

1-1-2014

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### Recommended Citation

Friedman, Lawrence M. (2014) "Human Rights, Freedom of Expression, and the Rise of the Silver Screen," *Hofstra Law Review*: Vol. 43 : Iss. 1 , Article 1.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol43/iss1/1>

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## HUMAN RIGHTS, FREEDOM OF EXPRESSION, AND THE RISE OF THE SILVER SCREEN

*Lawrence M. Friedman\**

### I. INTRODUCTION

There is a huge amount of literature on human rights and the rule of law. More to the point, these are burning issues; people have died in defense of human rights and the rule of law. In some countries, human rights and the rule of law are works in progress, to put it mildly; but even in countries where the rule of law seems to be fully realized, one can ask exactly what the rule of law means, how far it extends, and under what conditions. Similarly, with regard to human rights: what they are, who they belong to, and what they mean.

My interest in the rule of law and in human rights is primarily social and historical. Where do we get these ideas from—ideas about human rights and the rule of law? Obviously, they have not been around forever, certainly not in their modern form. The rule of law was not (we suppose) in the mental armory of cavemen. Some quite basic aspects of human rights—gender equality, for example—are fairly new in human history. Women did not vote or hold office until the twentieth century in most countries of the West. Alexis de Tocqueville wrote about democracy in America<sup>1</sup> at a time when women had no formal political voice in this country, supposedly a model democracy—or in any other country for that matter. And there were millions of slaves in the United States when de Tocqueville's book appeared.

The literature on human rights, on the whole, tends to ignore or downplay history, or to search in the vast jungle of history for “precursors” or prophets of modernity. To be sure, there is a kind of standard story about the development of the human rights culture. You can tick off certain landmarks along the road: the Declaration of

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1. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Arthur Goldhamer trans., 2004) (1835).

Independence of the United States (1776);<sup>2</sup> the Declaration of the Rights of Man and of the Citizen (1789)<sup>3</sup> during the French Revolution; the American Bill of Rights (1789);<sup>4</sup> the Atlantic Charter (1941);<sup>5</sup> the Universal Declaration of Human Rights (1948) (“UDHR”);<sup>6</sup> the Declaration of the Rights and Duties of Man of the Organization of American States (1948);<sup>7</sup> the European Convention on Human Rights (1950);<sup>8</sup> and many other charters, treaties, and declarations. Some authors go back a bit further, and throw in a few honored names—Immanuel Kant, for example.<sup>9</sup> Yet, to me at least, the literature is somewhat disappointing. We learn about these documents, manifestoes, charters, and the way they translate into action; but somehow, this is presented as a kind of inevitable growth, a natural evolution or unfolding, a tale of how human empathy and understanding increased as time went on.<sup>10</sup>

There are at least the beginnings of a literature on the sociology of human rights, including historical sociology, and I myself have tried to make a contribution.<sup>11</sup> In this Article, I want to examine one small aspect of that history, that is, freedom of expression, and indeed, only a sliver of that story—mainly, freedom of expression in the movies. However, before I discuss this, I want to say a few words about the longer and broader history of the following two key ideas: (1) fundamental human rights; and (2) the rule of law.

Ideas about the rule of law, in one significant sense, do have somewhat of a long history. There is a well-known Latin phrase, *fiat*

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2. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

3. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Fr. 1789).

4. U.S. CONST. amends. I–X.

5. The Atlantic Charter, U.S.–U.K., Aug. 14, 1941, 55 Stat. 1603.

6. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter G.A. Res. 217].

7. Organization of American States, American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82, doc. 6 rev. 1 (1992), *available at* [https://www.oas.org/dil/access\\_to\\_information\\_human\\_right\\_American\\_Declaration\\_of\\_the\\_Rights\\_and\\_Duties\\_of\\_Man.pdf](https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf).

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

9. *See generally* KANTIAN THEORY AND HUMAN RIGHTS (Andreas Follesdal & Reidar Maliks eds., 2014).

10. Samuel Moyn argues that the idea of human rights as universal and transnational really emerged only in the 1970s. *See generally* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

11. *See generally* LAWRENCE M. FRIEDMAN, THE HUMAN RIGHTS CULTURE: A STUDY IN HISTORY AND CONTEXT (2011) [hereinafter FRIEDMAN, THE HUMAN RIGHTS CULTURE]; OÑATI INST. FOR THE SOCIOLOGY OF LAW, MAKING HUMAN RIGHTS INTELLIGIBLE: TOWARDS A SOCIOLOGY OF HUMAN RIGHTS (Mikael Rask Madsen & Gert Verschraegen eds., 2013).

*justitia, ruat coelum*: let justice be done, though the heavens shake. The phrase does not, in fact, date all the way back to the days of the Romans; it probably first appeared in the seventeenth century. The basic idea is simple: laws should be enforced fairly, impartially, and regardless of consequences. Rules should be clear and definite, and applied without prejudice: no bribing of judges; no orders from the King to favor A over B; no bias against particular people or groups. Nonetheless, this classic notion of fairness was, necessarily, fairness within categories. Nobody, or almost nobody, in the seventeenth century thought that men and women had or should have equal rights—or nobles and commoners for that matter.

The fundamental premise of the modern human rights culture, on the other hand, is a premise of absolute equality: of genders; races; classes; ethnic groups; and so on. The law applies to everybody, and everybody has equal rights under the law.<sup>12</sup> This noble idea is expressed in probably every modern constitution or bill of rights. It is, to be sure, a goal and an ideal; millions of people believe in it. Of course, nowhere is such an ideal realized in full—probably no country even comes close. But, the concept certainly implies, for women and minorities, the right to vote and hold office, along with all of the other rights which the majority enjoys; and as time goes on, it has become a legal and social norm, which purports to rule out discrimination in employment, pay, and most other aspects of life.

Thus, as a social norm—and, very significantly, as an aspect of popular culture—the human rights movement, and the ideal of the rule of law, have more or less come to coincide. They are now, in an important sense, identical, in that they both insist on equality before the law.<sup>13</sup> Of course, the “rule of law” is a concept to a great degree wrapped up in procedures; the human rights culture, on the other hand, at least as it is commonly understood, is substantive. It includes, to be sure, procedural rights (rights to a fair trial, for example), but people also think that they have other specific and fundamental rights, such as freedom of religion, the right to travel, or the right to criticize the government. Of course, what these rights are, how far they extend, and what situations they cover are all questions that can be, and are, much

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12. The “core” of the principle is that “all persons and authorities within the state . . . should be bound by and entitled to the benefit of laws publicly made,” and which are “publicly administered in the courts.” TOM BINGHAM, *THE RULE OF LAW* 8 (2010).

