FORBIDDEN FILMS AND THE FIRST AMENDMENT

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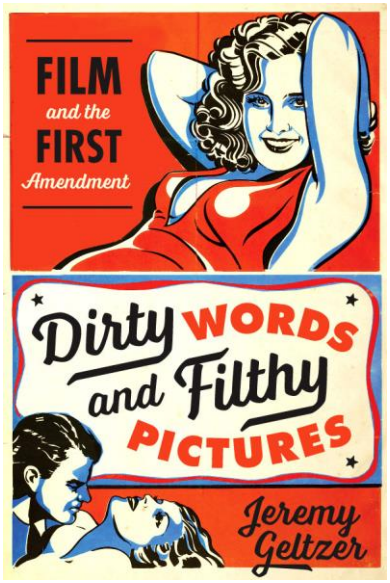
The story of film and the First Amendment charts a steady course toward creative freedom. Within one hundred years, motion pictures developed from a fairground attraction into an art form, and from a revolutionary technology into an industrially produced mass media. More accessible to large audiences and more powerful in delivering a message than any previous medium, the movies quickly transcended their origins as a penny-parlor amusement to become an important cultural influencer.



During the first decade of the twentieth century a web of local and regional film censors crisscrossed the country. These regulators intended to protect the morals of their communities, but the effects of their activism created a patchwork of inconsistent standards. Harry Aitken, President of the Mutual Film Corporation, was one of the first film producers to challenge the state's authority to censor and delay his pictures. But Aitken was less of a First Amendment warrior than a practical businessman. As he saw it, regional censorship was holding up his company's time-sensitive newsreels. He questioned the state's authority to regulate motion picture content. By 1915 Aitken had an answer, but it wasn't the result he had hoped for.

In *Mutual Film Corp. v. Industrial Commission of Ohio*[1] the Supreme Court unanimously held that motion pictures did not qualify for First Amendment protections.[2] The Court's reasoning hinged on

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1. 236 U.S. 230 (1915).
2. *Id.* at 244–45.

two points. First, "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit."[3] States had long regulated—and citizens had long accepted—standards governing stage productions, parades, fairs, and circuses. Second, the Court saw motion pictures as "vivid, useful, and entertaining, no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."[4] Perhaps it was because the silver screen transfixed audiences with a hypnotic influence unlike any other medium of expression that the Court found it well within the state's rights to regulate.

With a legal framework in place to support state censorship, leading film industry moguls rethought their approach. Motion picture producers and distributors turned to self-regulation in an effort to avert governmental interference. Studio executives created an organization, the Motion Pictures Producers and Distributors Association (M.P.P.D.A., later to become the Motion Picture Association of America, M.P.A.A.). The M.P.P.D.A. appointed a Washington insider, former Chairman of the G.O.P. and Postmaster General Will Hays, to lead a preventative anti-censoring effort. The initial solution proposed by the Hays office was self-censorship in the form of a list of "Don'ts" and "Be Carefuls." The "Don'ts" included profanity, nudity, traffic in drugs, white slavery, sex hygiene and venereal diseases, scenes of actual childbirth, or willful offense to any nation or race. The "Be Carefuls" revealed an even more granular listing of twenty-six sensitive subjects to avoid on screen. But the voluntarily verboten matters did not satisfy municipal censors. As the Jazz Age thrived, the Hays office had little effect.

The M.P.P.D.A.'s influence over movie content began to change when Hays hired Joseph Breen as an administrator in the west coast office in 1931. Taking the place of the "Don'ts" and "Be Carefuls," a production code was hammered out. Still, enforcement was lax until Breen took control of the newly formed Production Code Administration in June 1934. Under Breen, gangster dramas like *Scarface* were squelched and cunning sexual innuendoes from the likes of Mae West were silenced. Hollywood filmmakers were forced to convey naughty moments with elliptical references: a tight embrace, a fade to black, a train going through a tunnel.

On the one hand, the production code limited the subject matter and maturity of the movies. On the other hand, the code sought to preempt state censorship and avoid overlapping overseers of content. By joining the M.P.D.A.A., studios sacrificed autonomy to avoid

3. *Id.* at 244.
4. *Id.*

governmental regulators. In exchange, the M.P.D.A.A. lobbied in Washington to maintain the film industry's independence. This symbiotic relationship helped studios position their products as safe investments for financiers. Challenges to the status quo would not come from within the studio system: it was up to independent and international filmmakers to fight for film's First Amendment rights.

The showdown arrived in 1952. Roberto Rossellini's *The Miracle* played in Italy without incident. Once it arrived in the United States the censors sharpened their scissors. New York's board of regents banned the picture, but domestic distributor Joseph Burstyn championed the short film up to the Supreme Court. In a precedent-shattering verdict that was impossible to predict, the High Court reversed its long held position. Thirty-seven years after excluding film from the constitutional guarantees of free speech in *Mutual*, the *Miracle* decision brought movies under the aegis of the First Amendment.

The film community hailed *Joseph Burstyn, Inc. v. Wilson*[5] as the *Miracle* decision. In it, the Supreme Court concluded:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. . . . 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. . . .
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> . . . .
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> It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.[6]

Burstyn scratched out a small safe harbor for film freedom. The holding was narrow: motion pictures could not be banned for sacrilege. By the end of the decade, motion pictures would be accepted as legitimate speech and protected under the First Amendment. Across America, state censorship ordinances would experience a drawn-out death of a thousand cuts.

