing with lewd depiction of muscular primitive character who may or may not have been reasonably confused with Mr. Burroughs's work on *Tarzan*).

[83] "Eon" Productions being a central corporate vehicle in the Salzman and Broccoli empire.

[84] Probably the most important boxing rout of the interwar period.

himself, a man full of diplomatic secrets and spycraft abilities now fixing himself Vespers[85] to medicate boredom, drinking alone in the tradewind twilight of Jamaica.[86] Embroidered in Blofeld and SPECTRE was Bond's purpose; without them, Bond was an answer to a question nobody was asking.[87] And, like Bond, Salzman and Broccoli were in need of a villain of similar skill and ability to spar with, and they'd found it in McClory who claimed to have "transformed the supposedly violent and alcoholic James Bond of the Fleming books into the movie character who is so beloved, recognizable and marketable" today.[88]

VI. Preventing McClory's Sequel Strategy—But How?

This intellectual property jurisprudential interlude complete, we now return to "your regularly-scheduled programming" in the form of the main branch of Bond's intellectual property family tree–and its attempts to prune any green, competing McClory branches. Upon learning of this *Thunderball*-descended rival Bond production lineage, Salzman and Broccoli worked with Ian Fleming's estate and MGM to bring a hailstorm of litigation against McClory, who was now adequately financially backed and well-enough acquainted with the legal system to be undaunted. Broccoli correctly appraised

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[85] Fleming never ordered the famous drink at a bar, feeling it was almost always made incompetently by barmen in real life (even when the novel-style instructions were given), but did fix and shake the drink for himself on occasion. Field & Chowdury, *supra* note 11, at 262–63.

[86] Fleming sometimes cited the lack of things to do in Jamaica as part of its appeal as a place to write; there was little to do on long afternoons but admire the horizon, go over his notes, and write another chapter. Boredom (or, to use a kinder word, restlessness) was both a long-term affliction and an authorial asset for Fleming. Carter-Ruck, *supra* note 2, at 72–75.

[87] An allusion to President Johnson's summer-of-'68 remarks regarding nuclear weapons negotiations with the Soviets, a key diplomatic achievement not anticipated by Fleming's nuclear blackmail Bond plotlines. Johnson signed the treaty on 1 Jul. 1968, famously quipping that nuclear bombs are an answer to a question nobody's asking. Today, thankfully, the question remains unasked and no nuclear device has been deployed in anger (or detonated outside a controlled test environment) since August of 1945; contrary to four Bond plotlines, no terrorist or rogue / non-state organization has ever been in a position to credibly threaten a nuclear attack (nor have NATO-aligned agents needed to fight an evil genius who lives inside a mountain with his henchmen and a cat).

[88] McClory's position as restated by the Ninth Circuit in Danjaq LLC v. Sony Corp., 263 F.3d 942, 947 (9th Cir. 2001).

McClory this time as a patient and crafty defendant, unhurried, and in a better position to run out the clock; Broccoli needed to keep producing films to impress the studio bosses and secure funding for future Bond-related projects, things that would be hard to do with McClory in the way.

Broccoli was astute, but McClory had a plan. It was clever, if highly unusual. McClory would work closely with Paramount to create a film that was in every way a sequel to *Thunderball* but would not be promoted as such and would never mention the original film. This was carefully orchestrated to allow McClory to argue in future litigation that this new film was simply a continuation of his indisputably-permitted utilization of the *Thunderball* intellectual property, though audiences would see the new film as an expansion of the Bond franchise; done carefully and correctly, it would allow McClory to produce his own lineage of Bond films with powerful villains (Blofeld and his SPECTRE network of operatives) while Salzman and Broccoli would be stuck producing Bond films without the canon[89] antagonists.

The title *Never Say Never Again* (1983) was chosen, with "*Again*" being relevant because it further allowed McClory, if needed, to defend the film as a sequel.[90] The suit to enjoin and prevent the release of this film[91] by Broccoli and others was in the papers and represented by celebrity counsel, but it was too late.

