Sex Scene

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Part V: Contending with the Sex Scene
On February 8, 1961, J. P. McGlynn, a diesel instructor with the Union Pacific Railroad, fretted over the latest achievements of the local Citizen’s Committee for Decent Literature. The group had convinced several newsstands in Omaha, Nebraska, to stop selling *Playboy*, McGlynn’s favorite magazine and one he enjoyed reading with his two teenage sons. Suspecting that Hugh Hefner, the magazine’s editor, and Pat Malin, executive director of the American Civil Liberties Union (ACLU) would share his frustration, McGlynn implored them to defend his “freedom to read.” McGlynn’s letter points to a budding relationship between the ACLU, *Playboy* magazine, and *Playboy* readers, one that also signaled important developments in popular conceptions of the First Amendment. It represented a growing sense among many citizens that civil liberties included not just an individual right to speak but also rights as individual consumers to read, see, and hear.¹

This chapter explores ACLU contributions to the sexual revolution by examining the roots of two rights that many now take for granted. The first was a reinterpretation of the First Amendment to protect, not just the rights of speakers—producers of speech—but the rights of consumers of speech as well. Political theorists had long linked a particular type of consumption, citizens’ access to information, with democracy, but they did so by treating citizens in the aggregate as a tool for achieving and sustaining democracy.² What the ACLU did, increasingly in partnership with commercial producers and other interest groups, was fundamentally different and designed to empower citizens to claim access to information and images as an individual right.

The second right that contributed to the sexual revolution is the right to sexual privacy, beginning with the right to use birth control and later extending to the right of adults to engage in consensual sexual relations. Ironically, both opponents and proponents of “sexual freedom” demanded privacy, but the sexual revolution of the 1960s emerged through increasingly visible sex—in the media, public behavior, and the various stages of dress and undress that passed for fashion or political
protest. Practically every facet of public life exhibited transformations in displays of sexuality. The media contributed to the shift by using daring sexual material to make quick and easy profits (figure 13.1). Medical, legal, and demographic changes also played a role as the development of the birth control pill, concerns about overpopulation, and the expanding rights revolution helped to bring sexual expression and conduct into the public realm even as laws against their public presence withered under an emerging right to privacy.

By exploring how sex became more public even as privacy rights trumped sex laws, this chapter corroborates historian Beth Bailey’s observation that the sexual revolution grew out of “tensions between public and private.” It does this by considering an unexamined source and shaper of the sexual revolution: the ACLU. Ultimately, it argues that the ACLU advanced the cause of sexual liberation by empowering media consumers. More specifically, the ACLU established the consumer’s First Amendment rights to sexual material even as it battled, with mixed success, more conservative groups and individuals who invoked privacy rights to limit particular aspects of the sexual revolution.

**The ACLU, Consumer Rights, and the First Amendment**

The notion of media-related consumer rights was not entirely new when the ACLU began to transform it into a constitutional claim. The idea of consumer rights to media had been deployed by radio and motion picture reformers since at least the 1920s but as collective rather than individual rights. Leaders in the ACLU began to fashion an individualized version of media-related consumer rights by the middle of the 1940s in response to widespread concerns about corporate consolidation. American Civil Liberties Union board member and attorney Morris Ernst warned that media monopolies such as the Motion Picture Producers and Distributors of America (MPPDA) and the National Association of Broadcasters (NAB) reduced the availability of diverse views to consumers by restricting the access of certain speakers. “While we [in the ACLU] are fighting a particular effort to suppress the freedom of thought or expression of a particular man,” Ernst lamented, “the curse of bigness” assures that “fewer and fewer people” dominate “the pipelines of thought—the newspapers, the radio and the movies.” Some of his colleagues worried that tackling the problem of media consolidation would divert their energies into economic battles that were only tangentially related to civil liberties. The majority redirected Ernst’s critique toward more conventional
Fig. 13.1  By the late 1960s it was easy for consumers to purchase sexually oriented material in bookstores across the United States. Here, police detectives examine film in a New York City shop in 1970. (Courtesy UPI.)
civil libertarian goals by refocusing on the individual First Amendment rights of media consumers.⁶

In 1945, ACLU leaders publicized their new, consumer-oriented approach to the First Amendment in a formal resolution. “Freedom of speech, press and assembly,” they declared, “imply freedom to hear, read and see without interference by public authorities” or by “private agencies.” Affiliates of the ACLU quickly adopted the new language and perspective, agreeing that the real victims of censorship had always been not the publisher but the consumer.⁷

This new consumer-oriented policy helped the ACLU inspire wider public interest in its work. Since the organization’s earliest days, leaders complained that, beyond those who stood to profit—producers, exhibitors, and publishers—few people protested the closing of a burlesque theater, censorship of a motion picture, banning of a nudist magazine, or seizure of a racy novel. But by shifting attention from producers to consumers the ACLU’s new approach promised to persuade more people to take censorship personally. As ACLU member and censored author James Farrell urged ACLU president and founder, Roger Baldwin, we need to “popularize the idea that censorship is not [only] an invasion of the rights of the author; it is also an invasion of the rights of the reader. If this idea is popularized in the minds of liberal readers it would then be possible to stir them” to write letters and conduct protests on their own. Hoping for this very outcome, Baldwin issued a press release and a new ACLU pamphlet “Are you FREE to read—see—hear?” which pledged the ACLU to support the rights of audience members. He was delighted to receive an enthusiastic response from ACLU watchers and members, one of whom wrote simply, “I am glad to see the A.C.L.U. on the side of the consumer-listener.”⁸

