

CENSORSHIP OF INDECENCY IN IRELAND: A VIEW FROM ABROAD*

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I. INTRODUCTION

At first glance, the Irish regime of free speech does not appear to have a place for "indecent" material. The Irish Constitution shares some of the liberal features of its American counterpart,¹ but a deep division appears on the question of fundamental rights. Unlike the stark imperative of the First Amendment of the U.S. Constitution, the Irish guarantee of free expression is explicitly qualified, not once, but twice. First, this guarantee is made "subject to public order and morality."² Second, the guarantee is limited by this provision:

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavor to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.³

The limitation of free speech in such broad terms is not the only way in which the Irish Constitution differs from the American model. Ireland's Constitution establishes a parliamentary democracy,⁴ presupposes a homogenous Catholic culture,⁵ evokes the greater goal of social equality by establishing limits on the use of

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¹ Both are premised on the principle of government by consent of the governed. Both seek to create governments of limited power, divided into three specialized branches. Both contain an explicit Bill of Rights.

² IR. CONST. art. 40, § 6.

³ *Id.*

⁴ The Lower House of Parliament (*Dail*) has unquestioned supremacy over both the Upper House and the Presidency. *See Id.* arts. 15-28.

⁵ The imprint of Catholic ideology is discussed in Part I *infra*.

private property,⁶ and explicitly establishes education and family rights.⁷ The bald restriction of free speech in Ireland might surprise some American observers. However, in some respects the limits posed by "public order . . . morality [and] the authority of the state"⁸ parallel exceptions to the First Amendment's guarantee of free speech created by the U.S. Supreme Court.⁹

This Article develops the argument that the censorship of indecency in Ireland confounds liberal expectations about the effect of an extension of governmental power over free speech. The liberal fear, often expressed in the context of debate over the extent of free speech rights, is that as the power of the state expands, the freedom of the polity falls down a slippery slope to virtual extinction. From this perspective, an expansion of the State's censorship power is an invitation to repression. This Article argues that Ireland is an intriguing counter-example: expansive power to censor indecency has not led to increased repression.

Irish free speech restrictions reflect the unique features of Irish history in that they accommodate the structures of censorship first established under British rule. Ireland's emphasis on the regulation of public morality is clearly inherited from Britain,¹⁰ whose influence continued after Ireland gained its freedom in 1922. Within a year of the creation of Saorstát Éireann (the Irish Free State), the Censorship of Films Act was passed. As recently as 1989, the Irish government extended the State's censorship powers through passage of the Video Recordings Act ("VRA"). Between 1922 and 1989, several other important pieces of censorship legislation were passed by various governments, including Censorship of Film Acts, Censorship of Publications Acts, a Broadcasting Authority Act, Offenses Against the State Acts, and an Official Secrets Act.¹¹

Ironically, while the State's power to censor has grown, censorship of "indecent" material in Ireland in the 1990s appears to be far less extensive than at any other time in the twentieth century. While the "marketplace of ideas"¹² in Ireland may be less crowded

⁶ See IR. CONST. arts. 43, 45.

⁷ *Id.* arts. 41-42.

⁸ *Id.* art. 40, § 6.

⁹ Concerns based in public order and morality are evident in the creation of the fighting words, obscenity, and the "clear and present danger" exceptions to the free speech guarantee.

¹⁰ To learn more about censorship structures in Great Britain, see MARTIN ROBERTSON, *CENSORSHIP AND OBSCENITY* (Rajeev Dhavan & Christie Davies eds., 1978).

¹¹ See generally MICHAEL FORDE, *CONSTITUTIONAL LAW OF IRELAND* 453-497 (1987).

¹² In the context of a debate over indecent/pornographic/obscene material, the "marketplace of ideas" metaphor is something of a distraction. In the context of pornography

than in the United States, the gap between the two countries' marketplaces is relatively narrow. Given the inherent difficulties in quantifying the extent of censorship (particularly in the United States), it is impossible to construct a precise ranking. Nevertheless, this article demonstrates that while the power to censor is extensive in both countries, the willingness to censor "indecent" material bears little relation to the scope of the power.

Part I of this Article is devoted to the social and cultural context of censorship in twentieth century Ireland. Part II examines the contours of the Irish system of censorship, as it applies to indecent/obscene material, with particular attention paid to: (1) early and recent examples of censorship legislation; (2) the exceptions to the censor's reach; and (3) the attitude of the current film censor. In Part III, the case of Irish censorship is reconsidered from a First Amendment perspective.