Never Say Never Again was released and remains the most recent Bond film to not be produced by Eon, to not be distributed by United Artists or MGM (it was distributed by Warner Brothers), and to be principally funded by Paramount, earning over $160 million on a budget of $36 million

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[89] Not every Bond novel revolves around Blofeld and SPECTRE, but as Bond changes his mission profile, fieldwork identity, and female companion, the enemy provides a sort of point on the horizon for readers who otherwise would be without continuity (continuity being one thing that cannot be offered by the title character, a constantly-identity-changing spy who occasionally provides unreliable narration and displays erratic behavior).

[90] The continuity rule for characters and fictional places would protect this maneuver generally, if not specifically, even if McClory had not chosen to use the word "Again," but at this point the teapot of litigation was boiling at such a high temperature that its whistles could be heard across the Atlantic. The same principle would later protect a wide variety of parties far beyond the Bondiverse.

[91] This case is normally captioned The Right Honourable Raymond Arthur Clanaboy O'Neill v. Paramount Pictures Corporation and was not reported; because the plaintiff was ostensibly Fleming's estate, it was heard in that context: Aldwych, RCJ, Chancery on Special Petition. Sam Stamler QC represented the estate and the various co-plaintiffs, while Leonard Hoffmann QC victoriously defended McClory and Paramount.

($480 million and $108 million today, accounting for interim inflation), a big success. In the same year, Broccoli and Eon would release *Octopussy* (1983); because Connery was filming McClory's film, Eon had to continue filming with the less popular[92] Roger Moore.[93] United Artists came out ahead of Paramount that year, as *Octopussy* made $187.5 million against a budget of $27.5 million ($562 million and $82 million if one accounts for interim inflation).

VII. A Fresh Era of Litigation (1983–Present)

As mentioned earlier, for all his talents, Ian Fleming was not a screenwriter and had struggled to produce both radio plays and screenplays periodically during his writing career. And he would no doubt come to regret working with Whittingham and McClory to craft screenplay material from his novels, notes, and novella-length treatments of the James Bond material.[94]

Having succeeded in making, and harvesting hefty profits from, *Thunderball* and *Never Say Never Again*, McClory decided that *his* Bond lineage was the real one and that Broccoli's success was merely a branch of his own.[95] McClory signed an audacious deal in the autumn of 1997 to produce an entire lineage of his own Bond films, each of which would theoretically be beyond the grasp of Broccoli-funded litigation, as this entire universe would descend from the plotline of *Thunderball*, conspicuously featuring Blofeld and SPECTRE. He also contended Broccoli's own filmmaking had chronically trespassed on themes, elements, and aspects of Bond that McClory created.[96] Under McClory's theory, this would enable him and Sony, the studio behind his aspirations of grandeur, to produce Bond films 5a (*Thunderball*), 5b (*Never Say Never Again*), through 5*n* (*SPECTRE*?) without

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[92] Though many Bond fans, including the Author, do not particularly like Moore's portrayal of Bond, he appeared as the famous spy in seven feature films, more than any other actor in the Eon canon.

[93] Moore makes many arguments about, or perhaps excuses for, his lack of popularity with audiences in the role in his cheekily-titled autobiographical text. Roger Moore, Bond on Bond: Reflections On 50 Years of James Bond Movies (2012).

[94] *See Danjaq*, 263 F.3d at 947–49.

[95] Much of the historical research in this section relies heavily on the wonderfully researched and very readable volume by Robert Sellers on the litigation surrounding Bond. Robert Sellers, The Battle for Bond (2008).

[96] *Id.*

any continuing financial obligation fiscal or otherwise to Broccoli, Saltzman, Eon, or Fleming.[97]

MGM, after its acquisition of United Artists and upon learning of the Sony deal for new Bond films in a "*Thunderball*-as-Genesis universe," filed a lawsuit against both McClory and Sony seeking to prevent the production and release of these films as well as tens of millions of dollars in pecuniary damages. Unwilling to even discuss a settlement and adding more fuel on the fire, McClory and Sony counterclaimed not just to assert their right to create a post-*Thunderball* lineage of Bond films, but also claimed that they (McClory and Sony) were owed a portion of revenues from every Bond film ever created and released by Broccoli and Eon. In the end, Judge Edward Rafeedie (S.D. Ca.) granted to Broccoli and Eon a sweeping injunction that prevented McClory or Sony from doing any of the things needed to begin constructing a portfolio of Bond films tracing their pedigree back exclusively to *Thunderball*; Sony's appeal found no relief.[98]