The next move after *The Miracle* occurred in New York State when the Board of Regents objected to a French film entitled *La ronde* (1950). The fact that the picture was celebrated with two Academy

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5. 343 U.S. 495 (1952).
6. *Id.* at 501.

Award nominations, for writing and art direction, did not persuade the state's moral authorities, which refused to license the film. The New York Court of Appeals affirmed the decision. In his concurrence, Judge Charles Desmond wrote, "[T]he whole theme, motif and subject matter of this film . . . is sexual immorality. The totality of it, and every part of it, is sexual immorality. The point is not that it depicts immoral conduct—it glorifies and romanticizes it . . . ."[7] The court reasoned that while *Burstyn* had ruled out sacrilege as a permissible censoring standard, it did not completely strike down the police power of the states to censor film. One year after the *Miracle* decision, in *Commercial Pictures Corp. v. Board of Regents*,[8] *La ronde* was banned in New York. The picture was rejected because it promoted the idea of immorality.

Meanwhile, Ohio was wrestling with its own film censorship issues. Two pictures proved to be particularly troublesome. Richard Wright's adaptation of his own novel *Native Son* was rejected because it "contribute[d] to racial misunderstanding."[9] The second film was Joseph Losey's 1951 film-noirish remake of Fritz Lang's classic *M*, originally released in 1931. This film centered on a child murderer and the mobs that seek to bring him to justice. The Ohio censors felt that the film posed a threat to decent society:

> 1. There is a conviction that the effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime.
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> 2. Presentation of actions and emotions of child killer emphasizing complete perversion without serving any valid educational purpose. Treatment of perversion creates sympathy rather than a constructive plan for dealing with perversion.[10]

Hence, the film was banned on a theory that the theme could present an incitement to criminal action.

Standing behind their film regulators, the Supreme Court of Ohio would not annul the censor's ruling. The court stated:

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7. *Commercial Pictures Corp. v. Bd. of Regents of Univ. of State of N.Y.*, 113 N.E.2d 502, 512 (N.Y. 1953) (Desmond, J., concurring).

8. 113 N.E.2d 502 (N.Y. 1953).

9. *R.K.O. Radio Pictures, Inc. v. Dep't of Educ.*, 122 N.E.2d 769, 770 (Ohio 1954).

10. *Superior Films, Inc. v. Dep't of Educ.*, 112 N.E.2d 311, 318 (Ohio 1953) (internal quotation marks omitted).

> From the evidence before this court we cannot say that the [Division of Film Censorship of the Ohio Department of Education] abused [its] discretion in refusing to approve the picture film in question. The division, representing the public interest, has made its decision and this court cannot find affirmatively that it was in error in so doing.[11]

A year after the censor's stronghold had been cracked by the *Miracle* decision the film regulators of New York and Ohio had already reasserted control over the morality of the movies.

The Supreme Court stepped in and consolidated the two cases in *Superior Films, Inc. v. Department of Education*.[12] Citing *Burstyn*, the High Court issued a four-word, unsigned, per curiam decision that merely stated, "The judgments are reversed."[13] Justice William Douglas added a concurring opinion joined by Justice Hugo Black that clarified their stance: prior restraint and censorship of motion pictures would be strictly scrutinized. The movies, once regarded as a mere amusement or attraction, had achieved a greater cultural status:

> Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. . . .
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> In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor.[14]

With the *Superior Films* decision in January 1954, the Supreme Court clarified its position on film censorship. By the end of the year, Ohio's Supreme Court invalidated the state's ordinance regulating film in *R.K.O. Radio Pictures, Inc. v. Department of Education of the State of Ohio, Division of Film Censorship*.[15] *R.K.O.* focused on two pictures produced by Howard Hughes. Both films teemed with bodacious scantily clad women. Famed stripper Lili St. Cyr starred in the Arabian Nights–themed fantasy *Son of Sinbad* (1955). Jane Russell, the decades-long object of Hughes's obsession, was flaunted in a 3-D Francophile confection entitled *The French Line* (1954). The Ohio censors objected to both, banning them in the Buckeye State. This time

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11. *Id.* at 321.
12. 346 U.S. 587 (1954).
13. *Id.* at 588 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).
14. *Id.* at 589 (Douglas, J., concurring).
15. 122 N.E.2d 769 (Ohio 1954).

the state's court arrived at a different conclusion and overrode the censors. Lamented one dissenting judge, "The majority takes the view that the federal Supreme Court has held the Ohio film censorship statutes unconstitutional."[16] The tides were turning.

The following year, the Kansas State Board of Review, among the Midwest's oldest and most active censoring departments, attempted to enjoin Otto Preminger's *The Moon is Blue* (1953). The film focused on two men, played by William Holden and David Niven, competing for the affections of a young girl (Maggie McNamara in an Academy Award–nominated performance). The Kansas board took one look at the silly, sexy, screwball comedy and disapproved of it due to "Sex theme throughout, too frank bedroom dialogue: many sexy words; both dialogue and action have sex as their theme."[17] The board's refusal to license Preminger's film cited indecency. When the Supreme Court of Kansas upheld the ban, Preminger pressured his distributor, United Artists, to take an unprecedented step and release the picture without the Seal of Approval.[18] Despite its unlicensed, unpermitted status, *The Moon is Blue* brought in respectable box office. According to *Variety*'s year-end domestic grosses the picture placed number fifteen, earning $3.5 million.[19] This demonstrated that even an unpermitted "indecent" film could find a mainstream audience. The censor's strictures were becoming less influential.

