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Margaret A. Blanchard

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# THE AMERICAN URGE TO CENSOR: FREEDOM OF EXPRESSION VERSUS THE DESIRE TO SANITIZE SOCIETY—FROM ANTHONY COMSTOCK TO 2 LIVE CREW

MARGARET A. BLANCHARD\*

Three decades ago, Leonard W. Levy surveyed early American history and advanced the theory that the vaunted free press tradition was more myth than reality.<sup>1</sup> Such a supposition outraged critics, who felt that Levy had tampered with evidence and had tarnished the image of a value central to the nation's development.<sup>2</sup> The attacks on his work were so vehement that, twenty-five years after the publication of the original study, Professor Levy revised his earlier work and tempered its findings to indicate that perhaps a tradition of press freedom had been developing in the nation after all and that his phrase "legacy of suppression" was too harsh.<sup>3</sup>

The controversy over the Levy book reflects, in part, the importance of the free press lobby among American historians, lawyers, and journalists. Today's media empires have a vested interest in freedom of the press because they consider themselves the trustees of that First Amendment value. They and those associated with them want to ensure that freedom of the press remains unscathed by rumors of earlier American suppression. Once admitted, such restraints might remind those who look to history for guidance that the founding fathers were not all that tolerant of press excesses and, perhaps, that modern-day politicians should not willingly put up with such press behavior either.

This Article is not designed to debate the correctness of either Levy's views or those of his opponents. Rather, its purpose is to point out that by investing so much energy in disputing Levy's hypotheses, scholars have generally ignored a very real legacy

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\* Professor, School of Journalism and Mass Communication, University of North Carolina at Chapel Hill. B.S., University of Florida, 1965; M.A., University of Florida, 1970; Ph.D., University of North Carolina at Chapel Hill, 1981.

Portions of this Article are excerpted from MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* (1992).

1. See LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICA: LEGACY OF SUPPRESSION* (1960).

2. JEFFREY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 4-11 (1988); David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 499-509 (1983).

3. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* xxi (1985).

of suppression in this nation.<sup>4</sup> This repression involves the unwillingness of most Americans, including mainline journalists, to tolerate dissident political, economic, or social ideas. Indeed, after researching this subject, one is almost convinced that some large, anonymous committee has decided which ideas are acceptable for Americans to learn about and which ones are not. Thoughts in the latter category are considered far too dangerous and are targeted for extermination. The fact that many of these ideas have survived to become part of mainstream life is more a tribute to the tenacity of those who advocate them than to the willingness of Americans to allow new concepts into their lives.<sup>5</sup>

Although one might expect attempts to orchestrate political, economic, and social thought, one might also expect resistance when efforts to regulate thinking reach deep into the personal lives of Americans. Americans are steeped in the belief that each person's home is a private castle and that the government's reach stops at the threshold. As much as Americans relish their privacy, however, many of them have become increasingly willing to allow the government to intrude into their leisure time activities in an effort to cleanse society from excessive sexuality and to protect children from the perverting influences of various media forms. No longer is the family considered able or, perhaps more accurately, willing to set standards of behavior for its members. Rather than simply forbidding young people to listen to certain forms of music, read certain books, or see certain movies, many families have abdicated this responsibility to civic action groups and the government. Such a relinquishment of authority over individual lives has led to denunciations of various media forms, calls for self-regulation of individual mediums, and attempts to ban completely some sexually explicit speech.

Today's Americans are most familiar with the recent campaigns against the music of 2 Live Crew and the photographs of Andres Serrano and Robert Mapplethorpe. These crusades spring to mind when one discusses the repression of sexually explicit media activity. However, organized campaigns to restrict such materials

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4. This generalization, however, is not without exceptions. For a discussion of the repression of certain unpopular ideas, see JOHN LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* (1980).

5. These themes and the historical events that accompany them are explored in BLANCHARD, *supra* note \*. Among the ideas that succeeded despite national hostility include the abolition of slavery, the organization of workers, the receipt of equal rights for blacks, and the pressure to end the war in Vietnam, as well as political reforms such as the direct election of senators and the women's suffrage movement.

in the United States date back at least to the last quarter of the nineteenth century.<sup>6</sup> A study of such campaigns can teach valuable lessons about how to react to today's efforts to cleanse society of its least desirable speech elements. Such a historical study reveals that:

(1) conservative trends in political and economic life are strongly connected with such clean-up campaigns. Indeed, political conservatives may encourage attacks on sexually explicit materials in an effort to divert American energy from areas in which it could cause trouble for conservative interests;

(2) large-scale attacks generally begin with criticism of fringe materials in which few can find redeeming social value. Ultimately, however, the campaigns to clean up society try to expunge materials that most Americans consider important or valuable. For example, before he finished his career, Anthony Comstock attacked nude paintings by modern French masters and a play by George Bernard Shaw.<sup>7</sup> Early crusaders also helped retard the distribution of information on sex education, birth control, and abortion;<sup>8</sup>

(3) the media almost invariably yield to pressure from the attack and establish some sort of code of self-regulation to keep the reformers at bay. This was as true of the dime novels in Anthony Comstock's time as of the record industry today;

(4) parents and grandparents who lead the efforts to cleanse today's society seem to forget that they survived alleged attacks on their morals by different media when they were children. Each generation's adults either lose faith in the ability of their young people to do the same or they become convinced that the dangers facing the new generation are much more substantial than the ones they faced as children;

(5) the support for sexually explicit expression has never been strong. Most people simply do not want to talk about such materials. The words of George Carlin's infamous monologue or 2 Live Crew's obnoxious lyrics are conspicuously absent from major media sources. In almost every instance in which sexually explicit material is threatened, some such support does appear,

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6. See SIDNEY WARREN, *AMERICAN FREETHOUGHT* 164-65 (1943) (discussing the congressional introduction of the Comstock Laws).

7. See HEYWOOD BROWN & MARGARET LEECH, *ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD* 222-43 (1927).

8. See MARY WARE DENNETT, *BIRTH CONTROL LAWS: SHALL WE KEEP THEM, CHANGE THEM, OR ABOLISH THEM?* 19-45 (Leonard W. Levy ed., Da Capo Press 1970) (1926).

however reluctantly, but convincing people that this form of speech deserves protection is most difficult;<sup>9</sup> and

(6) in asking federal, state, and local governments to take action against sexually explicit speech, Americans are requesting intervention in the most private areas of family life—the right to inculcate in their children the moral values that they wish to pass on. Legislators, activists, and judges are making more of these decisions than ever before, and their standards may well not be those desired by individual families.

### I. ANTHONY COMSTOCK'S ATTACK ON OBSCENE MATERIALS

The latter quarter of the nineteenth century seethed with social, political, and economic unrest. The nation's leaders feared all attempts to upset the status quo and took substantial measures to counter threats posed by anarchists<sup>10</sup> and union organizers.<sup>11</sup> Business and political leaders also feared losing control, and with good reason; strikes often brought together those advocating political and economic change, and violence was never far behind.<sup>12</sup> The suppression of those advocating change was a vital part of the social and political agenda, and leaders sought to divert the energies of potential reformers into other activities.

Fortuitously coinciding with the attacks on political and economic deviants was a growing concern about the fate of American young men who were moving to the cities to find jobs. Essentially rootless in this new environment, these inexperienced youths, if left to their own devices after work, might fall prey to the

9. See, e.g., *FCC v. Pacific Found.*, 438 U.S. 726 (1978) (plurality opinion) (affirming the FCC's decision that George Carlin's monologue *Filthy Words* was indecent as broadcast).

10. See CHARLES A. MADISON, *CRITICS & CRUSADERS: A CENTURY OF PROTEST* 167-69 (1947); WILLIAM O. REICHERT, *PARTISANS OF FREEDOM: A STUDY IN AMERICAN ANARCHISM* 1-330 (1976); LILLIAN SYMES & TRAVERS CLEMENT, *REBEL AMERICA: THE STORY OF SOCIAL REVOLT IN THE UNITED STATES* (1934).

11. See ALBERT A. BLUM, *A HISTORY OF THE AMERICAN LABOR MOVEMENT* (1972); THOMAS R. BROOKS, *TOIL AND TROUBLE: A HISTORY OF AMERICAN LABOR* 38-83 (1964); SANFORD COHEN, *LABOR IN THE UNITED STATES* 59-82 (2d ed. 1966); ROBERT J. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO THE PRESENT* 9-19 (1978); JOSEPH RAYBACK, *A HISTORY OF AMERICAN LABOR* 103-207 (1959); NORMAN WARE, *THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895*, at 45-50 (1929).

12. For discussions of actual instances of strikes leading to violence, see HENRY DAVID, *THE HISTORY OF THE HAYMARKET AFFAIR: A STUDY IN THE AMERICAN SOCIAL-REVOLUTIONARY AND LABOR MOVEMENTS* 39-40 (2d ed. 1958) and ALMONT LINDSEY, *THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL* 1-16 (1942).

temptations of billiard parlors, bars, theaters, gambling tables, and houses of prostitution.<sup>13</sup> Thus, while the business community, with some government aid, suppressed radical political and economic thought, other Americans were hard at work cleaning up the moral dregs of society. This campaign appealed to individuals who believed that the national moral atmosphere needed to be purified in order to preserve a stable social structure. The era spawned the Young Men's Christian Association (YMCA), the Sunday school movement, the Salvation Army, and the Moody and Sankey revivals.<sup>14</sup> The campaign also gave rise to the first great crusader for cleaning up American literature and artwork, Anthony Comstock.<sup>15</sup>

Comstock came to New York City to work in a dry goods store after the Civil War, but his strong religious background soon led him in a different direction.<sup>16</sup> Appalled by his co-workers' reading materials, he became convinced that he must save individuals from falling into irreversible sin. Comstock therefore appealed to the YMCA for funding to support his campaign against obscene materials, and in 1872, Comstock and the YMCA joined forces to create the Committee for the Suppression of Vice, with Comstock as its secretary.<sup>17</sup> Its incorporators included some of the city's leading citizens: financier J.P. Morgan, mining magnate William Dodge, Jr., and industrialist Samuel Colgate.<sup>18</sup> Each had a stake in protecting the workforce from corrupting influences that may have been far different from Comstock's concern for the workers' immortal souls. Together they launched a campaign against obscenity, pornography, and information on birth control and abortion that set an unprecedented standard for the repression of sexually related ideas.<sup>19</sup>

In many respects, Comstock's crusade was a confusing one. He did interfere with the progress of American art and literature, but for the most part, he campaigned only against fringe mate-

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13. See BROWN & LEECH, *supra* note 7, at 77.

14. See *id.*, at 76.

15. See *id.*; see also Ralph Andrist, *Paladin of Purity*, AM. HERITAGE, Oct. 1973, at 4-7, 84-89; C. Fisher-LaMay, Anthony Comstock: Victorian America, Sexuality and Free Speech (1989) (unpublished M. thesis, University of North Carolina at Chapel Hill). For a discussion of the purity crusades of the era, see PAUL BOYER, PURITY IN PRINT: THE VICE SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA (1968) and DAVID J. PIVAR, PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL (1973).

16. BROWN & LEECH, *supra* note 7, at 76-89.

17. *Id.* at 152-54.

18. Fisher-LaMay, *supra* note 15, at 29.

19. BROWN & LEECH, *supra* note 7, at 128-54.

rials. Among the books he was responsible for destroying were such little-known titles as *The Lustful Turk*, *The Lascivious London Beauty*, and the *Beautiful Creole of Havana*. The closest he got to real literature was *Fanny Hill*,<sup>20</sup> and debate continues as to whether *Fanny Hill* constitutes real literature. Others during this era, however, moved closer to censorship of significant literature that is mistakenly associated with Comstock. Nathaniel Hawthorne's *The Scarlet Letter*, for instance, got into trouble because of its subject matter. Critics said it endorsed adultery even though the author treated the subject carefully and made sure that the act was punished in the end. Walt Whitman's *Leaves of Grass* also ran afoul of community censors because of its references to anatomy and sexual intercourse.<sup>21</sup>

Few states had obscenity laws on the books when Comstock became active.<sup>22</sup> The federal government, however, included provisions against the importation of obscene material as part of a customs law as early as 1842.<sup>23</sup> The first federal legislation regulating obscenity in the United States came in 1865 when Congress, concerned about obscene materials being sent to Union troops, passed a law barring "obscene book[s], pamphlet[s], picture[s], print[s], or other publication[s] of vulgar and indecent character" from the mails.<sup>24</sup> The statute merely legitimated the Postmaster General's removal of materials considered obscene from mail addressed to soldiers during the Civil War.<sup>25</sup> In 1868, Congress added information on lotteries to the list of items

20. *Id.* at 16.

21. See FELICE F. LEWIS, LITERATURE, OBSCENITY & LAW 1-25 (1976). In "Song of Myself," an integral part of the 1855 publication of *Leaves of Grass*, Whitman wrote:

I mind how once we lay such a transparent summer morning,  
How you settled your head athwart my hips and gently turn'd over upon me,  
And parted the shirt from my bosom-bone, and plunged your tongue to my  
bare-stript heart,  
And reach'd till you felt my beard, and reach'd till you held my feet.  
And:

I turn the bridegroom out of bed and stay with the bride myself,  
I tighten her all night to my thighs and lips.

THE OXFORD BOOK OF AMERICAN VERSE 284 (F.O. Matthiessen ed., 1950).

22. These states were Vermont (1821), Connecticut (1834), Massachusetts (1835), Pennsylvania (1860), and New York (1868). See LEWIS, *supra* note 21, at 7.

23. An Act to Provide Revenue from Imports, ch. 270, § 28, 5 Stat. 548, 566-67 (1842).

24. Post Office Act, ch. 89, § 16, 13 Stat. 504, 507 (1865).

25. See DOROTHY FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 55-57 (1977); James Paul, *The Post Office and Non-Mailability of Obscenity: An Historical Note*, 8 UCLA L. REV. 44, 49-50 (1961).

considered nonmailable.<sup>26</sup> In 1872, Congress expanded the section on obscenity somewhat so that "no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, or any letter upon the envelope of which, or postal card upon which scurrilous epithets may have been written or printed, or disloyal devices printed or engraved, shall be carried in the mail."<sup>27</sup> Even so, Comstock "found laws inadequate, and public sentiment worse than dead because of an appetite that had been formed for salacious reading; and especially because decent people could not be made to see or understand the necessity of doing anything in this line."<sup>28</sup>

Soon after beginning work with the Committee for the Suppression of Vice, Comstock sought new legislation to ban obscene materials from the mails. His 1873 campaign came at a propitious time because senators and representatives were bogged down in the *Crédit Mobilier* scandal in which various members of Congress were charged with selling political influence in return for a share of railroad profits.<sup>29</sup> Congress needed an issue that could help to clean up its much tarnished reputation; Comstock's purity campaign was just the ticket.

Unwilling to leave anything to chance, Comstock personally lobbied for revisions in existing law with the aid of an exhibit of offensive materials. Included were questionable publications, devices to increase sexual potency, and material on birth control and abortion. Comstock told anyone who would listen to him that the problem was immense; children could purchase "vile books" at their schools for a mere ten cents. In his brief career to date, he had seized obscene photographs, books and pamphlets, sheet music for impure songs, obscene playing cards, and immoral rubber articles.<sup>30</sup> He stated that none of this material should be available to the general public. He estimated that six thousand people were regularly employed by more than 144 companies producing and distributing obscene materials.<sup>31</sup> "[T]his business," Comstock told congressmen, "is carried on principally by the agency of the United States mails, and there is no law to-day by

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26. Post Office Act, ch. 246, § 13, 15 Stat. 196 (1868).

27. *Id.* ch. 335, § 148, 17 Stat. 283, 302 (1872).

28. BROUN & LEECH, *supra* note 7, at 86 (quoting ANTHONY COMSTOCK, *FRAUDS EXPOSED* (1880)).

29. *See id.* at 128-30.

30. *See* Andrist, *supra* note 15, at 85.

31. CONG. GLOBE, 42d Cong., 3d Sess. app. 168 (1873) (statement of Rep. Merriam introducing a letter from Anthony Comstock).



which we can interfere with the sending out of these catalogues and circulars through the mail, except they are obscene on their face."<sup>32</sup>

Revisions in the postal code attracted little debate, let alone criticism. Most members agreed with Congressman C.L. Merriam of New York, who told the House of Representatives that he doubted whether "war, pestilence, or famine could leave deeper or more deadly scars upon a nation than the general diffusion of this pestilential literature. The history of nations admonishes us that even our fair Republic will be of but short duration unless the vigor and purity of our youth be preserved."<sup>33</sup> According to Merriam, "these revelations have amazed and alarmed members of Congress."<sup>34</sup> Representatives must act, he said, so that "[t]he masses of our people, doubtless as ignorant hitherto as ourselves, of the nature and extent of this fearful evil"<sup>35</sup> will not question congressional interests. Indeed, he said, constituents would never "pardon us should we fail to put an end to this nefarious and diabolical traffic."<sup>36</sup> The measure passed at two o'clock the morning before Ulysses S. Grant's second inaugural.

Quickly known as the Comstock Act, the new legislation said:

no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature . . . shall be carried in the mail.<sup>37</sup>

Persons violating the law could be convicted of a misdemeanor and fined not less than one hundred dollars nor more than five thousand dollars for each offense or imprisoned at hard labor for one to ten years.<sup>38</sup> Congress named Comstock a special unpaid agent of the Post Office Department and allowed him to help enforce the Act.<sup>39</sup> By the end of 1873, Comstock reported fifty-five arrests and twenty convictions.<sup>40</sup> Legislative imprecision,

32. *Id.*

33. *Id.* (statement of Rep. Merriam expressing his own opinions).

34. *Id.*

35. *Id.*

36. *Id.*

37. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, § 2, 17 Stat. 598, 599 (1873).

38. *Id.*

39. See Andrist, *supra* note 15, at 86.

40. See BROWN & LEECH, *supra* note 7, at 152.

however, banned only materials relating to abortion and contraception from the mails; ordinary obscene publications slipped through the legislative net. Consequently, the Comstock Act was amended in 1876 to declare nonmailable “[e]very obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion.”<sup>41</sup>

The judicial system helped Comstock’s battle against obscenity. As of 1868, judges began applying a restrictive rule borrowed from the British to determine whether challenged material was obscene. Using the test developed in *Regina v. Hicklin*,<sup>42</sup> judges said the question of obscenity would turn on “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”<sup>43</sup> Judges using this standard condemned books because parts of them might be considered obscene by the young and inexperienced people who might happen to read them rather than by evaluating the books by the standards of the intended audience.<sup>44</sup> Court officials refused to enter obscene material into the record for fear of offending persons attending the session, and this further enhanced Comstock’s ability to obtain convictions. In addition, jurors were not allowed to hear so-called expert witnesses testify to the value of the material being challenged.<sup>45</sup> The court system was therefore fairly well-rigged to guarantee that material challenged as obscene would be found to be so.

Comstock carried out his assigned tasks with great vigor. His favorite tactic was to purchase suspect publications and then order—under an assumed name, of course—illicit materials through the mails.<sup>46</sup> Once he had the goods in his hands, he obtained his indictment, and the seller usually was on his or her way to jail. Initially, Comstock’s activities were almost ignored by the newspapers and magazines of the day. Comstock, however, was a master at public relations, and he had the right people behind his campaign. Eventually his efforts garnered the atten-

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41. Amendment to the Comstock Act, ch. 186, § 1, 19 Stat. 90 (1876).

42. 3 Q.B. 360 (1868).

43. *Id.* at 371.

44. *Id.*

45. *See id.* at 362.

46. *See* BROWN & LEECH, *supra* note 7, at 158-59.

tion of the media and, generally, their approval.<sup>47</sup> At times, though, the vice fighter took direct aim at the media themselves.<sup>48</sup>

Prior to the passage of the Comstock Act, for instance, many newspapers had carried advertisements for birth control devices and abortionists.<sup>49</sup> The ads disappeared after Comstock began his crusade, and many publishers sought his advice on the wisdom of promoting certain products. When editors refused his entreaties, Comstock became puzzled and angered. Comstock wrote in his diary that the editor of the *Sunday Mercury* seemed to think that because he published a paper, he should be licensed to put anything in it he chose. Comstock also commented that the editor thought that he could believe anything that suited him about any advertisement in his paper, that no law could proscribe what a paper should publish, and that he was not free to strike out an advertisement even though the parties engaged were known to be villains or abortionists. Comstock heartily disagreed. "I think a little wholesome law will bring him to terms. He says he shall have to have the law changed next session. Let's see him!"<sup>50</sup>

Comstock's law proved virtually immune to challenge, and the antvice campaign grew substantially. In 1873, the antvice campaign had become so large, and perhaps so controversial, that it was severed from the YMCA.<sup>51</sup> Most of the campaign's original supporters continued to back the new Society for the Suppression of Vice, which had extensive powers. In its new incorporation papers, careful readers found a clause saying, "The police force of the city of New York, as well as of other places, where police organizations exist, shall, as occasion may require, aid this corporation, its members or agents, in the enforcement of all laws which now exist or which may hereafter be enacted for the suppression' " of vice.<sup>52</sup> The vice society was not to help the police; the police were to help it. Furthermore, when the New York State Criminal Code was changed two years later to include a state version of the Comstock law, its provisions allowed society

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47. *Id.* at 145-47.

48. *Id.*

49. See Kathleen L. Endres, 'Strictly Confidential': Birth-Control Advertising in a 19th Century City, 63 JOURNALISM Q. 748 (1986) (describing advertisements for contraceptives and abortionists during the period from 1850 to 1880); Marvin Olasky, *Advertising Abortion During the 1830s and 1840s: Madame Restell Builds a Business*, 13 JOURNALISM HIST. 49 (1986) (analyzing a New York abortionist's use of newspaper advertising).

50. BROUN & LEECH, *supra* note 7, at 147 (quoting Comstock's diary).

51. *Id.* at 150-54.

52. DENNETT, *supra* note 8, at 31 (quoting Society for the Suppression of Vice's new incorporation papers, § 5).

agents to be deputized and to "make arrests and bring before any court . . . offenders found violating the provisions of any" state or federal law regulating the distribution of obscene and indecent materials.<sup>53</sup> Many other states passed so-called little Comstock laws, thus spreading the net widely for persons promoting obscenity, pornography, and birth control information.

Opposition to Comstock's efforts developed within the ranks of the Freethinkers—individuals opposed to the established religious orthodoxy that dominated thought in the late nineteenth century.<sup>54</sup> In fact, before the appearance of anarchists, many conservatives considered Freethinkers to be the leading threat to the nation's way of life. In place of organized religion, Freethinkers advocated absolute freedom of thought; they trusted the ability of individuals to discover truth for themselves. Their beliefs required freedom of expression on a wide variety of subjects.<sup>55</sup>

The antireligion stance of the Freethinkers may not have caught Anthony Comstock's eye, but the willingness of Freethinkers to discuss alternative sexual relationships won his notice. In addition, the Freethinkers called even more attention to themselves by banding together in July, 1876, to form the Liberal League and setting as one of their primary goals the repeal of the Comstock Act.<sup>56</sup> Liberal League members maintained that the Act was "diametrically opposed to the fundamental provisions of the American Constitution and subversive of the personal liberties to which every citizen is entitled."<sup>57</sup> The Act affected publishers who were forced to "place an embargo upon their scientific, physiological and anatomical productions,"<sup>58</sup> booksellers who were prohibited "from sending to a customer through the mail any books that he may sell over his counter with impunity,"<sup>59</sup> druggists who were punished for giving "the slightest intimation where any remedy can be obtained that will prevent conception

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53. *Id.* at 32 (quoting the revised criminal code § 1145).

54. See WARREN, *supra* note 6, at 164-65.

55. See JAMES TURNER, *WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA* 171-269 (1985); WARREN, *supra* note 6, at 163-64; Chris Wharton, "Speaking the Unspeakable: Birth Control Information and Freedom of Expression in Late 19th- and Early 20th-Century America" (1989) (unpublished M. thesis, University of North Carolina at Chapel Hill).

56. See BOYER, *supra* note 15, at 9; WARREN, *supra* note 6, at 164-68.

57. ANTHONY COMSTOCK, *FRAUDS EXPOSED* 402 (Patterson Smith 1969) (1880) (quoting a Liberal League resolution).

58. *Id.*

59. *Id.*

or an undue increase of population,"<sup>60</sup> and artists "who simply wish[ed] to make pictures of classic and beautiful statuary."<sup>61</sup> Average citizens confronted the worst problems of all, for the Act kept them from "using the mail for such purposes as originally designed by the founders of our government."<sup>62</sup> The League resolution expressed the concern of its members: "The mail is an institution for the people and belonging to the people and should by no means be controlled or dominated by any sect, creed or church. No censorship of the mail should be tolerated in this country."<sup>63</sup> League members contended, "It is far better that some objectionable matter should be carried by it than that the greater evil of the destruction of the personal liberties of the people should be perpetrated."<sup>64</sup>

The League resolution distressed Comstock, to say the least. He denied abridging freedom of speech:

I accord to every man the fullest scope for his views and convictions. He may shout them from the housetop, or print them over the face of every fence and building for all I care. But the common law and statutes both declare that he must do it in a decent and lawful manner or not at all.<sup>65</sup>

Seeing himself as sworn to uphold the law, Comstock said,

[A] man may think, write, and speak as he pleases by himself, but he must put his public utterances into decent language. The law says no obscene book *shall be published*; therefore if he writes a book he must not make it obscene, as it is unlawful, and if he does so make it, he must take the consequences of his own acts.<sup>66</sup>

Anthony Comstock pledged to make sure those consequences were felt.

Liberal League members soon began a petition drive to force repeal of the Act. Some seventy thousand citizens signed the document submitted to the House of Representatives in February, 1878. Signatories proclaimed themselves to be "loyal and

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60. *Id.*

61. *Id.* at 403.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 408.

66. *Id.* at 408-09.

devoted supporters of the 'Constitution' and firm believers in "personal liberty, freedom of conscience, of the press, and of the expression of opinion."<sup>67</sup> Members of Congress, they asserted, had been led astray when enacting such restrictive legislation. To the petitioners,

all attempts of civil government, whether State or national, to enforce or favor particular religious, social, moral, or medical opinions, or schools of thought or practice, are not only unconstitutional but ill-advised, contrary to the spirit and progress of our age, and almost certain in the end to defeat any beneficial objects intended.<sup>68</sup>

Supporters of repeal argued that "mental, moral, and physical health and safety are better secured and preserved by virtue resting upon liberty and knowledge, than upon ignorance enforced by governmental supervision."<sup>69</sup> League members advocated a version of John Milton's marketplace of ideas, stressing "that even error may be safely left free, where truth is free to combat it."<sup>70</sup> Because of their beliefs, the petitioners asked Congress to repeal or modify the obscenity statutes "so that they cannot be used to abridge the freedom of the press or of conscience, or to destroy the liberty and equality of the people before the law and departments of the government, on account of any religious, moral, political, medical, or commercial grounds or pretexts whatsoever."<sup>71</sup>

Efforts to repeal the legislation, according to Comstock, were "backed by one of the basest conspiracies ever concocted against a holy cause."<sup>72</sup> In addition, Comstock contended that the Supreme Court already had held that the statutes were constitutional.<sup>73</sup> Indeed, a unanimous Court had affirmed the right of Congress to bar lottery information from the mail, noting that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded."<sup>74</sup> In deciding *Ex*

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67. ANTHONY COMSTOCK, TRAPS FOR THE YOUNG 188 (Robert Bremner ed., 1967) (quoting a Liberal League petition).

68. *Id.* at 189-90.

69. *Id.* at 190.

70. *Id.*

71. *Id.*

72. *Id.* at 192.

73. *Id.*

74. *Ex parte* Jackson, 96 U.S. 727, 732 (1878) (upholding the right of Congress to allow postal searches and subsequent arrests under the Comstock Act); see also *In re* Rapier, 143 U.S. 110 (1892) (upholding the right of Congress to bar the sending of illicit lottery information through the mail).

*parte Jackson*, the Court, for one of the few times in the nineteenth century, directly addressed free expression concerns. "In excluding various articles from the mail," Justice Stephen Field wrote, "the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."<sup>75</sup> Congress may dictate "that the mail should not be used to transport such corrupting publications and articles, and that anyone who attempted to use it for that purpose should be punished."<sup>76</sup> The Justices did recognize, however, that "[l]iberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."<sup>77</sup> Thus, if "printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."<sup>78</sup>

Despite Supreme Court backing for the Comstock Act, the Liberal League persisted in its efforts to have it repealed. Comstock found its tactics repulsive and claimed that League members were attempting to "make [Comstock] so odious that he would not be believed."<sup>79</sup> After six weeks of trying, the League gained a hearing before a House committee,<sup>80</sup> but League members won little else. The committee reported to the full House that "'the Post-Office was not established to carry instruments of vice, or obscene writings, indecent pictures, or lewd books.'"<sup>81</sup> The law, the committee recommended, should remain unchanged.<sup>82</sup>

Although Comstock won the battle over the law, his war with the Freethinkers continued. The individuals who became particularly odious to him were the advocates of free love, who encouraged abandoning the traditional bonds of marriage and the family, who supported equality for women, and who, because of other beliefs, favored the dissemination of birth control information. Because free love required the freedom to enter into and end relationships at will, they argued that having children should be a matter of deliberate choice. The first encounter between

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75. *Jackson*, 96 U.S. at 736.

76. *Id.*

77. *Id.* at 733.

78. *Id.*

79. COMSTOCK, *supra* note 67, at 193.

80. *Id.*

81. *Id.* at 195 (quoting the Report of the House Committee on Revision of the Laws).

