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## Hollywood Loving

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# HOLLYWOOD LOVING

Kevin Noble Maillard\*

## INTRODUCTION

It is no coincidence that *Guess Who's Coming to Dinner*<sup>1</sup> was released the same year that *Loving v. Virginia*<sup>2</sup> was decided: 1967. It was the first time in American history that interracial marriage was collectively recognized as a legitimate, intimate choice between two adults. This public exposition of racial intermixture exposed a collective memory of racial heterogeneity previously treated in law and popular culture as suspect. Collectively, there were few possibilities, expressions, or affirmative realizations of interracial intimate culture before 1967. Some cases, like *McLaughlin v. Florida*<sup>3</sup> and *Perez v. Sharp*,<sup>4</sup> successfully overturned discriminatory laws targeting interracial couples, but the vast majority, like *Naim v. Naim*,<sup>5</sup> upheld them.

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\* Professor of Law, Syracuse University. Thank you to the student editors of the *Fordham Law Review* and to the Fordham Professors Robin Lenhardt and Tanya Kateri Hernández for organizing the Symposium entitled *Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality* held at Fordham University School of Law on November 2–3, 2017. Additional thanks to my excellent Symposium panel for the discussion: Solangel Maldonado, Nancy Buirski, Leora Eisenstadt, and Regina Austin. And thank you to Rose Cuison Villazor, Darren Rosenblum, and Bridget Crawford for their insight, encouragement, and expertise. For an overview of the Symposium, see R.A. Lenhardt, Tanya K. Hernández & Kimani Paul-Emile, *Foreword: Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality*, 86 *FORDHAM L. REV.* 2625 (2018).

1. *GUESS WHO'S COMING TO DINNER* (Columbia Pictures 1967) (starring Sidney Poitier, Spencer Tracy, Katharine Hepburn, and Katharine Houghton). The Internet Movie Database describes the film: "A couple's attitudes are challenged when their daughter introduces them to her African American fiancé." *Guess Who's Coming to Dinner*, IMDB, <http://www.imdb.com/title/tt0061735> [<https://perma.cc/LY85-2XK5>] (last visited Apr. 13, 2018).

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

3. 379 U.S. 184 (1964).

4. 198 P.2d 17 (Cal. 1948).

5. 87 S.E.2d 749 (Va. 1955); see also *Jackson v. State*, 70 So. 2d 114 (Ala. Ct. App. 1954); *Dodson v. State*, 31 S.W. 977 (Ark. 1895); *Jackson v. City & County of Denver*, 124 P.2d 240 (Colo. 1942); *Scott v. State*, 39 Ga. 321 (1869); *State v. Jackson*, 80 Mo. 175 (1883); *State v. Kennedy*, 76 N.C. 251 (1877); *Frasher v. State*, 3 Tex. Ct. App. 263 (1877).

Films, such as *Pinky*,<sup>6</sup> *Sayonara*,<sup>7</sup> and *West Side Story*,<sup>8</sup> showed the interpersonal struggles and community resistance toward cross-racial relationships. Yet these initial explorations rarely saw a victorious end. On a national level, expressions of interracial intimate culture simply did not exist.<sup>9</sup>

Fifty years later, visibility and legitimacy of racial amalgamation continues to be an issue. The pre-1967 legal regime not only prohibited interracial marriage but also forged an enduring image of interracial relationships as criminal, marginalized, and counterfeit. These laws treated race crossing as an affront to public decency and a breach of the social order.<sup>10</sup> In the same way that sodomy laws were “targeted at more than conduct,”<sup>11</sup> antimiscegenation laws deeply and negatively affected the way Americans continue to view race and racialization.

Legality and social acceptance of interracial marriage are different things. As Rachel Moran eloquently stated in her landmark book *Interracial Intimacy*, “*Loving* aspired to change the law, but the human heart lay beyond its reach.”<sup>12</sup> From this view, the state can only go so far. It cannot force people to marry or date someone of a different race,<sup>13</sup> and it certainly cannot punish private, discriminatory thoughts.