II. CONTEXT: ISOLATIONISM AND CATHOLICISM

Having won a war of independence in the early twentieth century, Irish political elites sought to separate Ireland from British influence to the greatest extent possible. This was a difficult task given: (1) geographic proximity; (2) economic dependence; and (3) the many cultural values shared by both communities. Nevertheless, four significant events indicate the strength of this desire for separation. First, Ireland remained neutral in World War II—not because of any sympathy for the Third Reich, but because of the symbolism attached to the possibility of Irish soldiers dying for a British cause.¹³ Second, Ireland made issues of national territory and the power of the Catholic Church central in its 1937 Constitution;¹⁴ both provisions are retaliatory in nature. Where the nation had once been neatly divided by Britain, the new Constitution raised a troublesome claim of unity;¹⁵ where the church had once been driven underground, the new Constitution recognized its "special position."¹⁶ Third, the Constitution declared Gaelic to be the national and first official language, although it was once the

in the United States, it is difficult to imagine that the ubiquity of pornographic material contributes to a market in ideas. Likewise the absence (until the mid 1990s, see *infra* note 51) of magazines such as *Playboy* and *Hustler* in Ireland has hardly impoverished a market in ideas.

¹³ After the war's conclusion Ireland opted not to join NATO.

¹⁴ See IR. CONST. arts. 2, 3, & 44, § 1.

¹⁵ Articles 2 and 3 of the Irish Constitution lay claim to a national territory that includes the six counties of Northern Ireland.

¹⁶ This part of Article 44, section 1 was removed from the Constitution in 1972.

target of a British policy of elimination.¹⁷ Finally, in 1948, Ireland broke its most significant governmental tie with Great Britain by withdrawing from the Commonwealth.

The single most important person in all of these developments has been Eamon DeValera. In many ways, he has been the "founding father" of modern Ireland.¹⁸ In the early 1930s he was elected to the first of several terms as Taoiseach (Prime Minister). He left his mark on Ireland not only through governmental policy, but also through the Constitution that he drafted.¹⁹ He served as Taoiseach and President at different times and founded a vital force in Irish politics, the Fianna Fail party.²⁰ This party has been in power more than any other in the history of the state—a significant feat in a country with one of the most complex systems of proportional representation in the world.²¹ DeValera's vision was to re-create Ireland as an isolated retreat from the modern world; Ireland would be home to "a people who were satisfied with frugal comfort and devoted their leisure to things of the spirit."²²

At a time when the dominant foreign media in Ireland were British (unlike today where European, American, and multinational interests proliferate), the obvious target of government policy under DeValera were those sinister influences on Irish culture. Patriots of the day saw grave signs of Ireland being dragged into an amoral, ecumenical, promiscuous, and "modern" gutter. In many ways the impressive list of books banned under the Censorship of Publications Act²³ is testimony to the aggressive implementation of DeValera's vision. The "things of the spirit" would not be displaced in Irish leisure by the visions of Margaret Mead, Graham Greene, or William Faulkner.

Equally interesting, and perhaps more damning from the perspective of the 1990s, is the number of Irish writers who were banned.²⁴ Their vision of Ireland's economic, religious, social, and sexual reality evidently distressed some readers in the nation; among those distressed readers were members of the Catholic Truth Society ("CTS"). As "a publications agency founded by the [Catholic] Bishops,"²⁵ the CTS became well known for its relentless

¹⁷ IR. CONST. art. 8.

¹⁸ GEMMA HUSSEY, *IRELAND TODAY* 156 (1993).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Proportional representation typically increases the power of minority parties.

²² BANNED IN IRELAND: CENSORSHIP & THE IRISH WRITER 9 (Julia Carlson ed., 1990) [hereinafter BANNED].

²³ See *infra* note 48.

²⁴ On this general topic see BANNED, *supra* note 23.

²⁵ KIERAN WOODMAN, *MEDIA CONTROL IN IRELAND 1923-1983*, at 51 (1985).

submissions to the Censorship Board (created under the 1929 Censorship of Publications Act). The power to set the national agenda had thus devolved to one Catholic interest group. As one law professor concluded: Irish society, at this time, was "in the grip of cultural isolationism, anti-intellectualism and sexual repressiveness."²⁶

The 1937 Constitution openly declares its commitment to a Catholic ideology. Its preamble calls on the Holy Trinity and the Divine Lord, Jesus Christ. Its prohibition of divorce remained in place until 1995.²⁷ As recently as 1983, an organization of Catholic Bishops characterized the role of Catholicism in Irish public life in these terms:

A Catholic Country and its government where there is a very considerable Catholic ethos and consensus shouldn't feel it necessary to apologize that its legal system constitutional or statutory reflects Catholic values. Such a legal system may sometimes be represented as offensive to minorities but the rights of a minority are not more sacred than the rights of a majority.²⁸

Ireland's Constitution once recognized the "special position of the Holy Catholic and Apostolic and Roman Church as the guardian of the faith professed by the great majority of [Ireland's] citizens."²⁹ The Constitution also provides extensive protection for the family—the State recognizes and guarantees to respect the family as a moral institution with inalienable rights "antecedent and superior to all positive law."³⁰ In support of the family, the Constitution commits itself to a traditional family structure in these striking terms:

In particular, the state recognizes that by her life within the home, woman gives to the state a support without which the common good cannot be achieved.