In Pennsylvania, Hallmark Productions submitted a movie that depicted—or glorified—the dangers of teenage marijuana usage. At first the picture was called *Wild Weed*. After certain mandated cuts the film was retitled *The Devil's Weed* and finally released as *She Shoulda Said 'No!'* The Keystone censors disapproved, citing the film as "indecent and immoral and, in the judgment of the Board, tend[ing] to debase and corrupt morals."[20] In a 1956 holding, the Supreme Court of Pennsylvania overturned the censors.[21]

Kroger Babb was an exploitation-film producer and presenter *par excellence*. He was a tireless creator of humbugs not seen since the likes of circus emcee P.T. Barnum. Babb was the mind behind one of the most profitable underground films of all time: *Mom and Dad*

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16. *Id.* at 772 (Weygandt, C.J., dissenting).

17. *Holmby Prods., Inc. v. Vaughn*, 282 P.2d 412, 413 (Kan. 1955).

18. *Film Comedy Booked Without Code Seal*, N.Y. TIMES, June 2, 1953, at 34.

19. *See* CHRIS FUJIWARA, THE WORLD AND ITS DOUBLE: THE LIFE AND WORK OF OTTO PREMINGER 146 (2008); *see also* JAMES L. BAUGHMAN, THE REPUBLIC OF MASS CULTURE: JOURNALISM, FILMMAKING, AND BROADCASTING IN AMERICA SINCE 1941, at 82 (3d ed. 2006).

20. *Hallmark Prods., Inc. v. Carroll*, 121 A.2d 584, 585 (Pa. 1956).

21. *Id.* at 589.

(1945). *Mom and Dad* depicted premarital sex; sex education, including the dangers of syphilis; and—shockingly—scenes of actual live birth (with the mother draped such that the infant's head breaches through a pile of towels).[22] Chicago's censors objected. In *Capitol Enterprises, Inc. v. City of Chicago*[23] (1958) they were overturned, this time by the United States Seventh Circuit Court of Appeals.

New York's Regents also tried to halt *Mom and Dad*. They too ruled the film was indecent. *Capitol Enterprises, Inc. v. Regents of the University of the State of New York*[24] went before the tribunal and met with the same result. The ban was lifted.[25]

By end of the 1950s, immorality (*La ronde*), incitement to crime (*M*), sexy words (*The Moon is Blue*), the tendency to debase morals (*She Shoulda Said 'No!'*), and indecency (*Mom and Dad*) were no longer valid reasons to ban a motion picture. But what about actual nudity? That question would be answered when New York and Chicago censors reviewed a nudist documentary entitled *Garden of Eden* (1954). There was nothing dirty about this film, nothing lewd or lascivious in the bucolic scenes of families cavorting in a country resort, sunbathing, playing volleyball, and socializing *sans* clothing. In *Excelsior Pictures Corp. v. Regents of the University of the State of New York*,[26] the court opined, "The film, which this court has viewed, is a fictionalized depiction of the activities of the members of a nudist group in a secluded private camp in Florida. There is nothing sexy or suggestive about it."[27] The United States District Court for the Northern District of Illinois came to a similar conclusion in *Excelsior Pictures Corp. v. City of Chicago*.[28]

Without immorality, indecency, incitement to crime or debasing of morals, suggestive language, or even explicit nudity as grounds to censor a motion picture, regional regulators and municipal censors had one remaining cause of action: obscenity.

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22. *See Capitol Enters., Inc. v. City of Chicago*, 260 F.2d 670, 670–72 (7th Cir. 1958).

23. 260 F.2d 670 (7th Cir. 1958).

24. 149 N.Y.S.2d 920 (N.Y. App. Div. 1956).

25. *Id.* Sixty years after its release, *Mom and Dad* was recognized by the Library of Congress and inducted into the National Film Registry. Press Release, Library of Congress, Librarian of Congress Adds 25 Films to National Film Registry (Dec. 20, 2005), http://www.loc.gov/today/pr/2005/05-262.html. James H. Billington, the Librarian of Congress, commented that *Mom and Dad* was "[t]he most successful sex-hygiene exploitation film of all time, a low budget but relentlessly promoted, socially significant film, which finished as the third highest grossing film during the 1940s." *Id.*

26. 144 N.E.2d 31 (N.Y. 1957).

27. *Id.* at 32.

28. 182 F.Supp. 400 (N.D. Ill. 1960).

But how would the courts measure film obscenity? The question was answered in *Jacobellis v. Ohio*,[29] which applied *Roth*, the Supreme Court's recently minted obscenity standard, to motion pictures. In *Roth v. United States* (1957),[30] the Supreme Court called for courts to consider "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[31] Writing for the Court, Justice William Brennan left his definition of "community" ambiguous. Seven years after *Roth*, *Jacobellis* was the first holding that explicitly applied this standard to motion pictures. In an opinion also penned by Brennan, it importantly articulated the community as a national standard as opposed to a local measure.