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6. PINKY (Twentieth Century Fox 1949). A contemporaneous review of *Pinky* in the *New York Times* describes the film: “[A] young nurse—a girl with white skin but Negro blood— . . . returns to her home in Mississippi after being raised and schooled in the North.” Bosley Crowther, ‘*Pinky*,’ *Zanuck’s Film Study of Anti-Negro Bias in Deep South, Shown at Rivoli ‘Strange Bargain’ and ‘Peddler and the Lady’ Other Movies Having Local Premieres*, N.Y. TIMES (Sept. 30, 1949), <http://www.nytimes.com/movie/review?res=9B00E3D9133FE33BBC4850DFBF668382659EDE> [https://perma.cc/P3GV-UPAN]. The review further notes that the film “skirts the edge of a fragile romance between the girl and a young white doctor from the North.” *Id.*

7. SAYONARA (Pennebaker Productions 1957). The film stars Marlon Brando as a U.S. Air Force officer stationed in Japan who deeply opposes interracial marriage until he falls in love with a local performer. *Sayonara*, IMDB, <http://www.imdb.com/title/tt0050933/> [https://perma.cc/6MYL-CWWC] (last visited Apr. 13, 2018).

8. WEST SIDE STORY (Mirisch Corporation 1961). Based on Shakespeare’s *Romeo and Juliet*, this modern adaptation features a forbidden romance between youths from warring Manhattan gangs. *West Side Story*, IMDB, <http://www.imdb.com/title/tt0055614/> [https://perma.cc/S2PW-GVG6] (last visited Apr. 13, 2018).

9. Kevin Noble Maillard, *The Multiracial Epiphany of Loving*, 76 FORDHAM L. REV. 2709, 2711 (2008) (“While *Loving* certainly had a monumental impact on the fundamental right to marriage, crediting *Loving* as the defining legal moment for mixed race in America undergirds the idea that racial hybridity and relationships did not exist before 1967.”).

10. See RACHEL MORAN, *INTERRACIAL INTIMACY* 5 (2001).

11. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring).

12. MORAN, *supra* note 10, at 99.

13. Writer Charles W. Chesnut posited this state-enforced scenario in a series of fantastical essays for *The Atlantic*. Under this hypothetical regime, every American would be required to reproduce with a person of another race until the majority of the populace consisted of multiracials. See generally CHARLES W. CHESNUTT, *THE FUTURE AMERICAN: A STREAM OF DARK BLOOD IN THE VEINS OF SOUTHERN WHITES* (1900), reprinted in CHARLES W. CHESNUTT: *ESSAYS AND SPEECHES* 126 (Joseph R. McElrath, Jr., Robert C. Leitz III & Jesse S. Crisler eds., 1999). After three generations, most Americans would have African, European, and indigenous ancestry, which would reduce racial animosity and prejudice due to the commonality of ancestry. See *id.*

Law reform is a crucial—but not the only—component of social change. Popular culture and the sources that we view as entertainment have great influence on our personal preferences and, likely, our political ones. The wide-ranging influence of entertainment in our personal lives goes far beyond commercial interests and consumptive influence. It defines and authenticates human experience, establishes a shared social reality, and disseminates community values. On a mass scale, film and television present collective visuals for viewers to internalize, absorb, and learn.

Entertainment picks up the mantle of influence that law cannot.<sup>14</sup> In a collection of essays entitled *How Television Shapes Our World View*, Deborah Macey, Kathleen Ryan, and Noah Springer describe television as “not simply entertainment, but [a] powerful socializing agent[] that show[s] the world as we might never see it in real life.”<sup>15</sup> Entertainment creates a narrative bridge between the rule of law and citizen compliance. It is a medium of persuasion that offers staged hypotheticals coupled with visual resolutions to demonstrate the application of legal principles in private life. Such efforts are certainly not limited to overtly legal programming but are

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14. Lawrence M. Friedman, *Through a Glass Darkly: Law, Culture, and the Media*, 62 DEPAUL L. REV. 571, 574 (2013) (“The movies could be dangerous; they had the power to corrupt the morals of ordinary people—and children—who sat in darkened theaters, mesmerized by the vivid images on the screens.”); Jon M. Garon, *Hidden Hands That Shaped the Marketplace of Ideas: Television’s Early Transformation from Medium to Genre*, 19 U. DENV. SPORTS & ENT. L.J. 29, 41 (2016) (“At the time, entertainment such as theatre, circuses, and broadcasts were highly regulated and heavily censored amid government concerns of their insidious, corrupting influences rather than protected as exemplars of civic discourse.”); Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1404 (2008) (summarizing Professor Robert Ellickson’s “keen observation that major media, arguably more than court cases, influence which norms the public ultimately adopts”); Amnon Reichman, *The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse*, 17 S. CAL. INTERDISC. L.J. 457, 461–62 (2008) (“[I]t is understood that law is greater than the sum of the rules, orders, and decrees generated and issued therein, and therefore simply reading the rules (or the cases that announced them) cannot tell us enough about the law. The formation of notions such as legitimacy, fairness, moral rights, and the like—which arguably reside outside black letter law—plays an important role, because these notions breathe contextual life into the law; they are the central ingredients in law’s framework narratives.”).