13. There is another, somewhat competitive notion of the rule of law—the notion that the Chinese seem to be referring to when they talk about the rule of law. Contracts are to be enforced, courts should respect the law, and property rights and investors should be protected. The fact that the “rule of law” in China does not include the full range of human rights is, alas, all too obvious at the present time. FRIEDMAN, *THE HUMAN RIGHTS CULTURE*, *supra* note 11, at 20.

disputed, at least in certain details. But there is, no doubt, a working core, where we find a good deal of consensus. It certainly includes the rights just mentioned—freedom of religion, the right to travel, and the right of free speech. Of course, each core right itself contains both a core and a gray area or periphery around it. A right to travel, yes, but to North Korea? A right to choose a religion, yes, but what if the religion preaches polygamy, or snake worship?

How the modern human rights culture grew, and why, is a complicated and murky subject. This culture can be explained, if at all, only in terms of a tangle of social, economic, political, and cultural forces, and the way these changed over time. Each of the so-called fundamental rights has its own particular history. But the trend lines are more or less similar. Each society, too, tells its own individual story. Yet, here too, the trend lines are more or less similar—at least in the wealthy, developed, democratic countries. The movement, roughly, goes from a norm and culture that differentiates (between groups and classes) to a norm and culture of absolute equality. That is, the starting point consists of rules and norms that draw a line between men and women, rich and poor, upper class and lower class, nobles and commoners, or state religion and other faiths (“dissenters,” pagans, or heretics). Eventually, the societies of Western Europe, and other democracies, came to embrace a new and general proposition, boldly stated in modern constitutions and charters: all members of society have equal rights. This was made explicit in key documents that appeared after the end of the Second World War.

Thus, Article 1 of the UDHR declares: “All human beings are born free and equal in dignity and rights.”<sup>14</sup> According to Article 2, each person is entitled to “all the rights and freedoms” set out in the UDHR, regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>15</sup> Article 3 of the influential “Grundgesetz” (Basic Law) of the Federal Republic of Germany (1949) declares that “[a]ll men are equal before the law,” and, specifically, that “[m]en and women have equal rights.”<sup>16</sup> In the last half of the twentieth century, there was a positive epidemic of constitution-making; country after country adopted or revamped their basic law. Quite typically, the new texts included a strong bill of rights, and set up some sort of court with powers of judicial review. The equality norm was always explicit in these documents. For example,

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14. G.A. Res. 217, *supra* note 6, art. 1.

15. *Id.* art. 2.

16. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, BGBl. I, art. 3 (Ger.).

Article 3 of the Italian Constitution of 1947 and Article 2, Section 9 of the South African Constitution of 1996 contain language to the same effect as the quoted language of the UDHR; that is, equality before the law for everyone, and no discrimination on the basis of sex, race, religion, and so on.<sup>17</sup> Both constitutions also created a Constitutional Court.<sup>18</sup>

We mentioned earlier the history of women's rights; the march toward universality is plainly reflected in this history. Today, women have the right to vote and hold office in every democratic society, and even in some not-quite-so-democratic societies. Of course, women do not vote in Saudi Arabia (actually, neither do men).<sup>19</sup> In the club of democratic countries, however, the right to vote is a fundamental, unquestioned aspect of citizenship. Voting was at one point in time quite restricted—perhaps to male owners of property. It evolved to include virtually all adult men. New Zealand gave women the right to vote in 1893.<sup>20</sup> In the United States, women gained this right in 1920.<sup>21</sup> French women were empowered in 1944. One of the last holdouts was Switzerland, of all places. A court decision in 1990 gave women the right to vote in one last and stubbornly resistant canton. In 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).<sup>22</sup> Countries who signed on were supposed to “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation.”<sup>23</sup> Most countries joined the parade (sometimes with reservations). Of course, one wonders what it meant for Afghanistan or Qatar to sign this document (the CEDAW had no real enforcement mechanism). Most countries have obeyed the mandate to “embody” the principle in a constitution or the like (or had already done so). Reality, even for the likes of Sweden or Finland, is different from theory; but at least CEDAW sends a clear and explicit message, and expresses a powerful ideal. And, it is equally clear and explicit that there has been, and continues to be, a strong global movement toward the goals that CEDAW sets out.

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17. See Art. 3 Costituzione [Cost.] (It.); S. AFR. CONST., 1996.

18. Art. 134 Costituzione [Cost.] (It.); S. AFR. CONST., 1996.

19. FRIEDMAN, *THE HUMAN RIGHTS CULTURE*, *supra* note 11, at 33, 78.

20. *Id.* at 78.

21. U.S. CONST. amend. XIX.

22. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

23. *Id.* art. 2(a).

## II. FREEDOM OF EXPRESSION

My main concern in this Article is freedom of expression, or, to be exact, one aspect of freedom of expression. Freedom of speech and expression is universally recognized as one of the fundamental human rights. It is enshrined in the First Amendment of the U.S. Constitution, and in every state constitution. In the big world, no modern constitution fails to mention it, together with 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 right. Additionally, they would probably also say, or admit, that the right is in fairly good shape in their country. There are, to be sure, always arguments about where free speech begins and ends—it has a core and a periphery, like all the other fundamental rights. To what extent can the state control advertising? Can the state ban pornography, and how do you define pornography? What about hate speech? Or holocaust denial? This is a crime in Germany and in a number of other European countries.<sup>24</sup> In the United States, state and federal codes list no such crime; presumably, holocaust denial is protected speech.

The American Bill of Rights gives pride of place to freedom of speech, which therefore has a respectable and long-term pedigree in the United States. But, the meaning of freedom of speech and expression has changed dramatically over the years. To take only the most obvious example: books, plays, and works of art, which in the past were considered plainly obscene, and were banned, are freely circulated today, and are defined as protected speech. We will return to this point later on.

One aspect of the history of free speech is, however, a bit less obvious. Just as there were once separate rules—separate rights—for elites and commoners, women and men, and as between statuses and classes, with regard to voting, and general position in society, so too, in a subtle way, there were different regimes of freedom of speech and expression: one set of rules (or attitudes) for elites, another for ordinary

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24. The German law is section 130 of the Penal Code (Strafgesetzbuch). STRAFGESETZBUCH [STGB] [PENAL CODE], Dec. 19, 2001, as amended, § 130 (Ger.). Paragraph three provides punishment for those who publicly, and in a manner offensive to public order, deny, justify, or trivialize the crimes committed by the Nazis; paragraph four punishes those who publicly injure the dignity of the victims, by justifying or approving of the acts of the Nazi regime in writings. § 130(3)–(4). A number of countries—for example, Poland, Hungary, and Lithuania—also make it a crime to deny the atrocities of communist regimes. *Report from the Commission to the European Parliament and to the Council: The Memory of the Crimes Committed by Totalitarian Regimes in Europe*, at 5, COM (2010) 783 final (Dec. 22, 2010), available at [http://ec.europa.eu/commission\\_2010-2014/redirecting/pdf/com\(2010\)\\_873\\_1\\_en\\_act\\_part1\\_v61.pdf](http://ec.europa.eu/commission_2010-2014/redirecting/pdf/com(2010)_873_1_en_act_part1_v61.pdf).

people. And, here too, the historical trend has been toward equality—toward eliminating all traces of this kind of discrimination. This took place, most notably, in the last half of the twentieth century.