Though alien to the jurisdiction of combat, we do wish the English courts in these matters had taken notice, as Justice Souter did years ago in another case involving a major motion picture studio,[99] of a brilliant but little-known passage from Judge Posner (7th Cir.) which addresses the distinction between a competitor suing a rival to achieve victory and collect damages and another, similar, competitor who files suit only to make noise in the courts, give gossip to the newspapers, and impose a burden on the defendant litigant:

> But we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would have to spend on the litigation—except that it wanted to use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and that this disclosure would increase

[97] This IP "offramp," however, was structurally compromised by McClory's greed and litigiousness, failing to support even Sony's first planned sequel.

[98] Sellers, *supra* note 95.

[99] PREI Inc. v. Columbia Pictures Ind. Inc., 508 U.S. 49, 73–74 (Souter, J., concurring).

> the interest rate that the competitor had to pay for bank financing; or *just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms*.[100] In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome.

Posner's concept of fair mutual combat is nice in principle but hard to apply to a slippery player; McClory was able to change disguises with skill fit for a *double-0* agent: when convenient, he was the poor little guy being beaten up by big, bad Eon (*see* various cases captioned *Danjaq*), but when needed he was a Sony-backed business mogul ready to take on Salzman and Broccoli toe-to-toe (*see Sony* lineage of litigation). This battle of injunctions and orders to interrupt or stall production did not, however, resolve the underlying problem of some rights residing within the Eon/Broccoli universe and other rights being held in perpetuity by McClory. As a result, and thanks to all parties' endurance for decades-long periods of litigation, Eon would not be able to use the Blofeld character or the SPECTRE organization until 2015, in the film *SPECTRE*, after rights reconciliation within the master portfolio was complete and McClory had been told to go away.

VIII. Comparative Calm and Rights Reconciliation (2006–Present)

Perhaps no film better wraps up the Bond rights battles than 2006's substantially reworked version of *Casino Royale* (2006). It introduces a new Bond in the form of Daniel Craig, brings the material into the present (Bond here plays Texas Hold 'Em poker, rather than the book version of baccarat), retains and restates his famous cocktail order, and only had a few clunky moments, like Eva Green's groan-inducing Omega wristwatch shout-out on the train.[101]

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[100] Emphasis added. The Author suspects Eon's aggressive posture toward McClory was rooted in part for its animosity toward its enemy's friend, Sony Pictures Entertainment, and in part in a deep desire to prevent other McClories (we beg Irish readers for forgiveness regarding this inappropriate plural form, perhaps offering *McCloryacha* as plural will appease those readers…).

[101] Green, whether through her brush with stardom in the franchise or from some other source, was also infected with the litigiousness that seems to soak all things Bond; it took only a few years from abandoning her role as (the now deceased) Vesper to take on her next role: plaintiff. *See* Green v. White Lantern Films (Britannica) Ltd., EWHC 930 (2023) (litigation related to non-Bond-franchise failed film project).

Nevertheless, it's a big step forward from watches with transmitters and lasers to Roger Moore driving an (gasp!) Italian GTV6 and then crashing it through a fence and having to dress up as a clown. No, really, that happened.

The franchise's fresh romance with a new Bond (Daniel Craig) coincides with the marriage between Sony and MGM, finally uniting the rights portfolio through studio M&A rather than the troubled rights-for-cash negotiations that may have never reached a resolution. It also reboots the franchise's relationship with key brands, abandoning Rolex[102] and re-embracing a post-Ford Aston Martin.[103]

Exactly one week after Daniel Craig and Eva Green visited the red carpet of the Odeon Theatre at Leicester Square in London to launch *Casino Royale* (2006), McClory died in Ireland. In another changing-of-the-guard moment, it was the first Bond premiere not attended by Sir Sean Connery.[104] If given an epitaph of his choosing, McClory might have opted to quote the Ninth Circuit's statement of his relationship with Bond: "McClory transformed the supposedly violent and alcoholic James Bond of the Fleming books into the movie character who is so beloved, recognizable and marketable … that [he earned] a significant stake in the Bond movies, which stems from rights to *Thunderball* obtained long ago."[105]