15. Deborah A. Macey et al., *Introduction to HOW TELEVISION SHAPES OUR WORLDVIEW: MEDIA REPRESENTATIONS OF SOCIAL TRENDS AND CHANGE* 1, 2 (Deborah A. Macey, Kathleen M. Ryan & Noah J. Springer eds., 2014).

instead transmitted implicitly in all genres,<sup>16</sup> including comedy,<sup>17</sup> romance,<sup>18</sup> science fiction,<sup>19</sup> action,<sup>20</sup> drama,<sup>21</sup> and even horror.<sup>22</sup>

Overall, I am interested in examining the indirect influence of law in the racialization of the “traditional” family.<sup>23</sup> In this Essay, I highlight how nongovernmental entities establish political, moral, and sexual standards through visual media, which powerfully underscores and expresses human behavior. Through the Motion Picture Production Code (the “Hays Code”) and the Code of Practices for Television Broadcasters (the “TV Code”), Americans viewed entertainment as a pre-mediated, engineered world that existed outside of claims of censorship and propaganda.<sup>24</sup> This Essay

16. See, e.g., Carol Sanger, *Integrating Humanities into Family Law and the Problems with Truths Universally Acknowledged*, 3 CALIF. L. REV. CIR. 34, 36 (2012) (arguing that integrating humanities and works of fiction into family law classes “provides a common text that enables students to simultaneously focus upon and distance themselves from the [legal] subject at hand”).

17. See, e.g., GUESS WHO (Regency Enterprises 2005); HITCH (Overbrook Entertainment 2005). See generally Angela Onwuachi-Willig, *There’s Just One Hitch, Will Smith: Examining Title VII, Race, and Casting Discrimination on the Fortieth Anniversary of Loving v. Virginia*, 2007 WIS. L. REV. 319.

18. See, e.g., SOMETHING NEW (Gramercy Pictures 2006); THE INCREDIBLE JESSICA JAMES (Beachside Films 2017).

19. *Star Trek: Plato’s Stepchildren* (NBC television broadcast Nov. 22, 1968); STAR WARS: THE FORCE AWAKENS (Lucasfilm 2015); see also Bill Higgins, *Hollywood Flashback: ‘Star Trek’ Showed TV’s First Interracial Kiss in 1968*, HOLLYWOOD REP. (May 26, 2016, 12:00 PM), <https://www.hollywoodreporter.com/news/tvs-first-interracial-kiss-star-896843> [<https://perma.cc/B7QZ-ZQZZ>].

20. See, e.g., MISSION IMPOSSIBLE (Paramount Pictures 1996); RUSH HOUR (New Line Cinemas 1998); see also Michael E. Ross, *Black and White Buddies Movies: How Sincere Is the Harmony*, N.Y. TIMES (June 14, 1987), <http://www.nytimes.com/1987/06/14/movies/film-black-and-white-buddies-how-sincere-is-the-harmony.html> [<https://perma.cc/9BSZ-DPTE>] (discussing the role that the film *Lethal Weapon* played in the evolution of “the buddy film as a biracial phenomenon, the buddy system revisited”); Jonah Weiner, *Buddies Cracking Jokes and Heads*, N.Y. TIMES (Feb. 19, 2010), <http://www.nytimes.com/2010/02/21/movies/21cop.html> [<https://perma.cc/SDF6-FKNV>] (discussing interracial “buddy cop” movies).

21. See, e.g., Marina Fang, *Here’s the History Behind ‘Loving,’ A New Film About a Major Civil Rights Victory*, HUFFINGTON POST (Nov. 4, 2016, 4:11 AM), [https://www.huffingtonpost.com/entry/loving-v-virginia-movie\\_us\\_581aee7ee4b0c43e6c1e2dfe](https://www.huffingtonpost.com/entry/loving-v-virginia-movie_us_581aee7ee4b0c43e6c1e2dfe) [<https://perma.cc/RZ4R-J7WH>]; Lars Larson, *Whitney Houston’s The Bodyguard Role Opened Up Interracial Dating*, CITY PAGES (Feb. 20, 2012), <http://www.citypages.com/music/whitney-houstons-the-bodyguard-role-opened-up-interracial-dating-6647604> [<https://perma.cc/2ZZB-NG5B>].