This consumer-rights approach to the First Amendment also sharpened the ACLU’s criticism of private business practices that prevented “the public from seeing, hearing or reading.” It implicated commercial vendors who deferred to pressure groups or exercised their own discretion in declining to stock particular material. In defense of consumer rights, the ACLU denounced the local theater exhibitor who rejected Howard Hughes’s The Outlaw (1943), the druggist who refused to stock Esquire, and the community bookseller who removed Edmund Wilson’s Memoirs of Hecate County from the shelf. In line with this new approach, ACLU leaders now supported the federal government’s antitrust suit against Paramount Pictures, arguing that producer ownership of theaters violated “the fundamental rights of motion picture audiences” who should be able to “see all films freely and on an equitable basis.” On these
same grounds, ACLU leaders considered initiating a lawsuit against the MPPDA for restricting the movies available to consumers through its Motion Picture Production Code. Ironically, the new policy also crystallized a shared interest between the ACLU and the MPPDA. Although the two organizations would continue to tangle over the MPPDA’s own internal censorship apparatus, leaders of both organizations agreed on the usefulness of casting censorship more broadly as a violation of consumer rights.

Ernst’s proposals were timely. They easily gained traction in the burgeoning postwar consumer economy that emerged alongside Cold War–inspired concerns about media monopolies, pressure group censorship, and freedom of speech. But for Ernst, media consumers were a tool for opening up the marketplace to more speakers, more producers of speech. For the ACLU, by contrast, simply enhancing media consumers’ rights to what had already been produced became the whole point. So whereas Ernst wanted to challenge media monopolies and create alternative new media outlets with broad public access, the majority of his ACLU colleagues considered such activity a distraction from their core civil liberties concerns. By defending the individual rights of media consumers “to see, read and hear”—whether those rights were threatened by private agencies or state censorship—the ACLU channeled Ernst’s broad communitarian arguments for an open marketplace of ideas into a narrower theory of individual consumer rights.

The “Right to Read”

By the 1950s, the ACLU faced new censorship threats. Racy books, magazines, and pinups proliferated in the consumer-driven, postwar era, arousing the ire of “decency” groups and inspiring a series of congressional hearings on obscenity, pornography, and juvenile delinquency. Sponsored by Congressman Ezekiel C. Gatings in 1952, Senator Estes Kefauver in 1954, and Congresswoman Kathryn E. Granahan in 1959, friendly witnesses cast pornography as a covert tool for subverting the superior morality of the United States in its Cold War against Communism. Leaders of the ACLU too spoke in a Cold War idiom, urging legislators to recognize freedom of speech and consumer rights rather than morality and Christianity as the distinguishing features between “our way of life” and Communism. “It is not only the freedom of the publisher that is at stake,” the ACLU’s executive director explained. “It is also the freedom of 160,000,000 Americans whose Constitution guarantees them that no governmental official may tell them what they may
or may not read.” But ACLU testimony could not compete with findings that Americans spent $1 billion annually on mail-order pornography and that millions of postal patrons received unwanted “lewd and obscene material.” These reports inspired the creation of the Comics Code, gave rise to new obscenity laws, and provoked even more activism by pressure groups.12

In response, ACLU leaders mobilized a consumer-rights-based campaign against pressure groups guilty of divesting “citizens of their right to read.” The national office issued press releases and pamphlets, challenged commission findings, lobbied against censorship bills, prevailed upon media code authorities, and condemned pressure groups as agents of censorship, all in the name of consumers’ rights. One ACLU radio announcement directly asked listeners, “Are you being deprived of the chance to read, see, or hear things in the press, films, radio, theater, books and magazines?” The national office also advised its affiliates—most of which responded enthusiastically—to protect “the public’s right to see, read and hear” by monitoring local exhibitors and booksellers who might be try to censor their own offerings. Local media outlets enjoy a “special relationship to the public,” the ACLU argued, so they must take responsibility for maintaining the “public’s freedom to see, read and hear everything.”13

The ACLU confronted resistance to its position on pressure group censorship from within and beyond its own ranks, but it also enjoyed the support of powerful allies in its defense of the consumer’s right to read, see, and hear. In 1951, Redbook published “What Censorship Keeps You From Knowing.” Later condensed for Reader’s Digest, this prominent article refocused concerns about censorship on the consumer and encouraged readers to join the ACLU. The concept of a “right to read” took hold as librarians, teachers, publishers, lawyers, and judges used it to defend themselves against censorship inspired by the Red Scare. Librarians too fought for the “freedom to read” when local officials and citizens demanded that they withdraw “un-American” materials from circulation. In 1953, the American Library Association (ALA) issued a widely publicized manifesto “On Freedom to Read,” which condemned “private groups and public authorities” who banned books or otherwise aimed to restrict their availability to the public. In a simple statement that delighted ACLU leaders, the ALA declared that “the freedom to read is guaranteed by the Constitution.” The American Book Publishers Council (ABPC) signed the ALA statement, initiated the formation of Right-to-Read Committees around the country, and joined with the ALA to form
the Commission on the Freedom to Read, made up of prestigious university professors. That same year, Judge Curtis Bok, a prominent Pennsylvania judge, delivered a radio address entitled “The Freedom to Read,” and the American Bar Association pronounced “the freedom to read” a “corollary of the constitutional guarantee of freedom of the press.” In 1955, Paul Blanshard—a trade union activist, journalist, and attorney who worked closely with the ACLU—published *The Right to Read: The Battle Against Censorship*. One year later, the ACLU and its affiliates helped Columbia Pictures advertise its new film *Storm Center*, featuring Bette Davis as an embattled librarian who defended “the freedom to read!” And in 1957, an ACLU board member published *The Freedom to Read: Perspective and Program*. American Civil Liberties Union leaders communicated regularly with freedom-to-read groups and celebrated the extensive alliance they formed for “readers’ rights” and against censorship.14