The facts of *Jacobellis* centered on the exhibition of a Louis Malle film entitled *Les amants* (*The Lovers*, 1958). Ohio censors found the artistic French picture obscene. Writing for the slimmest plurality, Brennan recognized the state's legitimate need to regulate materials deemed harmful to children. "But that interest does not justify a total suppression of such material."[32] The sensitive film was obviously not obscene, but the question was how to identify and tag materials that were obscene. It was in *Jacobellis* that Justice Potter Stewart's concurring opinion contained one of the most memorable and pithy lines in all of jurisprudence, regarding obscenity and hard-core pornography: "I know it when I see it."[33] He added, after watching *Les amants*, "[T]he motion picture involved in this case is not that."[34]

As the judicial obscenity standard evolved from *Roth* and *Jacobellis* to *Memoirs v. Massachusetts*[35] and then *Miller v. California*,[36] so would the analysis for film. Ultimately, the Court said, "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guarantees."[37]

But even *Miller* was not a stationary standard. The test was refined in subsequent decisions. In the following term, the Court further

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29. 378 U.S. 184 (1964).
30. 354 U.S. 476 (1957).
31. *Id.* at 489.
32. *Jacobellis*, 378 U.S. at 195.
33. *Id.* at 197 (Stewart, J., concurring).
34. *Id.* (Stewart, J., concurring).
35. 383 U.S. 413 (1966).
36. 413 U.S. 15 (1973).
37. *Id.* at 20 (alteration in original) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

clarified "community standards" in *Hamling v. United States*.[38] *Hamling* involved the mailing of a brochure deemed obscene; the case was heard by the Ninth Circuit and affirmed by the Supreme Court. Justice William Rehnquist opined that standards should be determined by the community where the jury was selected.[39] This took the test one step further away from Brennan's initial direction in *Roth*, amplified by *Jacobellis*, to judge obscenity by a national standard.

Three years after *Hamling* the Court revisited *Miller* in *Ward v. Illinois*.[40] In that case, Wesley Ward was charged with distributing two allegedly obscene publications: *Bizarre World* and *Illustrated Case Histories, a Study of Sado-Masochism*. One aspect of *Miller's* three-part rule was determined by "whether the [offending] work depicts or describes, in a patently offensive way, sexual conduct *specifically* defined by the applicable state law."[41] The publisher argued that since the S&M-themed content was not *specifically* prohibited by the obscenity ordinance, it should be permitted. Justice Byron Raymond White, writing for a slim 5–4 majority, held that an obscenity statute was not required to exhaustively enumerate the list of materials deemed offensive.[42] This would seem to run against the grain of *Miller*'s explicit holding.

White continued to mull over the statutory construction of obscenity ordinances in *Brockett v. Spokane Arcades, Inc.*[43] Here, the "prurient interest" requirement became the focus. A Washington State statute declared that any place where lewd films were publicly exhibited as a regular course of business could be deemed a moral nuisance. The statute defined "prurient" as "that which incites lasciviousness or lust."[44] Spokane Arcades sold and showed sexually explicit books and movies: inciting lasciviousness or lust was their core business. The smut purveyor challenged the statute on First Amendment grounds and claimed the ordinance was unconstitutionally overbroad. Spokane Arcades argued that by enumerating "lust" the law reached material that may arouse normal, healthy, natural sexual interests. The Court agreed. Severing the overbroad provision "lust" they sent the case back to the state for reconsideration.[45]

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38. 418 U.S. 87 (1974).
39. *Id*. at 105–06.
40. 431 U.S. 767 (1977).
41. *Miller*, 413 U.S. at 24 (emphasis added).
42. *Ward*, 431 U.S. at 773–76.
43. 472 U.S. 491 (1985).
44. *Id.* at 494 (quoting WASH. REV. CODE § 7.48A.010(8) (1983)).
45. *Brockett*, 472 U.S. 491; *see also Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980).

After tweaking the first two prongs of *Miller*, the Court turned to the third factor. The question of whether a work was devoid of serious literary, artistic, political, or scientific value had always been a slippery criterion. *Pope v. Illinois*[46] helped to clarify this step of the obscenity test. In that case, attendants at a Rockford, Illinois adult bookstore sold allegedly obscene magazines to undercover law enforcement officers. Defendants claimed that *value* should be judged according to community standards—in which they might not be obscene. The Court disagreed, once again in a decision penned by White, and clarified that value should be determined on an objective standard:

> There is no suggestion in our cases that the question of the value of an allegedly obscene work is to be determined by reference to community standards. . . .
> . . . The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.[47]

By 1987, the Court completed its tour of the *Miller* standard, refining the cogs in the mechanism by which obscenity would be judged. While the Court had recalibrated its test for obscenity, municipal regulators around the country were less open to change.

The first wave of film censors was composed of social activists rallying to rid their communities of filth. Anthony Comstock, founder of the New York Society for the Suppression of Vice and special agent for the Post Office Department, believed obscenity was the greatest threat to youth and society. Reacting in part to a boom in pornography that occurred during the Civil War, he lobbied Congress to enact what would become known as the Comstock Law in 1873. The Comstock Law made it illegal to send any obscene, lewd, and lascivious materials, including contraceptive devices and information on abortion, through the Postal Service.[48] Mayor George McClellan Jr. attempted to shutter New York's nickelodeons in 1908 to protect the health, safety, welfare, and morals of his city. State censors saw themselves as crusaders for their cause. Major M.L.C. Funkhouser was the moral

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46. 481 U.S. 497 (1987).

47. *Id.* at 500–01.

48. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, 42nd Cong., Sess. III, Ch. 258 (Mar. 3, 1873).

custodian for Chicago from 1907–18.[49] Dr. Ellis Oberholtzer was protector of Pennsylvania from 1915–21.[50] Susannah Warfield supervised Ohio's board of censors from 1922–54.[51] And Lloyd T. Binford defended Tennessee's values from 1928–55.[52]

The second wave of censors may have been slightly more reasonable. Christine Smith Gilliam's control of cinema in Atlanta could be unpredictably levelheaded during her two-decade term, 1945–64.[53] Mrs. Russell Wagers, Lollie Whitehead, and Margaret K. Gregory began their tenures as Virginia's regents in 1949 and remained until the board was defunded in 1966.[54] Helen Tingley served as Maryland's movie czar from 1943–48, her short term dominated by Howard Hughes's unyielding campaign to clear *The Outlaw*.[55] Damon Huskey, the high sheriff of Rutherford County, North Carolina from 1958–86, was the most militant of the second wave, banning all but G-rated films in his jurisdiction.[56]

Mary Avara joined the Maryland board of censors in 1960 and remained active until her post was decommissioned in 1981. Even as the office closed, Avara insisted that film censors played an important role in the cultural well-being of the community. Avara relished her reputation, appearing frequently on TV, on Johnny Carson, Merv Griffin, and Dick Cavett, but *People* reported that Avara's best performances were before the Maryland Senate. Defending her department's budget, "[s]he would fling her arms toward the heavens, point her fingers at the lawmakers like some avenging angel, and then unleash a tirade against pornography. 'Do you like filth?' she would shout. 'Do you like violence? Do you want your children to see this?'"[57] The final film to pass through Avara's office was the twelfth

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49. *See* Stephan Benzkofer, *When a Chicago Police Censor Ruled over Films with an Iron Fist*, CHI. TRIB. (Feb. 20, 2015, 4:18 PM), http://fw.to/4UkVqra.

50. *See E.P. Oberholtzer, Historian, 68, Dies*, N.Y. TIMES, Dec. 9, 1936, at 27.

51. *See She Sees 'Em Free*, OHIO ST. U. MONTHLY, Oct. 1922, at 16.

52. *See Memphis Censor to Retire*, N.Y. TIMES, Oct. 26, 1955, at 19.

53. *See* 3 HAROLD H. MARTIN, ATLANTA AND ENVIRONS: A CHRONICLE OF ITS PEOPLE AND EVENTS 411 (1987).

54. *See* Rose Bennett, *Censoring Job: Every Day Is Movie Day for These 3 Grandmothers*, FREE LANCE-STAR (Fredericksburg, Va.), Aug. 31, 1961, at 4.

55. *See* Stanley Frank, *Headaches of a Movie Censor*, SATURDAY EVENING POST, Sept. 27, 1947, at 20.

56. *Rutherford Sheriff Damon Huskey Prepares to Hang Up His Badge*, TIMES-NEWS (Hendersonville, N.C.), Nov. 22, 1986, at 16.

57. Karen Peterson, *Mary Avara, a Censor Who's Been Censored, Rates the New Freedom in Films Pg—'pure Garbage,'* PEOPLE (May 18, 1981), http://www.people.com/people/archive/article/0,,20079299,00.html; *see also* Jacques Kelly & Frederick N. Rasmussen, *Film Censor Mary Avara, 90 Dies*, BALT. SUN (Aug.

James Bond installment, *For Your Eyes Only* (1981); but by that time her board had long been a relic from an earlier era of film history.[58]

Although Avara's position as state censor was discontinued, her motivating question remained relevant: is censorship necessary?

In *State v. Jacobellis*,[59] Ohio's Supreme Court articulated why it felt censorship was important.

> History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fiber resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses.[60]

Contrasting with Ohio's Hobbesian view, New Jersey's Superior Court, Chancery Division, stated in *Lordi v. UA New Jersey Theatres, Inc.*[61] that "[w]hile the State has an interest in and may prevent the dissemination of material deemed harmful to children, that interest does not justify a total suppression of such material, for to do so would reduce the adult population to seeing and reading only what is fit for children."[62] Each position presents a valid argument.

Certain materials are more easily outlawed. Child pornography has an outlier status that is difficult if not impossible to dispute. In 1982, the Supreme Court unanimously ruled in *New York v. Ferber*[63] that the First Amendment did not forbid states from banning the sale of materials depicting children engaged in sexual activity. The motivation was protection of children. But *Ferber* left a loophole for would-be child pornographers: "if it were necessary for literary or artistic value,

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10, 2000), http://articles.baltimoresun.com/2000-08-10/news/0008100071_1_censor-board-maryland-state-board-film-censor; Frederick N. Rasmussen, *Mary Avara Scrubbed Those Dirty Movies*, BALT. SUN (Apr. 12, 2009), http://articles.baltimoresun.com/2009-04-12/news/0904100102_1_censor-board-mary-film-censor.

58. Gilbert Sandler, *When Censors Edited Reel Life*, BALT. SUN (Apr. 27, 1993), http://articles.baltimoresun.com/1993-04-27/news/1993117202_1_censor-board-maryland-state-board-watching-a-movie.

59. 179 N.E.2d 777 (Ohio 1962).

60. *Id.* at 779.

61. 259 A.2d 734 (N.J. Super. Ct. Ch. Div. 1969).