22. See, e.g., Lanre Bakare, *Get Out: The Film That Dares to Reveal the Horror of Liberal Racism in America*, GUARDIAN (Feb. 28, 2017, 8:00 AM), <https://www.theguardian.com/film/2017/feb/28/get-out-box-office-jordan-peelee> [<https://perma.cc/MTB4-LTDE>]; LAKEVIEW TERRACE (Screen Gems 2008).

23. This Essay is part of a larger project that examines the decentralization of the regulation of interracial intimacy and the collusive role of the state and the entertainment industry in perpetuating racial and sexual norms.

24. Jane M. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185, 186 (1973) (discussing the goal of the motion picture rating system as a means to “forestall[] censorship by the federal and local governments”); Jeremy Geltzer, *Forbidden Films and the First Amendment*, 2016 WIS. L. REV. FORWARD 1, 3 (“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.”); Alexandra Gil, *Great*

critically examines the role of film and television as persuasive and integral legal actors and it considers how these sectors operate to maintain, and sometimes challenge, racial order.

### I. INDUSTRY CENSORSHIP CODES

Antimiscegenation law was so pervasive and systematic that its prohibitions reached art and entertainment. Even within a mediated forum largely based on fiction and fantasy, the prohibitive laws of southern and border states<sup>25</sup> set a national standard for racial representation in film and television. These industries adopted an internal set of moral and ethical standards that governed production and broadcasting. These standards were enforced directives, much like an administrative law for Hollywood. From 1930 until 1968, the Hays Code<sup>26</sup> enforced cinematic propriety in film, and from 1951 until 1983,<sup>27</sup> the TV Code regulated standards of decency for television.<sup>28</sup>

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*Expectations: Content Regulation in Film, Radio, and Television*, 6 U. DENV. SPORTS & ENT. L.J. 31, 32 (2009) (“The Production Code Administration (PCA) was created in 1934 to enforce the Motion Picture Production Code of 1930 and avoid governmental control over the film industry. The PCA’s main function was to oversee the content of motion pictures, in response to a growing public outcry over the risqué nature of film . . . .”); Kenneth A. Paulson, *Regulation Through Intimidation: Congressional Hearings and Political Pressure on America*, 7 VAND. J. ENT. L. & PRAC. 61, 64 (2004) (“In response to the growing pressure, Hays and the MPPDA announced the adoption in 1930 of the Production Code, a self-regulating device designed to fend off government action.”); Thomas B. Leary & J. Roger Noall, Note, *Entertainment: Public Pressures and the Law: Official and Unofficial Control of the Content and Distribution of Motion Pictures and Magazines*, 71 HARV. L. REV. 326, 327 (1957) (“This self-regulation [by the Production Code] halted the drive toward official censorship so effectively that no state censorship laws were passed after 1922 and talk of federal censorship almost ceased.”).

25. See *Legal Map*, LOVINGDAY, <http://www.lovinday.org/legal-map> [<https://perma.cc/T8MG-VURZ>] (last visited Apr. 13, 2018).

26. The Hays Code governed the content of films produced between 1930 and 1968. THOMAS DOHERTY, *PRE-CODE HOLLYWOOD: SEX, IMMORALITY AND INSURRECTION IN AMERICAN CINEMA, 1930–1934*, at 1 (1999) [hereinafter DOHERTY, *PRE-CODE HOLLYWOOD*]. From 1930 to 1934, the Code had been adopted by the industry but screen writers and directors largely ignored its dictates and continued to create films with content that violated its precepts. *Id.* at 2. This changed in 1934, when the Production Code Administration was created and Joseph Breen was hired to oversee enforcement, which transformed the industry. See THOMAS DOHERTY, *HOLLYWOOD’S CENSOR: JOSEPH BREEN & THE PRODUCTION CODE ADMINISTRATION* 7–8 (2007). Breen gained a notorious reputation as a rigid and unyielding censor. *Variety* once said of Breen, “More than any single individual, he shaped the moral stature of the American motion picture.” *Id.* at 8 (quoting Thomas M. Pryor, *Joe Breen, Sire of Code Ratings, Dies; Long Ill*, *VARIETY*, Dec. 8, 1965, at 2).