In a sweeping call to arms in 1957, the ACLU offered to assist not only producers but also buyers who have “the will to explore legal avenues for the maintenance of their freedom.” The plea showed up in magazines and newspapers with national circulations and in the ACLU’s own widely circulated pamphlets with a cover letter by Morris Ernst titled “Your Freedom to Read is in Danger.” Leaders from the ACLU did not just offer assistance; they begged for an opportunity to provide it. For purposes of standing, or the right to bring a lawsuit, they needed a complainant who could demonstrate that s/he had been deleteriously affected in a way that legal action could resolve. Such lawsuits against pressure groups and other private entities were very difficult to execute, so ACLU leaders concentrated on educational work, urging consumers to defend their rights to read, see, and hear; exhorting producers and distributors to hold the line against pressure groups; and prevailing upon pressure groups themselves to eschew activities the ACLU considered censorious.15

A growing number of individuals—empowered by the concept of a right to read, see, and hear, and acting only in their capacity as consumers—began to demand access to and influence over the media. Many contacted the ACLU to report on and seek advice regarding pressure groups that tried to censor movies and books in their communities. They also created thousands of Right-to-Read Committees that mobilized consumer influence to counter the pressure wielded by groups such as the National Organization for Decent Literature (NODL). In addition, groups associated with more liberal causes mobilized and used the
discourse of consumerism to demand that the media portray African Americans and women more positively, for example, and drug use and alcohol abuse more negatively.\(^{16}\)

In the 1960s, consumers gained a powerful legal tool for defending their rights under the First Amendment, when two ACLU attorneys in Chicago established the media consumer’s standing to sue. The notion that consumers’ rights to hear, see, and read might bear legal weight and establish standing was new but timely; the notion of a “right to read, hear and see” now saturated American culture.\(^{17}\)

It all began with a wave of lawsuits inspired by the 1961 publication of *Tropic of Cancer*, the blockbuster “sex-capade” by Henry Miller. The book itself was not new, having appeared originally in a 1934 French edition released by Obelisk Press. In it, Miller narrated a relentless litany of sexual encounters, many described in intimate, graphic, and shameless detail. Attempts to import the book or publish it in the United States attracted support from the ACLU’s Northern California branch in the 1950s, but the novel failed in federal court. Founder of Grove Press, Barney Rosset—whose own youth was inspired by a smuggled copy of *Tropic*—was determined to publish the book in the United States. He began to lay the legal groundwork and introduce American readers to Henry Miller and, in 1959, his magazine, *Evergreen Review*, published Miller’s passionate “Defense of the Freedom to Read,” a piece designed to rally American readers to support his work by lamenting their victimization by censorship. Three years later, when Rosset released *Tropic of Cancer*, police confiscated the book, decency groups attacked it, librarians banned it, booksellers returned it, consumers demanded it, and Rosset prepared to defend it. But he was not financially ready for the more than sixty lawsuits that took *Tropic* into court all over the country. Attorneys of the ACLU were, and they represented *Tropic* itself, book dealers who sold it, the press that published it, librarians who offered it to the public and, even more significantly, prospective readers—would-be consumers who for the first time claimed the right to sue under the First Amendment.\(^{18}\)

The idea behind a reader’s right to sue for access to banned material dovetailed nicely with the maturing right-to-read movement. Joining long-standing efforts by the ACLU and ALA, Rosset and Miller crafted a high-profile right-to-read defense of *Tropic of Cancer* even as the editorials “Who Is to Censor What We See, Hear, Read?” “Your Right to Read, to Know,” and the like appeared regularly in the press. By 1962, in cooperation with the ACLU and the ABPC, the National Council of Teachers of English (NCTE) issued its own statements against censorship by pressure groups, entitled “The Right to Read” and “The Students’ Right to
Read.” That year, the ABPC’s regular newsletter “Censorship Bulletin” became “Freedom-to-Read Bulletin.” At the same time, a group of citizens formed Audience Unlimited to fight against censorship on behalf of consumers, and an ABPC leader published “Freedom to Read” in the Public Affairs Pamphlet series. The emerging homosexual press also made use of the new motto, announcing its efforts to “guarantee your FREEDOM TO READ” and running articles on “Freedom to Read and the Law.”