The example I will use—the case study—is the legal treatment of movies, chiefly in the United States, and, specifically, censorship of movies. The movie industry arose around 1900, and developed with enormous speed. Soon, movies became tremendously popular. Nickelodeons sprouted like mushrooms after rain in the cities. Movies were cheap, vivid, and enticing. And this made them, in the eyes of elites, a source of grave social danger. As early as 1907, the city of Chicago enacted a censorship ordinance.<sup>25</sup> An exhibitor who wanted to show a movie needed permission from the Chicago police.<sup>26</sup> A permit would not be issued if a movie was “obscene or immoral.”<sup>27</sup> After the police chief said no to two movies—*The James Boys in Missouri*<sup>28</sup> and *The Night Riders*<sup>29</sup>—plaintiffs, who were “engaged in the business of operating five and ten cent [movie] theaters in the city of Chicago,” went to court, claiming that the ordinance was discriminatory and unconstitutional.<sup>30</sup>

The Illinois Supreme Court, however, upheld the ordinance.<sup>31</sup> The court saw nothing wrong with the idea of censoring movies, and regulating “the five and ten cent theatres, attended in great numbers by children.”<sup>32</sup> The opinion talks a good deal about the right to control obscenity.<sup>33</sup> Yet, almost certainly, there was nothing really obscene about *The James Boys in Missouri* or *The Night Riders*. It was the popularity of the movies that made the court uneasy: their appeal to “great numbers” of people, including children.<sup>34</sup>

Other states and cities followed the lead of Chicago. Pennsylvania, for example, created a censorship board in 1911.<sup>35</sup> In Minnesota, the Village of Deer River—population around 1000—enacted a quite punitive ordinance, asking theaters (including movie houses) to pay an

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25. See *Block v. City of Chicago*, 87 N.E. 1011, 1012 (Ill. 1909). For more on movie censorship, see generally LEE GRIEVESON, *POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY-TWENTIETH-CENTURY AMERICA* (2004).

26. See *Block*, 87 N.E. at 1013.

27. *Id.*

28. *THE JAMES BOYS IN MISSOURI* (Essanay Film Manufacturing Company 1908).

29. *THE NIGHT RIDERS* (Republic Pictures (I) 1939).

30. *Block*, 87 N.E. at 1012-13.

31. *Id.* at 1016.

32. *Id.* at 1015.

33. See *id.* at 1013.

34. See *id.* at 1015.

35. See Harris Ross, *The Pennsylvania State Board of Censors: The Great War, the Movies, and D. W. Griffith*, 75 PA. HIST. 227, 227-28 (2008).



annual license fee of two hundred dollars.<sup>36</sup> The fee had been a mere twenty dollars before.<sup>37</sup> One exhibitor refused to pay: he claimed that he ran his business in a “quiet, orderly, and inoffensive way,” and that the business was “of a clean, moral, and instructive nature.”<sup>38</sup> But, the Minnesota Supreme Court upheld the ordinance in 1912.<sup>39</sup> Movies, said the court, were a new thing, growing like a weed, and “springing up everywhere,” even in villages.<sup>40</sup> They might have some educational value, but their “chief aim [was] to furnish the sort of entertainment that will draw the most dimes.”<sup>41</sup> To be sure, it might be quite “laudable” to provide people with “innocent and cheap amusement,” but the profit motive does have a tendency to favor entertainment “which will attract the greatest number,” rather than entertainment “which instructs or elevates.”<sup>42</sup> 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.”<sup>43</sup> They become the “rendezvous of the young and thoughtless, as well as the vicious.”<sup>44</sup>

As these decisions make clear, what made some people uneasy was the sheer popularity of this new medium. By 1910 or so, the country was “movie crazy;” attendance grew fantastically, year by year, and movie stars had become genuine celebrities, idolized by their fans.<sup>45</sup> People wondered, what impact did this new, powerful medium have—what did it do to the souls of millions of kids who flocked to the movie houses? Nothing good, apparently. Protecting the morals of children was an important theme of the movement to regulate movies. *Our Movie Made Children*,<sup>46</sup> published in 1933 by Henry James Forman, ticked off a whole flock of sins, which he blamed on the movies. Movies, for example, contributed to insomnia—they interfered with the sleeping habits of children. But this was by far not the worst of the sins. Many “young criminals” learned “criminal techniques” from the movies; and

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36. *Higgins v. Lacroix*, 137 N.W. 417, 417 (Minn. 1912).

37. *Id.*

38. *Id.*

39. *Id.* at 419.

40. *Id.* at 418-19.

41. *Id.* at 419.

42. *Id.*

43. *Id.*

44. *Id.*

45. See SAMANTHA BARBAS, *MOVIE CRAZY: FANS, STARS, AND THE CULT OF CELEBRITY* 1, 10-11, 35-36 (2001). At first, the studios refused to release the names of movie actors and actresses—the stars were completely 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. *Id.* at 10-11.

46. HENRY JAMES FORMAN, *OUR MOVIE MADE CHILDREN* (1933).

many girls, “in an institution for sex delinquents,” blamed the movies for “stimulating cravings for an easy life:” movies aroused the desire to have men “make love to them,” and was ultimately responsible for their “delinquency.”<sup>47</sup> Protection of children was certainly a key motive; but, under the surface, there was also the notion of protecting not only the children, but also the child-like masses as well—after all, censorship laws, where they existed, were never confined to children. They were laws to keep everybody out of unwholesome movies.<sup>48</sup>

The censorship movement gathered steam as time went by. Seven states had state censorship boards; in twenty-three other states, certain cities exercised control. And, the influence of the boards tended to spill over past city limits or state borders; thus, in a sense, there was a national system of censorship.<sup>49</sup> Of course, audiences flocked to many movies that were, in the eyes of censorship boards and religious leaders, rather objectionable. That, indeed, was the problem. For example, *A Fool There Was*,<sup>50</sup> a 1915 movie with Theda Bara, became a “box-office smash.” The plot was deeply disturbing: Bara played a “vamp,” a woman “who ruins honorable men by seducing them with her mystical charm and overt sexuality.”<sup>51</sup> At the end of the movie, the vamp’s victim has not been redeemed, and the vamp herself is triumphant.<sup>52</sup> This was just the sort of movie that censors were eager to ban.<sup>53</sup>

Exhibitors and movie companies of course were opposed to censorship. They knew which movies could make money, and they fought for the right to show these movies. But attacks on censorship in court quite generally failed. Courts upheld every licensing and censorship law that came before them.<sup>54</sup> Eventually, in 1915, the issue

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47. *Id.* at 280-81; 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*, J. POPULAR CULTURE, Fall 1991, at 127, 131-32.