Fitting that Bond, woven from postwar misogynistic English fabric, with a ready-in-the-holster prejudice against Irish characters,[106] and surrounded by one-dimensional beauties of every corner of the Commonwealth, would have boundaries for his adventures and fortunes set by a woman that shared her macroancestry with McClory's: the Ninth Circuit's own Irish Margaret McKeown. A Clinton appointee, McKeown was no stranger to this area and

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[102] The Hans Wilsdorf Foundation, which owns Rolex, does not pay filmmakers for product placement.

[103] While Aston Martin technically left the Premium Auto Group portfolio of Ford on 12 March 2007 in a 479M GBP complex two-stage divestment arrangement, it was clear during the production of *Casino Royale* that Aston Martin was not only actively for sale but likely to be sold around the time of the film's release. Aston is, as of this writing, subsisting on Canadian and Saudi cash infusions and actively recruiting for its fourth CEO in five or so years.

[104] Sir Sean Connery had not appeared on-screen since 2003 and reportedly suffered from health issues, including dementia, intermittently between 2005 and his death in 2020.

[105] Danjaq LLC v. Sony Corp., 263 F.3d 942, 947 (9th Cir. 2001).

[106] Whether this prejudice is inherited from Fleming or an invention of fiction is unclear, but Irish characters in Bond novels generally fit one of three stereotypes: innkeepers/bartenders/hoteliers, terrorists/saboteurs/henchmen, valets/chauffeurs/cabdrivers.

today, though retired from the Ninth Circuit, she is currently working on the *Restatement of the Law, Copyright* and received the ABA Margaret Brent Women of Achievement Award; she was (and is) not the pliable lass the fictional Bond might encounter in his international fieldwork. And opinions like McKeown's made it clear, if it was not already, that only corporate maneuvers on a grand scale would reunite the lineages of Bond IP.[107]

It is, for landscape context, worth noting that at this same time other great IP portfolios were also being reunited, or at least *kintsugi*-ed back together, through some combination of license renegotiation, corporate merger, and/or restatement of canon.

Other than the Bond franchise, perhaps the most famous example would be the reunion of Marvel comic book IP during this time under the Disney umbrella. Even though Krysten Ritter's enigmatic and gritty Jessica Jones (a Marvel character reunited with the canon MCU[108] in 2023-24) was originally created by ABC[109] and distributed by Netflix and Sam Jones's athletic and at times comedic Flash Gordon was originally created by Starling Productions and distributed by Columbia Pictures,[110] both Jones and Gordon are now eligible to be folded back into Disney's encyclopedic Marvel IP trove.

Many of the same updates given to modern Bond are applied to these other characters in the spirit of modernization and reconciliation; while Bond goes from Beretta-carrying[111] baccarat player to Walther-toting poker shark,

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[107] The McKeown opinion is the best-written and most entertaining piece of jurisprudential prose to emerge from the *Sony* litigation, 263 F.3d at 942, and kicks off with a quote from 1981's *For Your Eyes Only*.

[108] MCU stands for Marvel Cinematic Universe and is meant to distinguish this universe from the universes created in different eras of comic books and through non-Disney-controlled IP lineages, though these lineages sometimes intersect with and, rarely, are integrated with the MCU, as was the case with Jessica Jones and Luke Cage.

[109] Marvel Television was a venture within ABC Studios and, despite its name, was the result of an IP carve-out and not initially affiliated with the sleeve of Marvel IP purchased by Disney in its 2009 deal to buy similarly-named Marvel Entertainment, Inc.

[110] Flash Gordon (Universal Pictures 1980) remains Prof. Muth's favorite superhero film with its ambitious production by Dino De Laurentis, its soaring score by rock band Queen, and its fantastic recipe of humor, intrigue, and action. And if scientists ever find climate change originated on the planet Mongo, "you heard it here first."