As efforts to mobilize consumers on behalf of their right to read peaked, Rosset became one of the first publishers to organize an independent right-to-read crusade on behalf of a commercial publication. Chicago provided rich soil for his campaign, not only because it was Rosset’s hometown, but also because its police force was so widely reviled for its brutality and excess that citizens readily mobilized against it. As one ACLU attorney remembered, police seizures of *Tropic of Cancer* were a “gift horse” for galvanizing public opinion against censorship. Taking full advantage of local sentiment against the police and national attention to the right to read, Rosset recruited prominent literary figures to sign the “Statement in Support of Freedom to Read” and used it to arouse the community further. Letters to the editor echoed Rosset’s language as ordinary Chicagoans declared their right to read *Tropic of Cancer*. Elite Chicagoans also picked up the language. As a top official at Bell & Howell wrote, “I haven’t read [*Tropic of Cancer*] but I’ll be darned if I want a policeman telling me I can’t.” So even as decency groups advocated censorship in the press, in the courts, and behind the scenes in precinct offices, bookstores, and newsstands, others—including Rosset, the ABPC, the ALA, the NCTE, and the ACLU—readied the cultural environment for dramatic legal change on behalf of the consumer’s right to read.

The creative thinking of Joel Sprayregen and Burton Joseph, both general counsel for the ACLU’s Illinois Division, took the idea of consumers’ rights under the First Amendment to the next level—establishing prospective readers’ standing to sue for access to banned material. Sprayregen, a “feisty young lawyer” fresh out of Yale Law School, and Joseph, a working-class graduate of DePaul University Law School, actually shared many things including a Jewish heritage; frustration with the reluctance of booksellers, publishers, and distributors to challenge censorship; and an eagerness to take on the Chicago police. Together, they worked to establish the “new and unique principle that a private citizen, as a potential reader, has the right to challenge police censorship in the courts.” The task of establishing standing was “formidable,” Sprayregen acknowledged, given that the First Amendment referred only to producers not
consumers of speech, but he and Joseph assumed the job with gusto and optimism.21

The two firebrands found willing plaintiffs among their Northwestern University acquaintances. They included Franklyn Haiman, Sprayregen’s communications professor and director of the Northern Illinois ACLU; Isabel Condit, Joseph’s friend and neighbor and the wife of another professor; and Joseph Ronsley, an ACLU member and graduate student in English literature. The plaintiffs’ job was to canvass booksellers and confirm that they could not purchase Tropic of Cancer in Lake County, Illinois. They would then bring suit on behalf of themselves and all residents in their communities against suburban police chiefs who confiscated Tropic of Cancer, ordered dealers not to sell it, or otherwise violated the public’s right to read it.22

In Haiman v. Morris, Sprayregen argued before Samuel B. Epstein, chief judge of the Superior Court of Cook County, Illinois, that a prospective consumer must have standing to sue to protect the “constitutional right to read.” “We frankly concede,” his brief began, that “we know of no prior English or American decision presenting the precise question of the standing of citizens to sue against illegal official conduct which has deprived them of the right to read books of their choice.” Even so, he argued, the ideas behind a prospective consumer’s standing were deeply rooted in American history and democratic theory. The First Amendment was not designed primarily to protect a publisher’s right to earn a profit, but the American public’s right to enjoy a free exchange of ideas. “It must surely follow,” Sprayregen continued, “that American citizens have standing to sue against unlawful official interference with that access.” Judge Epstein agreed and granted Haiman and Condit status to sue as consumers and prospective readers. That alone represented a significant victory. Epstein’s final ruling brought yet another. Epstein came down firmly on the side of the consumer in an influential opinion that declared the “freedom to read” a “corollary to the freedom of speech and press.” One without the other would be “useless,” he asserted. To protect “the inherent constitutional rights and privileges of the reading public,” the police must cease and desist from interfering with the “free distribution and sale” of Tropic of Cancer.23

All but forgotten now, Epstein’s decision received a great deal of attention in its day. It was covered extensively in the national press and widely declared a landmark case in First Amendment jurisprudence. Sprayregen called it “the first English or American case in which the right of readers to sue to challenge censorship has been upheld.” Meanwhile, Rosset worked to draw greater attention to the opinion’s unique
consumer-orientation by recruiting two hundred prominent authors and publishers to endorse the opinion in a “Statement in Support of Freedom to Read” published on the front cover of his Evergreen Review. In the meantime, Ronsley v. Stanczak proceeded to the Circuit Court of Lake County, Illinois, where Joseph too argued for the consumer’s standing to sue public officials who demanded that bookstores remove Tropic of Cancer from their shelves. The “social value” of the First Amendment was not to protect “the right of the publisher to earn a profit,” he argued, but the public’s “free access to ideas and publications.” Like Epstein two months earlier, Judge Bernard M. Decker reaffirmed Ronsley’s standing to sue as a “prospective purchaser” and also proclaimed “the public’s right to read and have access to books of their choice.” Declaring that “the constitutional safeguards are designed not only to protect authors and publishers but the reading public as well,” Decker issued an injunction against police interference with Tropic. The ACLU’s consumer approach to freedom of speech carried the day. It circumvented the reluctance of commercial producers and distributors to sue and brought public pressure to bear on the judiciary in new ways. It also inspired members of the public, as consumers, to take censorship personally. After the success of Haiman and Ronsley, ACLU attorneys and others brought successful consumer-initiated suits against public officials in other cities, including South Bend, Indiana; Los Angeles; and Montgomery County, Maryland. And when ACLU affiliates represented booksellers, distributors or publishers, they now couched their role as “defending the right of a free people to choose their own reading matter.” The Supreme Court ended the three-year Tropic case craze in 1964, when it issued a per curiam ruling to reverse Florida’s holding that Tropic of Cancer was obscene. The words would come later in Justice William J. Brennan’s memorable observation that “it would be a barren marketplace of ideas that had only sellers and no buyers.” Meanwhile, John F. Kennedy fortified the relationship between consumerism and civil liberties, when he issued what amounted to a Consumer Bill of Rights, complete with presidential support for the right “to be informed” and “to choose.” Thus, by the middle of the 1960s, the ACLU’s concept of consumer rights had moved to the center of the Supreme Court’s First Amendment jurisprudence and received a presidential seal of approval.