48. Forman also, at least by implication, distinguished between the children of the well-off, and children of the poor. FORMAN, *supra* note 46, at 193. He also distinguishes between the impact of the movies in a “community where the rate of delinquency is low”—here the children can better resist the pernicious influence of movies—and the “tough . . . neighborhood . . . with a high delinquency rate.” *Id.*

49. LAURA WITTERN-KELLER, *FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915-1981*, at 30 (2008).

50. *A FOOL THERE WAS* (Fox Film Corporation 1915).

51. GERALD R. BUTTERS, JR., *BANNED: MOTION PICTURE CENSORSHIP, 1915-1966*, at 106 (2007).

52. *Id.* at 108.

53. *Id.*

54. See, e.g., *Buffalo Branch, Mut. Film Corp. v. Breiting*, 95 A. 433, 434 (Pa. 1915). This case upheld a Pennsylvania statute in a long, dreary opinion, which cited a variety of cases on the police power of the state, and then finally noted various cases that upheld the licensing of theaters and the like. See generally *id.*

reached the U.S. Supreme Court, in a case out of Ohio, which had a censorship board ("Board").<sup>55</sup> The Ohio Board was supposed to approve only films that were "of a moral, educational, or amusing and harmless character."<sup>56</sup> Was this statute constitutional?

The Supreme Court decided unanimously that it was. Justice Joseph McKenna wrote the opinion, which was short, but quite revealing. On the free speech issue, the Court made its position quite clear: the statute did not offend the right of free speech.<sup>57</sup> Since movies could be "used for evil," states were entitled to regulate them.<sup>58</sup> Everybody went to the movies—men, women, and children.<sup>59</sup> 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."<sup>60</sup> Movies could corrupt morals, and even excite a "prurient interest."<sup>61</sup> Yes, movies might sometimes express ideas, and act as "mediums of thought;" but the same would be true of "the theatre, the circus, and all other shows and spectacles."<sup>62</sup> The Court refused to extend the principle of freedom of speech to "the multitudinous shows which are advertised on the bill-boards of our cities and towns."<sup>63</sup> Movies were nothing but a business—a profit-making enterprise. They were not under the sheltering wings of freedom of speech. Censorship was an acceptable way to control them.

On the surface, censorship laws did not draw any kind of class distinction, and courts made no overt reference to class. But, what led courts and legislatures to think that movies posed a special danger to society's moral health? Not obscenity alone—most of the censored movies were not, in fact, obscene under any definition. Obscenity and pornography were already illegal; states had statutes against pornography for generations. In 1873, Congress enacted the so-called Comstock law ("Comstock law"),<sup>64</sup> which made it a crime to send obscene material through the mail.<sup>65</sup> To be sure, censorship laws made it possible to screen the movies—to filter out what was obscene. But, censorship went far beyond this. Here was a vast, new, powerful

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55. *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230 (1915).

56. *Id.* at 241 (internal quotation marks omitted).

57. *Id.* at 241-42.

58. *Id.* at 242.

59. *Id.*

60. *Id.* at 244.

61. *Id.* at 242.

62. *Id.* at 243.

63. *Id.* at 243-44.

64. Comstock Law of 1873, ch. 258, 17 Stat. 598 (1873).

65. *Id.*; see *infra* text accompanying note 104.

medium, a thrilling form of mass entertainment. To many people, the masses were like children—easily corrupted, and in need of special attention. It was important to control this powerful instrument—to counter whatever bad messages it might send.

Movies, in short, had to be “educational” or “harmless.” That was the idea. The struggle over movie morality raged on in the 1920s and 1930s. The industry was petrified with fear of federal censorship; it was bullied and badgered by the Catholic Church and other pressure groups; and the state censors were definitely having an effect. From 1930 to 1931, New York’s censors made “468 cuts for indecency, 243 for inhuman acts, 1129 for incitements to crime, and 1165 for moral corruption;” other censors also “scissored away.”<sup>66</sup> The industry, in order to defend itself, and to ward off federal control, decided on a course of self-censorship.

The Motion Picture Production Code (“Code”)<sup>67</sup> was promulgated in 1930. The Code was drafted, mainly, by two prominent Catholics: Martin Quigly and Father Daniel Lord.<sup>68</sup> With minor changes, the studios signed on. The Code begins with a set of “General Principles,” followed by more detailed prescriptions.<sup>69</sup> Movies, the Code announced, are primarily entertainment; entertainment can be a force for improving people, but it can also be the opposite.<sup>70</sup> “Wrong entertainment” may lower the “living condition and moral ideals of a race.”<sup>71</sup> There are, for example, “healthful sports,” like baseball, and bad ones, like “cockfighting, bullfighting, [and] bear-baiting.”<sup>72</sup> The Code reminded its readers of “the effect on ancient nations of gladiatorial combats, the obscene plays of Roman times, etc.”<sup>73</sup>

Specifically, 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.”<sup>74</sup> The movies also had to embrace law and order. Crimes “shall never be presented in such a way as to throw

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66. LEONARD J. LEFF & JEROLD L. SIMMONS, *THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE FROM THE 1920S TO THE 1960S*, at 14-15 (1990). On the work and travails of censorship boards and the like in one jurisdiction, see generally BUTTERS, *supra* note 51, describing the work of the censorship board in Kansas.

67. MOTION PICTURE PROD. CODE (1930), available at <http://www.artsreformation.com/a001/hays-code.html>.

68. Stephen Vaughn, *Morality and Entertainment: The Origins of the Motion Picture Production Code*, 77 J. AM. HIST. 39, 48-49 (1990).

69. LEFF & SIMMONS, *supra* note 66, app. at 284-86.

70. *Id.* app. at 287-88.

71. *Id.* app. at 288.