62. *Id.* at 737. *UA New Jersey Theatres* expands upon Justice Felix Frankfurter's statement that the effect of the ordinance under review "is to reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

63. 458 U.S. 747 (1982).

a person over the statutory age who perhaps looked younger could be utilized."[64]

Congress intended to close this loophole with the Child Pornography Prevention Act of 1996 (CPPA).[65] The act addressed content that simulated child pornography either by using adults who look like minors or by rendering with digital effects.[66] While *Ferber*'s main focus was protecting children, the CPPA addressed consumers of this prohibited material.

The Court shot the CPPA down in *Ashcroft v. Free Speech Coalition*.[67] The act was deemed overbroad since it could also be extended to restrict works of historic and artistic value. Wrote Justice Anthony Kennedy:

> Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. . . .
>
> Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, *Traffic*, which was nominated for Best Picture. The film portrays a teenager, identified as a 16–year–old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, *American Beauty* won the Academy Award for Best Picture. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man.[68]

The Court was reluctant to regulate content that played to perversions but avoided actual child endangerment.

Another area concerned with protecting innocent victims is animal cruelty. Should depictions of deliberate pain and inhumane treatment of animals be protected as free expression, or is there a valid interest in excluding such works from the protections of the First Amendment?

Hollywood has a long history of improper treatment of animals. Reports that as many as one hundred horses had died during the production of *Ben-Hur* (1925) were hushed by MGM; Warner Bros. covered up the destruction of horses in *The Charge of the Light Brigade*

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64. *Id.* at 763.
65. Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009–26 to 3009–31 (1996).
66. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002).
67. 535 U.S. 234 (2002).
68. *Id.* at 247–48 (citations omitted).

(1936); 20th Century Fox included a scene in *Jesse James* (1939) in which a horse fell to its death over a cliff during production.[69] Westerns, particularly low-budget, quickly produced B-movie sagebrush soaps, made use of trip wires, pitfalls, and chutes to make horses fall or coerced the animals into dangerous stunts.[70] In 1940, the American Humane Association (AHA) objected to these practices, but enforcement of ethical treatment of animals was haphazard until the 1980s.[71] The AHA's greater involvement was triggered in part by two incidents: the on-camera slaying of a water buffalo in *Apocalypse Now* (1979) and the accidental killing of a horse during a choreographed explosion in *Heaven's Gate* (1980).[72] After these instances of intentional and negligent cruelty, the AHA developed guidelines and was permitted access to monitor treatment of animals on unionized productions.[73]

These measures of self-enforcement only applied to unionized pictures. More recently, two independent productions prompted renewed inquiry into animal cruelty. One of these events was a viral video, the other, an underground fetish film.

In March 2008, a seventeen-second video was posted to YouTube depicting a U.S. marine in combat gear in Iraq. He stands on a desert precipice holding a white and brown puppy by the scruff of its neck. He then hurls the pup off the cliff. The video lit up the web with comments of disbelief and disgust. Three months later reports surfaced that the soldiers involved had been disciplined and discharged.[74] The Internet can harbor sinister sexual predators, but the destruction of a

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69. Susan McCarthy, *Hollywood's Long History of Animal Cruelty*, SALON (Apr. 2, 2012, 10:40 AM), http://www.salon.com/2012/04/02/hollywoods_long_history_of_animal_cruelty/; *8 Troubling Tales of Animal Abuse on Film Shoots*, THE WEEK (Nov. 19, 2012), http://theweek.com/articles/470272/8-troubling-tales-animal-abuse-film-shoots.

70. *See* Les Sellnow, *Hollywood Horses*, THE HORSE (Mar. 1, 2006), http://www.thehorse.com/articles/15979/hollywood-horses.

71. *See* Bernard Unti & Andrew N. Rowan, *A Social History of Postwar Animal Protection*, *in* THE STATE OF THE ANIMALS: 2001, at 21 (Deborah J. Salem & Andrew N. Rowan eds., 2001).

72. *See* Sam Adams et al., *Yes, Animals* Were *Harmed: 21 Films and TV Shows That Killed or Hurt Animals*, A.V. CLUB (Apr. 9, 2012, 12:00 AM), http://www.avclub.com/article/yes-animals-emwereem-harmed-21-films-and-tv-shows--72051.

73. *See* AM. HUMANE ASS'N, "NO ANIMALS WERE HARMED": GUIDELINES FOR THE SAFE USE OF ANIMALS IN FILMED MEDIA (2009), http://www.americanhumane.org/assets/pdfs/animals/pa-film-guidelines.pdf.

74. David Sarno, *A Marine Apparently Throws a Puppy Off a Cliff, and a Virtual Lynch Mob Forms*, L.A. TIMES (Mar. 16, 2008), http://fw.to/mZdYxYj; *see also* Mike Mount, *Puppy-Throwing Marine is Removed from Corps*, CNN (June 13, 2008, 10:20 AM EDT), http://www.cnn.com/2008/US/06/12/marine.puppy/.

puppy united a virtual lynch mob. The Marine Corps handled the puppy incident internally, dispensing penalties swiftly and with little publicity.