Consumer rights also presented the ACLU with exciting new ideas for membership recruitment. Leaders of the ACLU Illinois affiliate, for example, targeted buyers of Playboy, a Chicago-based magazine with national circulation that confronted frequent censorship threats (figure 13.2). Because “Playboy readers,” the local affiliate’s development di-
rector explained, “are ‘naturals’ for the ACLU,” they requested and obtained, without charge, names and addresses from Playboy’s subscriber list. “Sophisticated people like yourself,” one recruitment letter began, “are not afraid to read whatever magazine or book you want to,” including one that features “a picture of a divine figure with smasheroo legs.” Another acknowledged that “most men who like to gaze at pictures of beautiful women in a magazine . . . couldn’t care less about such stuffy business as civil liberties. After all, what has that got to do with a divine figure and elegant legs?” But the letter assured readers that “there are many people—you know the kind—who would do away with pictures of beautiful women” and censor books, movies, and magazines, “though you have a right to read these—a right guaranteed by the Bill of rights of the Constitution of the United States.” In a final pitch for membership, the letter pointed out that “a reader who enjoys reading what you enjoy reading about . . . should care enough to join the ACLU,” the only organization that defends “the rights of readers, writers, and publishers.”27 Through this recruitment strategy, the ACLU’s Illinois affiliate strength-
ened the growing tendency among civil libertarians to identify freedom and the First Amendment with consumption, adding a new dimension to that equation by treating consumers of cheesecake as especially laudable citizens whose rights to read represented the vanguard of First Amendment jurisprudence.

By the middle of the 1960s, the much-touted marketplace of ideas had taken on a character that would have been unrecognizable to the framers of the First Amendment two centuries earlier. Thanks in part to the deliberate efforts of civil libertarians riding the wave of postwar cultural and political trends, the public arena was increasingly conceived of less as a forum for the exchange of ideas and information among citizens of a polity than as a marketplace of buyers and sellers, consumers, and producers. No longer a community with aggregate needs, the marketplace now hosted individuals with singular claims to speak, to publish, and also to access all that was spoken and published. But even as ACLU attorneys fashioned this new understanding of individual consumer rights under the First Amendment, opponents employed this notion in ways that undermined the ACLU’s goal to open up and diversify the marketplace of ideas by maximizing consumer access to the products of American media.

Consumption and Privacy

Consumerism could cut many ways, and ACLU leaders soon confronted consumer-driven legislation designed to restrict and even homogenize the media marketplace. In 1963 and again in 1967, Congress held hearings on a series of bills that would allow postal patrons to identify material as “obscene,” “obnoxious” or “Communist propaganda” and demand to be removed from the sender’s mailing list. Supporters of the bill argued that mass mailings violated the privacy and sanctity of the home by bringing into it unsolicited advertisements from “an outfit called EROS,” “a homosexual group called the Mattachine Society,” and “a full-sized vibrating rubber finger for women.” In testimony replete with barbs directed at the ACLU, Charles Keating—founder of Citizens for Decent Literature (CDL)—assured legislators that Soviet leaders did not permit the circulation of such pornography, because they considered it “inimical to creativity and to a healthy, strong nation” (figure 13.3). For Keating, a nation’s values and priorities, not differences between a command economy and a consumer-driven one, explained the relative absence of pornography from Soviet public life. Carol Trauth,
a young woman associated with Keating’s CDL, criticized Playboy and other magazines for treating women as consumer objects, “as a plaything for men—a toy to be used and discarded.”

Throughout the hearings, friendly witnesses insisted that preserving the sanctity and privacy of the home required postal legislation that would allow potential recipients to reject particular types of material. Indeed, many postal patrons received mail directly into their homes in the 1960s; through a slot in the front door, mass mailings crossed physical boundaries between public and private. A graphic ad for “Strippers School Book,” “Men Only!,” “Scanty Panties,” or “Vibra Finger” might drop through the mail slot and hit the entryway floor, awaiting the homecoming of curious teens. Whereas earlier postal censorship involved public officials, these hearings showcased consumers who argued that without the postal bill they could not maintain their privacy by controlling what material entered their homes.29

Testifying for the ACLU, Herbert Monte Levy argued against the bill. Mass mailings did not jeopardize domestic privacy, he insisted. Without any new laws at all, consumers could tear up unsolicited circulars and throw them away. Junk mail could be annoying, Levy admitted, though
he had not been “fortunate enough . . . to get some of the salacious mail” others had described. After an extended debate over whether or not mass mailers targeted children and whether sexual immorality was more prevalent among Russians or Americans, the discussion turned again to privacy. Edward Roybal, a congressman from California, acknowledged “the right of the individual to solicit, to use the mails,” but “on the other hand, there is also the right of privacy.” Without missing a beat, Levy replied, “I would say that the right of privacy is not a constitutional right. The right of freedom of speech and press is.” Thus, just two years before the ACLU would argue confidently and passionately in *Griswold v. Connecticut* (1965) that a constitutional right to privacy protected the right of individuals to use birth control, its legal director denied the existence of such a right when opposing postal bills that empowered consumers to refuse particular types of mail.