72. *Id.*

73. *Id.*

74. *Id.* app. at 284.

sympathy with the crime as against law and justice.”<sup>75</sup> Moreover, “[t]he courts of the land should not be presented as unjust.”<sup>76</sup> Adultery was never to be shown in an attractive light. “[L]ustful kissing, [and] lustful embraces” were outlawed.<sup>77</sup> Scenes of passion should not “stimulate the lower and baser element.”<sup>78</sup> There should be absolutely no presentation of “[s]ex perversion,” “[w]hite-slavery,” or “[m]iscegenation;” “[s]ex hygiene and venereal diseases are not subjects for motion pictures.”<sup>79</sup> The Code, of course, forbade vulgarity, obscenity, and profanity; words like “God, Lord, Jesus, [and] Christ,” were not to be used except “reverently.”<sup>80</sup> Nudity was out; there were to be no undressing scenes, or indecent dances.<sup>81</sup> Movies were not to “throw ridicule on any religious faith,” and the “use of the Flag shall be consistently respectful.”<sup>82</sup>

The rules in the Code went far beyond the rules that applied to books, plays, and newspapers. This was deliberate. Movies were truly mass entertainment, while books and plays were not. Movies had “moral importance,” and the Code explicitly drew a class distinction. The “motion picture” had become “in an incredibly short period the art of the multitudes.”<sup>83</sup> Most arts “appeal to the mature.”<sup>84</sup> But this art, the art of the motion picture, “appeals at once to every class, mature, immature, developed, [and] undeveloped.”<sup>85</sup> It is recognized that: “Music has its grades for different classes; so has literature and drama.”<sup>86</sup> But, the motion picture “at once reaches every class of society;” it reaches “places unpenetrated by other forms of art.”<sup>87</sup> Hence it is hard to “produce films intended for only certain classes of people.”<sup>88</sup> Since theaters are built “for the masses,” films cannot enjoy as wide a “latitude” as books.<sup>89</sup>

For the first few years, the Code had only indifferent success. But, after a wobbly start, it turned into a very powerful instrument. In 1934,

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75. *Id.*

76. *Id.* app. at 290.

77. *Id.* app. at 285.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* app. at 291-92.

82. *Id.* app. at 285-86.

83. *Id.* app. at 288.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* app. at 288-89.

89. *Id.* app. at 289.

the industry created the Production Code Administration (“PCA”),<sup>90</sup> and gave the PCA the job of enforcing the Code. The PCA could levy fines on anyone who dared exhibit a film that broke the rules.<sup>91</sup> In the 1930s, the studios owned most major theaters in big cities; any film that lacked the PCA seal of approval was, therefore, “dead in the water.”<sup>92</sup> It would never reach an audience, and would consequently die of box office starvation.<sup>93</sup>

For about a generation, the Code was the industry’s bible. Under the leadership of Joseph Breen, the PCA vigorously enforced its standards.<sup>94</sup> Of course, studios constantly tested the limits. 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. This could be a difficult and protracted process. Before *Gone with the Wind*<sup>95</sup> could be approved, for example, there was a long period of give and take; the PCA insisted on all sorts of alterations in order to make the movie less sexually explicit, and less objectionable on a number of other scores.<sup>96</sup> 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.”<sup>97</sup> Breen wanted the offensive word dropped; the studio insisted on it.<sup>98</sup> In the end, the line stayed in the movie, but it was a near thing, and it took a lot of effort and argument.

The PCA was particularly worried about sex in the movies. Under the Code, for example, Mae West was extremely troublesome. West was wildly successful at the box office, largely because of her hip-wiggling sexuality and her thinly veiled double entendres. The PCA did not try to strip her acting of everything that made her popular; that was probably impossible. 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.”<sup>99</sup> Again, one sees the implicit line between “sophisticated” people, and the rest of humanity.

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90. WITTERN-KELLER, *supra* note 49, at 5.

91. *Id.* at 61.

92. *Id.* (internal quotation marks omitted).

93. *See id.*

94. *See id.* at 61-62.

95. *GONE WITH THE WIND* (Selznick International Pictures & Metro-Goldwyn-Mayer 1939).

96. LEFF & SIMMONS, *supra* note 66, at 85-99.

97. *Id.* at 97-99 (internal quotation marks omitted).

98. *Id.* at 97.

99. 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) (internal quotation marks omitted).

The United Kingdom, meanwhile, developed a system with principles that were quite similar to those of the American system. A British Board of Film Censors began its work in 1913.<sup>100</sup> Its principles were codified in 1926.<sup>101</sup> They included what one might have expected: no nudity; no scenes of men “leering at exposure of women’s undergarments;” nothing about abortion; no “[d]egrading exhibitions of animal passion;” no “[i]ndecent wall decorations;” and no men and women “in bed together.”<sup>102</sup> Such subjects as “[w]hite slave traffic,” “[a]bortion,” and “[t]ravesty and mockery of religious services” were taboo.<sup>103</sup> No films were allowed “in which sympathy is enlisted for the criminals.”<sup>104</sup> Additional restrictions included: no “[l]ampoons of the institution of monarchy,” or “[p]ropaganda against monarchy;” white men were not to be shown in a “state of degradation amidst native surroundings;” no “Bolshevist propaganda;” no “[e]quivocal situations between white girls and men of other races;” and British military officers were not to be “shown in a disgraceful light.”<sup>105</sup>

Censorship of books has had its own complex history. In some ways, it ran along lines that paralleled movie censorship. “Obscenity” and “pornography” were, of course, outlawed. Every American state had a law to this effect. These terms, moreover, were understood quite broadly. The famous Comstock law, which made it an offense to send obscene materials or pornography through the mail, also included a ban on 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 might get hold of these dreadful objects.<sup>106</sup>

Under the sheltering wing of the Comstock law, the postal authorities were supposed to keep out filth that might stream into the United States from the effete societies of Europe. Well into the twentieth century, these authorities zealously warded off such dangerous imports.

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100. JAMES C. ROBERTSON, *THE BRITISH BOARD OF FILM CENSORS: FILM CENSORSHIP IN BRITAIN, 1896-1950*, at 4-5 (1985).

101. *Id.* app. I at 180.

102. *Id.* app. I at 181-82.

103. *Id.* app. I at 180-82.

104. *Id.* app. I at 182.

105. *Id.* app. I at 180-81; *see also* ADRIAN BINGHAM, *FAMILY NEWSPAPERS? SEX, PRIVATE LIFE, AND THE BRITISH POPULAR PRESS, 1918-1978*, at 36 (2009). The general idea, of course, was to prevent movies from taking on any topic that was controversial, or which might undermine traditional morality. BINGHAM, *supra*, at 36.

106. Comstock Law of 1873, ch. 258, 17 Stat. 598, 599 (1873). For more background, *see generally* DONNA DENNIS, *LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK* (2009).