The second incident was even more outrageous and rose to the U.S. Supreme Court. The issue surrounded production and distribution of extreme fetish films known as "crush videos." Chief Justice John Roberts explained:

> [S]uch videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. Crush videos often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes," sometimes while "talking to the animals in a kind of dominatrix patter" over "[t]he cries and squeals of the animals, obviously in great pain." Apparently these depictions "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting."[75]

The Supreme Court granted certiorari to determine whether depictions of animal cruelty are categorically unprotected by the First Amendment in *United States v. Stevens*.[76]

Writing for an 8–1 majority (with Justice Samuel Alito dissenting), Roberts viewed the issue from a historical perspective. "[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. But we are unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment."[77] Prosecutors drew analogies between *Stevens* and *Ferber*: that animal cruelty, like child pornography, is so heinous a crime that depictions should be excluded from constitutional protections.[78]

This strategy failed. The Court saw *Ferber* as a special exception based on policy and "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[79] Defendant Robert J. Stevens was a video

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75. *United States v. Stevens*, 559 U.S. 460, 465–66 (2010) (citations omitted) (quoting H.R. REP. NO. 106–397, at 2–3 (1999)). For more information, see STOPCRUSH.ORG, http://www.stopcrush.org/ (last visited Jan. 29, 2016).

76. 556 U.S. 1181 (2009) (mem.).

77. *Stevens*, 559 U.S. at 469 (citations omitted) ("No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use" (quoting The Body of Liberties § 92 (Mass. Bay Colony 1641), *in* AMERICAN HISTORICAL DOCUMENTS 1000–1904, at 66, 79 (Charles W. Eliot ed. 1910))).

78. Brief for United States at 21, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769).

79. *Stevens*, 559 U.S. at 472.

producer who specialized in pit-bull-fighting films. He claimed to have not participated in the dogfights but merely videotaped the events: he would not have been guilty of the underlying crime of animal cruelty but only of producing depictions of the event.[80] Under the Court's reasoning, the filmmaker was able to prevail on his free speech claims.

Alito stood as the lone dissenter, arguing for the constitutionality of a law that established a criminal penalty for anyone who knowingly creates, sells, or possesses a depiction of animal cruelty if done for commercial gain.[81] Alito drew on the policies underlying *Ferber*, namely the protection of innocents, the elimination of a distribution network for such materials, and the fact that the harm caused by the criminal acts depicted greatly outweighed any value.[82] Hence, Alito reasoned, the regulation at issue in *Stevens*, if properly interpreted, could be applied to crush videos and dogfighting films without criminalizing hunting films or scientific studies.

After the Court declined to carve out a new exception for animal cruelty, the federal government responded by enacting the Animal Crush Video Prohibition Act of 2010.[83]

Hate speech has also posed a challenge for free speech advocates: should expression that is calculated to harm and aims to hurt be protected? In the United Kingdom, the Public Order Act of 1986 criminalized expression that was threatening or abusive and intended to stir up racial hatred.[84] France's hate-speech legislation derives from the Press Law of 1881, section 24.[85] Similarly, Australia, Britain, Canada, Denmark, France, Germany, India, the Netherlands, New Zealand, and South Africa are among the many nations that have prohibited hate speech.[86] In the United States, hate speech falls within constitutionally protected guarantees of the First Amendment.[87]

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80. Brief for the Respondent at 2–5, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769).

81. *Stevens*, 559 U.S. at 482 (Alito, J., dissenting) (discussing 18 U.S.C. § 48 (2006)).

82. *Id.* at 493–96 (Alito, J., dissenting).

83. Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111–294, 124 Stat. 3177 (codified as amended at 18 U.S.C. § 48 (2012)); Bill Mears, *Obama Signs Law Banning 'Crush Videos' Depicting Animal Cruelty*, CNN (Dec. 10, 2010, 4:48 PM EST), http://www.cnn.com/2010/POLITICS/12/10/animal.cruelty/.

84. Public Order Act, 1986, c. 64, § 18(1).

85. Loi du 29 juillet 1881 sur la liberte de la presse [Law 29 July 1881 on the freedom of press].

86. For Australia, see *Racial Discrimination Act 1975*; for Great Britain, see Public Order Act, 1986, c. 64; for Canada, see Criminal Code, R.S.C., 1985, c. C-46, §§ 318, 319, 320; for Denmark, see Penal Code (Strfl) § 266 b; French law contains numerous proscriptions against hate speech, Holocaust denial, and racism (e.g.,

While hate speech is protected, certain films have drawn fire for perceived messages of prejudice. When Martin Scorsese's *The Last Temptation of Christ* (1988) was released, protesters surrounded playhouses—over five hundred people assembled outside New York's Ziegfeld Theater.[88] In a throwback to earlier decades, Florida's Escambia County banned the film, but District Court Judge Roger Vinson enjoined the ban, "saying that it was unconstitutional and that 'red flags should run up' whenever government tried to violate the rights of citizens."[89]

Jewish groups expressed anger over Mel Gibson's *The Passion of the Christ* (2004), particularly the characterization of Jewish high priest Caiaphas. Much of this reaction was based on the director's outspoken anti-Semitic personal views. Other than making headlines during a news cycle, little action resulted.[90]

Christians objected to *The Last Temptation* and Jews criticized *The Passion*, but it was the international community of Islam that had the most incendiary reaction when they objected to a featurette entitled *Innocence of Muslims* (2012).