Four years later, constitutional rights to privacy were no longer in question, but the debate over postal legislation raged on as each side took different positions on the relative importance of privacy vis-à-vis freedom of speech. Postal officials demanded a law that would address the 200,000 complaints about unsolicited sexual mailings received in 1966 alone. Some were undoubtedly responses to the three million brochures for *Eros* recently mailed out by Ralph Ginzburg, who personally received at least ten thousand angry letters from recipients of his mailing. The postal service’s general counsel testified that when sexual displays are “thrust upon us . . . our privacy is invaded.” Legislation allowing postal patrons to demand removal from certain mailing lists might thwart constitutionally protected speech, he admitted, but the patron must retain the “right to secure the privacy of his home.” The ACLU’s Washington, DC, director, Lawrence Speiser, argued for the absolute primacy of the First Amendment, contending that privacy, though one of “the most precious rights of men . . . must yield when it comes in conflict with the paramount right of freedom of speech.” Allowing mail recipients to refuse mail from any concern they deemed responsible for having sent, in the past, erotic or sexually arousing material would invite abuse. Individuals would reject mail from “any company that includes a shapely female in its mail advertisements,” Speiser predicted, including creditors, the Internal Revenue Service, retail outlets, publishers, churches, charities, or political organizations. “The effect,” he warned, would be “the sexual sterilization of American business and industry.” Women’s bodies figured prominently in Speiser’s testimony as he concluded that if enacted, this law would result in “a 20th Century Mother-Hubbard-gowning” of American culture.
In the end, consumers who demanded privacy won. Congress passed a number of laws enabling postal patrons to stop items from mailers who had, in the past, sent “erotically arousing or sexually provocative” material. By 1969, ACLU leaders realized that they were, for the foreseeable future, fighting a losing war on this matter. Given the “temper of the times,” the presidential administration of Richard Nixon, and “the kind of Supreme Court which will be sitting two years from now,” they expected the postal laws to stick. And they did. In 1970, the Supreme Court declared that “a mailer’s right to communicate” must “stop at the mailbox of an unreceptive addressee” in order to “protect minors and the privacy of homes.” Here, the ACLU’s arguments for freedom of speech failed, succumbing to the powerful case made by legislators and witnesses who effectively appropriated two of the ACLU’s cherished civil liberties: consumer rights and privacy.

The ACLU and the Movies

Consumer rights also shaped the ACLU’s ongoing battle with the motion picture industry. American Civil Liberty Union leaders had long objected to the Motion Picture Production Code of the MPPDA, renamed the Motion Picture Association of America (MPAA) after World War II, as a restraint on trade, a form of private censorship, and a mechanism for pressure group blackmail. The ACLU continued to attack both the code and the handful of local movie censorship boards that hung on in several states and cities around the country, filing amicus briefs that highlighted consumer rights. In *Times Film Corp. v. Chicago* (1961), Sprayregen decried the censor’s ability to determine “what is appropriate for the public to hear and to see,” and in *Jacobellis v. Ohio* (1964), ACLU legal director Melvin Wulf accused film censors of violating “the right of members of the adult public to exercise their freedom of choice.” Parents as consumers, not public officials, should supervise children’s movie selections, they argued. A Supreme Court victory for the ACLU and its allies in *Jacobellis* left local censorship statutes in tatters. But the majority opinion approved of “laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination,” thereby inspiring an explosion of grassroots demands for state-mandated classification systems to categorize movies by age group. A deluge of movie classification laws followed. The ACLU joined movie industry representatives in condemning state-sponsored movie classification as censorship. Such systems would hold theater owners accountable for barring juveniles from movies rated
for adults and also impinge on adults’ rights to attend movies of their choosing. “A mother with a babe in arms,” one flier protested, “couldn’t go into a theatre playing an ‘adults only’ motion picture.” Together with motion picture interests, the ACLU insisted that state classification laws violated the rights of parents by usurping “the parent’s judgment as to what is good or not good for the children.”

The trend toward classifying movies had deep roots, but it also grew from new sources. Pressure groups had long compiled lists of approved and condemned movies, denoting those recommended for family viewing and inspiring the MPAA to sponsor its own lists. State-mandated movie classification grew out of this past but was also a reaction to more recent developments, including the postwar era’s increased attention to consumers and individual consumer choice. More specifically, the emerging field of market research and the ability of many industries to meet consumer demand with limited product runs allowed producers of consumer goods to cater to a segmented market even as they helped to create it. Recognizing the emerging, independent buying power of teenagers, postwar businesses offered fashions, music, food, and magazines such as Seventeen that further distinguished them as a unique age group with particular consumer needs. Meanwhile, television bypassed parents and advertised directly to children, using Tony the Tiger to sell cereal, promises of adventure to peddle space helmets, and dreams of glamour and domesticity to promote Barbie and the Easy-Bake Oven. Market segmentation also fueled and followed the tumultuous cultural and political climate that saw the rise of “identity politics” as individuals asserted group identities based on race, age, and gender. Thus, the Black Power movement emerged alongside Clairol hair treatments for Afros; the women’s movement saw its ideals of independence echoed in Virginia Slims’ “You’ve Come a Long Way Baby” commercials; and as the Gray Panthers fought against “ageism,” Modern Maturity advertised products to ease the pains and celebrate the freedom of the golden years. In the increasingly segmented cultural and political milieu of the 1960s and 1970s, motion pictures joined other commercial enterprises to direct products at particular and often identity-based groups of buyers.