Local officials could be, at times, even more zealous. In Boston, the notorious Watch and Ward Society (“Society”) kept an eagle eye out for whatever it considered “smut.” The Society was a private organization, but it was very effective at putting pressure on book-sellers, publishers, and libraries. All sorts of books were “banned in Boston,” including some notable classics. To the horror of the Society, the impact of its actions was often the opposite of what it wanted: banning books in Boston was a wonderful (and cheap) advertisement; it boosted sales in the rest of the country.<sup>107</sup> The theater, too, had its share of censorship problems. British authorities in 1898 refused to allow a showing of George Bernard Shaw’s play, *Mrs. Warren’s Profession*,<sup>108</sup> her profession was, after all, not a fit subject for the stage.<sup>109</sup> In the United States, in 1900, actress Olga Nethersole, together with her leading man, her manager, and the lessee of the theater, were arrested for their role in putting on a play called *Sapho*,<sup>110</sup> written by American playwright, Clyde Fitch.<sup>111</sup> The play, according to the indictment, was “lewd, indecent, obscene, filthy, [and] scandalous;” it contained “lascivious, and disgusting motions and assume[d] indecent postures” and “indecent, obscene, and disgusting words.”<sup>112</sup>

Of course, there were voices that criticized censorship and spoke out for freedom of expression. Eventually, these voices began to make a difference. In a famous decision in 1933,<sup>113</sup> a federal court ruled against the federal government, and in favor of a dangerous and infectious import, James Joyce’s novel, *Ulysses*.<sup>114</sup> The case is often seen as a key step on the road to First Amendment enlightenment. But, the language of the opinion is significant. At the district court level, Judge John Woolsey noted that the book was long and hard to read; studying it was “a heavy task.”<sup>115</sup> In Woolsey’s view, the book was not pornographic; it lacked

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107. See NEIL MILLER, BANNED IN BOSTON: THE WATCH AND WARD SOCIETY’S CRUSADE AGAINST BOOKS, BURLESQUE, AND THE SOCIAL EVIL 113, 119 (2010) (describing the Society’s actions and effect in Boston).

108. GEORGE BERNARD SHAW, *MRS. WARREN’S PROFESSION* (1893).

109. Permission “for public performance was eventually granted over a quarter of a century . . . later.” DOMINIC SHELLARD ET AL., *THE LORD CHAMBERLAIN REGRETS . . . A HISTORY OF BRITISH THEATRE CENSORSHIP* 67 (2004). As late as the 1950s, the Lord Chamberlain’s office was still fussing over plays such as *Waiting for Godot*, suggesting cuts. *Id.* at 149-50. For the play *Look Back in Anger*, the censor asked for a number of cuts as well, for example, in Act II, “[a]lter the reference to pubic hair,” and in Act III, “[e]ut ‘short-arsed.’” *Id.* at 151-52.

110. CLYDE FITCH, *SAPHO* (1900).

111. *Indictment for “Sapho,”* N.Y. TIMES, Mar. 23, 1900, at 2.

112. *Id.*

113. *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182, 182 (S.D.N.Y. 1933).

114. JAMES JOYCE, *ULYSSES* (1922).

115. *One Book Called “Ulysses,”* 5 F. Supp. at 183.



the “leer of the sensualist.”<sup>116</sup> This was not “dirt for dirt’s sake.”<sup>117</sup> Reading *Ulysses* would not “tend to excite sexual impulses or lustful thoughts.”<sup>118</sup>

*Ulysses* was (and is) pretty tough to read. There is no question that this influenced Woolsey’s decision. A reader searching for “prurient interest,” or something to arouse “lustful thoughts,” could surely find something easier and cheaper, preferably something designed for exactly those purposes. The circuit court affirmed Woolsey’s decision on appeal.<sup>119</sup> The judges agreed that the book was not pornographic. “[M]any passages show the trained hand of an artist,” but they did point out that “[p]age after page of the book is, or seems to be, incomprehensible.”<sup>120</sup>

Is it fanciful to interpret the case in class terms? That is, one could trust educated, elite people to comprehend material like *Ulysses*; for ordinary folks, the book might be dangerous, but no matter—ordinary folks would be unlikely to plow through it. Judge Martin Manton, who dissented at the appellate court level, thought that the book was obscene and should have been banned.<sup>121</sup> 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.”<sup>122</sup> Interestingly, in some editions of *The Satyricon*,<sup>123</sup> a Latin classic attributed to Petronius Arbiter—and considered quite salacious—the reader would suddenly come across passages that lapsed mysteriously into Latin.<sup>124</sup> Similarly, in texts of works by the Marquis de Sade, some editions might abandon English at times in favor of the original French.<sup>125</sup> Presumably, people who could read Latin and French would be immune to the dangerous passages. The masses, on the other hand, stood in danger of corruption.

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116. *Id.*

117. *Id.* at 184.

118. *Id.* at 185.

119. *United States v. One Book Entitled “Ulysses,”* 72 F.2d 705, 708-09 (2d Cir. 1934).

120. *Id.* at 707.

121. *Id.* at 709 (Manton, J., dissenting).

122. *Id.* at 711. 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. For more on this scandal, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 504-10 (1994).

123. PETRONIUS ARBITER, *THE SATYRICON* (W. C. Firebaugh trans., 1943).

124. *Id.* at 255.

125. *SELECTED WRITINGS OF DE SADE* 76-77 (Margaret Crosland trans., 1964).

### III. DECLINE AND FALL

Movie censorship and self-censorship began to fray around the edges as early as the 1950s. Struggles with the PCA became almost routine. In 1953, Otto Preminger directed a comedy, *The Moon Is Blue*;<sup>126</sup> the PCA refused to give this film its stamp of approval.<sup>127</sup> The PCA felt that the movie was too light and flippant on the subject of sex. The studio released it anyway. Many theaters booked it; it was a financial success. The handwriting was on the wall. In the age of the sexual revolution, the Code had become an anachronism. Also, by the 1950s, the movies faced dangerous new competition: television. This may have induced the studios to produce edgier, more “adult” movies. By the late 1950s, the Code was becoming increasingly irrelevant. It was abandoned altogether in 1968, and replaced by the rating system (“G,” “PG,” “R,” and “NC-17”). The ratings told parents what movies their children could or should see. For adults, there were no restrictions at all.

So much for self-censorship. Censorship itself had suffered fatal blows in the courts. One of the key cases<sup>128</sup> involved a movie called *The Miracle*.<sup>129</sup> This was an Italian import that 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.”<sup>130</sup> The exhibitor, Joseph Burstyn, fought the ban all the way up to the U.S. Supreme Court, where he won his case in 1952.<sup>131</sup> The decision was, on the whole, somewhat cautious. The opinion, written by Justice Tom Clark, did not strike down all forms of movie censorship, and deliberately reserved the question of whether movies could be censored as obscene. But, New York could not ban a movie simply because it was “sacrilegious.”<sup>132</sup>

Despite this cautious language, the case clearly represented a turning point. *Burstyn, Inc. v. Wilson* (the “*Miracle case*”),<sup>133</sup> made it clear that the decision in *Mutual Film Corporation v. Industrial*

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126. *THE MOON IS BLUE* (Otto Preminger Films 1953).

127. WITTERN-KELLER, *supra* note 49, at 185-86.

128. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952).

129. *THE MIRACLE* (Warner Bros. Entertainment Inc. 1959).

130. *Burstyn, Inc.*, 343 U.S. at 497-98. 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.” *Id.* at 497.