After a September 11, 2012 attack on the Libyan consulate, the U.S. State Department inaccurately cited an amateur video as a possible cause.[91] *Innocence of Muslims* was a crudely made fourteen-minute-long video posted to YouTube in July 2012. With the most amateur production values, an absurd script, and wince-worthy acting, the video was ignored until it became a convenient scapegoat. It

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defamation of certain groups is criminalized, CODE PENAL [C. PEN] art. R624-3); in Germany, *Volksverhetzung* (officially translated as "Incitement to Hatred") is prohibited, STRAFGESETZBUCHES [StGB] [CRIMINAL CODE] § 130; India's constitution imposes reasonable restrictions on the freedom of speech in the interest of the security of the state, public order, decency, or morality, INDIA CONST. art. 19, cl. 2; *Wetboek van Strafrecht* (the Dutch Criminal Code) prohibits both insulting a group and inciting hatred, discrimination, or violence, Wetboek van Strafrecht [Sv] §§ 137c–137h; New Zealand prohibits hate speech under § 61 of the Human Rights Act of 1993; and South Africa's constitution specifically excludes "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm," S. AFR. CONST., 1996, s. 16(2)(c).

87. *See* Michael W. McConnell, *You Can't Say That*, N.Y. TIMES SUNDAY BOOK REV. (June 22, 2012) (reviewing JEREMY WALDRON, THE HARM IN HATE SPEECH (2012)), http://nyti.ms/Lm5D7j.

88. Aljean Harmetz, *'The Last Temptation of Christ' Opens to Protests but Good Sales*, N.Y. TIMES (Aug. 13, 1988), http://nyti.ms/1OV70aC.

89. *Judge Overturns Ban on Film*, N.Y. TIMES (Sept. 11, 1988), http://nyti.ms/19ons3e.

90. Laurie Goodstein, *Months Before Debut, Movie on Death of Jesus Causes Stir*, N.Y. TIMES (Aug. 2, 2003), http://nyti.ms/1OV7sWh.

91. *See US Envoy Dies in Benghazi Consulate Attack*, AL JAZEERA (Sept. 12, 2012, 18:20 GMT), http://aje.me/QbxcAs.

is likely that the featurette was *intended* as hate speech: Mohammad is presented as lascivious, aggressively warlike, and buffoonishly comic.[92] The filmmaker, Coptic Christian Mark Basseley Youssef (also known as Nakoula Basseley Nakoula, Sam Basile, and Ebrahem Fawzy Youssef), posed as an Israeli-American; in interviews he claimed Jewish donors had funded the video. This may have been a strategic effort to pin the film's anti-Islam sentiments on Jews, playing two Copt enemies—Jews and Muslims—off against each other in a region all too easy to ignite. The fact that the film was produced in Los Angeles and initially distributed on YouTube, a site run by an American company, served to reinforce the view of a direct attack on Islam. Clips of *Innocence of Muslims* were rebroadcast on the Egyptian Al Nas television station and quickly became a magnet for disinformation.[93]

Innocence of Muslims would become a historical footnote after the swirl of controversy and an extended news cycle. But the short video contributed an interesting sideshow to film legal history. After appearing in *Innocence*, Cindy Lee Garcia received death threats. She brought suit against Google, parent company of YouTube, to cease distribution of the video.[94] In *Garcia v. Google, Inc.*,[95] the Ninth Circuit initially ruled in her favor with a novel theory that the actress had a protectable interest in her performance. Chief Judge Alex Kozinski viewed the balance of equities in Garcia's favor: the producer misrepresented the content of the film, no employment contract had been signed, and the threats were credible. *Innocence* was banned; YouTube and Google were ordered to cease distributing the video. Youssef's hate-instilled speech was curtailed under an innovative theory of copyright infringement. Google pushed for a rehearing, and the Ninth Circuit reconvened *en banc*. This time the eleven-judge panel announced on May 18, 2015, that Google had the right to post the *Innocence* video.[96] The takedown order had been in error. Wrote Judge

92. *See* Michael Joseph Gross, *Disaster Movie*, VANITY FAIR (Dec. 27, 2012, 12:00 AM), http://www.vanityfair.com/culture/2012/12/making-of-innocence-of-muslims ("Exceptionally amateurish, with disjointed dialogue, jumpy editing, and performances that would have looked melodramatic even in a silent movie, the clip is clearly designed to offend Muslims, portraying Mohammed as a bloodthirsty murderer and Lothario and pedophile with omnidirectional sexual appetites.").

93. *See* Steve Inskeep, *Free Speech in the Muslim World? Ask the Egyptian TV Station That First Aired the Anti-Islam Movie*, THE ATLANTIC (Sept. 19, 2012), http://www.theatlantic.com/international/archive/2012/09/free-speech-in-the-muslim-world-ask-the-egyptian-tv-station-that-first-aired-the-anti-islam-movie/262567/.

94. Claudia Rosenbaum, Innocence of Muslims *Actress Cindy Lee Garcia Sues Filmmaker, YouTube, Google*, E! ONLINE (Sept. 19, 2012, 7:10 PM), http://eonli.ne/18vCLly.

95. 766 F.3d 929 (9th Cir. 2014).

96. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015).

Margaret McKeown, "In this case, a heartfelt plea for personal protection is juxtaposed with the limits of copyright law and fundamental principles of free speech. The appeal teaches a simple lesson—a weak copyright claim cannot justify censorship in the guise of authorship."[97]

Innocence of Muslims was a special situation, but it also raises the issue of whether there *should* be state regulations on hate speech in the United States. Regulations on hate speech would bring America into alignment with other democracies that do ban such speech.

Despite the ugly effects of hate speech, extreme violence, and animal cruelty, it would be inconsistent with the ideals of the First Amendment to ban such communications. The dogfight promoter may be prosecuted but not the dogfight filmmaker. The price of broad First Amendment rights is tolerance of ignorant, offensive, and aggressive remarks.

97. *Id.* at 736.