Leaders from the MPAA worked closely with the ACLU as they developed a new movie rating system. Their general counsel, Barbara Scott, met several times with the ACLU’s board of directors to seek advice, answer questions, and address civil liberties concerns. Scott assured the board that the system would be voluntary but admitted that because the MPAA dominated the industry, participation would feel mandatory. Board member Harriet Pilpel objected to “a small body making judg-
ments for the entire film industry,” a practice likely to “stifle diversity of opinion” and inhibit the creative work of artists. Scott replied that producers and artists actually approved of the new system because, by providing a range of rating options, it would free them from the restrictions of the code and allow them to produce “films on a more mature level.” Other committee members worried that the rating system would violate the rights of parents by preventing them from taking their children to X-rated movies. The ACLU board finally voted unanimously to oppose the MPAA’s rating system and publicized the decision in a passionate defense of consumer rights. When the industry determines who may and who may not see a particular film, the ACLU declared, “the public has lost its right of choice.” Accordingly, “those who value highly the First Amendment guarantee of free expression should oppose the rating system.”

The MPAA unveiled its comprehensive movie rating system in 1968 over loud objections from the ACLU. It defended the new system as one that would allow moviegoers to make informed selections and parents to provide intelligent guidance to their children. Unspoken was the usefulness of the rating system for defending the movies against pressure groups, obscenity law, state-mandated classification, and renegade movie producers who released films without the MPAA seal of approval. Indeed, the timely passage of the rating system helped the movie industry weather two important events at the federal level. The Supreme Court, in *Ginsberg v. New York* (1968), upheld a New York statute that created an audience-specific definition of obscenity, “variable obscenity,” outlawing the sale to minors of material considered sexually harmful to them alone. Just a few months later, the U.S. Senate held hearings to explore the possibility of creating a “Committee on Film Classification” to make recommendations regarding the creation of a federal film classification system. American Civil Liberty Union leaders actively opposed both of these developments, but it was the MPAA’s rating system that protected movies against a federal ratings system and censorship laws inspired by *Ginsberg.*

The MPAA’s new rating system struck many people as momentous. “Social historians may someday write,” opined Vincent Canby for the *New York Times,* “that on Nov. 1, 1968, for better or worse, the American movie industry inaugurated its voluntary film classification system, designed to bar children under 16 from seeing movies that the industry’s code people deem to be too vulgar, violent, or sexy.” The rating system met with widespread approval from Catholic bishops, theater owners, and parents who praised the rating system as a major advance in private industry’s responsiveness to consumer demands. The ACLU stood prac-
tically alone in sturdy opposition.40 Consumerism, albeit essential to the ACLU’s campaign to erode restrictions on sexual expression, had proven slippery ground on which to stake a civil liberties agenda.

Conclusion

By some measures, the ACLU failed in its efforts to diversify and expand material available to consumers. The postal law passed, as did others like it, many still in effect today. Despite the ACLU’s consistent opposition, the MPAA rating system survives through the Classification and Rating Administration (CARA). Although it is less effective at keeping adolescents from attending movies rated R, PG-13, or NC-17 than many might wish, it nevertheless influences the movie choices made by millions of people and functions to keep movies awarded an X out of mainstream theaters and inaccessible to many.41 In these particular battles, the ACLU lost, trumped by consumer and privacy-based arguments that undermined its broader agenda of expanding and diversifying the media market.

But despite the apocalyptic predictions of many ACLU leaders, no return to Victorianism ensued. Indeed, Playboy reader J. P. McGlynn would have been pleased at the outcome. The ACLU may have lost its battle to free mass marketers from postal laws and save movies from rating systems, but there can be little doubt that it won the war. By establishing in law, jurisprudence, and the broader culture a consumerist approach to the First Amendment, the ACLU raised public concerns about censorship and heightened the sense of violation experienced by consumers denied access to particular media. Individual consumer demands, now interpreted as an exercise of First Amendment rights, would drive media culture even as pressure groups and collective efforts to reshape media content were recast as censorship.42

The ACLU piloted these transformations, advancing the cause of sexual liberation by bringing to sexual expression the gloss and respectability of constitutional rights and the crowd-pleasing allure of the buyer’s choice even as it battled more conservative groups on the territory of privacy and consumer rights. Moreover, the postal laws and rating system that withstanded the ACLU’s assault in the 1960s would matter little in a world of free-flowing video and Internet pornography, material protected not only by the producer’s but also by the consumer’s right to free speech and privacy. Even as the ACLU helped make it possible for sexuality to enter the public realm in new ways, it reinforced the notion that privacy rights apply to sexual behavior and that such
rights protect consumer access not only to sexual literature and images but also to sexual conduct and the means to control its reproductive consequences. As a result, sex would become ever more public even as privacy rights were trumped by sex laws, ultimately fulfilling ACLU leaders’ broader agenda of making sexual expression of all kinds more accessible.