27. The Hays Code was eventually replaced by the film rating system. Gil, *supra* note 24, at 34 (“In 1968, the MPPDA had become the Motion Picture Association of America (MPAA) and its new head, Jack Valenti, replaced the Production Code with the age-based rating system that is still in place today.”).

28. HARVEY C. JASSEM, U.S. DEP’T OF EDUC., ED 235 524, AN EXAMINATION OF SELF REGULATION OF BROADCASTING (1983), <https://files.eric.ed.gov/fulltext/ED235524.pdf> [<https://perma.cc/MX22-GGCV>].

*A. Film*

The film industry's adoption of the Hays Code imposed a consensus of moral opinion that appealed to Christian principles of human behavior and thought. Written by a Jesuit priest and a Catholic activist,<sup>29</sup> adopted by a Presbyterian elder,<sup>30</sup> and enforced by a Catholic journalist,<sup>31</sup> the Hays Code disseminated religious and patriotic values to its viewing public. In a written manifesto divided into two sections—"Principles Underlying the Code" and "Particular Applications"—the Hays Code lauded "the importance of entertainment and its value in rebuilding the bodies and souls of human beings."<sup>32</sup> It stated three general principles: (1) to discourage "crime, wrongdoing, evil, or sin"; (2) to promote "[c]orrect standards of life"; and (3) to support obedience to "[l]aw, natural or human."<sup>33</sup>

The Hays Code meticulously articulated forbidden subjects: crimes against the law, vulgarity, obscenity, indecent dancing, profanity, nudity, grotesque cruelty and bodily harm, and explicit sexuality.<sup>34</sup> It upheld respect for religion, patriotism, marriage, and good taste.<sup>35</sup> The code also rejected "low forms of sex relationship[s]"<sup>36</sup> because such portrayals would suggest acceptance and legitimacy; adultery, rape, perversion, seduction, and sexual health were not acceptable subjects for motion pictures.<sup>37</sup>

But the most curious aspect of the code was its regulation of racial intermixture. Even though the Hays Code generally prohibited subjects offensive to racial groups,<sup>38</sup> it also strictly prohibited subjects of miscegenation.<sup>39</sup> And even though interracial marriage was legally permitted in the majority of states during that period, onscreen, it was a forbidden offense. The effect was wide ranging: by omitting this human experience,

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29. The Code was authored by Father Daniel Lord and Martin Quigley. DOHERTY, PRE-CODE HOLLYWOOD, *supra* note 26, at 6.

30. Will Hays, the code's informal namesake and the Postmaster General under President Warren Harding, was hired by a group of studio executives in 1922 to manage offscreen scandals and onscreen controversies. *Id.* He became the public face of defending Hollywood antics as the motion picture industry grew. *Id.* His most significant accomplishment in this role was spearheading the adoption of the code. *Id.*

31. *See id.* at 9.

32. *Id.* at 347.

33. *Id.* at 361.

34. *Id.* at 361–64; Gil, *supra* note 24, at 45 ("The original eleven 'Don'ts' were: pointed profanity, licentious or suggestive nudity, illegal traffic of drugs, any inference of sex perversion, white slavery, miscegenation, sex hygiene and venereal diseases, actual childbirth, children's sex organs, ridicule of the clergy, and willful offense to any nation, race or creed.").

35. DOHERTY, PRE-CODE HOLLYWOOD, *supra* note 26, at 353, 356, 364.

36. *Id.* at 362.

37. *Id.* at 362–63.

38. Ticien Marie Sassoubre, *The Impulsive Subject and the Realist Lens: Law and Consumer Culture in Fritz Lang's Fury*, 20 S. CAL. INTERDISC. L.J. 325, 347–48 (2011) ("Though the Hays Code, as it came to be called, made no explicit mention of race (except to prohibit the filmic representation of 'miscegenation'), the 'willful offense to any nation, race or creed' had been prohibited by industry standards since 1927 and the depiction of interracial violence clearly, if tacitly, violated the Hays Code's injunctions against inciting violence and 'fomenting political and social unrest.'" (quoting RAYMOND MOLEY, THE HAYS OFFICE 52–67 (1945))).