82. *Id.*

Comstock and a free-love advocate involved Ezra Heywood and *Cupid's Yokes*, an argument against marriage that Heywood had written in 1876.<sup>83</sup> Comstock personally arrested Heywood in 1877 and took credit for the two-year prison sentence meted out upon conviction. The judge in the trial considered the offending pamphlet too obscene for the jurors to consider, making the case turn on whether Heywood had put the tract in the mail. Heywood's conviction led to substantial protest around the country and ultimately to a pardon from President Rutherford B. Hayes.<sup>84</sup>

The topic of sexual freedom was growing in importance in the United States, and Anthony Comstock stood astride the road to discussions of sex education and family planning that were at the heart of this issue. In addition, Comstock's encounters with the Liberal League and with Ezra Heywood were beginning to undermine some of his support. He continued to lose adherents as he went after D.M. Bennett, another Freethinker who, through the pages of *The Truth Seeker*, regularly took Comstock to task for his narrow-mindedness. Bennett might have eluded Comstock's net had he not advertised Heywood's *Cupid's Yokes* in the pages of his newspaper and responded to a request for a pamphlet from Comstock, who used a false name and address.<sup>85</sup> When the tract was received through the mail, Bennett was arrested.

In his trial, Bennett tried to win support for a new standard of obscenity that would have, among other things, called upon the jury to consider the challenged language and to review it in the context of the entire publication and in light of its avowed purpose.<sup>86</sup> Although such an approach later would carry the day, the judge in Bennett's case rejected the argument,<sup>87</sup> instructing the jury that

[a]ll men in this country, so far as this statute is concerned, have a right to their opinions. They may publish them. . . . [F]reelovers and freethinkers have a right to their views, and they may express them, and they may publish them; but they cannot publish them in connection with obscene matter, and then send that matter through the mails.<sup>88</sup>

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83. ROBERT BREMNER, *Introduction to COMSTOCK*, *supra* note 67, at xix.

84. *Id.*

85. *Id.*

86. *See United States v. Bennett*, 24 F. Cas. 1093, 1098 (C.C.S.D.N.Y. 1879) (No. 14,571).

87. *See id.* at 1098-99.

88. *Id.* at 1101.



Despite what Bennett and his attorney contended, the trial judge determined that freedom of the press “has nothing to do with this case. Freedom of the press does not include freedom to use the mails for the purpose of distributing obscene literature, and no right or privilege of the press is infringed by the exclusion of obscene literature from the mails.”<sup>89</sup> Bennett’s conviction and thirteen-month jail term were upheld on appeal.<sup>90</sup> This time a request for presidential intervention was of no avail; the sentence was served, but Bennett had made several telling points about the way in which matter considered obscene should be reviewed.

The battle for the right to discuss human sexuality resumed in 1883 when Ezra Heywood again fell victim to Comstock. This time Heywood carried advertisements for a feminine syringe in a magazine he published. Through this trial, Heywood again raised questions about the morality of Comstock’s attempts to suppress discussion of certain topics. Serving as his own attorney, Heywood argued that Freethinkers insisted “on Free Speech, Free Press and Free Mails for the proclamation of opinions relative to a syringe as well as for tracts, books, newspapers on all other subjects of human interest.”<sup>91</sup> A plea for increased freedom of expression topped his list of requested instructions to the jury. “[S]ince the Right of Private Judgment in Morals and the . . . right to utter, print and mail opinions thereon are irrevocably assured in those clauses of the Federal Constitution which guarantee Freedom of Conscience and Liberty of the Press,” he said, any “interpretation of this statute which excludes opinions from the United States mails, or otherwise restricts their circulation, . . . is subversive of the Constitution itself.”<sup>92</sup> The judge refused Heywood’s plea for the jury to consider the question of freedom of expression. Jurors, in turn, refused to find Heywood guilty, leading him to contend that they, in the best tradition of the John Peter Zenger jury, had decided to enlarge the scope of allowable discussion regardless of legal restrictions.

Heywood’s acquittal in no way ended Anthony Comstock’s reign of terror over the ideas espoused by American citizens. In this case, Comstock had gotten too close to individuals who had the intellectual resources to make a viable argument against his

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89. *Id.*

90. *See id.* at 1107.

91. EZRA H. HEYWOOD, FREE SPEECH 22 (1883) (emphasis omitted).

92. *Id.* at 37-38.

attacks. Generally, as a crusader for increased morality, Comstock stayed away from such persons. He preferred coarser literature and coarser opponents,<sup>93</sup> but he also conducted campaigns to force legitimate newspapers to stop carrying stories about football and boxing, sports considered far too violent for the type of society that Comstock envisioned. In addition, Comstock and his backers pursued so-called blood and thunder publications that carried vivid stories of crime. The dime novel, the functional equivalent of a comic book for an earlier generation of children, also came under Comstock's watchful eyes. To Comstock, these dime novels were leading youths down the path to destruction, for once a child had read such stories, no one could prevent a career of crime and the loss of an immortal soul.<sup>94</sup>

Terming such publications "devil-traps for the young,"<sup>95</sup> Comstock sought to stop the circulation of these weekly novels that featured brash Western heroes and hard-boiled big city detectives.<sup>96</sup> Judges, teachers, church workers, and police officers joined in the denunciation of such literature. In fact, these critics labeled the dime novel as the inspiration for all of the antisocial behavior exhibited by the youth of the day. They even tried—unsuccessfully—to connect convicted criminals with dime novels in order to bolster their case against the publications. When one criminal took the bait and attributed his behavior to a book he had read, authorities discovered that he had read a \$1.50 novel from a respected publishing house.

Nevertheless, the campaign against the dime novel was so substantial that Erastus Beadle, who headed one of the major dime novel publishing houses, took steps to safeguard his empire. In what likely was the first code of self-regulation imposed on a communication industry because of community opposition, Beadle told his authors to obey certain rules in framing their stories. "We prohibit all things offensive to good taste, in expression or incident," the Beadle statement to potential authors said.<sup>97</sup> Further, "[w]e prohibit subjects or characters that carry an immoral taint," and "[w]e prohibit the repetition of any occurrence, which, though true, is yet better untold."<sup>98</sup> Finally, "[w]e prohibit what cannot be read with satisfaction by every right-minded person—

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93. See *supra* note 20 and accompanying text.

94. See Mary Noel, *Dime Novels*, AM. HERITAGE, Feb. 1956, at 50-55, 112-13.

95. *Id.* at 55.

96. *Id.* at 112.

97. EDMUND PEARSON, *DIME NOVELS* 96 (1926).

98. *Id.* (emphasis omitted).

old and young alike."<sup>99</sup> Regardless of the campaign against the stories, Beadle's rules, and the occasional injunction to authors to include some moralizing in their material, at least one generation of young people continued to relish the real and imaginary heroes and villains that dotted the novels' pages.<sup>100</sup> Although Comstock tried to stop the dime novel, he ultimately failed to do so.

In fact, many of Comstock's efforts to purify America failed, largely because his campaigns attacked only surface problems in American society. Life was changing too rapidly for some people. By labeling certain ideas as the cause of all of society's woes and by trying to eradicate them, Comstock was attempting to hold back the sands of time. The ideas that he expounded were unsettling, but newer times demanded newer approaches to problems. Comstock really could wage only a delaying action; change would come.

As societal pressures for change became increasingly pronounced, Comstock's efforts were ridiculed, especially as he ventured into newer areas. He invaded the world of art, for instance, in an attempt to purge it of depictions of naked women.<sup>101</sup> After he had seized photographs of French masterpieces from a Fifth Avenue gallery, the *New York World* asked, "Has it really been determined that there is nothing wholesome in art unless it has clothes on?"<sup>102</sup> Comstock's attack on George Bernard Shaw's play, *Mrs. Warren's Profession*, which dealt with prostitution, led to packed houses and, allegedly, to Shaw's invention of the term "comstockery," which has forevermore been applied to extensive prudery.<sup>103</sup>

The tide was turning on Anthony Comstock, but he remained proud of his accomplishments. In 1913, two years before his death, Comstock recalled that in his forty-one years of work, he had been responsible for the conviction of enough people to fill a passenger train of sixty-one coaches, with sixty of the coaches containing sixty people each and the last one almost full. He also had destroyed almost 160 tons of obscene literature.<sup>104</sup> Perhaps one of Comstock's greatest contributions, however, was his ability to spark the development of an articulate opposition to his

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99. *Id.*

100. Noel, *supra* note 94, at 112-13.

101. See BROUN & LEECH, *supra* note 7, at 224.

102. *Id.* (quoting NEW YORK WORLD).

103. See *id.* at 222-43.

104. Andrist, *supra* note 15, at 5.

ensorship. In addition to efforts of the Liberal League and of Heywood and Bennett, Theodore Schroeder, one of the nation's earliest commentators on the First Amendment, challenged the presuppositions upon which Comstock based his actions. Although the two never met, they did carry on a fairly extensive correspondence in which each tried, unsuccessfully, to win the other over to his point of view.<sup>105</sup>

Such encounters with Comstock led Schroeder to reflect that the great vice crusader had indeed proven that obscenity was essentially harmless. As Schroeder wrote:

In a recent report [Comstock] informs us that for thirty years he has "stood at the mouth of a sewer," searching for and devouring "obscenity" for a salary; and yet he claims that this lucrative delving in "filth" has left him, or made him, so much purer than all the rest of humanity that they cannot be trusted to choose their own literature and art until it has been expurgated by him. Why is Mr. Comstock immune? It may be because he is an abnormal man, upon whom, for that reason, sensual ideas do not produce their normal reaction—in which case it is an outrage to make his abnormality a standard by which, under an uncertain statute, to fix what must be withheld from others. On the other hand, Mr. Comstock may be an average normal man, who has seen more "obscene" pictures and read more "obscene" books, and retained a larger collection of these, than any other living man. If it is true that his morality is still unimpaired, then it would seem to follow that "obscenity" cannot injure the ordinary normal human.<sup>106</sup>

Schroeder's writings on Comstock's censorship movement and its effect on society led to the first substantial defense of the right to print material that many in society would label as obscene.

Schroeder argued that state and federal laws against obscene literature should be discarded because they conflicted with the original intent of the First Amendment. In his view, the Framers of the Bill of Rights meant to enlarge the sphere of intellectual liberty for citizens; punishing printers of allegedly obscene materials would contract that liberty. In addition, laws such as those Comstock inspired violated the constitutional guarantee of due process of law because they were so vague that individuals were

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105. See David Brudnoy, *Theodore Schroeder and the Suppressers of Vice*, CIV. LIBERTIES REV., June-July 1976, at 48.

106. THEODORE SCHROEDER, "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW: A FORENSIC DEFENSE OF FREEDOM OF THE PRESS 103 (1911).

not sufficiently forewarned as to what behavior was illegal. Schroeder firmly believed that adverse judicial and public reaction eventually would lead to the elimination of such laws. The campaign against obscenity, Schroeder stressed, was marked by the "same passionate 'moral' necessity which once impelled judges to exercise their wits and their might in a crusade against witchcraft and verbal treason."<sup>107</sup> To Schroeder, censorship of ideas, even sexual ones, was part of one individual's desire to tyrannize others. Ultimately, he argued, the desire to determine what others read would reach popularly acceptable materials. In all cases, society would suffer from the lack of necessary information. Censorship had to be stopped, Schroeder contended, and soon.

## II. CENSORSHIP CONTINUES AT THE TURN OF THE CENTURY

Theodore Schroeder's plea for an end to censorship in order to encourage societal growth fell on deaf ears early in the twentieth century. The nation's fears about different people and different ideas continued, fueled in large part by the assassination of President William McKinley in 1901. The shooting quickly was attributed to a small anarchist faction, and steps were taken to suppress these dissidents.<sup>108</sup> State governments enacted laws designed to punish deviant political thinking, and the federal government began excluding aliens from the United States because of their political ideas.<sup>109</sup> In addition, The Comstock Act was amended to include a political component to the "indecent" materials that could be banned from the mails.<sup>110</sup> Radical labor movements further incited the generalized attitude of fear.<sup>111</sup> Concern about the allegedly impressionable minds of aliens joined similar fears about the unformed attitudes of American young people. The nation was about to embark on a decades-long campaign to promote 100% Americanism in all those who lived within its boundaries. Much of that campaign dealt with political ideas,

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107. *Id.* at 25.

108. See Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 AM. HIST. REV. 777, 780-81 (1955).

109. An Act to Regulate the Immigration of Aliens into the United States, ch. 1012, §§ 38-39, 32 Stat. 1213, 1221 (1903).

110. Post Office Act, ch. 206, 35 Stat. 406, 416 (1908).

111. See PAUL F. BRISSENDEN, *THE I.W.W.: A STUDY OF AMERICAN SYNDICALISM* (2d ed. 1920); MELVYN DUBOFKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* (2d ed. 1988); WILLIAM PRESTON, *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS 1903-1933* (1963).

but part of it almost naturally spilled over into the nation's leisure-time activities. Portrayals of sex and violence again caused concern; this time, however, the target was a new medium of communication—the motion picture.

The first motion pictures appeared in the late nineteenth century, and soon thereafter came the first incidents of censorship. In 1895, for instance, a kinetoscope parlor on the boardwalk at Atlantic City, New Jersey, pulled a short film called *Dolorita in the Passion Dance* to avoid offending local authorities. The next year, complaints arose about a prolonged kiss in *The Widow Jones*, a film version of a hit Broadway play. In 1897, authorities in New York City registered disapproval of *Orange Blossoms*, a short film showing a young bride taking off her clothes and revealing a bit of skin. Crime and violence joined sex on the list of complaints against motion pictures when *The Great Train Robbery* was released in 1903.<sup>112</sup>

Community concern led almost immediately to calls for censorship. Civic groups, churches, reform organizations, police, and some segments of the press demanded restrictions on motion pictures. In 1907, a *Chicago Tribune* editorial explained the nation's fears about this new form of entertainment. Movies were "schools of crime where murders, robberies, and holdups are illustrated. The outlaw life they portray in their cheap plays tends to the encouragement of wickedness. . . . Not a single thing connected with them has influence for good."<sup>113</sup> The editorial concluded, "The proper thing for city authorities to do is to suppress them at once."<sup>114</sup>

City officials quickly heeded the calls for suppression. The first municipal censorship ordinance went into effect in Chicago in 1907; under its provisions, the chief of police had to issue a permit before a film could be shown. He was to bar the showing of all films that he considered immoral or obscene.<sup>115</sup> Neither term was well defined, leaving motion picture censorship based

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112. See CHARLES FELDMAN, *THE NATIONAL BOARD OF CENSORSHIP (REVIEW) OF MOTION PICTURES: 1909-1922* 1-9 (1977); RUTH INGLIS, *FREEDOM OF THE MOVIES: A REPORT ON SELF REGULATION FROM THE COMMISSION ON FREEDOM OF THE PRESS* 83-84 (1947); RICHARD S. RANDALL, *CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM* 9-13 (1968); ROBERT H. STANLEY, *THE CELLULOID EMPIRE: A HISTORY OF THE AMERICAN MOVIE INDUSTRY* 174-230 (1978).

113. FELDMAN, *supra* note 112, at 3 (quoting *MOVING PICTURE WORLD*, Apr. 20, 1907, at 101).

114. *Id.*

115. RANDALL, *supra* note 112, at 11.

almost totally on the personal whim of the licensing official, a trait that was characteristic of almost all such provisions. The Chicago ordinance allowed an appeal to the mayor, but after that, the ruling would stand. Film distributors challenged the licensing program in court but lost.<sup>116</sup> Other municipalities enacted similar restrictions, and by 1911, Pennsylvania instituted the first state-wide licensing program.

Most early efforts to regulate the showing of motion pictures were based on the power of local governments to regulate businesses that operated within their domain. In December, 1908, the Mayor of New York City revoked the licenses of every motion picture theater within his jurisdiction. He focused on the safety standards of the theaters themselves as well as on the allegedly indecent character of many of the films shown in them. The closing of this large market to the growing film industry led almost immediately to the establishment of a local censorship committee. The movie houses were allowed to reopen after this civic group approved the films to be displayed. This municipal effort soon was transformed into the National Board of Censorship of Motion Pictures, which was sanctioned by the motion picture producers as the official clearinghouse for all films.

The National Board of Censorship created the pattern for most future efforts at self-censorship of media activities. The goal was to set up an organization that would gain sufficient credibility for its stamp of approval to be accepted in place of local or state review. Producers would send films to the Board for clearance prior to release and promise to make the recommended cuts. Eventually, the Motion Picture Patents Company, the monopolistic organization that controlled the making of most movies in the United States at the time, agreed not to send films to theaters that showed unapproved movies, thus giving the Board's sanction even more power.<sup>117</sup>

To further enhance its credibility, the Board enlisted representatives of various charitable, civic, and religious organizations to serve as reviewers.<sup>118</sup> The Board issued weekly bulletins of its reviews to mayors, police chiefs, and censoring boards around the country.<sup>119</sup> By 1913, the National Board of Censorship issued a list of standards used to evaluate films, which included the

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116. *Block v. Chicago*, 87 N.E. 1011 (Ill. 1909).

117. FELDMAN, *supra* note 112, at 28-30.

118. *Id.* at 59.

119. *Id.* at 63.

prohibition of obscenity, vulgarity, certain representations of crime, elaborate depictions of violence, blasphemy, and libel.<sup>120</sup> In all of their actions, the Board's goal was to apply national standards rather than local standards and thus to allow greater freedom for the developing industry.

Inevitably, movie censorship run by an organization sponsored by the film industry enjoyed only limited acceptance. Organizations that initially had joined the effort soon dropped out after charging that the National Board of Censorship was more interested in circulating movies than in cleaning them up.<sup>121</sup> Community leaders were increasingly upset by film content. Reformers argued that despite the Board's existence, more and more children were being exposed to depictions of crime and immorality. Some 500,000 to 600,000 children a day were said to see motion pictures that would corrupt their values and certainly lead to the degradation of the United States as a nation.<sup>122</sup>

In 1910, a committee in Cleveland, Ohio, reviewed some 250 films and declared that forty percent of them were unfit for children because they focused on crime, drunkenness, and loose morals.<sup>123</sup> The National Board countered that influences other than motion pictures shaped a juvenile's life choices, but as with the arguments about dime novels and the later arguments about comic books and rock music, the exaggerated views of the medium's influence were not tempered by reality. Although the National Board of Censorship had correctly evaluated the effect that movies had on individuals, its critics were right about the Board's subservience to the industry. Comparisons of films found objectionable by the review board and those rejected by municipal or state censors revealed that the industry-related critics were much more lenient. In the 228 films reviewed by both the Pennsylvania State Board of Censorship and the National Board of Censorship, the state censor called for 1464 deletions while the National Board asked for only forty-seven.<sup>124</sup>

Unpersuaded by the industry's efforts to clean itself up, critics continued to seek governmental regulation of the movies. In some areas, the critics were successful. In 1912, Congress barred films

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120. *Id.* at 64-65.

121. STANLEY, *supra* note 112, at 176.

122. FELDMAN, *supra* note 112, at 42.

123. *Id.* at 42-43.

124. STANLEY, *supra* note 112, at 176-77.



of prize fights from interstate commerce.<sup>125</sup> The action was based less on concern about the brutality of the sport than on concern about the circulation of a film that showed black heavyweight champion Jack Johnson defeating white former champion Jim Jefferies. Authorities feared that the wide distribution of the newsreel would cause racial unrest in certain parts of the country. A step that was more central to critics' concerns was the 1913 Tariff Act that allowed the Secretary of the Treasury to censor films before granting entry to this country.<sup>126</sup> In 1914, Congress also considered establishing a national censorship board to regulate movies.<sup>127</sup>

Although Congress ultimately did not act on movie regulation, the Supreme Court did enter the censorship fray in the 1915 case, *Mutual Film Corp. v. Industrial Commission*.<sup>128</sup> The case involved efforts by the Mutual Film Corporation, a Detroit-based film distribution company, to avoid submitting its movies to the Ohio licensing commission prior to displaying them in that state. The company argued that the state's regulation was an impermissible burden on interstate commerce, that it did not provide clear standards for evaluation, and that it violated free speech clauses in both the state and federal constitutions.<sup>129</sup> Motion pictures, the company's counsel told the Supreme Court, were "graphic expressions of opinion and sentiments, . . . exponents of policies, . . . teachers of science and history, . . . useful, interesting, amusing, educational and moral."<sup>130</sup>

Justice Joseph McKenna, writing for a unanimous Court, however, was unwilling to consider film as a medium of communication similar to speech or press. Motion pictures "may be mediums of thought, but so are many things," he wrote. "So is the theatre, the circus, and all other shows and spectacles, and their performances may be thus brought by the like reasoning under the same immunity from repression or supervision as the public press."<sup>131</sup> To the Court, only rights of property were involved: "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit,

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125. An Act to Prohibit Import and Interstate Transportation of Prize Fighting Films, ch. 263, 37 Stat. 240 (1912).

126. Tariff Act of 1913, ch. 16, 38 Stat. 114, 151.

127. FELDMAN, *supra* note 112, at 67.

128. 236 U.S. 230 (1915).

129. *See id.* at 239.

130. *Id.* at 241.

131. *Id.* at 243.

like other spectacles, not to be regarded . . . we think, as part of the press of the country or as organs of public opinion."<sup>132</sup> Movies, McKenna wrote, were "mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."<sup>133</sup> The Supreme Court could find no reason to intervene in state regulation of motion pictures.<sup>134</sup>

Although the Supreme Court declined to give motion pictures the protections offered by the free speech clauses on the state and national levels, individuals did not stop arguing for these safeguards. For instance, one of the major themes running through the struggles of D.W. Griffith to obtain clearance in 1915 for the display of his controversial movie, *The Birth of a Nation*, was the idea that motion pictures were a form of expression worthy of constitutional shelter. The movie, which dealt with the Civil War and Reconstruction and featured the rise of the Ku Klux Klan, encountered opposition from many groups, including the National Association for the Advancement of Colored People (NAACP), which protested its demeaning portrayal of blacks.<sup>135</sup>

In defense of his masterpiece, Griffith wrote a tract, *The Rise and Fall of Free Speech in America*, in which he argued for identical protection for motion pictures and the printed press.<sup>136</sup> "The moving picture," he wrote, "is simply the pictorial press," which, he said, "claims the same constitutional freedom as the printed press."<sup>137</sup> To Griffith, such protection meant "[u]njustifiable speech or publication may be punished, but cannot be forbidden in advance."<sup>138</sup> Censorship and its effect on the emerging motion picture industry was of primary concern for the great filmmaker. Continued restrictions, he claimed, were "seriously hampering the growth of the art."<sup>139</sup> Griffith criticized the Supreme Court's refusal to protect movies under free speech clauses: "It is said the motion picture tells its story more vividly than any other

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132. *Id.* at 244.

133. *Id.*

134. *Id.*

135. See Thomas R. Cripps, *The Reaction of the Negro to the Motion Picture Birth of a Nation*, 25 HISTORIAN 344 (1962-63).

136. FOCUS ON D.W. GRIFFITH 43 (Harry M. Geduld ed., 1971) (quoting D.W. GRIFFITH, *THE RISE AND FALL OF FREE SPEECH IN AMERICA* (1916)).

137. *Id.*

138. *Id.* at 43-44.

139. *Id.* at 44.

art. In other words, we are to be blamed for efficiency, for completeness. Is this justice? Is this common sense? We do not think so."<sup>140</sup> Griffith denied that he wished to "offend with indecencies or obscenities"; all he wanted was the "right, the liberty to show the dark side of wrong, that we may illuminate the bright side of virtue—the same liberty that is conceded to the art of the written word—that art to which we owe the Bible and the works of Shakespeare."<sup>141</sup>

Griffith's plea, however, was not heeded. Films remained under the watchful eye of community censors for more than three decades after his entreaty. Other areas of American society also remained repressed prior to World War I. The campaign against the dissemination of accurate sexual information, for instance, continued unabated. The dawn of the new century brought a renewed interest in the distribution of information about birth control, but the old censors were ready to halt such ideas from circulating. The Comstock Act, and indeed Anthony Comstock himself, still closed the avenues of communication to this information, even if it came from medical sources and was both accurate and safe.

In 1912, Margaret Sanger began a campaign to publicize accurate sexual information that ultimately led to the first breaches in the law.<sup>142</sup> Sanger's campaign started with two articles for the *New York Call*.<sup>143</sup> The first, "What Every Mother Should Know," ran without difficulty.<sup>144</sup> The second article, "What Every Girl Should Know," riled Comstock so much that the issue was barred from the mails.<sup>145</sup> The next issue of the newspaper carried the notice, "What Every Girl Should Know: 'NOTHING! By Order of the Post Office Department.'" <sup>146</sup> The objectionable article contained no information on birth control, but Comstock disliked Sanger's accurate discussion of venereal disease and her use of such words as gonorrhoea and syphilis.<sup>147</sup>

Having run afoul of the Comstock law once, Sanger determined to attack it again. This time, she planned to use her own publi-

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140. *Id.* at 45.

141. *Id.*

142. DAVID M. KENNEDY, *BIRTH CONTROL IN AMERICA* 1-35 (1970).

143. Lynne Masel-Walters, *For the 'Poor Mute Mothers'? Margaret Sanger and The Woman Rebel*, 11 *JOURNALISM HIST.* 4 (1984).

144. *Id.* at 4.

145. *Id.*

146. *Id.*; KENNEDY, *supra* note 142, at 16.

147. Masel-Walters, *supra* note 143, at 4.

cation, *The Woman Rebel*, as an offensive weapon. The first issue of the newspaper in March, 1914, and six out of the first eight editions were stopped by the post office for violating the Comstock law.<sup>148</sup> Again, Sanger provided no specific information about birth control but talked generally about related topics such as how much it cost to raise a large family, how prevalent abortions were in the United States, and how harmless birth control was.<sup>149</sup> She also carried a philosophical essay on the efficacy of assassination as a cure for political problems, apparently much like the one carried in an anarchist publication around the time of McKinley's death. Such an essay had resulted in the anarchist editor's arrest; Margaret Sanger followed in his footsteps. Sanger was arraigned on nine counts of violating the Comstock Act in August, 1914; one of those counts was for the publication of the essay on assassination.<sup>150</sup>

Sanger did not object to going to jail to serve the cause of birth control, but she did not want to be imprisoned for publishing basically innocuous materials. She asked the prosecuting attorney if she could change the charges on which she would be tried. She wanted to send a copy of her pamphlet "Family Limitation" through the mail and be charged for violating the Comstock Act for that. The pamphlet, which clearly discussed and described birth control techniques, would provide an ample test case for the viability of the Comstock Act when it came to discussing such information.<sup>151</sup> The authorities refused, and Sanger, rather than face charges that would provide less of a showcase for her views, fled to Canada, and later to Europe.<sup>152</sup>

The trial on "Family Limitation" came when Sanger's estranged husband, William, sold a copy of the pamphlet to a young man who begged for information on contraception. The young man had been sent by Anthony Comstock, who turned up an hour or so later to arrest William Sanger for violating New York State laws against the sale of such materials.<sup>153</sup> William Sanger based his defense on the notion that freedom of the press forbade the barring of the publication.<sup>154</sup> Contributions poured in for a defense fund, and William Sanger defended himself on free press

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148. *Id.*

149. *Id.*

150. KENNEDY, *supra* note 142, at 24.

151. *Id.* at 26.

152. *Id.* at 26-27.

153. Masel-Walters, *supra* note 143, at 8.

154. *See id.*

grounds. He was convicted and sentenced to spend thirty days in jail or pay a five hundred dollar fine.<sup>155</sup>

Upon his conviction, Margaret Sanger returned to the United States to face the charges pending against her.<sup>156</sup> After several postponements, in February, 1916, the government decided not to prosecute her. Although Margaret Sanger continued to speak on birth control topics, the issue of disseminating sexual information was essentially sidetracked until after the war. By then, the federal government itself had aided the cause of the informative use of sexual language. Substantial problems with syphilis among soldiers during the war led to a massive federal educational campaign on the disease among the military and civilian populations. Language that Anthony Comstock had considered indecent in 1914 was made socially acceptable by the government in 1916.<sup>157</sup>

### III. CENSORSHIP IN A CHANGING SOCIETY: THE 1920'S

Federal intervention, however, made little difference in a number of continuing crusades in American life, including that against information relating to birth control. World War I and the months immediately after it badly wrenched the American political psyche. The war years had been among the most repressive in the nation's history, with legislation that suppressed disagreement with the war dotting the statute books<sup>158</sup> and incidents of vigilante justice against those who seemed less than totally loyal appearing in newspapers.<sup>159</sup> Immediately after the war, the country fell into a period of harsh repression known as the Red Scare,

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155. *Id.* Comstock caught a cold when he was testifying against Sanger. The cold developed into pneumonia, and he died in September, 1915. *Id.*

156. *See id.*

157. *See* Timothy N. Walters & Lynne Masel Walters, *The Conspiracy of Silence: Media Coverage of Syphilis, 1906-1938* (Aug. 1989) (unpublished paper presented to the History Division, Association for Education in Journalism and Mass Communication Annual Meeting, Washington, D.C.).

158. *See* *Threats Against the President Act*, ch. 64, 39 Stat. 919 (1917); *Trading with the Enemy Act*, ch. 106, § 3(d), 40 Stat. 411, 413 (1917); *Espionage Act*, ch. 30, § 2, 40 Stat. 217, 218-19 (1917); *Sedition Act*, ch. 75, 40 Stat. 553 (1918).

159. *See* DONALD JOHNSON, *THE CHALLENGE TO AMERICAN FREEDOMS 63-84* (1963); GEORGE JUERGENS, *NEWS FROM THE WHITE HOUSE 126-72* (1981); PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 75-87* (1979); H.C. PETERSON & GILBERT C. FITE, *OPPONENTS OF WAR, 1917-1918 12-20* (1957).

during which persons with leftist leanings were persecuted.<sup>160</sup> Actions against those attempting to organize unions continued, and the campaign to promote 100% Americanism lost little steam in the early part of the decade. As the 1920's progressed, however, Americans became more and more concerned about societal changes that were having revolutionary effects on the nation's lifestyle. The Roaring Twenties' problems included automobiles, motion pictures, radio, prohibition and speakeasies, modern dancing, liberated women, and freer discussion of sexual matters. The excesses of the decade fed on a growing disillusionment about the nation's involvement in World War I.