[111] The small-caliber Beretta, though easily concealable and issued to Fleming himself during his time as an agent, was seen as not manly enough with its small frame size and small caliber and, perhaps more problematic, *too Italian* for a hero designed to appeal to postwar Western audiences who'd just prevailed over Axis enemies.

Gordon[112] goes from upper-crust Yale polo star to secretly-a-superhero NFL quarterback. Some similar IP cleanup was applied to the rights Lucas and Lucasfilms had sold over the years for *Star Wars*-related costumes, videogames, and toys, which are now reclaimed and reside firmly within the ambit of the Disney empire.

Conclusion: Simplified Timeline of Portfolio Fracture and Reunion

Though the modern-day *Casino Royale* (2006) allowed fans to reunite with some of the most beloved Bond IP in the wake of MGM's sale to Sony, it wouldn't be until 2013–14 that all McClory-related claims would be resolved, not through McClory's disarmament, but through his death, extinguishing potentially problematic remaining rights litigation. Final-phase principal filming and post-production for *Spectre* (2015) could then be completed, reintroducing viewers to SPECTRE and Blofeld. Today, after decades of litigation, no major rights controversies plague the Bond franchise. As of this writing, Eon has produced twenty-five films, the most recent being *No Time to Die* (2021).

When all is said and done, the multi-decade disputes and myriad high-profile copyright litigations proved monumental in establishing legal precedents that shaped copyright laws for decades to come. The Thunderball lawsuit established that copyright protection extends to characters and titles of fictional works. This had enormous implications for large IP portfolios that depend upon recognizable characters and a presence in the UK and European market(s),[113] allowing them to creatively leverage names of fictional characters, places, and storylines in a way they never had before.[114] The protections

[112] Some will argue Gordon is not an original Marvel canon character, and they would be right, but he's one of the few heroes to appear in both DC and Marvel universes in the modern era (the Dan Jurgens version of Flash for DC starting in 1988 and the Mark Shultz version of Flash for Marvel starting in 1995).

[113] And by doctrine of coterminous market inclusion prior to Brexit and by virtue of treaty post-Brexit.

[114] For an example, see perennial Marvel rival DC Comics's litigation campaign against nearly anyone making a toy, car, appliance, or cleaning product using any language similar to "super man" or "wonder woman" in its marketing within the ambit of European commercial litigation: DC Comics (Partnership) v Unilever Global IP Ltd. [2022], EWHC 434 (Ch), E.C.C. 18 (arguing "Wonder Mum" is a Class 3 trademark for soaps/shampoos/cosmetics/etc. vulnerable to invalidation due to its similarity to DC's competing mark "Wonder Woman," Wonder Woman was trademarked by DC in the European market in 2015 and Wonder Mum filed for

Disney's "MCU" enjoys[115] stem from this period; in some earlier era,[116] a non-licensee author could write a story where Ironman goes to the planet Mongo and battle archvillain Ming (a plotline never explored in Marvel's comic canon, though this mission is discussed in detail in the fifteenth strip of Flash)[117] with little fear of trespassing on Marvel's IP trove; today, such a story would be risky to publish, as it might invite litigation.

Furthermore, various Bond lawsuits over the years have also crystalized the court's position regarding what constitutes derivative work, precedents cited in numerous subsequent cases involving copyright infringement. Decisions from these cases helped clarify what it means for a work to be "based upon" or "adapted" from a pre-existing work, elements that today can be observed in the highest level of legal bases, including the Copyright Act of 1976. This broader concept of "adaptation" links written, film, and other work more tightly than ever before, allowing truly multimedia empire-building.[118]

In the context of the Bondiverse, it's crucial to understand that, unlike *Casino Royale* (1967) (not to be confused with *Casino Royale* (2006)), *Thunderball* was never intended to be a parody. Rather, it was a serious continuation of the Bond franchise and developed the same key source material, the same main character, and the same antagonist themes. In the modern framework,[119] a defendant cannot credibly plead in the alternative that the work is a serious sequel and a parody; the somewhat-obscure recent case on point is *Salinger v. Colting*,[120] which holds the unusual procedural provenance

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trademark protection in 2019 in the same market by Unilever; today, the two coexist thanks to a ruling by a London judge in 2022).