39. DOHERTY, PRE-CODE HOLLYWOOD, *supra* note 26, at 363.

the industry nationalized a regional proscription, which systematically disseminated miscegenation as antithetical to good taste and human decency.<sup>40</sup> This omission reified and underscored a presumptive and persistent anomaly of mixed race.<sup>41</sup> In this way, entertainment was racial pedagogy: by visual example, it explicated a racial taboo.

### B. Television

The TV Code extolled similar virtues of decency and civic-mindedness.<sup>42</sup> In its preamble, the television board consciously acknowledged the tremendous influence of commercial television in shaping the attitudes of viewers.<sup>43</sup> In its advancement of the public interest, the board recognized the responsibility of broadcasters to be “accountable to the American public for respect for the special needs of children, for community responsibility, for the advancement of education and culture, for the acceptability of the programs chosen, for decency and decorum in production, and for propriety in advertising.”<sup>44</sup> The TV Code also acknowledged a cocurricular function of television<sup>45</sup> in the socializing of viewers as “augmenting the educational and cultural influences of . . . institutions devoted to education and culture.”<sup>46</sup>

In this commitment to model wholesomeness,<sup>47</sup> the TV Code outlined an even more extensive list of acceptable and objectionable subjects than the

40. Comment, *Censorship of Motion Pictures*, 49 YALE L.J. 87, 104–05 (1939) (describing the \$25,000 fine imposed “against any member of the Hays organization who violated the Code” in order “to insure decency”).

41. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 128 (2003) (“Prior to the 1960s, portrayals or even insinuations of black-white interracial romance were virtually nonexistent on TV.”).

42. TELEVISION BD. OF NAT’L ASS’N OF RADIO & TELEVISION BROADS., *CODE OF PRACTICES FOR TELEVISION BROADCASTERS* (1951) [hereinafter TV CODE], <http://www.tvhistory.tv/SEAL-Good-Practice.htm> [<https://perma.cc/B74R-ALXW>].

43. *Id.* pmb1.

44. *Id.* (Advancement of Education and Culture).

45. Les Brown, *Self-Regulation in American Television in Areas Aside from Program Content*, 13 CARDOZO ARTS & ENT. L.J. 705, 708 (1995) (noting that the TV Code was adopted “as the industry’s response to congressional concerns about crime shows on television and their possible contribution to juvenile delinquency”); Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 732 (1999) (quoting the 1976 version of the TV Code as providing, “Broadcasters have a special responsibility to children. Programs designed primarily for children should take into account the range of interests and needs of children from instructional and cultural material to a wide variety of entertainment material. In their totality, programs should contribute to the sound, balanced development of children to help them achieve a sense of the world at large and informed adjustments to their society.”).

46. TV CODE, *supra* note 42 (Advancement of Education and Culture).

47. Campbell, *supra* note 45, at 733 (“[T]he Television Code was amended in 1975 to limit children’s exposure to programming containing violence, sex, or offensive language. Under what came to be known as the Family Viewing Policy, programs deemed inappropriate for general family audiences could not be shown during the first two hours of network programming in prime time.”); Newton N. Minow, *Television and the Public Interest*, 55 FED. COMM. L.J. 395, 404 (2003) (reproducing the speech of Newton N. Minow, former Chair of the Federal Communications Commission, given before the National Association of Broadcasters, in which he says, “Program materials should enlarge the horizons of the viewer, provide him with wholesome entertainment, afford helpful stimulation, and remind him of the responsibilities which the citizen has toward his society.”).



Hays Code. Prohibited were “smut,” drunkenness, gambling, superstition, condoning criminality, gratuitous horror, and validation of suicide.<sup>48</sup> Additionally, the TV Code required broadcasters to mind the sensitivities of children,<sup>49</sup> respect the sanctity of marriage, and encourage obedience to the law.<sup>50</sup>

Sex, according to the TV Code, was completely unacceptable program material.<sup>51</sup> Along with attacks on religion and glorification of criminal activity, sex did not “enlarge the horizons of the viewer, provide him with wholesome entertainment, afford helpful stimulation, and remind him of the responsibilities which the citizen has towards his society.”<sup>52</sup> Although the TV Code did not specifically prohibit miscegenation onscreen like the Hays Code, its general denunciations of “smut,” “vulgarity,” and “illicit” behavior<sup>53</sup> may be viewed as a penumbra of censorship that would have disallowed it. The TV Code, however, did mention “sex crimes and abnormalities,” a wide, subjective category of offenses that would have included miscegenation, homosexuality, incest, polygamy, and prostitution.<sup>54</sup>

## II. INFLUENCES

Film scholars have long studied the use of entertainment as an agent of ideological control, but legal scholars have been slower to engage the role that film and television played in upholding the rule of law and shaping political opinion. Visual media can influence opinion actively through positive and negative representation, as both industry codes explicitly outlined. It can also exert an equally strong power of suggestion through omission and silence. “Reality,” for viewers, is defined by what they do and do not see.