Strangely enough, this growing disenchantment with politics led Americans to contest the longstanding restrictions on reading material and birth control information. Before the decade was over, the system of censorship of ideas established by Anthony Comstock was badly shaken, although not totally destroyed.<sup>161</sup> Because of these battles, freedom of expression on sexual matters was decidedly expanded. In addition, these encounters led to an increased understanding of the value of freedom of expression.

The most successful struggle dealt with the right of Americans to decide for themselves what they wanted to read without having a censor interfere with the selection process. Comstock's vice society movement survived his death and, at the end of World War I, was still strong in New York City, Boston, and other communities.<sup>162</sup> Before the war, a conspiracy of sorts existed to keep offensive literature from contaminating American society. The reputable publishing houses refused to print controversial material. Fearing visits from local censorship agents and possible prosecution, booksellers declined to sell such works. If any controversial manuscripts managed to be printed, librarians restricted their purchases in light of what they thought patrons should read. Theodore Dreiser's experience with *The "Genius,"* his fifth novel, was a case in point.<sup>163</sup> The book had been in circulation for some nine months before anyone brought it to the attention of John Sumner, Comstock's successor as head of the

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160. See GOLDSTEIN, *supra* note 11, at 137-63; JOHNSON, *supra* note 159, at 119-48; PAUL L. MURPHY, *THE MEANING OF FREEDOM OF SPEECH* (1972); ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920* (1955); PRESTON, *supra* note 111; Stanley Cohen, *A Study in Nativism: The American Red Scare of 1919-20*, 79 *POL. SCI. Q.* 52, 52 (1964).

161. BOYER, *supra* note 15, at 95.

162. See *id.* at 82 (Boston).

163. See LEWIS, *supra* note 21, at 67-69.

New York Society for the Suppression of Vice. Sumner complained about its contents to the publisher, and postal inspectors expressed concerns about placing the volume in the mail. In the end, the publisher recalled all copies of the book, and Dreiser managed to obtain the printing plates just before the publisher destroyed them.<sup>164</sup> H.L. Mencken, who headed the Authors' League of America at the time, unsuccessfully tried to get his fellow authors to take a stand against the censorship of Dreiser's book.<sup>165</sup>

With the new decade came a change in faces and attitudes. New publishing houses were run by hungry executives who not only were unafraid of challenging existing mores but who were often convinced that such attacks were necessary to win customers.<sup>166</sup> With the growing disillusionment with the war and the values for which it stood, these new publishers had many excellent books from which to choose. Even with the changes, efforts to promote the freer distribution of literature may not have progressed far if Sumner and his allies had not tried to obtain a revision of the New York State obscenity law.<sup>167</sup> Supporters of the vice society movement decided in 1923, as Anthony Comstock's supporters had fifty years earlier, that a major reason why they were having such problems with indecent materials rested in poor legislation.<sup>168</sup> A tighter law would make it easier to prosecute offenders and to ban books. This time, however, the Society's "clean books" campaign ran into substantial opposition. For the first time, the legislative proposals sparked substantial debates among authors, booksellers, and librarians.<sup>169</sup> Many professional groups split over the issue, but out of each discussion came strong support for greater freedom of choice for the reading public. The measure went down to a resounding defeat in 1925, taking with it, for all intents and purposes, the New York Society for the Suppression of Vice.<sup>170</sup> The Society did not go out of business immediately, of course, but it successfully suppressed only a few works of literature after the legislation's defeat.

Censorship efforts in other parts of the country fell into disrepute as well. The Watch and Ward Society of Boston became the national laughingstock because its label "Banned in Boston"

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164. *Id.* at 68.

165. See BOYER, *supra* note 15, at 37-40; LEWIS, *supra* note 21, at 67-68.

166. BOYER, *supra* note 15, at 71-73.

167. *Id.* at 99-127.

168. *Id.* at 99.

169. *Id.* at 116.

170. *Id.* at 123.

was an immediate ticket to best-seller status.<sup>171</sup> Many of the books banned in Boston were readily available in other parts of Massachusetts and elsewhere around the country, but the forces of censorship were strong in this former Puritan citadel. The crisis for the Watch and Ward Society came in the late 1920's when the banned list included Sinclair Lewis's *Elmer Gantry*, Theodore Dreiser's *An American Tragedy*, and Ernest Hemingway's *A Farewell to Arms*.<sup>172</sup> Court cases regularly involved these and other works, with the defendant usually being some hapless clerk who had sold the book to a Watch and Ward Society agent. As the Society pursued literature that readers valued, ridicule of its actions became more frequent. The public increasingly opposed its stance, and authors visited Boston to entice city authorities into arresting them for selling their books. By the end of the decade, state laws were revised so that community action groups such as the Watch and Ward Society lost most of their power.<sup>173</sup>

The next target in the war against restrictions on access to literature was the U.S. Customs Service, which used tariff acts to keep certain books produced by foreign publishers from entering the country.<sup>174</sup> The Customs Service's review of literature was uneven and idiosyncratic. Books banned by inspectors at one port, for instance, might be allowed to enter the country at another location. Censorship was exercised by individuals who had read few books, who had little experience with great literature, and who often boasted about how many books they personally had excluded.<sup>175</sup> The problem came to a head in the 1920's because these functionaries were systematically excluding some of the great classics of Europe—works by authors such as Balzac, Boccaccio, Rabelais, and Casanova. In the spring of 1929, Congress debated a tariff bill that would have not only perpetuated the ban on allegedly obscene books but would have extended the prohibition to material that advocated the overthrow of the U.S. government.<sup>176</sup> The latter provision was designed to bring the tariff bill in compliance with legislation denying such publications access to the mails.

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171. *See id.* at 167-206.

172. *Id.* at 185, 195.

173. *See* Sidney S. Grant & S.E. Angoff, *Massachusetts and Censorship*, 10 B.U. L. REV. 36 (1930).

174. BOYER, *supra* note 15, at 208.

175. *Id.* at 209.

176. *Id.* at 210-11.



A new tariff bill containing both provisions passed in the House of Representatives.<sup>177</sup> In the Senate, Bronson Cutting, a Republican from New Mexico, decided to attack both censorship provisions. Spurring Cutting's concerns were complaints from a constituent whose efforts to bring a personal copy of D.H. Lawrence's *Lady Chatterley's Lover* into the country had been thwarted by customs officials. The senator wisely based his protest of the Customs Service's actions on problems encountered by more acceptable works such as Erich Remarque's *All Quiet on the Western Front*, a critically acclaimed volume that was strongly antiwar.<sup>178</sup> In addition to raising the vital question of who should decide what Americans could read, Cutting also took the Bureau of Customs to task for its erratic banning of books in translation. *Mademoiselle de Maupin* by Gautier, for instance, was allowed to enter the United States in its original language and in English translation, but the Spanish version was banned.<sup>179</sup> Cutting noted that the Bureau had issued a blacklist of books in October, 1928, that contained 739 volumes.<sup>180</sup> For reasons beyond Cutting's comprehension, more than half of the titles were in Spanish.<sup>181</sup> The list was a result of a meeting between Bureau of Customs and Post Office censors, Cutting said, as he described the session as one "of the experts of the two departments, men who had been reading indecent literature all their lives, and felt that they were entitled to say what was or was not indecent."<sup>182</sup>

The debate on Cutting's proposal to eliminate both the political and obscenity exclusions from the tariff bill occupied four days of the Senate's calendar in October, 1929, and March, 1930, the first time that either House of Congress ever discussed the ramifications of censorship at length. The news media provided substantial coverage of the 1929-30 debate, thus educating the general public on the censorship issue. During the debates, Cutting tried to explain the eccentricities of censorship to his colleagues and the nation. Censorship, for example, was biased inexplicably in favor of English authors:

I think it is splitting hairs to put, say, Boccaccio on one side of the line and Chaucer on the other, or Rabelais on one side

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177. *Id.* at 211.

178. *Id.* at 212-14.

179. 71 CONG. REC. 4434 (1929) (statement of Sen. Cutting).

180. *Id.*

181. *Id.*

182. *Id.*

of the line and Swift on the other. As a matter of fact, up to the eighteenth century English literature was just as plain-spoken—and perhaps a little more so—as any other literature on the face of the earth. After a century of comparative prudery I think that English literature is becoming fairly plain-spoken again. I do not believe we can make any such distinction on an issue of language.<sup>183</sup>

Cutting also tried to convince his fellow senators that banning books only enhanced their desirability. Such a tradition was longstanding, he said:

It started in the ancient Athenian community when an attempt was made to suppress the talking of Socrates. It was then for the first time that he acquired a great reputation among Athenian youth. When the great and respectable citizens of that time condemned him to death for contumacy, then again his reputation was increased a hundred-fold and his teachings have gone on from that time to this.<sup>184</sup>

Not only did the reputations of banned authors increase, but the prices of their works increased as well, Cutting said. Customs restrictions were far from effective, he said, noting,

As for the books which are not for sale at reputable book stores, they are printed privately; they are bootlegged; they are printed in this country just the same as abroad. I have here a list of books printed for what we might call the literary bootlegging trade. I think it includes all the books to which [his opponents] have referred. . . . They are being bought and sold at extravagant prices. . . .

It is the old question of censorship, Mr. President. We can not force people not to read something they want to read. If human beings think they have a right to read something, the presence of statutes is not going to interfere with them. We can pass all the laws we want, and the thing will remain the same.<sup>185</sup>

Cutting further argued that the Customs Bureau's censorship policies could not keep certain information from reaching American children. One major concern in the debate, of course, was

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183. *Id.* at 4435.

184. 72 CONG. REC. 5489 (1930).

185. *Id.* at 5494.

keeping sexual information away from those young people. Cutting quoted a survey done by a New York City expert a few years earlier in which children had been asked where they obtained "their first information as to sex matters."<sup>186</sup> The books, in rank order, were: the Bible, the dictionary, the encyclopedia, Dickens' novels, and Shakespeare.<sup>187</sup> The issues of censorship, Cutting maintained, were simply too complicated for government intervention. Decisions on what to read, he said, should be made by individual Americans based on their own best interests rather than by a governmental agency.

The measure that Congress finally passed removed the obscenity clause and most of the vague political references.<sup>188</sup> All that was left was a ban on material advocating forcible resistance to the law or threatening the life of the President. Further provisions called for books to be judged in their entirety, for the Secretary of the Treasury to issue blanket rulings allowing the admission of known classics and books of literary or scientific merit, and for individuals who were upset by Customs rulings to have access to the federal courts for redress.<sup>189</sup>

Provisions of the new law immediately liberalized the practices of the Customs Bureau. In 1931, for example, the Treasury Department removed bans on *The Arabian Nights*, Casanova's *Memoirs*, and Boccaccio's *Decameron*.<sup>190</sup> When Franklin Roosevelt took office in 1933, his Secretary of the Treasury appointed a special legal adviser to handle challenges to decisions by customs officials. By 1935, almost every book published by a reputable European firm was freely admitted to the United States. Appeals were quickly decided, and books with any possible merit were allowed to enter.<sup>191</sup> The whole process was speeded along by the decision in *United States v. One Book Called "Ulysses,"*<sup>192</sup> in which the district judge ruled that one of the most controversial books of the era, *Ulysses* by James Joyce, could enter the country uninhibited.<sup>193</sup> The federal judges hearing that case read the entire book and weighed its allegedly obscene passages against

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186. *Id.* at 5498.

187. *Id.*

188. Tariff Act of 1930, ch. 497, § 305, 46 Stat. 590 (1930).

189. *Id.* at 688.

190. BOYER, *supra* note 15, at 237.

191. *Id.* at 237-38.

192. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom.* United States v. One Book Entitled *Ulysses*, 72 F.2d 705 (2d Cir. 1934).

193. *Id.* at 185.

the merit of other sections.<sup>194</sup> In the process, the judges firmly established the standard whereby the whole book had to be considered and its effect had to be evaluated by the reactions of an average person.<sup>195</sup>

Buoyed by his success against customs officials, Senator Cutting attempted to restrict the ability of the U.S. Post Office to exclude materials from the mails. That effort failed legislatively,<sup>196</sup> but the court system toppled another of Anthony Comstock's major legacies. The case involved a pamphlet by Mary Ware Dennett, a mother of two boys and an activist in the birth control movement.<sup>197</sup> Dennett had written a pamphlet for her sons explaining the facts of life. The pamphlet, "The Sex Side of Life," was well-written and tastefully presented and soon was being distributed by the YMCA and similar organizations. Attempts to circulate the publication through the mail under the cheaper mailing rates available to printed material were stopped in 1922 by postal officials who termed the publication nonmailable because of its indecent contents.<sup>198</sup>

For the remainder of the decade, Dennett lobbied the Post Office to change its position on her booklet. She carried on an extensive correspondence with postal officials to determine what part of "The Sex Side of Life" was objectionable. The publication did not deal with birth control nor did it discuss abortion, yet the material was still termed indecent and, under Comstock's law, nonmailable.<sup>199</sup> As Dennett told one postal official in 1925,

So far as I know, you are the only individual in the country who considers anything in this pamphlet indecent. . . . If your single opinion is to outweigh theirs, must you not at least let them and me have the opportunity to know on what you base your willingness to utilize the power of the law to enforce your individual view?<sup>200</sup>

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194. *See id.* at 183; *see also One Book Entitled Ulysses*, 72 F.2d at 706 ("Certain of [Ulysses'] passages are of beauty and undoubted distinction, while others are of a vulgarity that is extreme . . .").

195. *One Book Entitled Ulysses*, 72 F.2d at 707; *One Book Called "Ulysses,"* 5 F. Supp. at 184.

196. BOYER, *supra* note 15, at 238.

197. *See* MARY WARE DENNETT, *WHO'S OBSCENE?* (1930).

198. *Id.* at 8-10.

199. *Id.* at 10-17.

200. *Id.* at 40-41.

Departmental Solicitor Edgar M. Blessing simply responded that he had reviewed the publication and found it indecent under the law. The term "indecent" had not yet been defined.<sup>201</sup>

Even as Dennett carried on this correspondence with postal officials, she continued to send "The Sex Side of Life" through the mail. Because she was forbidden use of the cheaper mail classifications, she filled orders for single copies by placing the material in sealed envelopes and using first-class postage; bulk orders went by express.<sup>202</sup> Her continuing effort to force the postal authorities to explain their actions led to problems. In January, 1929, Dennett was indicted for inserting into the U.S. mails "a pamphlet, booklet and certain printed matter enclosed in an envelope, which said pamphlet, booklet and certain printed matter were obscene, lewd, lascivious, filthy, vile and indecent, and unfit to be set forth in this instrument and to be spread upon the records of this Honorable Court."<sup>203</sup> Using the best of Anthony Comstock's tactics, a copy of "The Sex Side of Life" had been ordered by a decoy for the sole purpose of providing the evidence necessary to prosecute Dennett for sending indecent material through the mails.<sup>204</sup>

Liberals, joined by a healthy representation from the scientific and religious communities, rushed to Dennett's aid.<sup>205</sup> Despite their support, Dennett was convicted in a trial in which the judge allowed no testimony on the value of the pamphlet to be entered into evidence. Because the Post Office had already decided that such material was nonmailable,<sup>206</sup> the judge determined that the only issue was whether the pamphlet had been placed in the mail. On appeal, the court overturned the verdict, noting that "an accurate exposition of the relevant facts of the sex side of life in decent language and in manifestly serious and disinterested spirit cannot ordinarily be regarded as obscene."<sup>207</sup> After *United States v. Dennett*, the mails became more available for the dissemination of information related to sex education.<sup>208</sup>

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201. *Id.* at 41.

202. *Id.* at 33-34.

203. *Id.* at 46.

204. *Id.* at 47-48.

205. *See id.* at 70-129.

206. *Id.* at 178-83.

207. *United States v. Dennett*, 39 F.2d 564, 569 (2d Cir. 1930).

208. Although *Dennett* was instrumental in opening up the mails to distribution of information about birth control, postmasters general continued to think that they could exercise their personal tastes on sexually explicit materials in order to ban materials from

The campaign to send such material through the mails was accompanied by a similar effort to promote freer public discussion on birth control. Dennett and Margaret Sanger took different paths toward accomplishing the same goal. Dennett argued for the dissemination of birth control information as part of her total free-speech campaign. Sanger sought state and federal laws to protect doctors who discussed birth control with their patients. Both efforts moved forward in the 1920's, with Dennett's program apparently achieving the major success.

Although Sanger did get legislation protecting the medical discussion of birth control introduced in Congress and in some state legislatures, it was not enacted.<sup>209</sup> By the mid-1930's, most individuals active in the birth control movement believed that even though the Comstock laws remained on the books, they were no longer being used to bar the dissemination of birth control information through the mails. Also, no proof existed that physicians encountered legal difficulties if they talked about or prescribed birth control devices. Consequently, the legislative

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the mails. The Supreme Court finally evaluated that stance in 1946 when the Postmaster General decided that the men's magazine *Esquire* was a bit too bawdy to merit cheaper mailing privileges. The exclusion of the magazine was based on the fourth condition that publications must satisfy in order to be eligible for second-class rates. Under the 1879 law, a publication seeking the lower rates "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry." Postal Service Appropriations, ch. 180, § 14, 20 Stat. 355, 359 (1879). The Postmaster General believed a publication filled with smoking room humor did not benefit the public. "Writings and pictures may be indecent, vulgar, and risqué and still not be obscene in a technical sense," the Postmaster General said. "Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 149 (1946) (quoting the opinion of the Postmaster General resulting from a hearing considering the revocation of *Esquire's* second-class permit).

Writing for the Court, Justice William O. Douglas chastised the Postmaster General for his attempts to determine the nation's reading standards: "Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another." *Id.* at 157. Because of such variations, Douglas said, the Postmaster General may not impose his or her tastes on the granting of second-class mailing privileges, which ought to be handled solely on technical issues: "[T]o withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official." *Id.* at 158. In Douglas's view, this was far too dangerous a power to be vested in the hands of one person. *Id.* For further details about the *Esquire* case, see Jean Preer, *Esquire v. Walker: The Postmaster General and "The Magazine for Men"*, PROLOGUE, Spring 1990, at 7-23.

209. See KENNEDY, *supra* note 142, at 224-40.

effort died.<sup>210</sup> Despite the gains made by Dennett, Sanger, and others in the area of promoting freedom for the discussion of sex education and birth control, those issues continued to present problems. The Supreme Court finally entered the battle in the late 1960's by ruling that the dissemination of information about birth control was a permissible First Amendment activity with which neither the state nor federal government could interfere.<sup>211</sup>

Such gains in the areas of freedom to read in general and the freedom to read sexually related material in particular did not translate into greater freedom for other forms of communication. Entertainment forms apparently still offered greater challenges to morals than the written word, and the motion picture, which had faced the repressive urges of a substantial segment of the American public ever since it first appeared, encountered even greater difficulties in the 1920's. Church workers, teachers, physicians, and parents all joined the campaign to blunt the impact of movies, especially on the young. The silver screen was denounced for causing most of the decade's problems, ranging from liberated women to disrespectful children.<sup>212</sup>

Motion picture producers, in fact, helped to incite the 1920's censorship campaign. As the decade began, the producers found themselves briefly facing a business slump. To keep their profits high, they turned to more sensational fare. The era also marked

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210. *Id.* at 240-41. By the 1940's, the movement to promote the discussion of birth control had evolved into the Planned Parenthood Federation of America, which still exists today. *See id.* at 257-71.

211. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court confirmed the right of a person in a nonmedical field to distribute contraceptives and contraceptive information to unmarried individuals despite a contrary state law. Justice Douglas, in concurring with the decision, noted that distributing material was an extension of Baird's First Amendment right to lecture on the topic. *Id.* at 460 (Douglas, J., concurring). In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court held that state prohibitions on the advertisement or display of contraceptive information were unconstitutional under the First Amendment. *Id.* at 700-02. The state's argument that some persons who saw the advertisements might find them offensive was insufficient to override the First Amendment's protection of freedom of expression. *Id.* at 701. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court upheld the right of the drug products firm to send unsolicited mass mailings that included informational pamphlets dealing with contraceptives, venereal disease, and family planning. In this case, the Court specifically held that a section of the Comstock Act violated First Amendment rights. *Id.* at 75 (holding 39 U.S.C. § 3001(e)(2) unconstitutional as applied).

212. *See* INGLIS, *supra* note 112, at 62-171; RAYMOND MOLEY, *THE HAYS OFFICE* 25-31 (1945); RANDALL, *supra* note 112, at 14-15; STANLEY, *supra* note 112, at 179-85; Ben Yagoda, *Hollywood Cleans Up Its Act: The Curious Career of the Hays Office*, 31 AM. HERITAGE, Feb.-Mar. 1980, at 12.

the beginnings of the star system and the press agent. The everyday lives of the stars, of which many in middle America disapproved, became common fare not only in fan magazines but also in daily newspapers. As scandals rocked the movie community, reformers sought governmental censorship of motion pictures. In 1921 alone, almost one hundred bills designed to censor motion pictures were introduced in thirty-seven state legislatures.<sup>213</sup> During that same year, the U.S. Senate considered a congressional investigation of the industry.<sup>214</sup> In the winter of 1921 to 1922, bills calling for federal censorship of movies were introduced into the U.S. House of Representatives.<sup>215</sup>

Industry forces decided to act before the federal government intervened. With the National Board of Censorship discredited as a reviewing mechanism, the producers decided to try self-regulation. After creating the National Association of the Motion Picture Industry in March, 1921, they issued the Thirteen Points, a statement pledging members to avoid certain controversial topics in their films.<sup>216</sup> Sensitive topics included those "[w]hich emphasize and exaggerate sex appeal or depict scenes therein exploiting interest in sex in an improper or suggestive form or manner," those "which unnecessarily prolong expressions or demonstrations of passionate love,"<sup>217</sup> or those which are "predominantly concerned with the underworld or vice and crime, and like scenes, unless the scenes are part of an essential conflict between good and evil."<sup>218</sup> Stories that made gambling and drinking attractive or that emphasized crime were to be treated with care. Unfortunately for the leaders of the Hollywood community, their pledge existed only on paper; business as usual continued behind the cameras.

With more calls for federal intervention in the filmmaking process, the Hollywood producers decided to try another tactic. Professional baseball had just hired a "czar" to clean up its image in the wake of a terrible scandal; motion picture producers decided to do the same. They settled on Will H. Hays, who at the time of his hiring was Postmaster General under President

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213. Yagoda, *supra* note 212, at 15.

214. *Id.* at 16.

215. INGLIS, *supra* note 112, at 70.

216. *Id.* at 83-84.

217. *Id.* at 83 (quoting Statement of the National Association of the Motion Picture Industry that outlined the proposed Thirteen Points (Mar. 21, 1921)).

218. *Id.*



Warren G. Harding.<sup>219</sup> Hays was a nonsmoker, a teetotaler, an elder in the Presbyterian Church, a power in the Republican party, and the image of civic rectitude—just what the industry needed. After assuming the directorship of the Motion Picture Producers and Distributors of America, better known as the Hays Office, Hays worked to clean up the movie capital's image. He persuaded the studios to put morals clauses in stars' contracts so that they would lose their jobs if accused of moral turpitude. He also convinced the studios' publicity operations to tone down descriptions of the stars' lifestyles and salaries.<sup>220</sup>

For many years, Hays's activities were primarily in the public relations realm, but he successfully staved off additional legislative regulation. As he worked to improve the industry's image, Hays also worked to improve the producers' product. In 1924, his office took the first significant step toward self-regulation with the issuance of a statement known as the "Formula."<sup>221</sup> Hays and his staff decided that counseling filmmakers before they began work on a picture was better than trying to revise the finished product. The Formula tried to prevent stage plays, books, or stories with unacceptable themes from being considered for motion picture adaptation. Adherence to the Formula was strictly voluntary.<sup>222</sup>

Still not satisfied with motion picture standards, the Hays Office issued the "Don'ts and Be Carefuls" in 1927.<sup>223</sup> This list of eleven forbidden subjects and twenty-five topics on which producers had to be careful was designed to quiet frequent complaints. The "Don'ts" included profanity, nudity, drug trafficking, and miscegenation.<sup>224</sup> The "Be Careful" list touched on respect for the flag, treatment of international sensitivities, details about crime and criminals, and sex-related topics such as "[f]irst-night scenes" and "[m]an and woman in bed together."<sup>225</sup> Once again, however, agreement to follow the "Don'ts and Be Carefuls" was voluntary.<sup>226</sup> Not until the early 1930's would the Hays Office have authority to punish producers who violated its standards.

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219. Yagoda, *supra* note 212, at 13.

220. *Id.* at 16.

221. *Id.* at 17.

222. *Id.*

223. INGLIS, *supra* note 112, at 114-16.

224. *Id.*

225. *Id.* at 115.

226. *Id.* at 114.

Even while he was advocating effective self-regulation of motion pictures, Hays advocated greater freedom for the medium. His words, at times, sounded much like those of D.W. Griffith speaking in defense of *The Birth of a Nation*.<sup>227</sup> In 1927, for instance, Hays wrote, "There must be the same guarantee of freedom for artistic and inspirational development as has been accorded other methods of expression."<sup>228</sup> Motion pictures, he contended, "are evidences of human thought; and human thought, on which all progress depends, can not be tampered with safely."<sup>229</sup> In supporting greater freedom for motion pictures, Hays noted the fickle nature of censorship: "An inland State prohibited the display of girls in bathing suits," he said, "while a seacoast State, boasting one of the finest beaches in America, saw no impropriety in such scenes."<sup>230</sup> Even worse was the censorship imposed by Chicago. "For twelve years," he said, "Chicago censors have eliminated from the cinema references to crime, hold-ups, carrying of firearms, bootleggers, etc. And does any one venture to say that Chicago has become a more model city because of these prohibitions than its sister cities where such censoring practice has not obtained?"<sup>231</sup> Chicago, of course, was the gangland capital of the nation during the era. For the motion picture industry to grow, Hays argued, it needed freedom to explore ideas and to present those ideas on the screen without irrational censorship.<sup>232</sup>

Interestingly, the campaign against the motion picture industry contradicted efforts to win greater freedom for other forms of expression. Many people still believed that movies exerted a bad influence on their audiences. As a result, despite efforts to win greater freedom for printed materials, few voices called for freedom of expression for movie producers. In fact, with their repeated attempts at self-censorship, the motion picture producers were not even calling for freedom of expression for themselves. By putting inhibitory rules on paper, the producers demonstrated that they were willing to bargain away much of their freedom of expression in exchange for freedom from the constant threat of censorship. Financial exigencies demanded that producers turn out movies that could be shown nationwide with

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227. See *supra* notes 136-41 and accompanying text.

228. Will H. Hays, *Motion Pictures and Their Censors*, AM. REV. REVS., Apr. 1927, at 393.

229. *Id.*

230. *Id.* at 394.

231. *Id.* at 395.

232. *Id.* at 398.

little local interference. This need to make a profit would soon lead producers to a greater willingness to sacrifice their claims to freedom of expression.

#### IV. CENSORSHIP CONTRADICTIONS OF THE GREAT DEPRESSION

The Depression years were some of the freest that the nation has ever enjoyed in terms of freedom of expression. Dissident political views dotted the horizon as demagogues,<sup>233</sup> Fascists,<sup>234</sup> and Communists<sup>235</sup> presented views for public acceptance. Labor unions won the right to organize as the federal government came to their aid.<sup>236</sup> Pacifists finally found adherents to their cause as well.<sup>237</sup> The era was not without its problems for free speech, for it did mark the beginning of what became the House Committee on Un-American Activities,<sup>238</sup> and politicians enacted a series of repressive measures aimed ostensibly at curbing the fascist danger to the United States.<sup>239</sup> During this period, President Franklin Roosevelt authorized the Federal Bureau of Investigation to resume its supervision of Americans with allegedly threatening political ideas.<sup>240</sup> Despite the latter events, the period was essentially one of the freest in terms of the amount of discussion that Americans enjoyed. That freedom, however, did not extend to the motion picture industry.

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233. See DAVID H. BENNETT, *DEMAGOGUES IN THE DEPRESSION* (1969); ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION* (1982); GEOFFREY S. SMITH, *TO SAVE A NATION* (1973); James P. Shenton, *The Coughlin Movement and the New Deal*, 73 *POL. SCI. Q.* 352 (1958).

234. SANDER A. DIAMOND, *THE NAZI MOVEMENT IN THE UNITED STATES, 1924-1941* (1974); LEO P. RIBUFFO, *THE OLD CHRISTIAN RIGHT 25-79* (1989); MORRIS SCHONBACH, *NATIVE AMERICAN FASCISM DURING THE 1930S AND 1940S* (1985); John M. Werly, *The Millenarian Right: William Dudley Pelley and the Silver Legion of America*, 71 *S. ATLANTIC Q.* 410 (1972).

235. See HARVEY KLEHR, *THE HEYDAY OF AMERICAN COMMUNISM: THE DEPRESSION DECADE* (1984).

236. See JERALD S. AUERBACH, *LABOR AND LIBERTY* (1966); IRVING BERNSTEIN, *TURBULENT YEARS* (1969).

237. See ERNEST C. BOLT, JR., *BALLOTS BEFORE BULLETS* (1977); CHARLES CHATFIELD, *FOR PEACE AND JUSTICE* (1971); CHARLES DEBENEDETTI, *THE PEACE REFORM IN AMERICAN HISTORY* (1980); EILEEN EAGAN, *CLASS, CULTURE, AND THE CLASSROOM: THE STUDENT PEACE MOVEMENT OF THE 1930S* (1981).

238. See WALTER GOODMAN, *THE COMMITTEE 3-23* (1968); AUGUST RAYMOND OGDEN, *THE DIES COMMITTEE 38-46* (1945).

239. See Voorhis Act, ch. 897, 54 Stat. 1201 (1940); Alien Registration (Smith) Act, ch. 439, 54 Stat. 670 (1940); Hatch Act, ch. 410, § 9A, 53 Stat. 1147 (1939); Foreign Agents Registration Act, ch. 327, 52 Stat. 631 (1938).