[115] MCU defined, *supra* note 108.

[116] True generally, *but see* Lone Ranger, Inc. v. Cox, 124 F.2d 650, 651–52 (4th Cir. 1942) (defendant, in choreographing cowboy-themed circus performance, misappropriated Lone Ranger IP).

[117] Alex Raymond & Don Moore, Flash Gordon (S015, first published 19 Jan. 1941 and syndicated by King Features); today, the *Flash* comic strip lives on under the care of Dan Schkade and King Features is now a business unit of Hearst Publications and occasionally cross-licenses or co-promotes characters or other content with Marvel.

[118] Perhaps no beneficiary in the European market stands out as much a winner than Studio Ghibli, the top producer of Japanese-style anime content and the books, games, music, and other assets that surround that nihoncentric art form; its portfolio is protected (and occasionally expanded) by an army of London's top white shoe IP law groups.

[119] This framework predates *Salinger*, *infra* note 120, but that case is most illustrative of this conceptually.

[120] Salinger v. Colting, 641 F. Supp. 2d 250, 255 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68, 73–74 (2d Cir. 2010).

of being oft-cited but also not good law. In that case, the trial court notes that a defendant cannot "*post hoc*" to gain an advantage in the courtroom adopt a theory that a work was merely a parody when it was in fact a sequel.[121] In other words, fair use is claimed in the context of parody or it is not.

Unfortunately, the author from whose mind Bond was born would be unavailable for comment.

Ian Fleming, the author of the James Bond novels whose passing in August of 1964 accelerated the litigation between the parallel Bond film franchises, the culmination of his life works–all 12 books that have collectively sold a total of 18 million copies in 10 languages–created a complex web of trusts that continue to pay dividends to its beneficiaries today. He created two primary or principal trusts, the Book Trust and the Will Trust; the Book Trust oversees the copyrights to his James Bond novels, while the Will Trust manages the rest of his estate. According to Fleming's agent, Peter Janson-Smith, Fleming has made a total of $2.8M from his books. His famed tropical resort–Goldeneye–was acquired by Bob Marley and subsequently resold to his record company owner; today, it operates as a destination 5-star resort.

In any writing about Bond's legal adventures of less-than-book length, decisions to crop the edges of discussion are mandatory. This Article disregards earlier forays into Bond-on-film: prior to all the Broccoli and Saltzman productions, CBS created a 50-minute film based on the book *Casino Royale*; it is the only time actor Barry Nelson portrays Bond. Also largely ignored is the *Casino Royale* (1967) film that appeared in 1967, produced by Charles Feldman and not endorsed by Eon, Broccoli, or Saltzman, which was a satire (according to contemporary reviews, even a parody) of the underlying material; it was a too-many-cooks-in-the-kitchen production, with John Huston, Woody Allen, Peter Sellers, Orson Welles, and many others involved.

As this Article goes to press, the Bond franchise has finally resolved its 1961-2021 legal woes and doesn't face another major foreseeable legal hurdle until a decade from now, in 2034, when the UK copyrights on Ian Fleming's works are set to expire.[122] That said, no sequel to *No Time To Die* (2021)

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[121] Whether the work in question was "in fact" a sequel was a question disputed at trial in that case. However, the trial court found credible some evidence offered that the defendant had described the work as a sequel. *See id.* at 260 n.3.

[122] Fleming's novels are not vulnerable to the so-called 2039 rule under which UK copyrights expire on 31 Dec. 2039 if the death of the author is before 1969 and the works were not published until after 1988, as Fleming did die prior to 1969 (12 Aug. 1964) but his works were published and well into subsequent editions prior to 1988. Intellectual Property Office, *Copyright Notice: Duration of copyright (term)*, Gov't of the United Kingdom (Jan. 15, 2021), https://www.gov.uk/government/

has yet been announced, no actor has yet been named as a replacement for Daniel Craig in the eponymous leading role, and key allies of the franchise like Swatch Group[123] and Aston Martin[124] struggle with their own corporate strategy and financing challenges, respectively.