Public opinion largely reflects set agendas. Viewer attention focuses on what is aired, green-lit, published, or made available to them.<sup>55</sup> Coverage distorts the scale of the problem represented, and it dictates concerns about issues highlighted by film and television.<sup>56</sup> For example, news media

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48. TV CODE, *supra* note 42 (Acceptability of Program Material).

49. *Id.* (Responsibility Toward Children).

50. *See id.* (Acceptability of Program Material).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1057, 1059 (2006) (discussing studies, including one that “found that media exposure to general information about rape altered the standards that study participants used to determine guilt in a particular rape case presented to them later” and another that found “news stories showed to the participants—whether they were pro-victim or pro-defendant—increased the predictive power of the defendant’s credibility on the outcome of the case”).

56. Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, YALE L.J. FORUM (Sep. 1, 2006), <https://www.yalelawjournal.org/forum/the-csi-effect-fact-or-fiction> [<https://perma.cc/YX69-PDSC>] (“In 72% of [Maricopa County] cases, prosecutors suspect that jurors who watch shows like *CSI* claim a level of expertise during jury deliberations that sways other

coverage of the War on Drugs influenced constituent concerns, fluctuating from “3 per cent to over 50 per cent and back down to 3 per cent in the space of a decade.”<sup>57</sup>

As the Hays Code and the TV Code demonstrate, public morals and the development of good taste have historically been insidiously transmitted through entertainment. This covert influence shapes morality and dictates propriety through the creative gaze, as part of a systemic compliance with the rule of law. Joseph Goebbels, Nazi Minister of Public Enlightenment and Propaganda, affirmed this ambient power in an entry in his personal diary:

Even entertainment can be politically of special value, because the moment a person is conscious of propaganda, propaganda becomes ineffective. However as soon as propaganda as a tendency, as a characteristic, as an attitude, remains in the background and becomes apparent through human beings, then propaganda becomes effective in every respect.<sup>58</sup>

Goebbels saw the pedagogical utility of entertainment in its ability to convey obedience by circumventing affirmative consent to government directives. Instead, citizens were led to believe that their thoughts were independent.

It is a challenge to locate the origin of culture and the genesis of morality. Justice Oliver Wendell Holmes offers a humanistic explanation: “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”<sup>59</sup> Within this venerable precursor to legal realism lies a recognition of the dialectical relationship between law and social practice, and the human determinism that shapes legal events. This valorization of human law, as opposed to natural or divine law, draws upon people and their actions as the most influential determinants of our legal system.

But Holmes’s jurisprudence came long before television, film, and the creative artifices of human life. In these simulacra, screenwriters conjure an alternate universe; directors, actors, and crew execute the vision; and, in the past, the codes interpreted the propriety of these reproduced worlds. These three branches of entertainment conjure fictive environments based on real ones, and in return, the real environments strive to approximate the fictive.

So what is contemporary moral life, according to Holmes’s theory, if the human experience is mediated by media? This could include more than film and television: the press, social media, literature, music, and art. One commentator argues that television “programmes themselves are the texts emerging from dominant cultural values, ideas and beliefs.”<sup>60</sup> Another scholar takes a more critical approach and characterizes visual media as a

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jurors who do not watch those shows”). See generally Eliana La Ferrara et al., *Soap Operas and Fertility: Evidence from Brazil*, 4 AM. ECON. J. 1 (2012) (examining the effects of telenovela viewing in Brazil on fertility and family size).

57. BERNADETTE CASEY ET AL., TELEVISION STUDIES: THE KEY CONCEPTS 8 (1st ed. 2002).

58. DAVID WELCH, THE THIRD REICH: POLITICS AND PROPAGANDA 57 (1993).

59. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

60. CASEY ET AL., *supra* note 57, at 60.

“funhouse mirror that alters and distorts images: some elements are enlarged and highlighted, while others shrink or disappear altogether.”<sup>61</sup>

While laws indeed govern behavior and set standards for human and institutional action, those same subjects to this regulation and structuring articulate community values as reflected in law. It is not so much that legal subjects lie in wait for law to regulate behavior but that the democratic process facilitates a productive antagonism reflective of its constituency. And for much of our contemporary history, that constituency has been limited in its representation of women, racial and sexual minorities, the disabled, and the poor.