131. *Id.* at 506; see LAURA WITTERN-KELLER & RAYMOND J. HABERSKI, JR., *THE MIRACLE CASE: FILM CENSORSHIP AND THE SUPREME COURT* 102-10 (2008).

132. *Burstyn*, 343 U.S. at 505-06.

133. 343 U.S. 495 (1952).

*Commission of Ohio*,<sup>134</sup> which upheld censorship in 1915, was no longer good law. You could no longer dismiss movies as mere “entertainment,” or mere “spectacle,” unprotected by the First Amendment. Movies were forms of expression, and they had constitutional protection, just as books, plays, and newspapers did.<sup>135</sup>

By the end of the century, censorship was only a memory. Movies were now free to use dirty words (and they most assuredly did), they could show naked bodies (at least fleetingly), and they could violate any and all of the principles of the Code. Anything could go—as long as it could sell. In theory, hard-core pornography was still subject to a certain amount of control; in practice, hardly any at all.<sup>136</sup> Hollywood did not itself make and market “adult” films, but it had, and made use of, a latitude that would have been unthinkable in the past. Today, sex in the movies is no longer just for married people. Movies can accept or even defend adultery. Same-sex behavior is no longer taboo. Interracial love, romance, and sex, can be an element of a movie’s plot, and can be treated with sympathy. All of this, of course, parallels changes in the legal system itself. Adultery has been decriminalized in most states. The Supreme Court put an end to the last remaining sodomy laws in 2003,<sup>137</sup> most states had abolished them earlier. Similarly, the Supreme Court dispatched surviving laws against miscegenation in 1967 in *Loving v. Virginia*.<sup>138</sup> Many other rules and principles of the Code have also vanished from the scene. Movies are free to film stories where the wicked flourish, and where crime indeed does pay. Movies can also be “blasphemous,” though this is still rather tricky at the box office.

The last half of the twentieth century was a period of rapid and dramatic cultural change, including the civil rights movement, the sexual revolution, and an explosion in the technology of mass culture: television, very notably, followed by the Internet, iPods, iPads, video games, and so on. This resulted in a blurring of the line between mass culture and high culture. This was also a period of vast expansion for the human rights movement. Legally, country after country drafted and adopted new constitutions, which almost always included a bill of rights

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134. 236 U.S. 230 (1915).

135. See *Freedman v. Maryland*, 380 U.S. 51, 57-61 (1965). The *Freedman* case was another body blow to the censorship board idea; basically, after this decision, while in theory the state could still require studios to submit movies in advance, the board would have no power simply to ban a movie. *Id.*

136. For more on the tangled history of the legal status of obscenity and pornography in our times, see WHITNEY STRUB, *OBSCENITY RULES: ROTH V. UNITED STATES AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION* 201-22 (2013).

137. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

138. 388 U.S. 1, 2 (1967).

and a powerful court with the power of judicial review. Hundreds of statutes, rules, ordinances, treaties, and conventions set out and embodied norms of human dignity and fundamental rights. Behind the bony skeleton of law was the flesh and blood of a human rights culture. And, both the legal structure and the culture, as we mentioned, had, at their core, an ethos of absolute equality—at least as an ideal, but also realized to a greater or lesser extent in most modern, developed societies. In reaching this point, old norms of differentiation evaporated; old distinctions between elites and ordinary folks vanished into thin air. This was true, too, of the subtle and elitist core of theories regarding free speech and expression.

In our times, elitist theories of social control have lost their power. They are incompatible with the human rights culture, and with current conceptions of the rule of law. Theories of elite control (often, as in the United States, mostly implicit) assumed that it was essential, in order to keep a well-run and successful society, for people to have faith in their leaders. They needed to believe that their leaders were honest, diligent, and wise; anything else would endanger the social fabric.<sup>139</sup> Leaders had both rights and duties, in either case calling for special treatment. Censorship was at least a dim echo of these beliefs. But, today, in the age of the welfare state, in the age of mass society, deference and trust have been deemphasized. Distinctions of rank or education—formally, at least—have weakened. The decline and fall of movie censorship is one sign of this shift in general culture. After all, theories of elite control justified censorship in the first place.

#### IV. SELF-CENSORSHIP IN THE NEWS

As we saw, movie censorship was, in a way, a form of differentiation: it subtly assumed a double standard for freedom of speech and expression. It drew an implicit line between the mass public and elites. The mass public was to be treated, in a way, like children—as people easily spoiled and corrupted. They were presumably unable to handle and digest material that the elite and the highly educated could handle with ease. This double standard has now disappeared (for adults, at any rate). It was a victim of the general trend in the human rights culture, the trend from differentiation to equality.

In the past, other media, if not explicitly censored, did practice a fairly rigid form of self-censorship. The Victorian and post-Victorian

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139. For more on this thesis, see generally LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* (2007) [hereinafter FRIEDMAN, *GUARDING LIFE'S DARK SECRETS*].

presses were extremely prudish. This reached its highest form (or lowest, if you will) in the behavior of the mainstream, respectable press. But, even those “rags” that were considered “scurrilous” in their day were (to our eyes) exceedingly tame. In the press, moreover, self-censorship went beyond prudery. Mystery, obscurity, or a cloud of outright lies shrouded the personal lives of elites—namely, leaders and famous people. Until the 1950s, American newspapers did not receive or publish honest reports about the president’s health. In 1893, for example, doctors discovered a tumor in the mouth of President Grover Cleveland (who habitually chewed tobacco).<sup>140</sup> Cleveland underwent an operation on a yacht off Long Island under conditions of the strictest secrecy.<sup>141</sup> The President was supposedly on vacation. The truth came out only decades later.<sup>142</sup> Similarly, although the public knew (more or less) that President Franklin Delano Roosevelt was a victim of polio, public appearances were carefully stage-managed; the public was never allowed to see how disabled he was. Amazingly, out of some 35,000 known photographs of the President, only two show him sitting in a wheelchair.<sup>143</sup> Nor did the newspapers report on his general state of health. At the time he won his fourth term, in 1944, Roosevelt was, in fact, desperately ill. But the public heard nothing about this.<sup>144</sup>

The first president to release honest medical bulletins was President Dwight D. Eisenhower. Eisenhower had suffered a heart attack; the White House released the actual facts, after a certain amount of hemming and hawing (and lying).<sup>145</sup> Disclosure later became standard practice. In 1965, for example, President Lyndon B. Johnson underwent a gallbladder operation.<sup>146</sup> The newspapers reported details about the operation and his convalescence—for example, we were told that, 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.”<sup>147</sup>

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140. MATTHEW ALGEO, *THE PRESIDENT IS A SICK MAN: WHEREIN THE SUPPOSEDLY VIRTUOUS GROVER CLEVELAND SURVIVES A SECRET SURGERY AT SEA AND VILIFIES THE COURAGEOUS NEWSPAPERMAN WHO DARED EXPOSE THE TRUTH* 17, 63 (2011).