Just as *Dr. No* launched into a world defined by U.S.-Soviet tensions and the Cuban missile crisis, today the number of homelands and origin stories available for Bond villains dwindles: *The Man with the Red Tattoo*, a canonical Bond novel, deals with a weaponized variant of the West Nile Virus (*Flaviviridae*) [125] and likely is subject matter too hot to touch as the world recovers from the COVID-19[126] global pandemic; similarly, the plotline of the novel *On Her*[127] *Majesty's Secret Service*, which involves biological weapons possibly made in a lab in Asia,[128] might also too-closely track the recent pandemic to be remake-eligible.

Putting aside questions of political-correctness and recent events, audience revenue dynamics are also changing. The importance of the mainland Chinese (PRC) audience to total box office revenues is massive and hence Bond novels like *Colonel Sun* (1968), where Bond's principal adversary is a Chinese disinformation conspiracy involved in kidnapping and "turning" key people[129], may seem too similar to China's Great Firewall project and

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publications/copyright-notice-duration-of-copyright-term/copyright-notice-duration-of-copyright-term#:~:text=Some%20works%2C%20even%20though%20created,this%20notice%20for%20further%20information [https://perma.cc/QB34-4TEB].

[123] Swatch Group, a complex Biel, CH-based holding company, owns Omega, Bond's watch of choice in recent films. *See* Casino Royale (Eon 2006).

[124] At the time of this writing, Aston Martin recently closed the sale of more common shares to the Saudi sovereign wealth fund, bringing the Saudi-owned portion of Aston Martin to over 20 percent of the firm's common equity. Eva Mathews, *Saudi Wealth Fund to Become Aston Martin's Second-Largest Shareholder*, Reuters (July 15, 2022), https://www.reuters.com/business/autos-transportation/uks-aston-martin-raise-653-mln-pounds-equity-financing-2022-07-15/ [https://perma.cc/5B2B-67MW].

[125] Raymond Benson, The Man with the Red Tattoo (Hodder & Stoughton 2002).

[126] SARS-CoV-2, a quickly-mutating unstable coronavirus with many variant strains.

[127] With the ascension of King Charles III, presumably it would be remade as a contemporary "On His Majesty's Secret [Intelligence] Service" film.

[128] Ian Fleming, On Her Majesty's Secret Service 134 (Jonathan Cape 1963) ("Biological warfare? Yes, that's right. Anthrax and so on.").

[129] Ian Fleming, Casino Royale 79 (Cape Paperbacks, 3d ed. 1978) ("History is moving pretty quickly these days and the heroes and villains keep on changing parts.").

the disappearings of prominent people by the Chinese government (the 2020-21 disappearance of Chinese billionaire Jack Ma, followed by Ma's benign-to-positive comments about the Communist Party, being an oft-cited example[130]).

Audience tastes have also shifted; after the *Bourniverse*[131] films, the introduction of a more troubled and violent Batman,[132] and Daniel Craig's portrayal of Bond not as a class clown[133] but as a colder assassin, the audience expects something closer to the Rolex-favoring, Beretta-toting, Bentley-straight-eight-piloting semiautobiographical secret agent Fleming originally created. Whether this harder-edged Bond who does many of his own stunts[134] can be paired with an engrossing, but unlikely-to-offend-abroad, storylines remains to be seen. But one thing can be predicted with *near* certainty: we haven't seen the final legal siege of Eon, Danjaq, and the now-reunited Bond intellectual property fortress.

How audiences interact with content has also changed, especially in this most recent decade. The popularity of streaming services, including Amazon's Prime Video[135] where the next Bond film will likely premiere alongside

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[130] *See* Li Yuan, *Why China Turned Against Jack Ma*, N.Y. Times, Dec. 24, 2020, https://www.nytimes.com/2020/12/24/technology/china-jack-ma-alibaba.html [https://perma.cc/3SN3-3VGM].

[131] Films produced by Universal Pictures and loosely based on Robert Ludlum's novels. As of this writing, the universe includes six canon feature films, many authorized and unauthorized additional pieces of literature, and parallel fanfiction ranging from manga to novellas.