Notes


5. Quote from Ernst, “Memorandum by Morris Ernst Prepared at the Request of the Board of Directors at the Special Meeting Held Thursday Oct. 9, 1941,” ACLU-MF, reel 192.

6. Baldwin to Ernst, December 11, 1944, ACLU-MF, reel 228. Ernst, “Memorandum on the Problems of Freedom and Diversity in Communications,” December 1944; Baldwin to board of directors, January 4, 1945; ACLU Board of Di-
rectors Minutes, January 8, 1945; Baldwin to the National Committee and Affiliated Committees, January 17, 1945, all in ACLU-MF, reel 227.

7. Quotes from Baldwin to Mr. C. E. Boyer, May 19, 1945; and “Are you FREE to READ—SEE—HEAR?” n.d., both in ACLU-MF, reel 232. See also Chicago Division, ACLU, “Statement on Censorship of Indecent and Obscene Literature,” February 28, 1949, ACLU-MF, reel 261.


16. See William Peters, “What You Can’t See on TV,” Redbook, July 1957, ACLU-


21. First and last quotes from author interview with Sprayregen, January 26, 2010; second quote from Sprayregen to Spencer Coxe, December 7, 1961, both in *ACLU-MF*, reel 58. See also Sprayregen to Louis L. Jaffe, October 26, 1961, University of Chicago Library, American Civil Liberties Union Illinois Division Records (hereafter, *UCL–ACLU*), box 32. Sprayregen credited the following two influential law review articles with his ideas: Jaffe, “Standing to Secure”; and his “Notes: Government Exclusion of Foreign Political Propaganda,” *Harvard Law Review* 68, no. 8 (June 1955): 1393–1409. On ACLU frustration with


the defendants filed a motion to dismiss the case, arguing that Ronsley lacked standing to sue in part because he stood to suffer no damage to his property. First three quotes from Alexander Polikoff and Burton Joseph, “Memorandum in Opposition to Defendants’ Motion to Strike Complaint and Dismiss Action,” in Ronsley v. Stanczak, n.d.; final three quotes from Judge Bernard M. Decker, “Memorandum of Opinion,” Ronsley v. Stanczak (April 6, 1962). See also Gertz to Sprayregen, April 9, 1962; Gertz to Polikoff and Joseph, April 9, 1962; and “Motion to Strike Complaint and Dismiss Action,” in Ronsley v. Stanczak (February 15, 1962), all in LOC-EGP, box 258. See also “Uphold Citizen’s Right to Challenge Censorship by Public Official,” n.d., ACLU-MF, reel 60; and Brief for the Plaintiffs-Appellees, Haiman v. Morris (September Term 1962), NUA-FHP, box 23.


28. In 1978, consumers assembled the Right to Read Defense Committee and won a suit against local public schools in Chelsea, MA, which forced school officials to restore a volume that had been removed from the library due to sexual con-


31. First two quotes from “Statement of Timothy J. May, General Counsel, United States Post Office Department Before United States Senate Special Subcommittee on Juvenile Delinquency,” February 17, 1967, quotes from 7 and 9; third quote from “Statement of Lawrence Speiser,” April 13, 1967; all other quotes from “Testimony of Lawrence Speiser,” October 30, 1967, all in ACLU-MF, reel 65. See also Speiser to Pemberton, Reitman, and Marvin Karpatkin, March 1, 1967; Karpatkin to Pemberton et al., March 27, 1967, ACLU-MF, reel 65. Speiser rallied Playboy editors to the cause by characterizing the bill as a threat to the magazine, claiming that it was aimed at “non-obscene mail matter.” See “Postal Pandering,” Playboy (January 1968), 61–62, 66. On Ginzburg see Boyer, Purity in Print: Book Censorship in America from the Gilded Age to the Computer Age (Madison: University of Wisconsin Press, 2002), 300–305.


33. Rice to Eric Johnston, June 11, 1953; Forster to DeBra, September 21, 1953; Forster to Kenneth Clark, December 3, 1953; Forster to Johnston, December 30, 1953; Forster to DeBra, December 30, 1953, all in ACLU-MF, reel 46. Forster to Schreiber, January 21, 1954, ACLU-MF, reel 48. Patrick Malin to Johnston,


38. Pilpel and Scott quotes from “Minutes, Communications Media Committee,”


41. In 2008, the law prevented a mailer from continuing to send material to a
patron who complained that it was “erotically arousing or sexually provoc-
tive.” 39 USC section 3008. On the current rating system, see the MPAA web-

42. Indeed, by the end of the first decade of the twenty-first century, lead ACLU
staff attorney Chris Hansen averred that consumers’ rights under the First
Amendment are so well established today that the ACLU will readily bring a
lawsuits on behalf of consumers, but rarely needs to do so, because censorship
itself has become so rare. Chris Hansen, interview with the author, November
24, 2009. For examples of ACLU cases argued in part on behalf of consumers,
see Ashcroft v. Free Speech Coalition, 535 U.S. 234 (April 16, 2002); and Ashcroft v.
ACLU, Brief for the Respondents, 542 U.S. 656 (June 29, 2004). Authors of
law review articles express frustration at courts’ unwillingness to distinguish
between producers’ and consumers’ rights under the First Amendment. See,
for example, Dana R. Wagner, “The First Amendment and the Right to Hear:
Urofsky v. Allen,” Yale Law Journal 108, no. 3 (December 1998): 669–676; and