240. See FRANK J. DONNER, *THE AGE OF SURVEILLANCE 53-78* (1980); Kenneth O'Reilly, *A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security*, 69 *J. AM. HIST.* 638, 646-47 (1982); Athan G. Theoharis, *The FBI's Stretching of Presidential Directives, 1936-1953*, 91 *POL. SCI. Q.* 649, 652-61 (1976-77).

If anything, motion pictures became even more susceptible to repressive pressure. At the onset of the Depression, movie producers still were operating under a voluntary code of self-regulation.<sup>241</sup> As audiences dwindled, producers again tried to lure them back by offering more violent and more sensational material than ever before. Calls for increased restrictions on motion pictures followed. This time, demands for motion picture censorship were augmented by the results of studies by social scientists of the effects that movies had on the American viewing public. The studies painted a glum picture for movie producers, who were told that American young people in particular spent far too much time in theaters and learned many bad habits from what they saw on the silver screen.<sup>242</sup>

The popularized version of twelve separate studies into the influence of films on children concluded that “[m]an is by nature an imitative animal.”<sup>243</sup> The reports contended that humans emulate what they see on the silver screen, and thus films posed a great danger. The reports stated: “[W]hen the young see pictures presented in a certain way, it is small wonder that the vividness of the reception of those scenes, owing to the youth and freshness of the spectators, makes of the movies a peculiarly incisive and important factor in schemes of conduct.”<sup>244</sup> In fact, “[t]he less experience the spectators have, the less selective they naturally are. Coming to the young, as pictures do, in the most impressionable years of their life, the effect becomes of extraordinary weight and potentiality, and amounts often to a shaping and molding of their character.”<sup>245</sup> The nation’s adults should be concerned about the effect that films have on children, the report stressed. “At their best,” said the study, movies “carry a high potential of value and quality in entertainment, in instruction, in desirable effects upon mental attitudes and ideals, second, perhaps, to no medium now known to us. That at their worst they carry the opposite possibilities follows as a natural corollary.”<sup>246</sup>

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241. See *supra* notes 216-26 and accompanying text.

242. See INGLIS, *supra* note 112, at 175-76; MOLEY, *supra* note 212, at 77-78; RANDALL, *supra* note 112, at 15-18; STANLEY, *supra* note 112, at 174-230; Yagoda, *supra* note 212, at 12. For a popularized version of the 12 separate studies on the effects of movies sponsored by the Payne Fund, see HENRY JAMES FORMAN, *OUR MOVIE MADE CHILDREN* (1933).

243. FORMAN, *supra* note 242, at 147. The Payne Fund financed these studies between 1929 and 1933. *Id.*

244. *Id.* at 177.

245. *Id.*

246. *Id.* at 273.

Aware of the national concern about the influence of motion pictures on American young people, the U.S. Senate called for an investigation of the motion picture industry in February, 1932.<sup>247</sup> To fend off such intervention, motion picture producers restated their interest in the production standards that the Hays Office administered, but they still refused to make the standards mandatory. Soon the motion picture producers were without options. The final push toward a mandatory production code came from the Roman Catholic Church.<sup>248</sup> In October, 1933, a papal emissary attending a Catholic charitable function in New York announced that "Catholics are called by God, the Pope, the Bishops and the priests to a united and vigorous campaign for the purification of the cinema, which has become a deadly menace to morals."<sup>249</sup>

From that call came the Legion of Decency, an organization sponsored by the National Conference of Catholic Bishops, which was established in November, 1933.<sup>250</sup> Between seven million and nine million American Catholics signed the legion pledge, which called upon them to boycott any films declared objectionable by the church hierarchy.<sup>251</sup> Members of non-Catholic religious groups also signed up. The church now had a strong voice at the box office, and its clergy exercised that voice loudly and clearly. Church leaders at times warned parishioners that to attend certain films was sinful, and they encouraged boycotts of theaters that continued to show objectionable movies.<sup>252</sup>

The movie industry immediately responded to the Legion of Decency by renewed emphasis on the Hays Office and the production code.<sup>253</sup> A system was set up so that films required a certificate of approval prior to release, and member studios agreed not to circulate any film that did not have a certificate. In addition, the producers promised to impose a twenty-five thousand dollar fine on anyone who produced, distributed, or exhibited a motion picture without this seal of approval.<sup>254</sup> The Hays Office became heavily involved in censoring scripts before

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247. INGLIS, *supra* note 112, at 119.

248. *Id.* at 120-21.

249. N.Y. TIMES, Oct. 2, 1933, *quoted in* Richard Corliss, *The Legion of Decency*, 4 FILM COMMENT 26 (1968) (emphasis omitted).

250. *See* INGLIS, *supra* note 112, at 120-25.

251. *Id.* at 122-23.

252. *Id.* at 124.

253. *Id.* at 125.

254. *Id.*

films were made and in reviewing pictures before release. No fines were ever collected, but the motion pictures of the era were substantially changed.<sup>255</sup> Great emphasis was placed on an overall set of principles guiding film production. According to these standards, "No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience will never be thrown to the side of crime, wrongdoing, evil or sin."<sup>256</sup> In addition, "[c]orrect standards of life, subject only to the requirements of drama and entertainment, shall be presented,"<sup>257</sup> and "[l]aw, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation."<sup>258</sup> Although the standards may sound noble to a more modern movie viewer who is satiated by the sex and violence that permeates many motion pictures today, the code and its enforcement created great problems for producers who viewed the screen as a medium for artistic expression and who believed that their speech should be unfettered.

Such regulations posed real threats for the translation of some books to the silver screen. One classic that ran into substantial difficulties was *Gone With the Wind*.<sup>259</sup> Margaret Mitchell's use of the term "nigger," her references to the Ku Klux Klan, her sexual relationship between Belle Watling and Rhett Butler, and her scene of forced intercourse between estranged husband Rhett and wife Scarlett were among the elements that collided with Hollywood's code of screen morality.<sup>260</sup> Producer David O. Selznick negotiated long and hard, giving here and there, to win approval on key scenes.<sup>261</sup> He won permission, for instance, for Clark Gable to sweep Vivian Leigh off her feet and carry her up the staircase for what today would be called spousal rape. Rhett's actions drew cheers from audiences. Selznick also managed to keep the scene of Scarlett on the morning after that lovemaking in the film. The scene showed how much she had enjoyed her renewed relation-

255. *Id.* at 142.

256. Motion Picture Production Code (adopted Feb. 1930), *quoted in* Yagoda, *supra* note 212, at 19.

257. *Id.*

258. *Id.* For a discussion of the role that morality played in motion picture regulation, see Stephen Vaughn, *Morality and Entertainment: The Origins of the Motion Picture Production Code*, 77 J. AM. HIST. 39 (1990).

259. See LEONARD J. LEFF & JEROLD L. SIMMONS, *THE DAME IN THE KIMONO* 87-107 (1990).

260. *Id.* at 86-91.

261. *Id.* at 91-105.

ship with her husband and therefore violated the bans on sexual intimacy and on showing pleasure over it. Selznick's biggest success likely was over the most remembered line in the film: Rhett Butler's "Frankly, my dear I don't give a damn" in his last scene with Scarlett. The censors at first had wanted the line to read "My dear, I don't care."<sup>262</sup> When a version of the film using such language was tested, audience reaction was poor, and Selznick put additional pressure on the Hays Office for approval for the now-famous language, which he finally received.<sup>263</sup> *Gone With the Wind* was a big-budget film from a best-selling novel, and Selznick was a hard negotiator. The problems that he encountered showed how difficult it was for scenes that today are considered classic to reach the screen in the 1930's. Producers with less determination, less influence, or a less powerful script had little chance of winning battles with the ever-present censor.

Indirectly, the federal government helped disgruntled producers find outlets to display their more controversial efforts through a series of antitrust actions. The motion picture industry long had been dominated by monopolies. In the beginning, the technology necessary to make movies was tightly controlled; most people gained access to the means of production only after court action. The next control point was the means of distribution and exhibition. Here, producers would either wholly own or have long-term contracts with the distributors of films and the theaters that exhibited movies. Through these arrangements, the major production companies dictated which movie houses would show what films and for how long in more than three-quarters of the nation's cities. Independent theaters had a hard time obtaining films, and independent producers had difficulty finding theaters to display their work.<sup>264</sup>

Beginning in 1930, Supreme Court decisions chipped away at these monopoly arrangements.<sup>265</sup> The monopoly was finally bro-

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262. *Id.* at 97.

263. *Id.* at 104-05.

264. See ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 537-677 (1947); Simon N. Whitney, *Antitrust Policies and the Motion Picture Industry*, in *THE AMERICAN MOVIE INDUSTRY: THE BUSINESS OF MOTION PICTURES* 161-204 (Gorham Kindem ed., 1982).

265. See, e.g., *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944) (conspiracy of exhibitors to obtain licensing agreement from distributor violated the Sherman Act); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (contracts in restraint of trade not protected by the Copyright Act); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44 (1930) (agreement between distributors restricting the making of new contracts with exhibitors violated the Sherman Act); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930) (agreement among distributors restricting the terms of contracts with exhibitors violated the Sherman Act).

ken in 1948, when the Supreme Court once again held that industry practices violated antitrust laws in *United States v. Paramount Pictures*.<sup>266</sup> As a result, the producers divested themselves of any theaters that they owned and thus opened the way for competition among individual exhibitors for films.<sup>267</sup> Major movie producers could no longer retaliate against exhibitors who displayed productions offered by independent companies.<sup>268</sup> These so-called independents generally did not adhere to the Hays Office production code, and soon portions of the silver screen were open to experimentation that never would have been possible had the major studios still dominated the means of exhibition.<sup>269</sup>

The case that brought about these changes also offered an interesting insight into the changing view of the Supreme Court about movies and the First Amendment. In 1915, the Supreme Court decided *Mutual Film Corp. v. Industrial Commission*<sup>270</sup> and definitely placed movies outside the protection of the First Amendment.<sup>271</sup> In writing the majority decision in *Paramount Pictures*,<sup>272</sup> Justice William O. Douglas opened up the possibility that movies might be included within the First Amendment.<sup>273</sup> In response to concerns raised about the effect that such a monopoly might have on freedom of speech, Douglas wrote, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."<sup>274</sup> The case, however, offered no room for the Court to rule on such a matter because it focused only on interpretation of the antitrust laws.<sup>275</sup> Before too many years passed, however, the Supreme Court would squarely face a case that asked for First Amendment protection for expression on the motion picture screen.

266. 334 U.S. 131 (1948) (price-fixing conspiracy among distributors and vertical combinations in production, distribution, and exhibition violated the Sherman Act).

267. EDWARD DE GRAZIA & ROGER K. NEWMAN, *BANNED FILMS: MOVIES, CENSORS, AND THE FIRST AMENDMENT* 70 (1982).

268. Douglas Ayer et al., *Self-Censorship in the Movie Industry: A Historical Perspective on Law and Social Changes*, in *THE AMERICAN MOVIE INDUSTRY: THE BUSINESS OF MOTION PICTURES* 225 (Gorham Kindem ed., 1982).

269. *Id.*

270. 236 U.S. 230 (1915).

271. *Id.* at 243-44.

272. 334 U.S. 131, 166 (1948).

273. *Id.*

274. *Id.*

275. *Id.*



## V. A MILESTONE FOR FREE EXPRESSION IN THE COLD WAR

The American political scene was most confused from immediately after World War II through about 1960. Communists became the prime targets for government at all levels<sup>276</sup> and for civilian vigilantes.<sup>277</sup> In times of political repression, the freedom to explore expressive activities during leisure time usually contracts, but this time, things were somewhat different. Conservative forces tried to exert their repressive tendencies, but they were not always successful.

As usual in times of increased conservatism, many Americans became attracted to campaigns to clean up literature and motion pictures. Once more the goal was to use these media to build good American values. The generation's moral purists launched their attack on several fronts only to find the Supreme Court invoking the First Amendment to protect two favorite targets of censorship: the movies<sup>278</sup> and allegedly obscene literature.<sup>279</sup> A third medium of expression, comic books, faced an outraged public for the first time in the 1950's and succumbed to pressures to enact a code of self-regulation.<sup>280</sup>

The attack on comic books reached its peak in the mid-1950's, focusing on the supposed connection between comic books and juvenile delinquency. New York City psychiatrist Fredric Wertham was largely responsible for rousing the nation's parents into a state of frenzy over the effects of comic books on children. In numerous articles and speeches on the topic, Wertham convinced American parents that comic books provided a blueprint for a

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276. For discussion of the government's search for Communists in the post-World War II era, see ELEANOR BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* (1953); DAVID CAUTE, *THE GREAT FEAR* (1978); WALTER GOODMAN, *THE COMMITTEE* (1964); ALAN D. HARPER, *THE POLITICS OF LOYALTY* (1969); EARL LATHAM, *THE COMMUNIST CONTROVERSY IN WASHINGTON* (1966); and PETER L. STEINBERG, *THE GREAT "RED MENACE"* (1984).

277. For discussion of how the entertainment industry blacklisted its own members suspected of being Communists, see LARRY CEPLAIR & STEVEN ENGLUND, *THE INQUISITION IN HOLLYWOOD* (1979); JOHN COGLEY, *REPORT ON BLACKLISTING: MOVIES* (1956); JOHN COGLEY, *REPORT ON BLACKLISTING: RADIO-TELEVISION* (1956); and MERLE MILLER, *THE JUDGES AND THE JUDGED* (1952).

278. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (holding that motion pictures were protected by the Fourteenth Amendment).

279. See *Roth v. United States*, 354 U.S. 476 (1957) (holding that the First Amendment does not protect obscenity, but stating that not all portrayals of sex are obscene).

280. J.P. Williams, *Why Superheroes Never Bleed: The Effects of Self-Censorship on the Comic Book Industry*, 26 *FREE SPEECH Y.B.* 60, 60-61 (1987).

life of crime and delinquency.<sup>281</sup> Although his complaints were much like those raised in Anthony Comstock's time about dime novels,<sup>282</sup> Wertham's criticisms of comic books achieved greater credibility because of his professional status. He couched his findings in scientific terms and related them to children that he treated in mental health clinics; from these encounters, he generalized about the entire juvenile population.<sup>283</sup> The doctor's warnings led various cities and states to enact regulations against certain kinds of comic books.<sup>284</sup> The U.S. Senate even looked into the relationship between comics and juvenile delinquency as part of an ongoing investigation of youth crime.

A Senate report on the issue was explicit about the kind of comics of which it disapproved. It described several story lines that were totally unacceptable. In one, called "Bottoms Up,"<sup>285</sup> by Story Comics, a confirmed alcoholic spent all of his wife's earnings on alcohol. As a result, says the report,

their small son is severely neglected. On the day the son is to start in the first grade in school the mother asks the father to escort him to the school building. Instead, the father goes to his favorite bootlegger and the son goes to school by himself. En route the child is struck and killed by an automobile. Informed of the accident, the mother returns home to find her husband gloating over his new supply of liquor. The last four panels show the mother as she proceeds to kill and hack her spouse to pieces with an ax.<sup>286</sup>

Equally disgusting to the committee was the story "With Knife in Hand,"<sup>287</sup> produced by Atlas Comics, which told the story of "a promising young surgeon"<sup>288</sup> who operated

on wounded criminals in order to gain the money demanded by his spendthrift wife. After the surgeon has ruined his professional career by becoming associated with the under-

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281. *Id.* at 61; see FREDRIC WERTHAM, *SEDUCTION OF THE INNOCENT* (1953) (summarizing Wertham's arguments concerning comic books).

282. See *supra* notes 94-100 and accompanying text.

283. Williams, *supra* note 280, at 61.

284. *Id.* at 62.

285. *Bottoms Up*, in *MYSTERIOUS ADVENTURES* (Oct. 1952).

286. S. REP. NO. 62, 84th Cong., 1st Sess. (1955).

287. *With Knife in Hand*, in *STRANGE TALES* (Aug. 1954).

288. S. REP. NO. 62, *supra* note 286, at 8.

world, a criminal comes to get help for his girl friend who has been shot by the police. In the accompanying panels the girl is placed upon the operating table; the doctor discovers that the criminal's girl friend is none other than his own wife. The scene then shows the doctor committing suicide by plunging a scalpel into his own abdomen. His wife, gasping for help, also dies on the operating table for lack of medical attention. The last scene shows her staring into space, arms dangling over the sides of the operating table. The doctor is sprawled on the floor, his hand still clutching the knife handle protruding from his bloody abdomen. There is a leer on his face and he is winking at the reader, connoting satisfaction at having wrought revenge upon his unfaithful spouse.<sup>289</sup>

Such comics may have been extreme examples of those that attracted Dr. Wertham's ire, for he was distressed about the more traditional comics as well. He stated, "[W]e have found that it makes no difference whether the locale is western, or Superman or space ship or horror, if a girl is raped she is raped whether it is in a space ship or on the prairie."<sup>290</sup> In addition, "[i]f a man is killed he is killed whether he comes from Mars or somewhere else,"<sup>291</sup> he told the senators. Comic books, he said, "cause a great deal of ethical confusion."<sup>292</sup> Even the popular Superman stories created problems because "[t]hey arose in children phantasies [sic] of sadistic joy in seeing other people punished over and over again while you yourself remain immune."<sup>293</sup> He was also concerned about "whole comic books in which every single story ends with the triumph of evil, with a perfect crime unpunished and actually glorified."<sup>294</sup>

Moreover, the comic books were omnipresent; Wertham said:

I have seen children who have spent \$75 a year and more, and I, myself, have observed when we went through these candy stores in different places, not only in New York, how 1 boy in a slum neighborhood, seemingly a poor boy, bought 15 comic books at a time.<sup>295</sup>

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289. *Id.*

290. *Juvenile Delinquency (Comic Books), 1954: Hearings on S. 190 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 83d Cong., 2d Sess. 82 (1954)* (statement of Dr. Fredric Wertham) [hereinafter *Comic Books Hearing*].

291. *Id.*

292. *Id.* at 85.

293. *Id.* at 86.

294. *Id.*

295. *Id.* at 82.

Children were enticed into spending so much money on comics, he said, because publishers had to sell 300,000 copies of each issue to make a profit.<sup>296</sup> He stated,

[Y]ou would not go far wrong if you assumed that this comic book is read by half a million children, for this reason, that when they are through with it and have read it, they sell it for 6 cents and 5 cents and then sell it for 4 cents and 2 cents.<sup>297</sup>

After that, he said, "you can still trade it."<sup>298</sup> Thus, comic books posed substantial problems for American youth.

Wertham's opinions about the dangers of comic books did not remain unopposed. Frederic M. Thrasher, a noted criminologist, argued that

[t]he current alarm over the evil effects of comic books rests upon nothing more substantial than the opinion and conjecture of a number of psychiatrists, lawyers and judges. True, there is a large broadside of criticism from parents who resent the comics in one way or another or whose adult tastes are offended by comics stories and the ways in which they are presented. These are the same types of parents who were once offended by the dime novel, and later by the movies and the radio. Each of these scapegoats for parental and community failures to educate and socialize children has in turn given way to another as reformers have had their interest diverted to new fields in the face of facts that could not be gainsaid.<sup>299</sup>

William M. Gaines, publisher of Entertaining Comics Group,<sup>300</sup> a prime target of Wertham's ire, also tried to lay responsibility for youthful behavior on sources other than comic books: "The basic personality of a child is established before he reaches the age of comic-book reading,"<sup>301</sup> Gaines told the senators. "I don't believe anything that has ever been written can make a child overaggressive or delinquent."<sup>302</sup> Indeed, Gaines pointed to issues of his publications that had "dealt with antisemitism, and anti-

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296. *Id.* at 88.

297. *Id.*

298. *Id.*

299. Frederic M. Thrasher, *The Comics and Delinquency: Cause or Scapegoat*, J. EDUC. SOC., reprinted in *Comic Books Hearing*, *supra* note 290, at 26.

300. *Comic Books Hearing*, *supra* note 290, at 97.

301. *Id.* at 98.

302. *Id.*

Negro feelings, evils of dope addiction and development of juvenile delinquents."<sup>303</sup> He took pride in stories that were "designed to show the evils of race prejudice and mob violence."<sup>304</sup>

Gaines then tried to show how futile the senators' efforts were. He held up a copy of the day's *Herald Tribune* and said, "On the front page a criminal describes how another criminal told him about a murder he had done. In the same paper the story of a man whose ex-wife beat him on the head with a claw hammer and slashed him with a butcher knife."<sup>305</sup> That same issue contained a "story of a lawyer who killed himself"<sup>306</sup> and "a story of a gang who collected an arsenal of guns and knives."<sup>307</sup> Gaines denied that he was criticizing the newspaper but argued that "when you attack comics, when you talk about banning them as they do in some cities, you are only a step away from banning crimes in the newspapers."<sup>308</sup> Furthermore, as Gaines noted: "Once you start to censor you must censor everything. You must censor comic books, radio, television, and newspapers."<sup>309</sup>

Senate committee members, however, were not convinced by arguments such as those presented by Thrasher and Gaines. Their investigators had found that more than thirty million crime and horror comic books were printed every month.<sup>310</sup> If only fifty percent of the books were sold each month, publishers would realize a gross annual profit of eighteen million dollars.<sup>311</sup> These objectionable books accounted for about twenty percent of the total output of the comic book industry,<sup>312</sup> which had been in existence only since 1935.<sup>313</sup> By reading these comics, the Senate subcommittee on juvenile delinquency said, children were exposed to brutality and violence<sup>314</sup> and were shown how to commit criminal offenses.<sup>315</sup> In addition, comic books glorified the criminal life, making it seem worthy of emulation.<sup>316</sup> Although the Senate

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303. *Id.* at 99.

304. *Id.*

305. *Id.* at 100.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. S. REP. NO. 62, *supra* note 286, at 2-3.

311. *Id.* at 3.

312. *Id.*

313. The first modern comic book, *New Fun*, appeared in 1935. *Id.*

314. *Id.* at 7.

315. *Id.* at 14-15.

316. *Id.* at 15.

subcommittee rejected the notion of federal censorship of comic books "as being totally out of keeping with our basic American concepts of a free press operating in a free land for a free people,"<sup>317</sup> it saw nothing wrong in citizens groups pressuring vendors and wholesalers who sold the offensive publications to stop carrying certain comics.<sup>318</sup> The committee also endorsed an effective code of self-regulation for the industry,<sup>319</sup> noting that an attempt in 1948 to clean up the comics failed because few publishers cooperated in the effort.<sup>320</sup>

With the Senate hearings as impetus, comic book publishers joined together to stave off further interference.<sup>321</sup> The Comics Code Authority was given the power to inspect story lines, artwork, and advertising to make sure that none of these violated the code, which was geared toward keeping details of crime and violence out of print.<sup>322</sup> Some of the rules sounded much like those self-imposed on the movie industry in the 1930's.<sup>323</sup> For instance, "[i]nclusion of stories dealing with evil shall be used or shall be published only where the intent is to illustrate a moral issue and in no case shall evil be presented alluringly, nor so as to injure the sensibilities of the reader."<sup>324</sup> Another rule provided, "[r]espect for parents, the moral code, and for honorable behavior shall be fostered."<sup>325</sup> As with the motion picture code, participating publishers ostentatiously displayed the authority's seal on their covers. Distributors and wholesalers began refusing to handle any comic books without that seal.<sup>326</sup> Wertham had to be delighted; twenty-four of the twenty-nine publishers producing crime- and violence-filled comic books went out of business.<sup>327</sup>

Civil libertarians, however, were unhappy about the pressures exerted on the comic book industry. The American Civil Liberties

317. *Id.* at 23.

318. *Id.* at 24.

319. *Id.* at 32.

320. *Id.* at 30-31.

321. *Id.* at 32.

322. Williams, *supra* note 280, at 64.

323. *See supra* notes 253-58 and accompanying text.

324. CODE OF THE COMICS MAGAZINE ASSOCIATION OF AMERICA, INC. § B(4) (1954), *reprinted in* S. REP. NO. 62, *supra* note 286, at 37.

325. *Id.* § C (Marriage and sex) (3), *reprinted in* S. REP. NO. 62, *supra* note 286, at 37. For a discussion of the effects of the hearings and the comics code on the industry, see Michael J. Sutton, *The Superhero Straightjacket: Why the Mass Medium of American Comic Books Never Really Grew Up* (1991) (unpublished M. Arts thesis, University of North Carolina at Chapel Hill).

326. Williams, *supra* note 280, at 64-65.

327. *Id.* at 65.

Union (ACLU), finding no agreement among experts as to the effect that comic books actually had on children,<sup>328</sup> could see no reason to infringe on constitutional protections.<sup>329</sup> "Some persons have suggested that, as a general rule, censorship is wrong, but that it might be proper to censor comic books since only children's reading would be affected,"<sup>330</sup> said the ACLU. "If the problem existed in a vacuum, it could be effectively argued that children's reading material should be handled differently than adult material, because the youthful mind has not matured to the level where it can assimilate and wisely evaluate a complex of ideas."<sup>331</sup> However, the ACLU contended that censorship never exists in a vacuum.<sup>332</sup> Allow it to begin, and stopping it might be very difficult.<sup>333</sup> In addition, the ACLU argued that many comic book readers were adults,<sup>334</sup> and

[t]he ACLU is opposed to the prior censorship of reading material for adults, even if children may obtain access to such material. . . . To condone pre-censorship for children is to risk abandonment of all reading material to the censor, since in one way or another youngsters are apt to obtain any book at some time.<sup>335</sup>

According to the ACLU, self-regulatory codes were dangerous and should always be opposed.<sup>336</sup> "Collective adherence to a single set of principles in a code,"<sup>337</sup> the ACLU warned, "has the effect of limiting different points of views, because individual publishers—as well as writers—are fearful of departing from the accepted norm lest they be held up to scorn or attack and suffer economic loss."<sup>338</sup> Such restrictions then reduce the number of ideas available in society, which, in turn, affects "the lifeblood of a free society."<sup>339</sup> Despite the ACLU warnings about "the dangers

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328. ACLU, CENSORSHIP OF COMIC BOOKS: A STATEMENT OF OPPOSITION ON CIVIL LIBERTIES GROUNDS 2-3 (1955).

329. *Id.* at 3.

330. *Id.* at 4.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 4-5.

336. *Id.* at 7-8.

337. *Id.* at 7.

338. *Id.*

339. *Id.*

of monopoly or uniformity of ideas,"<sup>340</sup> the comics code went forward.<sup>341</sup> With the comics code, the development of this medium was arrested. Comic book publishers, instead of experimenting to find the medium's potential, opted for conformity and commercial success.<sup>342</sup>

The motion picture industry also had chosen conformity and commercial success. Safe and profitable films were the rule for several years, but by World War II, producers began to rebel against the restrictions that the motion picture production code imposed on their creativity. Howard Hughes was the first to contest the authority of the code office when he issued *The Outlaw* in 1943. The film involved provocative footage and advertisements featuring Jane Russell. Because of Hughes's involvement with the war effort, he pulled the film but re-released it in 1946.<sup>343</sup> This time he successfully defied the production code and earned more than three million dollars for his act of mutiny.<sup>344</sup>

Hughes's success raised the question of how long other producers could be held in check. When the Supreme Court broke up the monopoly over the distribution and exhibition of films in 1948,<sup>345</sup> the Justices indirectly opened the way for greater freedom of expression on the screen. In 1952, the Supreme Court provided an even clearer answer when it overturned its 1915 ruling that had labeled movies as simply entertainment<sup>346</sup> and found a limited First Amendment protection for motion pictures.<sup>347</sup> The movie involved in the case was *The Miracle*,<sup>348</sup> a foreign-language film by Roberto Rossellini that starred Anna Magnani. The story line was controversial because it featured Magnani as a simple-minded goatherd who was raped by a man she identified as St. Joseph, her favorite saint. Most of the movie dealt with the goatherd's pregnancy, her belief that she was carrying a divine child, and her mistreatment by other villagers.<sup>349</sup> The Roman Catholic Church in the United States condemned the film and sought to ban it.<sup>350</sup> The New York State licensing

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340. *Id.* at 8.

341. The Comics Code Authority was created in 1954. Williams, *supra* note 280, at 64.

342. For a discussion of the comic code's effect on comics as art, see *id.* at 65-68.

343. STANLEY, *supra* note 112, at 201.

344. *Id.* at 201-02.

345. *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

346. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 244 (1915).

347. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

348. *Id.*

349. *Id.* at 508 (Frankfurter, J., concurring).

350. *Id.* at 513 n.18.



commission obliged, barring the film from display on the grounds that it was sacrilegious.<sup>351</sup> An unanimous Court overturned the state ruling and ordered that the film be shown without interference.<sup>352</sup>

The Court now stated that “[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas.”<sup>353</sup> Justice Tom C. Clark declared that movies “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”<sup>354</sup> He continued, “The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.”<sup>355</sup> Although some argued that “motion pictures possess a greater capacity for evil, particularly among the youth of a community than other modes of expression,”<sup>356</sup> Clark responded, “[I]t does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.”<sup>357</sup>

Just what sort of community control the Court would allow was unknown at the time of the *Burstyn* decision involving the movie *The Miracle*. Motion picture producers soon released even more films that were not cleared by the industry’s code authorities.<sup>358</sup> The Supreme Court continued to rule on movie-related cases<sup>359</sup> and, by 1965, finally decided that a well-defined censorship program with specific legal safeguards could withstand constitutional scrutiny.<sup>360</sup> By that time, however, producers paid little

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351. *Id.* at 495.

352. *Id.* at 506.

353. *Id.* at 501.

354. *Id.*

355. *Id.*

356. *Id.* at 502.

357. *Id.*

358. See DE GRAZIA & NEWMAN, *supra* note 267, at 91 (discussing the release of two films, *The Moon in Blue* (United Artists 1953) and *The Man with the Golden Arm* (United Artists 1955), which did not receive the Motion Picture Association of America’s seal).