[132] These films are often referred to by fans as "The Dark Knight Trilogy," though Warner Brothers does not use this demonym except in the marketing of its three-DVD Blu-ray box set. The films are all written and directed by Christopher Nolan and feature continuity elements with a few discontinuity elements (including the controversial recasting of Rachel Dawes). The films are Batman Begins (Warner Bros. Pictures 2005), The Dark Knight (Warner Bros. Pictures 2008), and The Dark Knight Rises (Warner Bros. Pictures 2012), though theatrical release dates varied and some markets did not receive *Batman Begins* until the winter of 2005 or even early 2006; it was the first DC universe film to premiere outside the U.S. (Tokyo).

[133] Many critics disliked Pierce Brosnan's overly-comic portrayal of Bond, turning the character into a grinning Casanova rather than a crafty, brooding, tradecraft-obsessed secret agent.

[134] An audience expectation arguably created and maintained by Tom Cruise's *Mission Impossible* films.

[135] Prime Video is a service of parent megaretailer Amazon and offers a variety of content including film and television content, some of which is produced as original content by Amazon MGM Studios, some of which is purchased from third parties, and some of which is licensed for streaming distribution. Several

theatrical debuts, has altered how viewers receive content. Simultaneous launches, in theaters and streaming on the same day or within same week, are rising in popularity as this article goes to press—with Denis Villeneuve's film *Dune: Part Two* (2024) being a successful example, perhaps because so many watched the first of these films at home amidst the COVID-19 global pandemic's restrictions on theater-going. Today, with Bond intellectual property being united after the Sony–MGM (circa 2005) and now residing within Amazon's library (post-Amazon's acquisition of MGM circa 2022), it seems likely many more *007* adventures lie ahead.

In the meantime, something to wet your whistle,[136] as they say: "In a deep champagne goblet. … Three measures of Gordon's, one of vodka, half a measure of Kina Lillet. Shake it very well until it's ice-cold, then add a large thin slice of lemon-peel. Got it?"[137]

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important aspects of the terms of the arrangement between Amazon and MGM have not been made public—perhaps, someday, more will be known and the Authors imagine future legal scholars might write an article covering the sixty-year period following the Amazon deal. *See generally* Todd Spangler, *Prime Video Now Reaches More Than 200 Million Monthly Viewers, TV Ads 'Off to a Strong Start," Amazon CEO Says*, Variety (Apr. 11, 2024), https://variety.com/2024/digital/news/amazon-prime-video-200-million-monthly-viewers-tv-advertising-ceo-1235967913/.

[136] *See* Lauren Bacall's famous scene as Marie "Slim" Browning to Humphrey Bogart in *Key Largo*.

[137] Bond in *Dr. No* at ch. 7 during his meeting with Felix Leiter, a retired Marine turned CIA asset (1958).

Appendix: Syllabus of Key Cases*

Danjaq, SA v. MGM/UA Communications Corp., 773 F. Supp. 194 (C.D. Cal. 1991) (important as to discussion of distribution agreement between Eon and Danjaq and effects on other parties).

Danjaq, SA v. Pathe Communications, Corp., 979 F.2d 772 (9th Cir. 1992) (causes Danjaq to commit to Delaware after 9th Cir. finds corporation is resident both in home jurisdiction and principal place of business).

Danjaq, LLC v. Sony Corp., 1998 WL 957053, (C.D. Cal. 1998) (Sony and Columbia enjoined from making any further Bond films).

Danjaq, LLC v. Sony Corp., 165 F.3d 915, (9th Cir. 1998) (affirms injunctive order above).

Fogerty v. MGM Group Holdings Corp., Inc., 379 F. 3d 348 (6th Cir. 2004) (controversy over theme song for *The World is Not Enough*).

Legislator 1357 v. MGM, 452 F. Supp. 2d 382, 385-86 (S.D.N.Y. 2006) (describes how rights to Fleming's works moved from his personal property into trusts and then through various entities).

Johnson v. Metro-Goldwyn-Mayer Studios Inc., Case No. C17-541 RSM and not reported (W.D. Wash. 2017) (important for showing level of tension over what is and is not a "canon" Eon Bond film).

* Note: these cases are organized chronologically rather than by jurisdiction.