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HOLLYWOOD LOVING

Kevin Noble Maillard*

INTRODUCTION

It is no coincidence that Guess Who’s Coming to Dinner\(^1\) was released the same year that Loving v. Virginia\(^2\) 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 interracially intimate culture before 1967. Some cases, like McLaughlin v. Florida\(^3\) and Perez v. Sharp,\(^4\) successfully overturned discriminatory laws targeting interracial couples, but the vast majority, like Naim v. Naim,\(^5\) upheld them.

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2. 388 U.S. 1 (1967).
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*, Sayonara, and *West Side Story*, 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 interracially intimate culture simply did not exist.

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. In the same way that sodomy laws were “targeted at more than conduct,” 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.” From this view, the state can only go so far. It cannot force people to marry or date someone of a different race, and it certainly cannot punish private, discriminatory thoughts.


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.”).


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. 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.” 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. Denver 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, including comedy, romance, science fiction, action, drama, and even horror. Overall, I am interested in examining the indirect influence of law in the racialization of the “traditional” family. 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.

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”).


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


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 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 enforced cinematic propriety in film, and from 1951 until 1983, the TV Code regulated standards of decency for television.


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.”).

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, adopted by a Presbyterian elder, and enforced by a Catholic journalist, 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.” 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.”

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. It upheld respect for religion, patriotism, marriage, and good taste. The code also rejected “low forms of sex relationship[s]” because such portrayals would suggest acceptance and legitimacy; adultery, rape, perversion, seduction, and sexual health were not acceptable subjects for motion pictures.

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, it also strictly prohibited subjects of miscegenation. 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,
the industry nationalized a regional proscription, which systematically disseminated miscegenation as antithetical to good taste and human decency. This omission reified and underscored a presumptive and persistent anomaly of mixed race. 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. In its preamble, the television board consciously acknowledged the tremendous influence of commercial television in shaping the attitudes of viewers. 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.” The TV Code also acknowledged a cocurricular function of television in the socializing of viewers as “augmenting the educational and cultural influences of . . . institutions devoted to education and culture.”

In this commitment to model wholesomeness, 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. pmbl.

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.\textsuperscript{48} Additionally, the TV Code required broadcasters to mind the sensitivities of children,\textsuperscript{49} respect the sanctity of marriage, and encourage obedience to the law.\textsuperscript{50}

Sex, according to the TV Code, was completely unacceptable program material.\textsuperscript{51} 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.”\textsuperscript{52} Although the TV Code did not specifically prohibit miscegenation onscreen like the Hays Code, its general denunciations of “smut,” “vulgarity,” and “illicit” behavior\textsuperscript{53} 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.\textsuperscript{54}

\section*{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.\textsuperscript{55} Coverage distorts the scale of the problem represented, and it dictates concerns about issues highlighted by film and television.\textsuperscript{56} For example, news media

\begin{footnotesize}
\begin{enumerate}
\item TV CODE, supra note 42 (Acceptability of Program Material).
\item Id. (Responsibility Toward Children).
\item See id. (Acceptability of Program Material).
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item 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”).
\item 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
\end{enumerate}
\end{footnotesize}
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.”

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.

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.” 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.”

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).

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.”

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 marked a significant milestone by having an interracial couple show intimate affection on television. But it was not a romantic kiss; instead, it was an involuntary action due to a hypnotic telekinetic force wielded by other characters onscreen. The producers anticipated outrage from southern viewers and planned to edit the scene for certain markets. Ultimately, the scene aired intact and received little complaint.

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.

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.”).
65. Higgins, supra note 19.
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. 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. 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.”

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).