359. See *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (holding that requiring films to be submitted before a censorship board prior to exhibition was not facially unconstitutional); *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (holding that the First Amendment protected a movie portraying acts of sexual immorality as desirable).

360. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). Chief Justice Earl Warren, however,

attention either to the motion picture code or to licensing authorities.<sup>361</sup> In 1968, the industry abandoned the code in favor of a rating system.<sup>362</sup> Instead of all movies being made to suit all audiences, which was the premise under which the production code operated, producers made their movies to meet the criteria of a certain classification.

The standards by which ratings were assigned sounded suspiciously like those implemented by the Hays Office thirty-some years earlier. The list started off with the reminder that "[t]he basic dignity and value of human life shall be respected and upheld and restraint shall be exercised in portraying the taking

had doubts about the wisdom of allowing censorship boards to continue their interference in the showing of movies. In *Times Film Corp.*, 365 U.S. 43, he wrote:

[T]his case clearly presents the question of our approval of unlimited censorship of motion pictures before exhibition through a system of administrative licensing. Moreover, the decision presents a real danger of eventual censorship for every form of communication, be it newspapers, journals, books, magazines, television, radio or public speeches. The Court purports to leave these questions for another day, but I am aware of no constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune.

*Id.* at 50-51 (Warren, C.J., dissenting).

The Chief Justice also decried the exuberance of the Chicago censors, which he called "astonishing." *Id.* at 69. He wrote:

The Chicago licensors have banned newsreel films of Chicago policemen shooting at labor pickets and have ordered the deletion of a scene depicting the birth of a buffalo in Walt Disney's *Vanishing Prairie*. Before World War II, the Chicago censor denied licenses to a number of films portraying and criticizing life in Nazi Germany including the March of Time's *Inside Nazi Germany*. Recently, Chicago refused to issue a permit for the exhibition of the motion picture *Anatomy of a Murder* based upon the best-selling novel of the same title, because it found the use of the words "rape" and "contraceptive" to be objectionable.

*Id.* (citations omitted).

Warren believed that "[f]reedom of speech and freedom of the press are further endangered by this 'most effective' means for confinement of ideas," *id.* at 75, because of the lack of standards that could withstand judicial scrutiny, *id.*: "It is axiomatic that the stroke of the censor's pen or the cut of his scissors will be a less contemplated decision than will be the prosecutor's determination to prepare a criminal indictment." *Id.*

In *Freedman*, the Court adopted Warren's views on the need for procedural safeguards. Justice Douglas, joined by Justice Black, concurred with the majority that Maryland's statute was unconstitutional but argued briefly that "a pictorial presentation occupies as preferred a position as any other form of expression. If censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre." *Id.* at 62 (Douglas, J., concurring).

361. See Suzanne Yeager, *G-GP-R-X: Forced Self Regulation?*, FREEDOM OF INFO. CENTER REP., Feb. 1971, at 4 (stating "it had become obvious that . . . the industry would not discipline itself").

362. *Id.* at 1.

of life.'"<sup>363</sup> That is followed by the precept that "[e]vil, sin, crime and wrong-doing shall not be justified."<sup>364</sup> Moviemakers were also instructed that "[i]llicit sex relationships shall not be justified and intimate sex scenes violating common standards of decency shall not be portrayed."<sup>365</sup> During the first eighteen months or so of the rating system's existence, 655 films were reviewed.<sup>366</sup> Of these, twenty-nine percent received a G rating, forty percent a GP rating, twenty-six percent an R rating, and six percent an X rating.<sup>367</sup> Producers became well-known for dickering for better ratings for their films by dropping a bit of bad language, a touch of violence, or a brief sexual interlude.<sup>368</sup> Although the ratings system has been harshly criticized from time to time and revised periodically, it still stands.<sup>369</sup>

Faith in audience ability to make wise reading or viewing decisions forms the crux of most efforts to oppose censorship; lack of confidence in Americans to make such choices governs most restrictive movements. In the 1950's, still another attempt to limit the nation's reading choices occurred. The National Organization for Decent Literature (NODL), another Catholic-sponsored censorship group, emerged in the postwar era.<sup>370</sup> Not content

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363. Suzanne Yeager, *G-GP-R-X: Exercise in Ambiguity*, FREEDOM OF INFO. CENTER REP., Mar. 1971, at 4 (quoting MPAA, *THE MOTION PICTURE CODE AND RATING PROGRAM: A SYSTEM OF SELF-REGULATION* 5 (1968)).

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* at 3.

369. The crusade to clean up movies continues. Now attention is focused on a new rating, NC-17, which was designed to replace the X rating and allow motion pictures that treat sex more explicitly to be shown in more theaters around the country. Judy Howard, *Religious Groups Battle NC-17 Rating*, NEWS & OBSERVER, (Raleigh, N.C.), Nov. 9, 1990, at D5. The X rating had been a liability to motion picture producers because few theaters would show the films, which many thought were pornographic, and few newspapers would carry advertisements for the films. Jonathan Mandell, *The Year's Hottest Stories: Hype, Fraud, Sex and Censorship*, NEWSDAY, Dec. 30, 1990, at pt. II, 1. NC-17, which stands for no children under seventeen admitted, is supposed to remove the stigma that the X carried and to provide more mature fare in motion pictures to adults. Howard, *supra* at 5D. The industry's move was met by protests at theaters showing films bearing the new rating. Chuck Phillips, *A War on Many Fronts*, L.A. TIMES, Dec. 26, 1990, at F1. The Reverend Donald E. Wildmon, a modern-day Anthony Comstock, and his supporters are asking video rental stores not to offer such films to customers. M.S. Mason, *Does the NC-17 Rating Equal an X?*, CHRISTIAN SCI. MONITOR, Jan. 29, 1991, at 13. Blockbuster Video, the largest video store chain in the country, has said it would not carry such films. *Id.* For a discussion of Wildmon's impact on American leisure time activities, see *infra* notes 580-84 and accompanying text.

370. In 1955, the NODL set up a National Office for Decent Literature in Chicago to

to pursue fringe literature, NODL representatives condemned critically acclaimed books by best-selling authors. Targets included the paperback versions of works by Ernest Hemingway, William Faulkner, John Dos Passos, and Emile Zola<sup>371</sup>—often simply because the artwork on book covers was highly suggestive.<sup>372</sup> Members would visit stores selling these books, inform the proprietors of their concerns, and offer to issue each store owner a certificate for display that attested to the fact that no inappropriate books were available on the premises.<sup>373</sup> Parishioners then were advised to patronize only stores posting such signs.<sup>374</sup>

Members of the ACLU found that NODL tactics had far-reaching implications for freedom of choice of reading materials: "Books by recipients of the Nobel Prize, the Pulitzer Prize, and the National Book Award have been made markedly less available to the reading public by the censorship of a private and anonymous jury acting under its own standards of morality and taste."<sup>375</sup> The ACLU added, "[T]hese are books which have been the object of responsible literary criticism and studied in hundreds of literature courses throughout the country."<sup>376</sup> Essentially, the ACLU found it repugnant

that the judgment of a particular group is being imposed upon the freedom of choice of the whole community. The novel which may be thought by a committee of Catholic mothers to be unsuitable for a Roman Catholic adolescent is thus made unavailable to the non-Catholic. It is plainly necessary to challenge the NODL as keeper, by self-election, of the conscience of the whole country.<sup>377</sup>

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coordinate its national efforts. The NODL was a particularly prominent censorship group because it "wielded [great influence] in removing books from circulation." ACLU, STATEMENT ON CENSORSHIP ACTIVITY BY PRIVATE ORGANIZATIONS AND THE NATIONAL ORGANIZATION FOR DECENT LITERATURE, reprinted in THE FIRST FREEDOM, at 135 (Robert B. Downs ed., 1960).

371. William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 317-18 (1954).

372. *Id.* at 303.

373. John Fischer, *The Harm Good People Do*, HARPER'S, Oct. 1956, at 14.

374. *Id.* For further discussion of the NODL story, see PAUL BLANSHARD, THE RIGHT TO READ 186-89 (1955) and Lockhart & McClure, *supra* note 371, at 304. See generally John Courtney Murray, *The Bad Arguments Intelligent Men Make*, AMERICA, Nov. 3, 1956, at 120-23 (defending the NODL's actions).

375. ACLU, *supra* note 370, at 136.

376. *Id.*

377. *Id.*

Few of the books under attack had been involved in legal actions, so the only NODL charge against the volumes was that the books offended members' moral convictions.<sup>378</sup> Through their techniques, the NODL affected the reading habits of far more than Catholics. By influencing merchants not to carry certain books, others were stopped from purchasing them as well.<sup>379</sup> A congressional committee investigating pornographic materials during this time period noted that significant problems existed in connection with "pocket-size books, which originally started out as cheap reprints of standard works, [but] have largely degenerated into media for the dissemination of artful appeals to sensuality, immorality, filth, perversion, and degeneracy."<sup>380</sup> The committee majority seemed to agree with "[c]ivil and religious organizations . . . that the same concerted action should be taken against moral filth as would be taken against material filth."<sup>381</sup> Thus, the committee recommended a long list of legislation designed to stop the flow of "obscene, lewd, lascivious, or filthy"<sup>382</sup> materials. A minority of the committee, however, found the majority recommendations unacceptable, warning, "There is a distinction between what may broadly be classified as obscene and what falls within the realm of free thought and creative expression, which is perhaps the most basic and fundamental principle in the free way of life."<sup>383</sup>

Not only had the committee failed to recognize the difference between the obscene and the acceptable, but so, too, had the NODL. Many legal scholars believed that the United States would not protect literature until the Supreme Court finally entered the fray. In 1957, the Justices handed down their first major decision on obscenity, which provided fairly expansive protection for written materials.<sup>384</sup> Although convictions in the cases were affirmed, Justice William Brennan, writing for five members of the Court, said, "The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."<sup>385</sup>

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378. Fischer, *supra* note 373, at 138.

379. *Id.* at 139.

380. H.R. REP. NO. 2510, 82d Cong., 2d Sess. 3 (1952).

381. *Id.*

382. *Id.* at 116. Two of the committee's recommendations were that the interstate transport of obscene materials for sale or distribution should be deemed a federal offense, *id.*, and that the postmaster general should be authorized to impound mail of persons selling obscene materials, *id.* at 117.

383. *Id.* at 121.

384. *Roth v. United States*, 354 U.S. 476 (1957) (involving the mailing of obscene circulars and advertisements).

385. *Id.* at 487.

A closer examination of the matter is necessary, Brennan said, arguing that "the standards for judging obscenity [must] safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing<sup>c</sup> to prurient interest."<sup>386</sup> Although refusing to grant constitutional protection to obscene materials, Brennan did sanction a liberal test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."<sup>387</sup> Later the Court would expand and contract the test for obscenity,<sup>388</sup> but would never abandon it completely. This decision created a standard against which literature could be measured. The fact that a test existed, however, did not end efforts to restrict the availability of literature extrajudicially.

## VI. RICHARD NIXON PICKS UP ANTHONY COMSTOCK'S MANTLE

When Richard Nixon assumed the presidency, the nation was seething with unrest. The antiwar movement had forced Lyndon Johnson from office and was trying to push the new President into quickly ending the conflict.<sup>389</sup> Black activism had turned violent during the Johnson years, when official reaction to the activism had transformed inner cities into combat zones.<sup>390</sup> College campuses still were wracked with protests,<sup>391</sup> and many radicals left the university campuses to launch violent attacks on the community as a whole.<sup>392</sup> One of Nixon's major goals was to

386. *Id.* at 488.

387. *Id.* at 489.

388. *See, e.g.,* *Miller v. California*, 413 U.S. 15, 24-25 (1973) (adopting a three-pronged test to determine whether material is legally obscene); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 419 (1966) (holding that for material to be obscene it must be "utterly without redeeming social value" (emphasis omitted)).

389. *See* MELVIN SMALL, *JOHNSON, NIXON, AND THE DOVES* (1988) (chronicling the impact of the antiwar movement during Vietnam on Presidents Johnson and Nixon); NANCY ZAROULIS & GERALD SULLIVAN, *WHO SPOKE UP? AMERICAN PROTEST AGAINST THE WAR IN VIETNAM, 1963-1975* (1984) (discussing opposition to the war in Vietnam).

390. *See* WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION* (1988) (detailing the FBI's infiltration of the Black Panthers); KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972 (1989) (discussing the FBI's response to the civil rights movement); ROBERT WEISBROT, *FREEDOM BOUND 1958-60* (1990) (describing the Watts riots of 1965); Paul Harris, Comment, *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 CAL. L. REV. 702, 707 n.30 (1968) (describing violent demonstrations in Harlem).

391. *See* THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970) (discussing student protests on university campuses).

392. *See* TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* 326-34 (1987) (describing

quiet dissent in the land, and he did so systematically and effectively. The new President believed the American people were trying to transform the country into too much of a participatory democracy, and the people soon found themselves disenfranchised from decisionmaking at the highest levels. In addition, some members of the counterculture that caused Nixon so much distress had turned the nation into a dirty, smelly, sexually oriented, drug-infested environment. Determined to stop this slide to moral degradation, the President and his assistants launched a major effort to clean up American society. As in Anthony Comstock's time, they sought to divert the attention of the American people from the political side of life to the moral side, and many of the campaigns designed by the Nixon White House successfully turned attention to this new issue.

At least part of the campaign against obnoxious entertainment was due to Nixon's connection to the more conservative wing of the Republican party, which obligated him to serve a constituency that followed in the footsteps of Anthony Comstock. The President felt required to take a stand against forces in society that were once again leading American young people to perdition. The dangers this time were far more formidable than dirty books or comic books. Now the fears were based on sexual promiscuity and drug use in addition to the more traditional concerns about political radicalism. The President had already challenged political radicalism among young people and seemed to be winning that battle.<sup>393</sup> The next step was to attack the promotion of illicit drug use.

In the 1960's and early 1970's, the popular drugs among American young people were marijuana and LSD, and in September, 1970, Vice President Spiro Agnew criticized the American music industry for recording songs with lyrics that he claimed promoted the drug culture.<sup>394</sup> Although noting some current music was acceptable, Agnew warned: "[I]n too many of the lyrics, the message of the drug culture is purveyed. We should listen more carefully to popular music," he told an audience of Nevada Republicans, "because at its best it is worthy of more serious

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the violent demonstrations during the 1968 Democratic Convention in Chicago); WEATHERMAN (Harold Jacobs ed., 1970) (chronicling the history of the Weatherman, a Vietnam-era revolutionary group that advocated armed struggle).

393. See BLANCHARD, *supra* note \*, at 357.

394. Spiro T. Agnew, Speech Before the Nevada Republicans (Sept. 14, 1970), in JOHN R. COYNE, JR., THE IMPUDENT SNOBS: AGNEW VS. THE INTELLECTUAL ESTABLISHMENT 369, 371 (1972).

appreciation, and at its worst it is blatant drug culture propaganda."<sup>395</sup> Several songs earned specific denunciation. A 1960's Beatles hit, *With a Little Help from My Friends*, contained the wording "I get *by* with a little help from my friends, I get *high* with a little help from my friends."<sup>396</sup> "[U]ntil it was pointed out to me," Agnew said, "I never realized that the 'friends' were assorted drugs with such nicknames as 'Mary Jane,' 'Speed,' and 'Benny.' But the double meaning of the message was clear to members of the drug culture—and many of those who are tempted to join."<sup>397</sup> The popular song "White Rabbit" also had objectionable wording:

"One pill makes you larger and one pill makes you small  
And the ones that mother gives you don't do anything at all. Go  
ask Alice when she's ten feet tall."<sup>398</sup>

Even the titles of some songs should raise danger signals, Agnew contended, as he denounced *The Acid Queen*, *Eight Miles High*, *Couldn't Get High*, *Don't Step on the Grass, Sam*, and *Stoned Woman*.<sup>399</sup>

Agnew stated, "I am sure that very few, if any, station managers in America would deliberately allow the use of their radio facilities to encourage the use of drugs."<sup>400</sup> The Vice President believed "[f]ew parents would knowingly tolerate the blaring of a drug-approving message from phonographs in their homes. And few musicians intend their 'in-jokes' and double meanings to reach past the periphery of pot users. But the fact is that the stations do, the parents do, and the musicians do."<sup>401</sup> The Vice President's rhetoric was insufficient to stop radio stations from playing such music, and so the next volley came from the Federal Communications Commission (FCC), which in March, 1971, issued a warning to radio stations about the potential adverse consequences of playing music that advocated the use of drugs.<sup>402</sup> If these lyrics

395. *Id.*

396. *Id.* (quoting THE BEATLES, *With a Little Help from My Friends*, on SGT. PEPPER'S LONELY HEARTS CLUB BAND (EMI Records 1967)) (emphasis added).

397. *Id.*

398. *Id.* at 371-72 (quoting THE JEFFERSON AIRPLANE, *White Rabbit*, on SURREALISTIC PILLOW (RCA Records 1967)).

399. *Id.* at 372.

400. *Id.*

401. *Id.*

402. *In re* License [sic] Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409, 409 (1971).



were repeatedly broadcast, said the FCC majority, "[i]t raises serious questions as to whether continued operation of the station is in the public interest. . . . In short, we expect broadcast licensees to ascertain, before broadcast, the words or lyrics of recorded musical or spoken selections played on their stations."<sup>403</sup>

To FCC Commissioner Nicholas Johnson, the public notice was an attempt at outright censorship of "song lyrics that the majority disapproves of."<sup>404</sup> In addition, Johnson said, "[I]t is an attempt by a group of establishmentarians to determine what youth can say and hear; it is an unconstitutional action by a Federal agency aimed clearly at controlling the content of speech."<sup>405</sup> The message was plain: censor any lyrics that might promote the use of drugs or else face problems at license renewal time.<sup>406</sup> Johnson stated that the attack on song lyrics:

[was] a thinly veiled political move. This Administration has, for reasons best known to the President, chosen to divert the American people's attention to "the drug menace," and away from problems like: the growing Southeast Asian war, racial prejudice, inflation, unemployment, hunger, poverty, education, growing urban blight, and so forth.<sup>407</sup>

The music that attracted the attention and dollars of American youth had undergone a dramatic change in the 1960's and early 1970's. Once devoted to irrelevant topics, music now focused directly on pertinent occurrences, and the musicians of the era became the troubadours of various protest movements. Although Agnew and the FCC picked on lyrics that they viewed as promoting drug use, music that raised the social conscience also was suspect, as it always had been. The Industrial Workers of the World attracted the first twentieth century notice to the power of song when its *Little Red Songbook* became an integral part of its meetings, and songs such as *Solidarity Forever*, sung to the tune of the *Battle Hymn of the Republic*, became one of the hated union's calling cards.<sup>408</sup> Woodie Guthrie carried on the tradition

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403. *Id.*

404. *Id.* at 412 (Johnson, Comm'r, dissenting).

405. *Id.*

406. *Id.*

407. *Id.* at 414.

408. Part of *Solidarity Forever* goes:

"They have taken untold millions that they never toiled to earn  
But without our brain and muscle not a single wheel can turn

in post-World War II days with his tribute to the American worker, *This Land Is Your Land*,<sup>409</sup> and Bob Dylan brought the song to social protest in the early 1960's with his *Blowin' in the Wind*.<sup>410</sup>

Critics of American listening habits during the 1960's and early 1970's wanted to target such songs as Pete Seeger's *The Big Muddy*, which actually was about a World War II river crossing but, because of current events, was perceived as a criticism of the way in which troops were treated in South Vietnam.<sup>411</sup> Perhaps the most controversial song of the period was written by a nineteen-year-old, P.F. Stone, and was banned from many of the nation's Top 40 radio stations because of its antiwar, antiestablishment message.<sup>412</sup> Entitled *The Eve of Destruction*, the lyrics said in part:

"The Eastern World it is exploding  
Violence flaring, bullets loading

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We can break their haughty power; gain our freedom when we learn  
That the Union makes us strong  
Solidarity Forever!"

DAVID P. SZATMARY, *ROCKIN' IN TIME: A SOCIAL HISTORY OF ROCK AND ROLL* 66 (1987) (citing RALPH CHAPLIN, *Solidarity Forever*, in *LITTLE RED SONGBOOK* (1909)). For details on the use of music for protest, see JEROME L. RODNITZKY, *MINSTRELS OF THE DAWN* (1976).

409. For further discussion of Woody Guthrie's influence on the protest movement, see RODNITZKY, *supra* note 408, at 49-50.

410. Partial lyrics here read:

"How many years can a mountain exist before it is washed to the sea?  
Yes 'n' how many years can some people exist before they're allowed to be free?  
Yes 'n' how many times can a man turn his head pretending he just doesn't see?  
The answer my friend is blowin' in the wind, the answer is blowin' in the wind."

SZATMARY, *supra* note 408, at 62 (quoting BOB DYLAN, *Blowin' in the Wind*, on *THE FREEWHEELIN' BOB DYLAN* (Columbia Records 1963)).

411. Partial lyrics are:

"Maybe you're still walking and you're still talking  
And you'd like to keep your health.  
But every time I read the papers  
That old feeling comes on:  
Waist deep in the Big Muddy and the  
Big Fool says to push on."

Terry H. Anderson, *American Popular Music and the War in Vietnam*, 11 *PEACE & CHANGE* 51, 52 (No. 2 1986) (quoting PETE SEEGER *The Big Muddy*, on *WAIST DEEP IN THE BIG MUDDY* (Columbia Records 1963)). For other discussions of the era's protest music, see R. SERGE DENISOFF, *SING A SONG OF SOCIAL SIGNIFICANCE* (2d ed. 1983); ROBERT A. ROSENSTONE, "*The Times They Are A-Changin'*": *The Music of Protest*, 382 *ANNALS AM. ACAD. POL. & SOC. SCI.* 131 (1969).

412. Anderson, *supra* note 411, at 52.

You're old enough to kill, but not for voting  
 You don't believe in war, but what's that gun you're toting?"<sup>413</sup>

Although experts debated whether the audience listened to songs for the meaning or for the sound,<sup>414</sup> American conservatives became convinced that the lyrics were leading the nation's young people into undesirable attitudes and unspeakable acts. Unable to touch songs with words focusing on social problems, the administration turned instead to lyrics that supposedly urged listeners to experiment with drugs. Many rock-and-roll artists of the day invited censure because concerned adults believed that ostentatious substance abuse by performers idolized by American young people could lead the youths to emulate that behavior. The music form was even called acid rock.<sup>415</sup> By the time the FCC was finished with this particular crusade, many acid rockers found radio outlets for their music difficult to obtain. In fact, many radio stations imposed outright bans on more than twenty songs that the Defense Department said had drug-related lyrics.<sup>416</sup> Artists affected included The Beatles, The Byrds, The Grateful Dead, and The Jefferson Airplane. Even folk singers Peter, Paul, and Mary found their popular *Puff (the Magic Dragon)* on the list of songs having drug-related lyrics.<sup>417</sup>

For radio station managers who did not want to ban songs simply because conservative FCC members believed the Defense Department's categorization, the problem became one of determining just what the Commission wanted the stations to do. Few broadcasters could figure it out. Several stations asked for clar-

413. *Id.* at 55 (quoting P.F. STONE, *Eve of Destruction* (1965)).

414. One study in the late 1960's, for instance, claimed that more than 70% of the students questioned reported that they sought out music more for the sound than for the message. *Id.* at 52.

415. For a discussion of the development of acid rock, see SZATMARY, *supra* note 408, at 107-27.

416. Much like the list of targets of Anthony Comstock's attacks, the titles that the FCC warned stations about concentrated on mostly highly forgettable works but included among their number a few songs that are remembered even today. The songs listed were: *I Get By With a Little Help from My Friends*, *Cocaine Blues*, *White Rabbit*, *Acid Queen*, *The Virgin Fugs*, *The New Amphetamine [sic] Shriek*, *The Alphabet Song*, *I Like Marijuana*, *Hashing*, *Walking In Space*, *Heroin*, *Fire Poem*, *Don't Step on the Grass*, *Velvet Cave*, *Cloud Nine*, *The Pusher*, *Tambourine Man*, *Puff (the Magic Dragon)*, *Eight Miles High*, *Acapulco Gold*, *Along Comes Mary*, *Happiness is a Warm Gun*, *Mellow Yellow*, and *Lucy in the Sky with Diamonds*. *Ups and Downs of Drug Lyrics*, BROADCASTING, Apr. 19, 1971, at 28.

417. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 176-82 (1987).

ification from the Commissioners and received a contradictory response. "Clearly," said the Commission majority,

in a time when there is an epidemic of illegal drug use—when thousands of young lives are being destroyed by use of drugs like heroin, methedrine ("speed"), cocaine—the licensee should not be indifferent to the question of whether his facilities are being used to promote the illegal use of harmful drugs.<sup>418</sup>

On the other hand, said the Commissioners, a licensee that took all records referring to drugs off the air went too far; the FCC did not promote censorship. The Commissioners said, "[W]e trust that with the issuance of this opinion, such licensees will cease such grossly inappropriate policy and rather will make a judgment based on the particular record."<sup>419</sup>

Once again in dissent, Commissioner Johnson still argued that his colleagues had gone too far. Not only had the Commission failed to clarify its policy, but it also had continued its indirect censorship. Just the fact that the FCC had seen fit to address the issue of song lyrics in the first place was sufficient to dampen freedom of expression, Johnson said.<sup>420</sup> He continued:

Even in a society as free as ours there are natural inhibitions to speaking one's mind in ways likely to alienate actual or potential institutional leaders, employers, friends and neighbors. All incentives encourage conformity, suppression of the uncomfortable truth, and the eventual atrophy of the very powers of perception and analysis upon which individuality (and a vibrant democracy) depend.<sup>421</sup>

Because broadcasters "are a pretty skittish lot,"<sup>422</sup> Johnson feared the worst: "Having been told—very loudly and clearly—that powerful people in Washington are interested in their records' song lyrics, all too many will go out of their way to select lyrics designed to please."<sup>423</sup> Just by issuing the warning, "the Government has succeeded in its purpose; it is then safe to issue all the

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418. *In re* License [sic] Responsibility to Review Records Before Their Broadcast, 31 F.C.C.2d 377, 378 (1971).

419. *Id.* at 380.

420. *Id.* at 386-88.

421. *Id.* at 387.

422. *Id.* at 388.

423. *Id.*

apologies and rescinding statements necessary to silence the critics."<sup>424</sup>

Still dissatisfied with the FCC's explanation, one station tried to win approval of a policy based squarely on the First Amendment. Yale Broadcasting Company's management acknowledged that some of the songs were "controversial and not approved of by certain segments of the American populace"<sup>425</sup> because they presented "unpopular political, cultural and social ideas"<sup>426</sup> and referred "to the illegal use of drugs."<sup>427</sup> Because of the controversy, the station reiterated its belief that the First Amendment protected song lyrics. The station policy stated, "Music and especially modern popular music is an important form of communication and art," and "modern popular music, including rock music, is a medium of communication for the young. It reflects the cultural aspirations, and the highest and lowest ideals of youth."<sup>428</sup> In addition, "[i]t is first and foremost the creative expression of the artist who views the world as he sees it and expresses this view through his music."<sup>429</sup>

Thus, "[c]ensorship of the musical artist is contrary to the policy of this licensee."<sup>430</sup> The station wanted to "judge the song on the basis of its overall artistic merit and to present the audience with superior music."<sup>431</sup> In addition, "[t]he licensee believes that songs, including their lyrics, are protected forms of expression under the First Amendment, and deserve to be heard by our audience without interference. Moreover, it is the obligation of the licensee to be responsive to the First Amendment rights of its audience."<sup>432</sup> While defending its right to play songs on First Amendment grounds, the station said it was "aware of the problems of drug abuse and will always attempt to present programming which responds to this issue of current and pressing public concern. Such programming is and will be in the form of news, spot announcements and specific programming directed to this issue."<sup>433</sup> The FCC refused to rule on Yale Broadcasting's

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424. *Id.*

425. *In re Licensee Responsibility to Review Records Before Their Broadcast*, 31 F.C.C.2d 385 app. at 388 (1971).

426. *Id.*

427. *Id.*

428. *Id.* at 389.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

proposed policy, asserting that it had said enough on the matter and that station management could base its actions on previous comments.<sup>434</sup>

Unhappy with the FCC's inaction, Yale Broadcasting went into court. The Court of Appeals for the District of Columbia upheld the FCC policy, and the Supreme Court refused to hear the case.<sup>435</sup> Two Justices, William O. Douglas and William J. Brennan, were willing to set the case for oral argument.<sup>436</sup> Sufficiently outraged at the Court's decision, Douglas wrote a dissent to the refusal to grant certiorari. The FCC's action, he declared, constituted an impermissible invasion of First Amendment freedoms.<sup>437</sup> If the FCC warning notice stood, the ramifications might be endless: "For now the regulation is applied to song lyrics; next year it may apply to comedy programs, and the following year to news broadcasts."<sup>438</sup> Douglas believed that "[s]ongs play no less a role in public debate, whether they eulogize the John Brown of the abolitionist movement, or the Joe Hill of the union movement, provide a rallying cry such as 'We Shall Overcome,' or express in music the values of the youthful 'counterculture.'"<sup>439</sup> In all instances,

[T]he Government cannot, consistent with the First Amendment, require a broadcaster to censor its music any more than it can require a newspaper to censor the stories of its reporters. Under our system the Government is not to decide what messages, spoken or in music, are of the proper 'social value' to reach the people.<sup>440</sup>

FCC officials, of course, won the day, and the Supreme Court's unwillingness to challenge the FCC's attempts to clean up the airwaves had far-reaching effects. In 1973, the same year that the Court refused to review the drug-lyrics issue, another odd case concerning the censorship of the airwaves began moving through the system. According to the story given out at the time, a father was riding in a car with his young son when the radio station they were listening to broadcast comedian George

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434. *Id.* at 387.

435. *Yale Broadcasting Co. v. Federal Communications Comm'n*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

436. *Yale Broadcasting Co. v. Federal Communications Comm'n*, 414 U.S. 914, 914 (1973).

437. *Id.* at 916-17 (Douglas, J., dissenting).