141. *Id.* at 63, 89.

142. *Id.* at 213.

143. Times have certainly changed: the FDR Memorial includes a statue showing the President in his wheelchair. *Franklin Delano Roosevelt Memorial*, NAT’L PARK SERV., [http://www.nps.gov/nr/travel/presidents/fdr\\_memorial.html](http://www.nps.gov/nr/travel/presidents/fdr_memorial.html) (last visited Nov. 23, 2014).

144. See STEVEN LOMAZOW & ERIC FETTMANN, *FDR’S DEADLY SECRET* 129-35 (2009).

145. See Russell Baker, *Eisenhower Is in Hospital with ‘Mild’ Heart Attack; Stricken in Sleep*, N.Y. TIMES, Sept. 25, 1955, at 1.

146. Robert B. Semple, Jr., *Johnson Enjoys Good Appetite; Doctors ‘Satisfied’ by Progress*, N.Y. TIMES, Oct. 14, 1965, at 32.

147. *Id.*

Needless to say, reports on the sex life of a president were completely taboo. President John F. Kennedy was a notorious womanizer. Dozens and dozens of reporters (among others) must have known about his habits. However, nothing at all appeared in the newspapers. In the United Kingdom, the press tiptoed around any news that reflected on the royal family. In the 1930s, the new king, King Edward VIII, ignited a constitutional crisis because he wanted to marry an American divorcee. The local press did not print a word about the growing scandal. Throughout the rest of the world, the King's personal crisis was big news; but British newspapers felt a "duty to protect the dignity of the monarchy by not circulating damaging rumours."<sup>148</sup>

Today, of course, on both sides of the Atlantic, the situation has changed dramatically. President Bill Clinton's sexual foibles were shouted to the skies (and were a factor, indeed, in his impeachment trial). In England, the Queen's wayward children, their marriages and divorces, the saga of the late Diana, Princess of Wales, and the hell-raising behavior of Prince Harry, have all been dished up in enormous, lip-smacking details. The tabloids, which continue to thrive on sex, sensationalism, scandal, and celebrity gossip, led the way.<sup>149</sup> But, the more prestigious papers, too, printed "news" that they never would have printed before.<sup>150</sup>

Among other things, this, too, is part of the movement from differentiation—or, if you like, the double standard—toward equality, or a single standard. The double standard did have a certain point: it protected the reputation of elites. Elites included not only political leaders, but religious leaders, business leaders, and social leaders, as well. For the elites themselves, this was self-serving, to say the least. But it probably did reflect a genuine, if implicit, theory about the way free societies simply had to operate.<sup>151</sup>

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148. BINGHAM, *supra* note 105, at 241. Once the news broke—and the King abdicated—the newspapers made up "for lost time, covering the constitutional crisis from every angle." *Id.* at 242.

149. See generally MARTIN CONBOY, *TABLOID BRITAIN: CONSTRUCTING A COMMUNITY THROUGH LANGUAGE* (2006).

150. In other countries, deference to elites may have lasted longer, in some regards. See Raphael Minder, *Long Above Scrutiny, King and Family Find the Throne Turning Hot*, N.Y. TIMES, Apr. 16, 2013, at A6. This article is about the Spanish royal family. *Id.* According to the article, for years "the members of Spain's royal family were treated with profound deference . . . Their private lives generally went uninvestigated." *Id.* 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. *Id.* This deference "wasn't driven by fear, but instead by respect and gratefulness." *Id.* All this, now, has decisively ended.

151. Major institutions operate in a similar fashion. There is a natural tendency to try to cover up scandal. When the cover-up fails, as often happens these days, the public is, quite properly, outraged. Consider, for example, the current travails of the Roman Catholic Church. Yes, the way

As the double standard faded into history, what replaced it was the notion that the public had a right to know all. This “right to know is,” in a way, the other side of the coin of freedom of expression. It 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 connected with another salient aspect of modern society: the celebrity culture. There is significant literature regarding celebrity culture, and the very meaning of the term.<sup>152</sup> A “celebrity” is not simply someone who is famous; a “celebrity” is both famous and familiar—we know what they look like, sound like, and act like.<sup>153</sup> The public is caught up in a game of celebrities; but celebrities are not “gods or supermen but human beings,” and human beings “who are most attractive when they most resemble ordinary people.”<sup>154</sup> Of course, there is an aura about celebrities, but the familiarity is even more crucial than the aura. And this familiarity is a direct consequence of the role the mass media play in our society.

The movies helped create 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 enormously. Later came the Internet, which has had a huge impact on celebrity culture, and will no doubt continue to do so. Both television and the Internet can create instant celebrities.

The law, as always, reflects changes in society. Norms of the modern human rights culture have refined and redefined norms of freedom of speech and expression. The law of privacy reflects the rise of a celebrity culture, as does the social and legal right to know. In our times, people are (rightly) concerned with privacy, threats to privacy, and ways to protect privacy; yet, paradoxically, the privacy rights of celebrities and public figures have gone into deep eclipse in the United States.

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the Church reacted to priests who molested children was—in contemporary terms—indefensible. But, many members of the hierarchy were no doubt sincere in believing that covering up the scandal was better for society (and the Church) than letting the faithful know what was going on, and thus, sapping their faith in the institution.

152. See, e.g., GRAEME TURNER, UNDERSTANDING CELEBRITY 4-9 (2004).

153. See FRIEDMAN, GUARDING LIFE'S DARK SECRETS, *supra* note 139, at 225-30.

154. CHARLES L. PONCE DE LEON, SELF-EXPOSURE: HUMAN-INTEREST JOURNALISM AND THE EMERGENCE OF CELEBRITY IN AMERICA, 1890-1940, at 281 (2002).

## V. A CONCLUDING WORD

The general argument in this Article has been about the movement from differentiation to equality. I have suggested that this is a general trend, a feature of the evolution of modern human rights culture. I suspect that each item on the standard 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, as we pointed out, that courts and other organs of government had to treat all members of a class in an equally. Today, the rule of law and the human rights culture coincide; they both signify (or are supposed to signify) absolute equality before the law, and (even more so) absolute equality of opportunity within society.

We mentioned women’s rights, but there are other examples, as well. Take, for instance, freedom of religion. The story begins in an age of state religions (we can skip over periods in which heretics were burned at the stake). Minority religions then gained rights—or, rather, gained tolerance. In England, dissenters and Catholics won the right to vote and serve in Parliament. They were tolerated; but there was still an official state religion. Today, state religions have vanished from the Western world, except in the most formal and empty sense. To the contrary, the state proclaims absolute neutrality between religions and religious beliefs. Of course, the “absolute” in absolute equality has to be taken with a grain of salt; no absolute is absolutely absolute, and perhaps, never will be. But that is another, and more complicated, story.



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