### III. REPRESENTATION

Captain Kirk and Lieutenant Uhura’s kiss on the “Plato’s Stepchildren” episode of *Star Trek* in 1968<sup>62</sup> marked a significant milestone<sup>63</sup> by having an interracial couple show intimate affection on television.<sup>64</sup> But it was not a romantic kiss; instead, it was an involuntary action due to a hypnotic telekinetic force wielded by other characters onscreen.<sup>65</sup> The producers anticipated outrage from southern viewers and planned to edit the scene for certain markets.<sup>66</sup> Ultimately, the scene aired intact and received little complaint.<sup>67</sup>

As one of the first instances of miscegenation onscreen, the *Star Trek* kiss was remarkably timed. One year after the *Loving* decision in 1967, the airing of the episode demonstrated a shift of representation and the necessity of redefining abnormal behavior. In the wake of *Loving*, a legal decision that removed barriers to interracial marriage nationwide, retaining the traditional code guidelines, which actively prohibited these relationships, violated these adopted declarations of liberty and equality.<sup>68</sup>

61. Macey et al., *supra* note 15, at 3.

62. See Higgins, *supra* note 19.

63. David Ray Papke, *Skepticism Bordering on Distrust: Family Law in the Hollywood Cinema*, 50 FAM. CT. REV. 13, 14 (2012) (“During the first half of the twentieth century, marriage between a man and a woman of different races was barred in much of the country, and Hollywood considered the topic of interracial marriage too hot to handle. . . . The ‘Don’ts and Be Carefuls’ grew into the industry’s notorious self-censoring Hays Code of the early 1930s, and for decades interracial marriage was forbidden in the movies.”).

64. Kevin Noble Maillard, *Erased Onscreen: Where Are the Interracial Couples?*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/movies/interracial-couples-on-screen-loving-get-out.html> [<https://perma.cc/Q6HH-ARFS>].

65. Higgins, *supra* note 19.

66. Stephanie Buck, *Star Trek’s Interracial Kiss the Deep South Almost Never Saw*, BUS. INSIDER (July 22, 2016, 1:54 PM), <http://www.businessinsider.com/star-treks-interracial-kiss-deep-south-almost-2016-7> [<https://perma.cc/7XCD-ETUJ>].

67. Reportedly, the episode generated an extraordinarily large batch of positive fan mail, with only one letter expressing mild criticism. A white man from the South wrote in saying, “I am totally opposed to the mixing of the races. However, any time a red-blooded American boy like Captain Kirk gets a beautiful dame in his arms that looks like Uhura, he ain’t gonna fight it.” NICHELLE NICHOLS, *BEYOND UHURA: STAR TREK AND OTHER MEMORIES 196–97* (1994).

68. Papke, *supra* note 63, at 14 (“[O]nly in the 1960s did both the Hays Code and state laws barring interracial marriage fall by the wayside.”).

But the path to full equality has yet to be realized. While interracial couples in film and on television are becoming more common, they are still an extreme rarity.<sup>69</sup> The erosion of the Hays and TV Codes and their prohibitions on interracial content has not ushered in a wave of production reflective of diversity of family formation and intimate choice. Representation is caught in a media purgatory: interracial content is no longer “illegal,” but its continued absence contributes to a collective outlook of interracial combinations as rare and anomalous.<sup>70</sup> These are the lingering effects of not only the systematic exclusions and preclusions of the antimiscegenation regime but also the concomitant morality and decency lessons imposed upon previous generations by the entertainment industry. If social change entails a true transformation of civil rights and liberties, this must be realized in both law and social practice. In our contemporary culture, shared social realities must reflect a diversity of humanity rather than the mediated aspirations inherited from Depression-era theologians. At this point in our history, representation onscreen is proceeding with “all deliberate speed.”<sup>71</sup>

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69. See Maillard, *supra* note 64.

70. Onwuachi-Willig, *supra* note 17, at 319–21 (discussing the role that race played in the casting decisions for the couple in the 2005 romantic comedy *Hitch* starring Will Smith, a black actor, and Eva Mendes, a Cuban American actress).

71. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).