438. *Id.* at 917.

439. *Id.* at 918.

440. *Id.*

Carlin's "Filthy Words" monologue, which had been recorded before a live audience.<sup>441</sup> Further research into the background of the complaint revealed that the father, John R. Douglas, was a conservative Republican and a member of the national planning board for Morality in Media; the young son was a fifteen-year-old.<sup>442</sup> The complaint against the Carlin monologue did not arise for six weeks, leading some skeptics to wonder whether the complainant had even heard the recording over the air.<sup>443</sup> In any event, the father asked the FCC to ban such material from the airwaves. In 1975, the Commission ruled in the father's favor but did not impose formal sanctions on the station. Instead, the Commission said its order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."<sup>444</sup>

The Pacifica Foundation, which operated the offending radio station, contended that the monologue had been part of a legitimate program on language and its use and that the station had warned listeners that the monologue might be offensive before the recording was played. Believing that the Commission's action had a chilling effect on its freedom, Pacifica Foundation took the matter into court. In 1978, a closely divided Supreme Court gave its blessing to the FCC's actions.<sup>445</sup> Even though the five majority Justices failed to agree on one opinion, the message still was clear: bad language had no place on the American airwaves. In delivering the opinion of a plurality of the Court, Justice John Paul Stevens acknowledged that "[t]he words of the Carlin monologue are unquestionably 'speech' within the meaning of the First Amendment"<sup>446</sup> and that just because "society may find speech offensive is not a sufficient reason for suppressing it."<sup>447</sup>

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441. The objectionable words, according to a transcript of the monologue attached to the Supreme Court's opinion, were: "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (plurality opinion). In introducing the monologue, Carlin said he had been "thinking about the curse words and the swear words, the cuss words and the words that you can't say . . . on the public, ah, airwaves." *Id.*

442. *Powe*, *supra* note 417, at 186.

443. *Id.*

444. *Citizens Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 99 (1975).

445. *Pacifica Found.*, 438 U.S. 726 (plurality opinion).

446. *Id.* at 744.

447. *Id.* at 745.

Broadcasting, however, was a different kind of speech and thus was subject to regulation.<sup>448</sup>

Stevens argued:

[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder.<sup>449</sup>

The radio station's disclaimer before the Carlin monologue was insufficient, he said, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."<sup>450</sup> Stevens found it unconvincing to argue "that one may avoid further offense by turning off the radio when he hears indecent language" because this "is like saying that the remedy for an assault is to run away after the first blow."<sup>451</sup> In addition, Stevens noted that "broadcasting is uniquely accessible to children, even those too young to read. . . . Pacifica's broadcast could have enlarged a child's vocabulary in an instant."<sup>452</sup> Consequently, the FCC was justified in determining that indecent language was inappropriate over the airwaves during certain hours of the day.

Justice Brennan led the dissenters in charging that the majority had essentially decided that "the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court."<sup>453</sup> The decision, he complained, was another attempt by conservatives on the Court "to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case,"<sup>454</sup> which he found "dangerous as well as lamentable."<sup>455</sup> Equally disturbing, he said, was the fact that the decision represented the "depressing inability to appreciate that in our land of cultural pluralism,

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448. *Id.* at 748-49.

449. *Id.* at 748.

450. *Id.*

451. *Id.* at 748-49.

452. *Id.* at 749.

453. *Id.* at 762-63 (Brennan, J., dissenting).

454. *Id.* at 775.

455. *Id.*



there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities."<sup>456</sup>

Brennan also denounced the kind of censorship that the majority and concurring opinions typified:

Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.<sup>457</sup>

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456. *Id.* Although the Court was badly split, Nixon appointees Burger, Rehnquist, Blackmun, and Powell all joined Stevens in upholding the FCC ruling against the Carlin monologue. *Id.* at 729, 755 (plurality opinion). Burger and Blackmun, the only two of the Nixon foursome on the Court in 1971, had dissented in *Cohen v. California*, 403 U.S. 15 (1971), the case in which Justice Harlan found "Fuck the Draft," as emblazoned on Cohen's black leather jacket, to be protected speech. Powell and Rehnquist were added to the Court in 1972 and joined Burger and Blackmun in dissenting from a Court order vacating the convictions in three cases involving inappropriate use of language. As Justice Powell explained in his dissenting opinion to the Court's order in *Rosenfeld v. New Jersey*, the use of "m----- f-----" to describe teachers, the school board, the town, and the nation in a public school board meeting was simply inappropriate. 408 U.S. 901, 905 (1972) (Powell, J., dissenting, joined by Burger, C.J., and Blackmun J.). "One of the hallmarks of a civilized society is the level and quality of discourse," he wrote. *Id.* at 909. "We have witnessed in recent years a disquieting deterioration in standards of taste and civility in speech. For the increasing number of persons who derive satisfaction from vocabularies dependent upon filth and obscenities, there are abundant opportunities to gratify their debased tastes." *Id.* Public meetings in which women and children were present simply were not among the options. *Id.*

Rehnquist felt the same way when he dissented in *Rosenfeld*, *Lewis v. City of New Orleans*, 408 U.S. 913 (1972), and *Brown v. Oklahoma*, 408 U.S. 914 (1972). *Id.* (writing one dissenting opinion for *Rosenfeld*, *Lewis*, and *Brown*) (joined by Burger, C.J. and Blackmun, J.). In *Lewis*, the person had been convicted of breach of peace for addressing police officers as "'g- d- m----- f----- police.'" *Id.* (quoting *Lewis*). In *Brown*, a man was convicted of using obscene and lascivious language in public or in the presence of females for referring to some police officers as "m----- f----- fascist pig cops" and to one officer in particular as that "black m----- f----- pig." *Id.* at 911. None of that language, according to Rehnquist, was fit for public discourse. *Id.* at 912. The Justices, by the way, used the dashes to indicate the language that was so objectionable that they could not even enter it upon the record. When Stevens joined the Court under the Ford administration, the stage was set for the "fragile sensibilities" of five Justices to be offended by language used in public—and for them to do something about it.

457. *Pacific Found.*, 438 U.S. at 770-71 (Brennan, J., dissenting).

Brennan thought that the government should not decide what was proper to broadcast. He stated, "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand."<sup>458</sup>

Although the *Pacifica* decision, which was handed down after Nixon had resigned his office, went far in restricting so-called morally offensive programming, the Reagan FCC continued the crusade. However, the attacks on offensive programming over the air did little to address another area of great concern for conservatives—obscenity. In this area, Nixon had a few problems, but again the Supreme Court provided the appropriate conservative solution.

Nixon's difficulties in the area of obscenity resulted from the work of the Commission on Obscenity and Pornography, established by Congress in 1967, which issued its report in 1970. Nixon could appoint only one Commission member and had denounced the activities of the Commission. The Commission's report distressed conservatives who were increasingly concerned about sexual promiscuity, and Commission recommendations would have made Anthony Comstock turn over in his grave. The very first sentence of these recommendations read: "The Commission believes that much of the 'problem' regarding materials which depict explicit sexual activity stems from the inability or reluctance of people in our society to be open and direct in dealing with sexual matters."<sup>459</sup> From the conservative perspective, this was only the beginning. The Commission, for instance, recommended launching a massive sex education campaign to tear away misperceptions about sex and begin an open discussion on issues surrounding obscenity and pornography.<sup>460</sup> Even worse, it recommended that all legislation keeping sexual materials from consenting adults be repealed.<sup>461</sup> "Extensive empirical investigation, both by the Commission and by others," the report said, "provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or

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458. *Id.* at 772.

459. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 47 (1970) [hereinafter 1970 OBSCENITY REPORT].

460. *Id.* at 48.

461. *Id.* at 51.

individual harms such as crime, delinquency, sexual or nonsexual deviancy or severe emotional disturbances.”<sup>462</sup> Noting that “[s]ociety’s attempts to legislate for adults in the area of obscenity have not been successful,”<sup>463</sup> the Commission stressed that “[p]ublic opinion in America does not support the imposition of legal prohibitions upon the right of adults to read or see explicit sexual materials.”<sup>464</sup>

In addition, the Commission’s report noted that “adult obscenity laws deal in the realm of speech and communication. Americans deeply value the right of each individual to determine for himself what books he wishes to read and what pictures or films he wishes to see.”<sup>465</sup> Such beliefs “value and protect the right of writers, publishers, and booksellers to serve the diverse interests of the public”<sup>466</sup> that cannot be infringed unless a clear threat of harm makes that course imperative. “Moreover, the possibility of the misuse of general obscenity statutes prohibiting distributions of books and films to adults constitutes a continuing threat to the free communication of ideas among Americans—one of the most important foundations of our liberties.”<sup>467</sup>

Although recognizing that many Americans feared “that the lawful distribution of explicit sexual materials to adults may have a deleterious effect upon the individual morality of American citizens and upon the moral climate in America as a whole,”<sup>468</sup> the Commission said the majority of its members believed these fears “flow[ed] from a belief that exposure to explicit materials may cause moral confusion which, in turn, may, induce antisocial or criminal behavior.”<sup>469</sup> The Commission reiterated its conclusion that no such connection existed. In fact, the Commission majority hypothesized that “[t]he open availability of increasingly explicit sexual materials”<sup>470</sup> and “the ready availability of effective methods of contraception, changes of the role of women in our society, and the increased education and mobility of our citizens”<sup>471</sup> had a greater effect on sexual morality than did sexually explicit materials.<sup>472</sup>

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462. *Id.* at 52.

463. *Id.* at 53.

464. *Id.*

465. *Id.*

466. *Id.* at 54.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* at 55.

471. *Id.*

472. *Id.*

This permissiveness drove Nixon's sole Commission appointee, Charles Keating, a Cincinnati lawyer who headed a private organization called "Citizens for Decent Literature," into court to force the Commission to delay release of its report until he could draft a dissent.<sup>473</sup> In that dissent, Keating labeled the majority's recommendations "shocking and anarchistic."<sup>474</sup>

At a time when the spread of pornography has reached epidemic proportions in our country and when the moral fiber of our nation seems to be rapidly unravelling, the desperate need is for enlightened and intelligent control of the poisons which threaten us—not the declaration of moral bankruptcy inherent in the repeal of the laws which have been the defense of decent people against the pornographer for profit.<sup>475</sup>

The majority report violated all that Keating held dear, and he argued vehemently for the protection of decency and morality:

Far from needing repeal of legislation controlling pornography, what is called for is a return to law enforcement which permits the American to determine for himself the standards of acceptable morality and decency in his community. Our law enforcement in the area of obscenity has been emasculated by courts, seemingly divorced from the realities of our communities, determining from afar the standards of those communities.<sup>476</sup>

In large measure, Keating's dissent was prescient. The legal system had indeed made a jumble of obscenity law since the Supreme Court began ruling on obscenity cases in the 1950's. In its first decision on the matter, five Justices had agreed that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance,"<sup>477</sup> thus placing obscenity outside protected speech. As the Court heard more cases, the Justices became increasingly willing to protect more material. In 1966, the Court reached a high-water mark when a plurality held that in order to ban literature, the state must prove that "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the

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473. *Pornography: Odd Man In*, NEWSWEEK, Sept. 21, 1970, at 44. In the late 1980's, Charles Keating became a leading figure in the nation's savings and loan scandal.

474. 1970 OBSCENITY REPORT, *supra* note 459, at 514.

475. *Id.* at 548.

476. *Id.* at 549.

477. *Roth v. United States*, 354 U.S. 476, 484 (1957).

material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."<sup>478</sup> The community standards applied here and in similar cases, much to the dismay of Keating and other conservatives, were national standards. At the least, conservatives argued through Keating and others, local standards should be used in deciding what is obscene.

By 1973, the Supreme Court, under the tutelage of Chief Justice Warren Burger, was ready to provide the limits on obscenity desired by Charles Keating and the Nixon administration. For one thing, the five-man majority established a new standard for judging obscenity. According to Chief Justice Burger, who wrote for the majority, the new guidelines for judging obscenity were:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>479</sup>

In terms of community standards, Burger said:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive."<sup>480</sup>

Indeed, he stated, "[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States."<sup>481</sup>

With this ruling, the standard by which obscenity would be judged took a giant step backward. Now, there would be fifty sets of standards for evaluating obscenity; as states began im-

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478. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413, 418 (1966).

479. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

480. *Id.* at 30.

481. *Id.*

plementing these new guidelines, obscenity definitions would vary from community to community as lawmakers and judges decided that even states were too large to be considered homogeneous in their attitudes toward sexually explicit literature. Conservative communities could protect themselves while liberal areas could have access to such information. Liberals in conservative towns and conservatives in liberal communities would continue to protest that they were being discriminated against by this procedure. For the person trying to sell such materials, ascertaining the criteria that would be used should a case go to court became impossible, something the dissenters in the 1973 case had predicted.<sup>482</sup>

## VII. THE CRUSADE IN A CONSERVATIVE ERA

Although more than seven years passed between the end of the Nixon administration and its crusade against sexually explicit or otherwise indecent materials and the beginning of the Reagan presidency, little changed in terms of conservative desires to cleanse American society. The Reagan White House may have been even more committed to secrecy in government, but this charming President got away with most of his efforts to eliminate the American people from the political process.<sup>483</sup> Once excluded from the body politic, these Americans had excess energy that needed funnelling into the proper channels. Because the administration had close ties to the conservative political and religious communities, the answer was obvious: a massive attack on the diminution of moral standards in American life. Conservative religious and political constituencies were naturally interested in such a topic, and many liberals would support selected campaigns. Thus, the assault on immorality at all levels and in all forms began in the Reagan administration and has continued, for many of the same reasons, under George Bush.

One of the more controversial clean-up campaigns of the 1980's involved pornography. Some sexually explicit speech, the Supreme Court ruled, clearly stood outside the First Amendment. Obscenity, however, was difficult to isolate from protected speech, and all sexually explicit material was not necessarily obscene. But that fact did not stop efforts to banish sexually explicit

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482. *See id.* at 37-47 (Douglas, J., dissenting).

483. *See* DONNA A. DEMAC, *KEEPING AMERICA UNINFORMED: GOVERNMENT SECRECY IN THE 1980's* 19-21, 25-29 (1984); *FREEDOM AT RISK* 69-85 (Richard O. Curry ed., 1988).

material from American society. Early in the 1980's, much of this effort was directed by ardent feminists who believed that the portrayal of women in pornography was a root cause of inequality between the sexes. Because such materials featured women simply as sex objects or as persons to be beaten, battered, and abused, the feminists argued that women in the real world were subjected to physical abuse and to inequitable treatment at school, on the job, and at home. "[P]ornography doesn't just drop out of the sky, go into his head and stop there. Specifically, men rape, batter, prostitute, molest, and sexually harass women,"<sup>484</sup> explained Catharine A. MacKinnon, one of the leading feminist theorists on the relationship between pornography and the treatment of women. "Under conditions of inequality, they also hire, fire, promote, and grade women, decide how much or whether or not we are worth paying and for what, define and approve and disapprove of women in ways that count, that determine our lives."<sup>485</sup> Because the portrayals of women in pornography conditioned men, equality between the sexes would come only with its elimination.

Some feminists took the tried and true approach of protesting at places where alleged pornography was sold, and targets often included publications such as *Playboy*, *Penthouse*, and *Hustler* magazines. Other antipornography workers encouraged municipalities to pass ordinances outlawing the sale of pornographic materials.<sup>486</sup> Although such ordinances would regulate pornography, their defenders said the laws did not restrict speech. Instead, they contended, the laws restricted offensive conduct that denied women their equal rights in society. Backers of the pornography statutes also claimed that the Supreme Court shielded certain groups from the abuses of pornography in 1982 when the Justices allowed states to regulate child pornography.<sup>487</sup>

The premise of the laws caused problems for judges asked to rule on their constitutionality. As one federal district judge commented, the feminists and their supporters in government contended "that the production, dissemination, and use of sexually explicit words and pictures is the actual subordination of women

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484. Catherine K. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 51 (1985). For background on the feminist view on pornography, see Anne W. Nunamaker & Maurine H. Beasley, *Women, the First Amendment, and Pornography: An Historical Perspective*, 4 STUD. IN COMM. 101 (1990).

485. MacKinnon, *supra* note 484, at 51-52.

486. See DONALD A. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 30-31 (1989).

487. See *New York v. Ferber*, 458 U.S. 747 (1982).

and not an expression of ideas deserving of First Amendment protection."<sup>488</sup> Unable to accept these contentions, the district judge determined that the measure was unconstitutional.<sup>489</sup> Members of the appeals court panel agreed. The ordinance, they said, discriminated on the ground of the content of the speech:

Speech treating women in the approved way—in sexual encounters “premised on equality” . . .—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole.<sup>490</sup>

The panel continued, “[T]he state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.”<sup>491</sup> The effort to pass laws to protect women from the effects of pornography ended in 1986 when the Supreme Court affirmed the decision of the Court of Appeals without writing an opinion.<sup>492</sup>

The campaign against pornography, however, was far from over. Although the feminists had not abandoned the field, the spotlight shifted to the Reagan administration, and in 1986, the Attorney General’s Commission on Pornography called for legislation to restrict sexually explicit materials. Whereas the President’s Commission on Obscenity and Pornography in 1970 had recommended abolishing regulations on such materials because it discovered no connection between them and antisocial behavior, the 1986 Report found many such links. The task force’s findings were immediately disputed by many social scientists whose work was quoted. The experts said that, in many cases, the Commission misused data in order to prove a direct tie between sexually explicit material and acts of sexual violence that did not truly exist.<sup>493</sup>

Critics of the 1986 study stated that one reason for the difference in findings between the two reports was that the latest

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488. *American Booksellers Ass’n, Inc. v. Hudnut*, 598 F. Supp. 1316, 1330 (S.D. Ind. 1984), *aff’d*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

489. *Id.* at 1341-42.

490. *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

491. *Id.*

492. *American Booksellers Ass’n, Inc. v. Hudnut*, 475 U.S. 1001 (1986).

493. Daniel Goleman, *Researchers Criticize Federal Report on Porn*, NEWS & OBSERVER (Raleigh, N.C.), May 18, 1986, at A21.



Commission was dominated by individuals with law enforcement backgrounds while the 1970 Commission had many members with civil liberties interests. However, Commission members claimed that the difference rested in substantial societal changes since 1970 and said that in 1986,

we live in a society unquestionably pervaded by sexual explicitness. In virtually every medium, from books to magazines to newspapers to music to radio to network television to cable television, matters relating to sex are discussed, described, and depicted with a frankness and an explicitness of detail that has accelerated dramatically.<sup>494</sup>

To restrain any further emphasis on sexuality, the Commission made ninety-two specific recommendations for increased activity at all levels of government against purveyors of these materials. The recommendations included proposals for laws calling for the forfeiture of any profits made through the violation of obscenity laws, much the way profits related to drug trafficking were forfeited.<sup>495</sup> In addition, the Commission suggested that "Congress should amend the Federal obscenity laws to eliminate the necessity of proving transportation in interstate commerce,"<sup>496</sup> which had been a requirement since Anthony Comstock's day. Instead, federal cases should be brought when "the distribution of the obscene material 'affects' interstate commerce."<sup>497</sup> Task forces designed solely to investigate and prosecute obscenity offenses should be established on federal and state levels, and special attention should be paid to the alleged connection between the distribution of obscenity and pornography and organized crime.<sup>498</sup> State and local governments also should find ways to aid "those who suffer mental, physical, educational, or employment disabilities as a result of exposure or participation in the production of pornography."<sup>499</sup> State legislatures also were encouraged to ex-

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494. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 225-26 (1986) [hereinafter 1986 PORNOGRAPHY REPORT].

495. *Id.* at 464-72.

496. *Id.* at 472.

497. *Id.* at 473.

498. Federal and state prosecutors have moved against sexually explicit materials in this context since the Meese Commission report was published. The Supreme Court has found no First Amendment impediment to the use of racketeering laws to punish distributors of obscenity. *See Fort Wayne Books, Inc. v. Indiana*, 484 U.S. 46 (1989).

499. 1986 PORNOGRAPHY REPORT, *supra* note 494, at 456.

plore the possibility of "a civil remedy for harms attributable to pornography."<sup>500</sup>

Despite these wide-ranging recommendations, Attorney General Edwin Meese III denied any interest in censorship: "This department, as long as I am attorney general, is not going to engage in any censorship that violates the First Amendment."<sup>501</sup> Few in the publishing world, however, believed that the First Amendment would stop Meese from acting against materials that he considered pornographic or obscene.<sup>502</sup> Little came of the recommendations made by the Commission under Meese, whose work as Attorney General soon fell under the cloud of the Iran-contra scandal. In 1986, Meese did, however, start a special unit within the Justice Department designed to attack pornographic materials. The unit served primarily as a speech-writing force for Meese. Under Richard Thornburgh, who took over as Attorney General after Meese's resignation, the unit changed focus. One of its operations became known as Project PostPorn, a Justice Department effort still in force today, aimed at ruining the business of mail-order operations selling sexually explicit—but not obscene—merchandise. The techniques used to obtain the materials are quite similar to those practiced by Anthony Comstock,<sup>503</sup> and the Department hopes to bring these businesses into court in enough states that it will be financially impossible for them to defend all of the legal actions.<sup>504</sup> A court order blocked the expansion of this approach,<sup>505</sup> but existing cases seem

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500. *Id.* at 457.

501. *Federal Report Urges Assault on Porn*, NEWS & OBSERVER (Raleigh, N.C.), July 10, 1986, at A1, A16.

502. Such fears may have come to fruition when Congress enacted the Child Protection and Obscenity Enforcement Act in late 1988 to protect children from sexual exploitation. 18 U.S.C. § 2251 (1988). The law was designed to add more punishment for the misuse of minors in books, magazines, periodicals, films, videotapes, and other related materials. Among its provisions was one calling for substantial recordkeeping on the part of producers and reproducers of material to ascertain the age of participants. *Id.* § 2257. A variety of organizations including the American Library Association attacked the law in court arguing that its provisions were too vague and could easily reach protected speech. A federal district court agreed, finding that the recordkeeping provisions "are unconstitutional under the First Amendment because they infringe too deeply on First Amendment protected material." *American Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 479 (D.D.C. 1989). Congress rewrote the provisions in 1991. See 18 U.S.C.A. § 2251 (West Supp. 1991).

503. See *supra* note 46 and accompanying text.

504. Tom Jones, *Quietly, Justice Unit Wages War on Porn: But Suit Could Thwart Unusual Prosecutorial Scheme*, LEGAL TIMES, June 18, 1990, at 1.

505. See *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15 (D.D.C. 1990) (holding that mail order distributors of sexually oriented magazines and videos were entitled to a preliminary injunction against successive multiple prosecutions allegedly designed to force them out of business); see also Tom Watson, *DOJ Campaign Against Porn Loses Tactic*, LEGAL TIMES, July 30, 1990, Update, at 7.

to be going forward.<sup>506</sup>

Other efforts to clean up society, which began about the same time as the Attorney General's Commission was conducting its study, were far more successful. Probably the most successful campaign was launched in 1985 by a group of well-placed Washington wives, including Tipper Gore, wife of the Democratic senator from Tennessee, Albert Gore, and Susan Baker, wife of then Secretary of the Treasury James Baker III. The women created the Parents' Music Resource Center (PMRC), a lobbying group that campaigned for self-regulation within the music industry. Their fears were based in part on studies that showed that young people listened to rock music for at least four hours every day.<sup>507</sup> In fact, some critics of youthful involvement with rock music complained that teenagers listened to some 10,500 hours of rock music between the seventh and the twelfth grades. That, said concerned citizens, was just five hundred hours less than the total number of hours spent in school during twelve years of their lives.<sup>508</sup>

In addition to the amount of time spent in listening to such music, critics contended that modern rock music praised violence against women,<sup>509</sup> incest,<sup>510</sup> rebellion,<sup>511</sup> bestiality,<sup>512</sup> drug and al-

506. See Bob Cohn, *The Trials of Adam & Eve*, NEWSWEEK, Jan. 7, 1991, at 48.

507. Peggy Mann, *How Shock Rock Harms Our Kids*, READER'S DIGEST, July 1988, at 101-05.

508. Stewart Powell et al., *What Entertainers Are Doing to Your Kids*, U.S. NEWS & WORLD REP., Oct. 28, 1985, at 46.

509. "I'll either break her face or take down her legs . . .

Get my ways at will  
Go for the throat, never let loose  
Going in for the kill. . . ."

*Record Labeling, 1985: Hearing before the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 37 (1985) [hereinafter Labeling Hearing] (quoting MOTLEY CROE, Live Wire, on TOO FAST FOR LOVE (Electra)).*

510. "I was only 16,  
But I guess that's no excuse.  
My sister was 32  
Lovely and lose [sic].  
My sister never made love to anyone but me.  
Incest is everything it's said to be."

*Id.* at 38 (quoting PRINCE, *Sister*, on DIRTY MIND (Warner Brothers 1980)).

511. "Oh you're so condescending  
Your gall is never-ending  
We don't want nothin', not a thing, from you  
Your life is trite and jaded  
Boring and confiscated  
If that's your best, your best won't do  
OH. . . . ."

cohol abuse, and suicide.<sup>513</sup> Other critics claimed that the music

OH. . . . .  
 We're right/Yeah  
 We're free/Yeah  
 We'll fight/Yeah  
 You'll see/Yeah  
 We're not gonna take it  
 No, we ain't gonna take it  
 We're not gonna take it anymore."

*Id.* at 87 (quoting TWISTED SISTER, *We're Not Gonna Take It*, on STAY HUNGRY (Atlantic)). Interestingly, the line "we're not gonna take it anymore" was a slight variation of the most remembered line from a highly praised and Academy Award-winning film in 1976, *Network*. The film—and line—were highly popular with those who are now criticizing a similar philosophy in the song.

512. "I got pictures of naked ladies lying on my bed.  
 I whiff the smell of sweet convulsion.  
 Thoughts are sweating inside my head.  
 I'm making artificial love for free . . .  
 I start to howl in heat . . .  
 I fuck like a beast . . .  
 I come to steal your love."

*Id.* at 42 (quoting W.A.S.P. *Fuck Like a Beast*, on ANIMAL (F\*\*K LIKE A BEAST) (Capitol Records)).

513. "Wine is fine but whiskey's quicker  
 Suicide is slow with liquor  
 Take a bottle drown your sorrows  
 Then it floods away tomorrows  
 Evil thoughts and evil doings  
 Cold, alone you hand in ruins  
 Thought that you'd escape the reaper  
 You can't escape the Master Keeper  
 Cause you feel life's unreal and you're living a lie  
 Such a shame who's to blame and you're wondering why  
 Then you ask from your cask is there life after birth  
 What you sow can mean Hell on this earth  
 Now you live inside a bottle  
 The reaper's traveling at full throttle  
 It's catching you but you don't see  
 The reaper is you and the reaper is me  
 Breaking law, knocking doors  
 But there's no one at home  
 Make your bed, rest your head  
 But you lie there and moan  
 Where to hide, Suicide is the only way out  
 Don't you know what it's really about."

Peter Alan Block, *Modern Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 777-78 n.5 (1990) (quoting OZZY OSBOURNE, *Suicide Solution*, on BLIZZARD OF OZ (CBS Records)). The parents of John McCollum sued the recording artist and the company that produced the record on the grounds that it inspired their son to commit suicide. In rejecting the claim, the court noted that suicide was a fairly prevalent theme in literature and in music, citing Shakespeare and the theme song from the popular movie M\*A\*S\*H. See *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 190 n.4 (1988).

promoted satanism.<sup>514</sup> As with the campaigns against dime novels and comic books in earlier days,<sup>515</sup> critics called for action to protect American young people. The critics, however, forgot the previous campaigns against certain kinds of music and how foolish those efforts looked from a historical perspective. In 1940, for instance, NBC radio banned more than 140 songs because they allegedly encouraged a disrespect for virginity, mocked marriage, and encouraged sexual promiscuity.<sup>516</sup> Cole Porter's *Love for Sale*, for example, could be played only in the instrumental version.<sup>517</sup> Duke Ellington's *The Mooche* was blamed for an increase in rape.<sup>518</sup> When rock music first appeared on the scene, Frank Sinatra, who had caused bobby-soxers to swoon at his feet in the 1940's, termed it "the most brutal, ugly, desperate, vicious form of

514. "Look at me, Satan's Child  
 Born of evil, thus defiled.  
 Brought to life through satanic birth  
 Come look at me and  
 I'll show you things that will open your eyes. . .  
 Listen to me and I'll tell you things that will sicken your mind. . .  
 I drink vomit of the priests,  
 Make love with the dying whore. . .  
 Satan as my master incarnate  
 Hail, praise to my unholy host . . . ."

*Labeling Hearing*, *supra* note 509, at 41 (quoting VENOM, *Possessed*, on POSSESSED (Relativity)).

515. See *supra* notes 94-100, 280-320 and accompanying text.

516. This time period was infamous for its concern about song lyrics. *It Ain't Necessarily So*, from George Gershwin's *PORGY AND BESS*, for example, had its recorded lyrics changed from "I takes that Gospel whenever it's poss'ble" to "I takes that fable whenever I'm able." Dick Dorrance & Jo Ranson, *You Can't Sing That*, 48 AM. MERCURY 324, 324 (1939). Among the songs that could not be performed vocally over the radio included *She Lived Next Door to the Firehouse*; *Horsie*; *Keep Your Tail Up*; *Mr. Gallagher and Mr. Shean*; and *I'll Be Glad When You're Dead, You Rascal You*. *Id.* at 325. As with Anthony Comstock's list of books, few of these made anyone's list of songs that would be remembered for all time. A few of them were memorable, however, and the changes required in still others that might be considered classics were substantial. *Id.* at 326.

517. Steven Dougherty, *From 'Race Music' to Heavy Metal: A Fiery History of Protests*, PEOPLE WKLY., Sept. 16, 1985, at 52. A portion of the lyrics here read:

Love for sale,  
 Appetizing young love for sale.  
 Love that's fresh and still unspoiled  
 Love that's only slightly soiled,  
 Love for sale.  
 Who will buy?  
 Who would like to sample my supply?  
 Who's prepared to pay the price  
 For a trip to paradise?  
 Love for sale.

THE COMPLETE LYRICS OF COLE PORTER 145 (Robert Kimball ed., 1984).

518. Dougherty, *supra* note 517, at 52.

expression it has been my misfortune to hear.”<sup>519</sup> When Elvis “The Pelvis” Presley made his first appearance on *The Ed Sullivan Show* in 1956, he was photographed only from the waist up.<sup>520</sup> These examples show that adults had not changed much about the way in which they reacted to the music that young people found attractive over the years.

In fact, when the U.S. Senate held a hearing on the effects of rock music in 1985, Virginia Senator Paul Trible talked of how Plato’s views of music were not far different from those of concerned citizens today. “More than 2,300 years ago,” Trible said, “Plato recognized that music is a powerful force in our lives, that music forms character and therefore plays an important part in determining social and political issues.”<sup>521</sup> Even more important to the Senator was the fact that, “[i]n Plato’s words, ‘When modes of music change, the fundamental laws of the state change with them.’”<sup>522</sup> Indeed they should change, Trible seemed to be saying, for “[r]epeated exposure to song lyrics describing rape, incest, sexual violence, and perversion is like sandpaper to the soul.”<sup>523</sup>

Were Trible and the other senators present at the hearing suggesting federal laws to meet the problems presented by modern rock music? The recording industry, like the motion picture industry before it, wanted to take no chances.<sup>524</sup> In response to repeated criticism, leaders of the recording industry tried to find the least intrusive form of self-regulation necessary to satisfy PMRC demands. In August, 1985, for instance, just before the Senate hearing, the Recording Industry Association of America (RIAA), which represented about eighty percent of the nation’s recording companies, announced plans to put labels on recordings that contained “explicit lyrics.”<sup>525</sup> RIAA president Stan Gortikov said the industry “sympathetically acknowledge[d] the legitimate concerns of parents who wish[ed] to limit exposure of their young children to recordings with explicit content which they deem[ed] objectionable” and thus would start labeling.<sup>526</sup> The

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519. SZATMARY, *supra* note 408, at 23 (quoting Frank Sinatra).

520. Dougherty, *supra* note 517, at 53.

521. *Labeling Hearing*, *supra* note 509, at 3.

522. *Id.*

523. *Id.*

524. *See supra* notes 362-69 and accompanying text.

525. Ken Terry, *Diskeries to Label ‘Explicit’ Records: Claim Right to Rule on Lyrics*, VARIETY, Aug. 14, 1985, at 63.

526. *Id.*

music industry's proposal, however, was much less than the PMRC wanted.<sup>527</sup> The PMRC's goal was a uniform industry-wide rating system directed by an outside body, perhaps somewhat like the old Hays Office.<sup>528</sup> Gortikov responded that the recording industry, which produced some twenty-five thousand individual recordings annually, was far too diverse for centralized supervision.<sup>529</sup> An "explicit lyrics" label applied by the manufacturer to certain albums was the best it could do.<sup>530</sup>

Few members of the PMRC believed recording industry disclaimers, and the "Washington wives,"<sup>531</sup> as they were pejoratively known, kept asking for more.<sup>532</sup> Like the movie industry before it, the recording industry soon found itself subjected to a variety of pressures designed to bring conformity.<sup>533</sup> Eventually, as with the movie industry, recording producers agreed to place warning labels on their products or to provide printed lyrics for songs dealing with explicit sex, violence, or drug use.<sup>534</sup> The label would read "Explicit Lyrics—Parental Advisory."<sup>535</sup> Once again, as with the movie industry, self-regulation was not successful. Labels were left off,<sup>536</sup> printed too small,<sup>537</sup> or done in jest;<sup>538</sup> by 1987, PMRC was threatening additional action against the producers.<sup>539</sup> The threats took on added force as state legislatures

527. *Id.* (noting that "the label consensus on warning stickers falls far short of what the PMRC asked for").

528. *PMRC Calls for Panel to Devise Rating Guidelines*, VARIETY, Aug. 14, 1985, at 63.

529. Terry, *supra* note 525, at 63. (Gortikov noted that a uniform rating system "would require a process for rating about 100 tunes per working day" and was "impracticable for the recording industry.").

530. *Id.*

531. Michael Dolan, *'Porn Rock' Hearing Hot Ticket in D.C.; Zappa Lashes PMRC*, VARIETY, Sept. 18, 1985, at 73.

532. *Id.* (noting that the PMRC wants voluntary "R" labels put on records containing explicit lyrics and full disclosure of lyrics prior to purchase of any music).

533. See Dolan, *supra* note 531, at 73 (reporting Frank Zappa's criticisms of the congressional fact-finding committee); *Rock Stars Taunt Congress; Backlash May Make Lawmakers Less Willing to Support Media*, VARIETY, Sept. 25, 1985, at 37 (reporting that the PMRC demands record labeling).

534. Dennis Wharton, *RIAA, PMRC Reach Accord on Record Lyrics; Labels Agree to Use Stickers or Print Words*, VARIETY, Nov. 6, 1985, at 85.

535. *Id.*

536. Dennis Wharton, *'Porn Rock' Foes Charge Labels Have Ignored Pact on Racy Lyrics*, VARIETY, Dec. 17, 1986, at 85.

537. *Id.*

538. *Id.* at 86 (reporting that one company flaunted the agreement by using a warning label that reportedly read "unanimously uncensored and disapproved of by parents everywhere").

539. *PMRC Threatens to Expose Labels Over Alleged Disregard of Deal*, VARIETY, June 17, 1987, at 87.

considered bills that would require the labeling of recordings.

In response to pending legislation in at least a dozen states, the recording industry and the PMRC announced another agreement.<sup>540</sup> Once again the industry promised to put "Explicit Lyrics—Parental Advisory" on LPs, cassettes, and compact disks that contained lyrics that focused on certain forms of sexual conduct, violence, or illegal drug and alcohol use.<sup>541</sup> The idea was that parents would review song lyrics to decide whether they wanted their children to purchase or listen to the music. This agreement differed from the earlier one in that this time, the labels would be of like size with similar placement on all merchandise.<sup>542</sup> Lyrics would be printed on the back of packaging, if space permitted. In return for the agreement on labeling, state legislators withdrew pending legislation.<sup>543</sup> This agreement, too, seemed somewhat ineffectual, and legislatively mandated labeling or court action to punish store owners who sell music containing objectionable lyrics remained possible.<sup>544</sup> In addition, the agreement ignored the fact that most recordings are purchased directly by young people without parental intervention or approval.

Although some critics found the agreement a significant chill on artistic freedom of expression, Tipper Gore found nothing in the new accord that challenged First Amendment principles. She commented, "We have never been for anything but the voluntary system allowing people to make their own decisions. . . . We do not support any restrictions on sales or performances or anything."<sup>545</sup> To critics of the labeling arrangement, including *New York Times* columnist Tom Wicker, labeling was perilously close to censorship.<sup>546</sup> Record store owners, for instance, had been arrested for selling allegedly obscene music.<sup>547</sup> To Wicker, state-mandated labeling would "inhibit or prevent sales," lead artists

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540. Jon Pureles, *States Drop Record-Labeling Bills*, N.Y. TIMES, Apr. 6, 1990, at C36.

541. *Id.*

542. *Id.* (stating "the new labels, appearing in a uniform place, will be easier for casual consumers to identify").

543. *Id.* Legislators in 13 states withdrew bills after companies agreed in March, 1990, to sticker albums. *Id.*

544. *Id.* The Pennsylvania House of Representatives passed a bill in December, 1990, requiring fluorescent labels warning about lyrics; similar bills were pending in Delaware, Florida, and Missouri. *Id.*

545. *Id.*

546. Tom Wicker, *States Set Up Confrontations of Lyrics and Law*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 3, 1990, at A12.

547. *Id.* (describing the arrest, conviction, and pending appeal of Tommy Hammond, the first American ever found guilty of selling recorded obscenity).



"to alter their creative works to avoid labeling and the resulting damage to sales," or cause producers "to urge artists to do so."<sup>548</sup> The required stickers put in place by the record industry itself could have the same effect.

After the recording industry announced its compliance with the latest PMRC demands, two events occurred that showed that the accord was considered, in some quarters, to be insufficient to stop the flow of objectionable music: Members of the Louisiana House of Representatives approved a mandatory labeling law that would prohibit the sale to an unmarried person under the age of seventeen of songs that contain lyrics that touch on "rape, incest, bestiality, sadomasochism, violent sex, prostitution, murder, satanism, suicide, ethnic intimidation, or use of illegal drugs or alcohol";<sup>549</sup> and a federal judge in Florida declared that a 2 Live Crew album, *As Nasty As They Wanna Be*, was obscene, allowing authorities to arrest shop owners who sold it.<sup>550</sup>

In response to the increased pressure brought by the forces of censorship, some members of the recording industry have tried to develop a more effective response to attacks on their livelihood. Some are offering bonuses to individuals who show a voter's registration card upon purchasing a recording.<sup>551</sup> Others are raising the equivalent of a music defense fund to help store operators who run afoul of censorship forces.<sup>552</sup> Still others are adding a second label to their recordings that promises legal help if needed as a consequence of selling that particular item.<sup>553</sup> Unfortunately, still others are refusing to promote more controversial groups and lyrics in an effort to avoid the problem altogether.<sup>554</sup>

The 2 Live Crew situation focused on another form of music that was causing a great deal of unhappiness in some circles. Rap music was different from contemporary rock music. In the latter, determining the words of controversial songs was very difficult to do; in the former, the words, which were spoken in

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548. Tom Wicker, *Labeling Lyrics a Step from Restricting Speech*, NEWS & OBSERVER (Raleigh N.C.), Feb. 7, 1990, at A14.

549. Richard Harrington, *Louisiana Passes Record-Labeling Bill*, NEWS & OBSERVER (Raleigh, N.C.), May 26, 1990, at D7.

550. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 596 (S.D. Fla. 1990) (finding *As Nasty As They Wanna Be* obscene under the *Miller* test).

551. Meg Cox, *Music Industry Composes Counterpoint as Demands to Censor Lyrics Increase*, WALL ST. J., Oct. 19, 1990, at B1.

552. *Id.* (reporting that promoters of a live pay-per-view cable concert by rap act 2 Live Crew funneled proceeds to the ACLU).

553. *Id.* (suggesting that Capitol Records plans to take this step).

554. *Id.*

cadence, were designed to be heard. The audience to which rap music appealed was primarily young, male, and black. The lyrics were, by most adult standards, appalling. Like rock music, these lyrics seethed with violence toward police officers,<sup>555</sup> women,<sup>556</sup> and other races, religions, and ethnic groups.<sup>557</sup> Performers contended that they were only depicting society as it really was, particularly for young black people in the inner cities to whom rap music was primarily directed.<sup>558</sup> Representatives of groups such as the ACLU found no reason to censor what the popular artists said, arguing that courts would not interpret the lyrics as advocating violence or crime.

Parents were concerned, and, through them, lawmakers maintained watch. As Tipper Gore stressed: "Words like 'bitch' and 'nigger' are dangerous. Racial and sexual epithets, whether screamed across a street or camouflaged by the rhythms of a

555. N.W.A., or Niggas with Attitude, a black rap group, ran afoul of the FBI with a song, *F--- Tha Police*, which contained the lyrics:

"Pullin' out a silly club so you stand  
With a fake-ass badge and a gun in your hand  
Take off the gun so you can see what's up  
And we'll go at it, punk, and I'm 'a f--- you up . . .  
I'm a sniper with a hell of a 'scope. . .  
Takin' out a cop or two . . ."

Jerry Adler et al., *The Rap Attitude*, NEWSWEEK, Mar. 19, 1990, at 58 (quoting N.W.A., *F--- Tha Police*, on STRAIGHT OUTTA COMPTON (Atlantic Records)).

556. One of the top groups, Guns N' Roses, got in trouble for a song called *Used to Love Her*, which contained these lyrics:

"I used to love her but I had to kill her  
She bitched so much/She drove me nuts  
And now I'm happier this way."

*Id.* at 56 (quoting GUNS N' ROSES, *Used to Love Her*, on GN'R LIES (Geffen Records)).

557. Public Enemy advocated blatant anti-Semitism:

"Crucifixion ain't no fiction  
So-called chosen, frozen  
Apology made to whoever pleases.  
Still they got me like Jesus."

*Id.* at 57 (quoting PUBLIC ENEMY, *Welcome to the Terrordome*, on FEAR OF A BLACK PLANET (CBS Records 1990)).

558. Henry Louis Gates, Jr., at the time an English professor at Duke University, argued that 2 Live Crew lyrics simply fall within the "coded ways of communicating" that African-Americans developed in the United States. Henry Louis Gates, Jr., *2 Live Crew Decoded*, N.Y. TIMES, June 19, 1990, at A23. In addition, he said, "2 Live Crew is engaged in heavy-handed parody, turning the stereotypes of black and white American culture on their heads," *id.*, and he warned against "a too literal-minded hearing of the lyrics," *id.* In addition, he claimed that rock music has always been heavily sexual in content but said that 2 Live Crew simply is more explicit in what it says. *Id.* He also charged that legal actions against 2 Live Crew are racially based, noting that white comic Andrew Dice Clay has a similar repertoire but has escaped prosecution. *Id.* (suggesting that this fact is related to the "specter of the young black male as a figure of sexual and social disruption").

song, turn people into objects less than human—easier to degrade, easier to violate, easier to destroy.”<sup>559</sup> She firmly believed that her crusade to end such song lyrics was vital to the continued survival of American society.<sup>560</sup>

The 2 Live Crew imbroglio simply aggravated an already difficult situation. Before the confrontation over *As Nasty as They Wanna Be*, 2 Live Crew was a moderately successful group. After a federal district judge declared its album legally obscene, its success was magnified substantially. Its *Nasty* album sold many more copies, and its next album, *Banned in the U.S.A.*, was a fantastic success.<sup>561</sup> The lyrics in *Nasty* were indeed explicit. In *Me So Horny*, the group chanted:

I won't tell your momma if you don't tell your dad  
I know he'll be disgusted when he sees your pussy busted.<sup>562</sup>

In *Dick Almighty*, one line read, “He'll tear the pussy open cause it's satisfaction.”<sup>563</sup> Finding the recording obscene under Florida law, the federal judge noted that “[t]he evident goal of this particular recording is to reproduce the sexual act through musical lyrics. It is an appeal directed to ‘dirty’ thoughts and the loins, not to the intellect and the mind.”<sup>564</sup> In fact, he noted that

559. Tipper Gore, *'Entertainment' Teaches Hatred*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 10, 1990, at A13.

560. *Id.* (contending that obscene and violent song lyrics have led to increased youth violence and racism).

561. See *Gone Platinum*, NEWSWEEK, July 30, 1990, at 57 (reporting that Atlantic Records received orders for more than one million copies before the album was released).

562. 2 LIVE CREW, *Me So Horny*, on AS NASTY AS THEY WANNA BE (Luke Records).

563. 2 LIVE CREW, *Dick Almighty*, on AS NASTY AS THEY WANNA BE (Luke Records).

564. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 591 (S.D. Fla. 1990). This case also involved an interesting technique used by law enforcement officials in various parts of the country—a technique that the judge in the case found to be a form of prior restraint. *Id.* at 603. Owners and operators of stores that carry materials that could be found obscene in a court often are warned that legal action might ensue if they continue to offer such materials. In many cases, the stores remove the potentially offensive items from the shelves to avoid possible legal action. Such warnings are usually made before any legal determination that the materials are obscene. Nor do the law enforcement officials know for sure that a jury will find the cited materials obscene. In many cases, however, the warning is as effective in stopping the sales of objectionable material as a full-fledged legal action. Carl Fox, District Attorney for Orange County, N.C., Speech given at a media law class of the University of North Carolina at Chapel Hill (Dec. 5, 1990).

Fox, interestingly, put *As Nasty as They Wanna Be* on his list of items that might be targeted for prosecution. His district includes Chapel Hill, North Carolina, home of the University of North Carolina, and his constituents soon let Fox know that the community standards of that area required the 2 Live Crew recording to rise and fall with market demand. He subsequently removed the recording from his list. The district attorney in

the group had put out a clean version of the same lyrics, *As Clean As They Wanna Be*, and had discovered that sales of that recording were limited.<sup>565</sup> Thus their success rested on sales of the explicit album, which, he found, "taken as a whole . . . is legally obscene."<sup>566</sup>

A record store owner convicted of selling the now obscene recording was fined one thousand dollars and court costs for his offense.<sup>567</sup> Three members of the group stood trial on obscenity charges in South Florida for a live performance in which they presented the nasty version of the lyrics in an adults-only show.<sup>568</sup> After about two hours of deliberation, the jury found the performers not guilty on the obscenity charge.<sup>569</sup> Perhaps the jurors decided that the lyrics were more comical than obscene.<sup>570</sup> One possible reason for the discrepancy in verdicts was the fact that a police recording of the live concert was hard to understand in court.<sup>571</sup> Officers took the stand to read the offensive lyrics to the jury, which jurors found rather humorous. *2 Live Crew*, however, is far from humorous. It and its counterparts are being blamed for a variety of ills in American society. Columnist George F. Will, for instance, finds it ironic that society legislates against smoking in restaurants but that singing *Me So Horny* is a constitutional right.<sup>572</sup> He says such music fosters social attitudes like those that led to the gang rape of a Central Park jogger in the spring of 1990.<sup>573</sup>

Whether Will's opinion is correct is beyond the scope of this study, but similar concerns have energized various segments of society to try to repress such explicit song lyrics. A frontal attack on recordings seems unlikely to succeed, in part, due to the fact that the Supreme Court has declared that "[m]usic, as a form of expression and communication, is protected under the

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neighboring Durham County, home to Duke University, placed the recording on his list of items that might be prosecuted for obscenity and received few protests. The album remains banned in Durham County, showing once again the vagaries of local community standards.

565. *Skyywalker Records*, 739 F. Supp. at 592.

566. *Id.* at 596. The decision has been appealed. *Luke Records, Inc. v. Navarro*, No. 90-5508 (11th Cir. 1991).

567. *Store Owner Fined \$1,000 for Selling 2 Live Crew Albums*, DURHAM MORNING HERALD, Dec. 13, 1990, at A11.

568. *2 Live Crew Members Acquitted*, DURHAM MORNING HERALD, Oct. 21, 1990, at A3.

569. *Id.*

570. *See id.*

571. *Id.* (the recording was "mostly unintelligible").

572. George F. Will, *America's Slide into the Sewer*, NEWSWEEK, July 30, 1990, at 64.

573. *Id.* (asserting that the rap lyrics of *2 Live Crew* may give listeners the idea that violence against women is fun).

First Amendment."<sup>574</sup> In addition, community standards determine whether certain music may be suppressed because it is obscene.<sup>575</sup> The vagaries of community standards may be seen in the 2 Live Crew incident in which a federal judge, ruling without the aid of a jury, found that the recorded version of *As Nasty As They Wanna Be* offended the sensibilities of South Floridians as he understood them,<sup>576</sup> but a jury of South Floridians found the group itself not guilty of presenting an obscene concert.<sup>577</sup>

Whether the lyrics of certain songs can be deemed obscene when minors are concerned, however, is another question. The Supreme Court held that governments may enforce a different obscenity standard when it comes to minors,<sup>578</sup> but whether governments would take such steps is another matter. The effect of song lyrics on young people, however, obviously presents a serious problem to society. With music playing such an important

574. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

575. See *Miller v. California*, 413 U.S. 15, 24 (1973).

576. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 592-93 (S.D. Fla. 1990).

577. *2 Live Crew Members Acquitted*, *supra* note 568, at A3.

578. *Ginsberg v. New York*, 390 U.S. 629 (1968). Justice William O. Douglas disagreed with his brethren in the *Ginsberg* decision and traced the Court's faulty reasoning back to Anthony Comstock:

This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of state and federal regulation of "obscenity" is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. The "juvenile delinquents" I have known are mostly over 50 years of age. If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for "protecting" many groups in our society, not merely children.

While I find the literature and movies which come to us for clearance exceedingly dull and boring, I understand how some can and do become very excited and alarmed and think that something should be done to stop the flow. It is one thing for parents and the religious organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor. As I read the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and the prosecutor in the middle of this publishing business.

*Id.* at 654-55 (Douglas, J., dissenting). Douglas feared that the Court's decision had placed its membership squarely in the middle of the publishing business once more. *Id.* at 656.

part in the lives of young people, the crucial question is just how great a role it has in shaping their value systems. Research cited by the PMRC supports the notion that song lyrics shape attitudes; but earlier research also said that comic books corrupted readers' morals.<sup>579</sup> At the heart of the issue is whether these concerns validate efforts to force the recording industry into self-regulation. Does the industry's agreement to label music constitute a form of self-censorship? Scholars and critics who have studied the effect of self-regulation on the motion picture and comic book industries report that the chill sent through the reaches of those businesses stunts artistic growth. How the music industry will fare as the result of such challenges is unclear.

If difficulties arise in banning recordings such as those by 2 Live Crew from production or sale, government officials may have another way to limit the access of juveniles to such offensive materials. The FCC, spurred on by Congress and conservative groups such as the Reverend Donald E. Wildmon's<sup>580</sup> American Family Association, has taken dead aim on indecency over the airwaves. Although the campaign has not yet attempted to limit the songs that may be played on the air, such a reach is not inconceivable. Whether this action would directly affect recording sales is another matter because many of the more offensive songs simply are not played on radio. Their sales depend on a public following developed independent of air play, but lack of radio

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579. See *supra* notes 281-98, 310-16 and accompanying text.

580. Wildmon, who is in his early 50's and is the father of four, is close to claiming the title of latter day Anthony Comstock because of his role in attacks on arts and entertainment in this country. Bruce Selcraig, *Reverend Wildmon's War on the Arts*, N.Y. TIMES, Sept. 2, 1990 (Magazine), at 22, 25. His organization led the attack on movies such as *The Last Temptation of Christ* and on art funded by the National Endowment for the Arts. *Id.* at 22. He has also mobilized supporters to boycott businesses that advertise on disapproved television shows and bookstores that carry publications that he dislikes. He was pastor of a Methodist congregation in Mississippi when he started his National Federation for Decency in the mid-1970's. *Id.* at 43. He soon left his congregation, entered the decency business full time and eventually changed the name of his organization to the current title of the American Family Association. *Id.* To aid his efforts, he joined forces with right-wing politicians and their mass-mailing experts. *Id.* (describing how Wildmon joined for a brief time with the Reverend Jerry Falwell). His *A.F.A. Journal* claims to circulate about 425,000 copies. *Id.* He has written at least two books supporting his various causes, which outline how his supporters can proceed with his campaigns at a local level. In *The Home Invaders*, Wildmon said of television, "The organized church in America faces the greatest threat to its existence since our country was founded" because programming stresses "the humanist view of man." DONALD E. WILDMON, *THE HOME INVADERS* 5 (1985). In *The Case Against Pornography*, he warns, "[t]here is a great spiritual war being waged . . . to replace the Christian concept of man with a secular and humanist concept." DONALD E. WILDMON, *THE CASE AGAINST PORNOGRAPHY* 7 (1986).

exposure could adversely affect the development of some groups and restrict the way in which the musical artform develops.

The decency-over-the-airwaves campaign is another one of those conservative-inspired, politically motivated efforts to clean up society. In fact, some critics say it was the direct result of conservative opposition to President Reagan's sending FCC Chairman Mark Fowler's name to the Senate for confirmation to a second term.<sup>581</sup> Wildmon complained that Fowler had done "nothing, zero, zilch" about the indecent programming that Wildmon believed was plaguing the airwaves.<sup>582</sup> The anti-Fowler campaign led to an accord between the FCC and various national decency organizations including the American Family Association, the National Federation of Decency, and Morality in Media.<sup>583</sup> The latter groups agreed to send complaints about allegedly obscene materials to the FCC, and the Commission promised to investigate.<sup>584</sup>

FCC members had virtually abandoned the indecency field after the *FCC v. Pacifica Foundation*<sup>585</sup> decision in 1978.<sup>586</sup> Indecent

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581. John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 344 (1989) (suggesting that picketing of the FCC's offices to protest the renomination of Fowler as Chairman led to the adoption of the FCC's new indecency policy).

582. *Id.* at 344 (quoting Bob Davis, *FCC Chief Shifts Obscenity View As He Seeks Job Reappointment*, WALL ST. J., Dec. 1, 1986, at 44). Fowler's nomination was withdrawn after more than six months without Senate action on his reappointment. *See id.* at 344-46. Dennis Roy Patrick was tapped to succeed Fowler, but his nomination triggered protests from the National Decency Forum, a coalition of groups such as Wildmon's working to remove objectionable programming from the airwaves. *It's Official: Patrick for FCC Chairmanship*, BROADCASTING, Feb. 9, 1987, at 43. Presidential aide Patrick Buchanan denounced the Fowler FCC for ignoring the 20,000 obscenity or indecency complaints that it had received annually. *Id.* Mr. Patrick, who had been a commissioner, protested that "[t]he broadcast of obscene or indecent material is prohibited by law" and that "[a]s a commissioner, I have supported and will continue to support efforts to enforce that law." *Id.* He believed that critics misrepresented his position and said, "I hope to have a constructive dialogue with them in the future because this is in my view a very serious issue." *Id.*

583. Crigler & Byrnes, *supra* note 581, at 344-46 (describing meetings between FCC authorities and various representatives of the American Family Association, the National Federation of Decency, and Morality in Media).

584. Ironically, the FCC began regulating decency over the airwaves about the same time that it decided to discontinue regulating political fairness. The Reagan administration sponsored the deregulation of much of the broadcasting industry, and a major casualty was the fairness doctrine. In setting the sequence of events in motion to abolish the requirement that broadcasters provide time for various points of view, the Commission said, "[W]e conclude that the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest." In *Complaint of Syracuse Peace Council Against Television Station WTVH*, 2 F.C.C.R. 5043, 5043 (1987). The Commission's concern for the First Amendment has not surfaced in relation to the decency-over-the-airwaves debate.

585. 438 U.S. 726 (1978) (plurality opinion).

586. *See supra* notes 445-58 and accompanying text.

programming was essentially defined as repeated use of the words found in Carlin's monologue,<sup>587</sup> and even those were not banned between ten p.m. and six a.m.<sup>588</sup> Such standards were too permissive for those watching the media and for the newly concerned members of the FCC. Indeed, some radio broadcasters gave their critics reason to be concerned. On April 29, 1987, the FCC issued three opinions regarding allegedly indecent programming carried by three different radio stations. Its members found excerpts from a play dealing with the sexual fantasies of homosexuals,<sup>589</sup> a song played on a university radio station that focused on sexual intercourse,<sup>590</sup> and a sexually explicit talk show<sup>591</sup> to be unacceptable uses of the airwaves. Because it was changing its standards on such programming, commissioners magnanimously declined to take action against the three offending FM-radio licensees who had not had due warning of the new policy.<sup>592</sup> From then on, however, things would be different.<sup>593</sup>

Although the FCC would continue to use the *Pacifica* standard of whether "language or material that depicts or describes, in terms patently offensive as measured by contemporary commu-

587. See *Pacifica Found.*, 438 U.S. at 738-41.

588. See *id.* at 732 n.5.

589. Station KPFK-FM in Los Angeles, California, another station licensed by the Pacifica Foundation, contended that the sections of the play, *THE JERKER*, which it carried over the air were an important part of a discussion on AIDS and were included within a program called *I Am Are You?* (IMRU), which was aimed at the area's homosexual community. *In re Pacifica Found., Inc.* 2 F.C.C.R. 2698, 2698 (1987). The language that the FCC found offensive included: "I'll give you the gentlest fuck west of the Mississippi!" and "We cuddled and played around a bit before he started working on my ass." *Id.* at 2700 (quoting *THE JERKER*). The dialogue came from a conversation between two men. *Id.*

590. The objectionable song, played over KCSB-FM, in Santa Barbara, California, was *Makin' Bacon*. Its lyrics included:

"Makin' bacon is on my mind  
Come here baby, make it quick.  
Kneel down here and suck on my dick  
Makin' bacon is on my mind."

*In re Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703, 2703 (1987) (quoting KCSB-FM broadcast).

591. The show, hosted by Howard Stern, in Philadelphia, Pennsylvania, was carried during the morning hours and focused on sexually explicit dialogue between the host and callers. *In re Infinity Broadcasting Corp.*, 2 F.C.C.R. 2705, 2705 (1987). One excerpt that the FCC found offensive was:

Howard Stern: "God, my testicles are like down to the floor. Boy, Susan, you could really have a party with these. I'm telling you honey."  
Ray: "Use them like Bocci balls."

*Id.* at 2706.

592. *Id.* at 2706; *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. at 2704; *In re Pacifica Found., Inc.*, 2 F.C.C.R. at 2701.

593. *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. at 2704 (warning that future violations would be sanctioned appropriately).



nity standards for the broadcast medium, sexual or excretory activities or organs,"<sup>594</sup> no longer would an FCC determination be based solely on the repetitive use of Carlin's seven "filthy" words.<sup>595</sup> "In addition, although it remains that indecency will be actionable only when there is a reasonable risk that children are in the audience," the new FCC statement said, "the fact that an indecent transmission occurs after 10:00 p.m. and is preceded by a warning will not automatically insulate the transmission from enforcement action."<sup>596</sup>

Just what the new regulations meant in terms of programming was unclear, but to many individuals and groups who did not believe that the government had the right to choose the nation's listening material even if children were involved, the new approach to indecent transmissions was unacceptable. When asked to reconsider its position, the FCC reiterated its basic assumption that the government should aid parents in regulating what their children heard and noted that broadcasters might now be able to air programming of all sorts beginning at midnight.<sup>597</sup> This, said the Commission order, "is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience."<sup>598</sup> The results of the Commission's reconsideration still were unacceptable to those who thought this bordered on censorship. Representatives of Action for Children's Television, the ACLU, and other interested parties filed suit.<sup>599</sup> Although the court did not agree that the FCC was meddling in purely private affairs,<sup>600</sup> circuit court judges did say that the Commission's standards needed to be more precise.<sup>601</sup>

With the court's decision, the matter went back to the Commission—more or less. Conservative groups had already pressured the FCC to begin this campaign, and before it could engage

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594. New Indecency Enforcement Standards, 62 Rad. Reg. (P & F) 1218, 1219 (1987).

595. *Id.* at 1218.

596. *Id.*

597. *In re Infinity Broadcasting Corp.*, 3 F.C.C.R. 930, 937 n.47 (1987).

598. *Id.*

599. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1334 (D.C. Cir. 1988), *vacated as moot*, 932 F.2d 1504 (D.C. Cir. 1991).

600. *Id.* at 1344.

601. *Id.* at 1342-43 (holding that the FCC must provide clear notice of reasonably determined times at which indecent material may be aired).

in any reconsideration another force entered the fray—the Congress of the United States. Senator Jesse Helms, Republican of North Carolina, well-known for his advocacy of morally correct causes, rose in the Senate on July 26, 1988, to propose an amendment to the FCC's budget.<sup>602</sup> The language that Helms suggested was simple: "By January 31, 1989, the Commissioner[s] of the Federal Communications Commission shall promulgate regulations in accordance with § 1464, Title 18, United States Code, to enforce the provisions of such Section on a 24 hour per day basis."<sup>603</sup> Helms was highly critical of the so-called safe harbor granted broadcasters that would allow the use of questionable material between midnight and six a.m.<sup>604</sup> "Garbage is garbage, no matter what the time of day or night may be,"<sup>605</sup> Helms said as he argued that the government should no longer sanction its use.

The law that Helms wanted enforced dated back to the Communications Act of 1934,<sup>606</sup> which created the FCC. Language in section 326 created an impossible dilemma for commissioners and broadcasters. It said on the one hand,

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.<sup>607</sup>

Immediately after that emancipating sentence, however, the law said, "No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."<sup>608</sup> When the criminal code was revised in 1948, the last sentence was removed from the Communications Act and joined with other language referring to obscene materials.<sup>609</sup> The law clearly said what Jesse Helms said it did, and

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602. 134 CONG. REC. S9911 (daily ed. July 26, 1988) (statement of Sen. Helms).

603. *Id.*

604. *Id.* at S9912 (stating that the "safe harbor rule is in direct contradiction to the [Communications Act] that Congress passed in 1934").

605. *Id.*

606. Communications Act of 1934, ch. 652, § 326, 48 Stat. 1065 (codified as amended at 47 U.S.C. § 151 (1988)).

607. *Id.* § 326, 48 Stat. at 1091.

608. *Id.*

609. 18 U.S.C. § 1464 (1988) ("[W]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000.").

his amendment was added to the law establishing the commission's budget for the fiscal year ending September 30, 1989.<sup>610</sup>

From that point, the fight over indecency on the airwaves became bogged down in move and countermove as is only possible in the interactions between various organs of the federal government. On December 21, 1988, the FCC acquiesced to congressional wishes and adopted a rule to end all programming that could be considered indecent.<sup>611</sup> The rule was scheduled to go into effect on December 28, 1988.<sup>612</sup> Opponents of the rule rallied once more and on January 23, 1989, won a court order that stopped the FCC from implementing the twenty-four-hour ban until the court could consider its constitutionality.<sup>613</sup> Before that could happen, the U.S. Supreme Court issued a ruling in a "dial-a-porn" case in which it responded to similar congressional efforts to cleanse the telephone lines of sexually explicit messages.<sup>614</sup> Here, the Court said that banning obscene telephone messages was permissible<sup>615</sup> but that Congress had to take care when it attempted to reach simply indecent communications.<sup>616</sup> The Justices criticized Congress' approach as overly broad; although congressional concern for children who had access to the telephone numbers was admirable, it was possible for Congress to fashion a means to protect children that would not keep adults from having access to the messages if they so desired.<sup>617</sup> The Court reminded Congress that "[s]exual expression which is indecent but not obscene is protected by the First Amendment" and that such communication may be regulated only "in order to promote a compelling interest," such as the protection of minors, "if [Congress] chooses the least restrictive means to further the articulated interest."<sup>618</sup>

Members of the FCC, still considering themselves under the requirements imposed by Congress, went back to the drawing board. They had not given up their desire to cleanse the airwaves.

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610. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

611. 47 C.F.R. § 73.3999 (1988).

612. *Id.*

613. Order, Action for Children's Television v. FCC, No. 88-1916, (D.C. Cir. filed Jan. 23, 1989) (per curiam), cited in Crigler & Byrnes, *supra* note 581, at 331 n.13.

614. Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989).

615. *Id.* at 125 ("[T]here is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings.").

616. *Id.* at 130-31 (holding that the statute was not sufficiently narrowly drawn because it banned indecent, as well as obscene, speech).

617. *Id.* at 129 (concluding that the legislative record contained no findings that indicated there was no less restrictive means to achieve the government's interest in protecting minors).

618. *Id.* at 126.

On November 20, 1989, barely five months after the dial-a-porn decision, commissioners solicited public comment on whether banning indecent communication from the airwaves at all hours of the day was the least restrictive way to protect children.<sup>619</sup> Although it allegedly sought public input as to whether the ban was necessary at all and whether the ban should be effective to protect all children under the age of seventeen rather than children under the age of twelve as was the practice in earlier decisions, the language of the FCC notice clearly revealed the end goal of the inquiry.<sup>620</sup>

Congress, the FCC said, intended to protect children under the age of seventeen.<sup>621</sup> In addition, states had statutes that protected those under seventeen from certain sexually oriented materials, and the Motion Picture Association of America barred young people under seventeen from certain of its releases under its rating system.<sup>622</sup> Unless someone could come up with a good reason to lower the age, the FCC obviously was determined to use seventeen as the cutoff point. The FCC commented that Congress was also correct in demanding a twenty-four-hour ban on indecent programming.<sup>623</sup> Studies of listening habits revealed that the average number of teenagers tuning in to at least fifteen minutes of radio programming between midnight and six a.m. was 716,000<sup>624</sup>—certainly enough to warrant a total ban on indecent programming. The problem remained as to how to allow indecent programming over the airwaves to reach consenting adults while preventing children from hearing it. Although the FCC had its own answer in mind, the Commission asked for public comments.<sup>625</sup>

In August, 1990, the Commission announced that “no alternative to a 24-hour prohibition on indecent broadcasts would effectively serve this government interest” in protecting the nation’s children from sexually explicit material.<sup>626</sup> The Commission found no technological devices that would bar youth access to such programming and apparently did not trust the ability of parents

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619. *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358, 8360 (1989).

620. *See id.* at 8358 (The Commission stated that it had “long believed that broadcasting indecent [material] during times when there is a reasonable risk of children in the audience is inimical to the public interest.”).

621. *Id.* at 8360.

622. *Id.*

623. *Id.* at 8361-62.

624. *Id.* at 8361.

625. *Id.* at 8360-64.

626. *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 5 F.C.C.R. 5297, 5297 (1990).

to set and enforce rules for their children.<sup>627</sup> Only if a licensee could prove that "children in fact are not present in the broadcast audience in their market at the time the alleged indecent program was aired" could it escape retaliation by the FCC.<sup>628</sup>

The FCC's ruling led to a continuation of the court battle. Action for Children's Television (ACT), as lead party in the case, argued that parents, rather than the government, should be responsible for choosing the programming that their children hear or see.<sup>629</sup> In May, 1991, the Court of Appeals for the District of Columbia agreed with ACT and its fellow petitioners. The FCC, said the court, may not ban indecent material totally from the airwaves.<sup>630</sup> The panel ordered the FCC to find a "safe harbor" for such broadcasts,<sup>631</sup> stating that "[t]he fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that . . . such a prohibition cannot withstand constitutional scrutiny."<sup>632</sup>

The next step for those interested in cleansing the airwaves is to take the case before the United States Supreme Court, where the outcome is far less predictable. The special nature of broadcasting, which allows the government to regulate it, and its manner of infiltrating the family home could entice the Justices to agree with those who wish to restrict programming contents. If the Supreme Court sides with Congress and the FCC, the implications for contemporary music as well as for other programming would be immense, and a major form of communication for all members of society would be permanently cleansed of material that a certain segment of society finds unsuitable for children. People with sufficient money could, of course, attend live performances or purchase recordings of certain materials, but those without extra funding would be denied access to such information and entertainment. Perhaps that is just what those trying to purify society want—to keep almost all people of all ages from exposure to sexually explicit materials. If they succeed with over-the-air broadcasting,<sup>633</sup> the modern-day purity move-

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627. *Id.*

628. *Id.*

629. Telephone Interview with Peggy Charren, President, Action for Children's Television (Mar. 22, 1991).

630. *Action for Children's Television, Inc. v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991).

631. *Id.* (ordering the FCC to determine the times at which indecent material may be broadcast).

632. *Id.* at 1509.

633. People concerned about the decency of material entering American homes also have

ment will have taken a major step toward achieving that goal.

With the attack on indecency in broadcasting well under way, leaders of the purity movement looked for new areas of society that needed cleansing. They found such a target in the National Endowment for the Arts (NEA). The United States does not have a long tradition of supporting the arts with public money as do other countries; the urge to censor that with which we disagree simply runs too deep to allow the leeway necessary for innovative artistic effort at government expense. Only one earlier attempt was made to provide public funding for the arts. Efforts by the Works Progress Administration, which was part of Franklin Roosevelt's program to find jobs for unemployed artists, writers, and actors during the Depression, lasted only a few years.<sup>634</sup> The material produced by its members was considered socialistic by more conservative members of Congress, and the program ended.<sup>635</sup> No further involvement between artists and the government occurred until the NEA began in 1965. The endowment had a relatively peaceful existence until 1989, when members of Congress discovered that federal funds had underwritten photographs by Robert Mapplethorpe and Andres Serrano that were considered obscene by congressional conservatives.<sup>636</sup>

The issue may not even have come to congressional attention without the aid of the widespread network of the Reverend Wildmon. In April, 1989, a member of his organization sent Wildmon a newspaper clipping complaining about the display of the Serrano photograph "Piss Christ," which featured a plastic crucifix partially submerged in a jar of urine.<sup>637</sup> Outraged, Wildmon ran an article in the AFA's monthly magazine condemning the NEA for helping to finance the Serrano exhibit that included that particular picture and urged his supporters to tell Congress

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attacked cable television programming. Most of the controversy here has focused on state and local attempts to regulate content. Because of the voluntary nature of cable subscriptions, such efforts have failed before the First Amendment. *See, e.g., Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (holding the provisions of an ordinance regulating indecent material on cable television unconstitutionally broad); *Community Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (stating that the City of Roy could not restrict the type of material shown on cable television because to do so violated the First Amendment).

634. WILLIAM E. LEUCHTENBURG, *FRANKLIN ROOSEVELT AND THE NEW DEAL, 1932-1940* 126-28 (1963).

635. *See id.*

636. Selcraig, *supra* note 580, at 22-24 (describing Reverend Wildmon's mailing campaign designed to stimulate congressional action on NEA grants).

637. *Id.* at 22.

that they did not want their tax dollars spent for such blasphemous work.<sup>638</sup> One immediate result was a considerable uproar in Congress.<sup>639</sup>

Congressional anger eventually focused on the Serrano photograph and on an exhibit of photographs by the late Robert Mapplethorpe, which critics labeled as pornographic and homoerotic. Among the latter photographs were those showing one man urinating into another's mouth, a man with a whip inserted in his anus, and the exposed genitals of an eight-year-old boy and a four-year-old girl.<sup>640</sup> The NEA had given Serrano a fifteen thousand dollar grant for his work; Mapplethorpe had a thirty thousand dollar NEA grant to finance his activities.<sup>641</sup>

By July, 1989, the key player in the debate again was Senator Jesse Helms, well-known for his dislike of homosexuals. Helms attached an amendment to a bill funding the operations of the Department of the Interior, under which the NEA operates, to curtail the agency's freedom in granting money.<sup>642</sup> Senate leaders were trying to push the funding bill through, and Helms threatened to make sure a copy of a catalog containing the Serrano picture was on every Senate desk if the amendment was not added. His amendment was accepted by the Democratic leadership, and it passed by a voice vote.<sup>643</sup> The Helms proposal banned the use of federal money for "obscene and indecent" art or for any activity that "denigrates, debases or reviles a person, group or class of citizens on the basis of race, creed, sex, handicap, age or national origin."<sup>644</sup> In addition, the amendment banned funding artwork that featured "sodomasochism, homoeroticism, the exploitation of children" and that "denigrates the objects or beliefs of the adherents of a particular religion or nonreligion."<sup>645</sup> The amendment was so all-encompassing that voting against it was almost impossible. The Senate measure would have withheld forty-five thousand dollars from the NEA budget for the next

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638. George Hager, *Between Art and a Hard Place, 'Shock Art' Flap Has NEA Supporters On the Defensive, Looking for Answers*, DURHAM MORNING HERALD, Sept. 3, 1989, at D1.

639. *Id.*

640. Mike McManus, *Controversy Continues over NEA Grants to Artists*, DURHAM MORNING HERALD, Apr. 1, 1990, at C9.

641. *Id.*

642. 135 CONG. REC. S8806 (daily ed. July 26, 1989) (amendment proposed by Sen. Helms).

643. *Id.* at S8809.

644. *Id.* at S8806.

645. *Id.*

year to indicate displeasure with the endowment's funding of Serrano and Mapplethorpe and would have barred the two agencies that provided their grants from receiving any NEA money for the next five years. As Helms said, "If someone wants to write ugly nasty things on the men's room wall, the taxpayers do not provide the crayons."<sup>646</sup>

Cries of outrage quickly came from the art community. Critics said senators simply did not understand the rigorous review process involved in NEA grants, and how money was awarded solely on artistic merit. In addition, senators did not appreciate the need for freedom from government intervention in order to maintain a viable artistic community in the United States. Government intervention in artistic projects was more appropriate for totalitarian nations than free ones, said the critics. Ted Potter, executive director of the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina, which had funded Serrano, was particularly distressed. Those people who condemned Serrano's "Piss Christ" photograph did not understand that Serrano, a devout Roman Catholic, was unhappy about modern exploitation of religious feelings. "This was an artist generally presenting as a protest statement this critical and outrageous issue of religious abuse and exploitation," Potter said. "Fine protest art makes protest visible, and he's done that with this photograph."<sup>647</sup>

Other art leaders also condemned attempts to censor the nation's artists. The president of the Metropolitan Museum of Art, who had spent time in Eastern European countries in the diplomatic service, for example, noted, "I lived for years in the Soviet Union, and I watched how the government tried to establish itself as arbiter for what is and what isn't art." William H. Luers found it "frightening that at a time when the rest of the world seems to be discovering freedom and liberty for all people to express their ideas, we seem to be giving it up. Somehow, culture is seeming anti-American."<sup>648</sup> John Brademas, president of New York University, who as a congressman firmly supported the NEA, carried the analogy one step further. He stated: "Totalitarian governments—like Hitler's Germany, Stalin's Soviet Union and Deng Xiaoping's China—dictate what art and what ideas are

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646. Maureen Dowd, *Helms in Midst of Clash Between Art, Politics*, NEWS & OBSERVER (Raleigh, N.C.), July 28, 1989, at A1, A4.

647. *Vote to Trim Arts Funding Brings Cries of Censorship*, DURHAM MORNING HERALD, July 28, 1989, at A14.

648. Grace Glueck, *NEA Vote Prompts Anger, Approval*, NEWS & OBSERVER (Raleigh, N.C.), July 30, 1989, at E3.



acceptable. Governments of free peoples don't. That's the difference between us."<sup>649</sup>

All of the great arguments about artistic freedom were simply unable to sway members of Congress, many of whom seemed to agree with conservative Republican Walter H. Annenberg, publisher, former ambassador, and art collector. "I hate to see a constraining hand in relation to art," he said, "[y]et on a personal basis, I'm sick of people expressing their artistic attitudes and talents in an unappetizing manner. In a constitutional democracy anything may be possible," he admitted, "[b]ut I thought Mapplethorpe went too far, trying to justify his own inclinations. It's unfortunate that a talented human being would engage in that. He asked for it by going overboard."<sup>650</sup> Senator Helms, who had been busy fanning the flames of artistic intolerance, would have agreed with Annenberg's assessment. "No artist has an unqualified right to be subsidized by the taxpayer,"<sup>651</sup> Helms said. "[Serrano] is not an artist, he is a jerk."<sup>652</sup>

Congress refused to accept Helms' amendment in its final version of the law funding the NEA. Instead, it included language barring federal financing for work that may be considered obscene or lacking serious artistic, literary, political, or scientific merit.<sup>653</sup> In the latter phrasing, Congress borrowed language from the Supreme Court's 1973 definition of obscenity.<sup>654</sup> The 1989 measure also set aside funds to study the way in which grants were awarded and to recommend improvements so that such incidents could not happen again.<sup>655</sup> In addition, artists had to agree not to violate the congressionally imposed restrictions. A federal judge eventually vetoed the latter arrangement, noting that "the chilling effect . . . arising from the NEA's vague certification requirement is unmistakably clear" especially be-

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649. *Id.*

650. *Id.*

651. Jesse Helms, *Let Public See 'Art,'* NEWS & OBSERVER (Raleigh, N.C.), July 29, 1989, at A15 (appearing in a letter to the editor in which Sen. Helms requested the *News and Observer* to exhibit three photographs so that the public could decide whether the government had funded "art").

652. *Vote to Trim Arts Funding Brings Cries of Censorship*, *supra* note 647, at A14.

653. Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Title III, § 304(a), 103 Stat. 741 (1989).

654. *Miller v. California*, 413 U.S. 15 (1973) (upholding conviction for mailing sexually explicit material).

655. *See Compromise Accepted on Obscene Art*, DURHAM MORNING HERALD, Sept. 30, 1989.

cause "the NEA occupies a dominant and influential role in the financial affairs of the art world in the United States."<sup>656</sup>

The battle over federal financing of the arts was far from over, however, despite the resolution of the 1989 skirmish. The NEA operates under a five-year congressionally granted charter, and its charter was up for renewal in 1990. At the beginning of the 1990 struggle, the Bush administration seemed prepared to counter Helms. The President himself, when asked at a news conference about his attitudes on art censorship, said that he believed no federal official or agency "should be set up to censor what you write or what you paint or how you express yourself." Personally, he said: "I am deeply offended by some of the filth that I see into which federal money has gone, and some of the sacrilegious, blasphemous depictions that are portrayed by some to be art. And so, I will speak strongly out opposed to that." Just how firmly he opposed censorship was left open to question, for he added that he would try "to convince those who feel differently in terms of legislation that we will do everything in our power to stop pure blasphemy."<sup>657</sup> As the NEA funding debate continued, the administration, facing a conservative backlash, retreated from anything close to an unconditional endorsement of its renewal.<sup>658</sup> Eventually, the 1990 legislation funding the NEA called for officials making grants to take into "consideration general standards of decency and respect for the diverse beliefs and values of the American public."<sup>659</sup> Neither side was satisfied with this compromise, and the battle promised to continue.

### VIII. CONCLUSION

One would assume that the major concern raised by more than a hundred years of efforts to sanitize society would be artistic freedom, but that may well *not* be the central issue. Over these years, writers, film producers, comic book publishers, and recording companies repeatedly bargained away their artistic freedom in favor of increased sales and decreased threats of

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656. *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991).

657. *Bush Firmly Opposes Art Censorship*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 24, 1990, at A4.

658. *Bush Switches, Backs NEA Restrictions*, DURHAM MORNING HERALD, June 14, 1990, at A7.

659. Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. 101-512, Title III, § 103(b), 104 Stat. 196 (1990) (amending 20 U.S.C. § 954(d) (1988)).

intervention from outside sources, be they governmental or private. Indeed, the preceding pages tell the story of organized efforts to make leisure time expressive activities acceptable to groups that may be the most easily affronted within society.

Because of the continuing attacks in such areas, the central questions may concern what kind of society America should be and who should make the decisions as to what Americans read, see, and hear. As the nation grows more diverse, so too, do its interests. Christian Fundamentalists, their conservative political allies, and their fellow travelers find the artwork and the lifestyles of some Americans so distasteful that they believe the material is equally unacceptable to all Americans. They seek to purge the nation of these sexually explicit materials but ignore the fact that the works are not legally obscene and should be available to consenting adults. In addition, this coalition ignores the fact that past crusades reached literature, music, and art that modern society values and that these crusades typically target material that would accurately inform the nation about sex-related issues. On the pretext of saving the nation's youth from moral degradation, these groups forge ahead on all fronts.

The last time such a broadly based coalition was formed to save American society was in the 1930's when liberals, fearful of a growing fascist movement in the United States, joined with conservatives to enact legislation aimed at punishing individuals who held certain political beliefs. These laws were lightly used against the right-wingers of the time, but after World War II, they were dusted off and used against those whom the conservatives wanted punished from the beginning—the communists. Many good liberals who supported such an assault on native fascism in the 1930's found themselves mortally wounded when their left-wing affiliations came under attack in later years. Earlier liberals made an unthinking alliance with conservatives to achieve a short-term goal; such may be the case again today in the case of alliances to clean up reading, viewing, and listening habits.

In each era described above, many Americans could agree with the initial targets of the censors, but history reveals that censorship never remains stationary. Anthony Comstock started out after fringe literature that few valued but ended his career pursuing works by George Bernard Shaw. Movie censors, intent on keeping impressionable audiences from imitating a life of debauchery portrayed on the silver screen, gave the nation years of single beds and chaste kisses while depicting families with

multiple children. Comic book critics attacked horror and crime publications and froze that medium into a permanent adolescence. Although much of today's music has little to recommend it, earlier music censors reached out to what today's generation would consider classics by Cole Porter and Duke Ellington. Is it possible to trust contemporary censors to go just so far and no further? Or is it more likely that, given society's blessing, today's Anthony Comstocks will continue to censor until they reach literature, music, film, and artwork considered valuable by many Americans?

Recent Supreme Court decisions may have given a considerable boost to today's generation of Comstocks. Those who would censor work funded by the NEA were heartened by Chief Justice Rehnquist's words in *Rust v. Sullivan*,<sup>660</sup> a case concerning abortion counseling. In it, he wrote, "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest."<sup>661</sup> Such decisions are not content-based decisions but "merely" decisions by the government "to fund one activity to the exclusion of the other."<sup>662</sup> If the government can refuse to fund family-planning clinics that offer abortion counseling, is it far-fetched to imagine that the government could "selectively fund a program to encourage certain" artwork "it believes to be in the public interest"?<sup>663</sup>

Similarly, the Court's decision in *Barnes v. Glen Theatre, Inc.*,<sup>664</sup> a case involving nude dancing, could imperil efforts to maintain a safe harbor for radio programming considered by some to be indecent. Although he could build only a plurality to support his opinion, the Chief Justice approved of public indecency statutes that "reflect moral disapproval of people appearing in the nude among strangers in public places."<sup>665</sup> Because of this long-term "moral disapproval," Rehnquist found "a substantial government interest in protecting order and morality" behind the ban on nude dancing.<sup>666</sup> Although nude dancing might have some expressive elements, the Chief Justice considered the state's expression of "moral disapproval" of public nudity of greater weight.

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660. 111 S. Ct. 1759 (1991).

661. *Id.* at 1772.

662. *Id.*

663. *Id.*

664. 111 S. Ct. 2456 (1991) (plurality opinion).

665. *Id.* at 2461.

666. *Id.* at 2462.

The next time the Court may be asked to deal with public "moral disapproval" of some activity may come when the Supreme Court considers the FCC's regulations on indecency over the airwaves. Sensing an increasingly conservative Court, conservative backers of the ban are sure to push the Justices to display their own moral disapproval of such programming. If a broadcast ban on indecent programming were upheld, this might inspire conservative forces\* to support similar legislation to censor explicit music lyrics.

Many Americans do not realize the extent to which this campaign to sanitize society has allowed the government to intrude into their private lives. If they noted the clean-up campaign at all, they decided rather complacently that market forces were simply at work—that these materials deserve to rise and fall based on whether people will pay for them. What many Americans do not know is that groups can organize boycotts that exaggerate their power and that such pressure will keep materials objectionable to *those* groups from reaching the wider public, which might not be so easily offended. In the 1950's, for instance, the National Organization for Decent Literature successfully kept paperback copies of books by some of the nation's leading authors from the general public because that group objected to the artwork on the books' covers.<sup>667</sup> Today, Donald Wildmon's organization advocates boycotts of mall-based bookstores because they carry literature that he and his followers consider unacceptable.

Rather than seeing the potential reach of legislative, regulatory, and pressure-group tactics, Americans focus on single perceived evils—quieting 2 Live Crew or closing down exhibits containing the work of Mapplethorpe and Serrano. Most Americans fail to see the pervasiveness of this outside intrusion into family decisionmaking. Some groups fighting the FCC's efforts to ensure decency on the airwaves argue that parents should make moral choices for their children rather than the government. Those in favor of a variety of pending regulations, however, show little trust in parental supervision. With the ever-increasing number of single-parent households and homes in which both parents work, perhaps children do not get the supervision and guidance they once did. In addition, crime, drug abuse, and sexual promiscuity are very real problems in American life. Given such problems, society wants to select an apparent cause for the

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667. See *supra* notes 371-72 and accompanying text.

nation's difficulties and attack it. Indeed, Americans have long used scapegoats to avoid facing their real problems; the current attack on sexually explicit material makes perfect sense in light of that history. The problem remains that once the government is allowed to reach into private decisionmaking, it will be almost impossible to tell where the intrusion will stop. Many Americans remember reading books that depicted governmental takeover of childrearing in order to make sure that it was done properly—with "properly" being defined by government. Few expect official intervention in childrearing of the kind practiced in *Brave New World*<sup>668</sup> or *1984*<sup>669</sup> to occur in the United States, but then most Americans did not think that the 1930's antifascist legislation would be used against liberals, either.<sup>670</sup>

Many of the current crusaders have not considered the sexual changes that have taken place in the United States in recent history. Advertising is permeated with sexual inferences, television shows are full of sexual behavior that never would have been permitted twenty-five years ago, and movies are inundated with sex and violence on a scale never before seen. Much of this change is due to the sexual revolution that occurred during the 1960's and early 1970's. Indeed, many of the people in the current debate participated in that revolution, and now, as they reach middle age, they find repulsive the changes that stemmed from the protest movements and the counterculture. In trying to eliminate those changes from their collective memory, Americans fail to realize that it is impossible to turn the clock back to simpler times, even though generations of Americans have tried just that. Reformers consistently fail to see the parallels between their behavior and that of earlier censors. These reformers also fail to see that what shocked one generation becomes acceptable behavior to later generations—a consideration of the problems

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668. ALDOUS HUXLEY, *BRAVE NEW WORLD* (Perennial Library ed., Harper & Row 1969) (1932) (bearing and raising children conducted in an assembly line fashion).

669. GEORGE ORWELL, *1984* (Signet Classic ed., New American Library 1981) (1949) (depicting a future in which the sole purpose of marriage is to beget children to serve the government).

670. Government and pressure groups are already reaching into public school systems to cleanse libraries of objectionable books, rid student newspapers of stories that deal with undesirable subjects, and clean up the language that students use publicly. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding censorship of high school newspaper); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (allowing school district to limit the language used in a nominating speech); *Island Trees v. Pico*, 457 U.S. 853 (1982) (rejecting school board's removal of books from school library for political, religious, or social reasons).

encountered by *Gone With the Wind* and the music of Cole Porter proves that.<sup>671</sup>

In many respects, the battle over sexually explicit material has not moved far from where it was during Anthony Comstock's reign of terror. Although we do not have samples of the dirty lyrics that caught the great purity crusader's attention, we do know that they were included on his list of offensive materials that needed regulating in the late nineteenth century. Most likely, the dirty lyrics of Comstock's generation were just as obnoxious to Victorian America as those of 2 Live Crew are in the 1990's. Comstock also found that the dancing style of his generation was too suggestive, attacking the hootchy-kootchy as it was performed at the Columbian Exposition in Chicago in the 1890's. The hootchy-kootchy probably was that generation's lambada.

Perhaps even more important than the right of Americans to decide what they wish to read, see, and hear for themselves is the fact that this generation's purity crusade is diverting national attention away from more important areas. Indeed, many individuals who believe in a government based on popular participation have not yet realized that by devoting so much energy to what is essentially the private business of American citizens, their attention has been successfully diverted from participation in the political and economic planning processes of the nation. While Richard Nixon was playing upon the moral heartstrings of America, he was deeply involved in Watergate. While Ronald Reagan and his associates heartily endorsed the purity campaigns that consumed so much attention, they were also systematically closing the government to citizen involvement and were plunging ever deeper into the Iran-contra affair. In recent years, more and more access to information about government has been curtailed, governmental policies have been made in secret, and wars have been fought with little attention paid to public opinion before the fact. Rather than debating the wisdom of Grenada, Panama, or the Persian Gulf, many of the most articulate Americans who, under other circumstances would fight such exclusions from the body politic, argue over 2 Live Crew, Robert Mapplethorpe, Andres Serrano, and indecent programming on the airwaves. First Amendment liberals are so busy fighting the arts-related fires lighted by Jesse Helms, Donald Wildmon, and others like them, that they have little time or energy to combat the closing in of government.

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671. See *supra* notes 259-63, 516-17 and accompanying text.

Historians cannot predict whether society will ever progress in accepting sexually dissident ideas. The explicitness of today's entertainment certainly supplies ample cause for concern, and the overall condition of American society intensifies those apprehensions. Whether the curtailment of sexually explicit materials will solve societal problems is another matter. Perhaps a more important question is whether today's campaign will lead to efforts to reach items that certain members of society find valuable. Even more vital is the question of what is happening to the American political and economic structure while a great number of activists fight over the censorship of sexually explicit materials.