The state shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.³¹

It is hardly surprising that Irish women have struggled more than their western counterparts to achieve political, economic and legal parity with men. Nevertheless, they have also shared in many of the remarkable advances achieved by western women in the last

²⁶ Kevin Boyle, *Preface to BANNED*, *supra* note 23, at vii.

²⁷ IR. CONST. art. 41, § 3.

²⁸ Kevin Boyle, *Freedom of Expression*, in HUMAN RIGHTS, A EUROPEAN PERSPECTIVE 216 (Liz Heffernan & James Kingston eds., 1994).

²⁹ IR. CONST. art. 40, § 2 (repealed 1972).

³⁰ IR. CONST. art. 41, § 1.

³¹ IR. CONST. art. 41, § 2.

three decades.³² It is interesting to note that this traditional allocation of gender roles occurs in the Irish Constitution under the heading of family protection. In contrast, the U.S. Bill of Rights ignores the institution of family, thereby causing substantial difficulties for the Supreme Court on some questions of fundamental rights.³³ In Ireland, the act of constitutionally recognizing the traditional nuclear family logically complements efforts to establish national standards of decency and indecency.

III. 1929 AND 1989: TWO ACTS-ONE PURPOSE²

This examination of Irish censorship will focus on two acts devoted to censorship passed by the Irish Parliament some sixty years apart: the Censorship of Publications Act of 1929 and the Video Recording Act of 1989. These two acts are part of a panoply of prohibitive regulations. Michael Forde's compendium of Irish Constitutional Law lists restrictions of expression under the following categories:³⁴

1. State Security and Authority:
 - Official Secrets Act
 - Offences Against the State Act
 - Broadcasting Authority Act
2. Public Order Health and Safety:
 - Drugs Act
 - Wireless Telegraphy Act
3. Public Morality - Obscenity:
 - Censorship of Publications
 - Censorship of Films
 - Other Restrictions
4. Rights and Freedoms of Others:
 - Blasphemy
 - Defamation

³² More than twenty years of a combination of legal actions, unremitting political pressure by the women's movement, and European directives have changed women's position in Ireland immensely. . . . When the pill and the contraceptive finally came to Ireland, they fell on fertile ground, so to speak. Ireland, having been slow to begin the process of catching up with what had happened a generation earlier in other industrialized countries, crowded a lot of change into a short time. The network of laws against women, their inability to control their fertility, and legal obstacles to their participation in the full life of the country have undergone dramatic and far-reaching change.

HUSSEY, *supra* note 19, at 424-25.

³³ Important decisions on family matters have depended on innovative forms of constitutional interpretation that engendered controversy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court strained to explain constitutional family rights in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

³⁴ FORDE, *supra* note 12, at 462-82. Most of these categories of unprotected speech have equivalents in the U.S. system of censorship.

Breach of Confidence

5. The Judicial Process - Contempt of Court:
 - Prejudicing Fair Trial
 - Censuring Judicial Performance

The 1929 and 1989 Acts represent early and recent instances of the bureaucratic effort to restrict freedom of expression. The 1929 Act was not the first piece of censorship legislation under Saorstát Éireann. It was preceded by the Censorship of Films Act passed in 1923. The latter was passed "under cover of night,"³⁵ and, unlike the 1929 Act, put enormous censorship power in the hands of one individual.³⁶ It has been amended by various acts including the 1989 VRA.

As the focus of this paper is on obscene/indecent material, the 1929 and 1989 Acts are deserving of closer examination. The 1929 Act is complex and thorough. It established a system for prohibiting books and periodicals. It also established four criminal offenses based on the following materials: prohibited books and periodicals; indecent pictures; material that promotes abortion or contraception; and certain materials related to judicial proceedings.

A. *Prohibition Provisions*

Indecency is the central, but not the sole, criterion for prohibition—books and periodicals are both subject to censorship on this ground. Indecency is one of the few terms that is explicitly defined by the act. Material is indecent if it is "suggestive of, or inciting to sexual immorality or unnatural vice or likely in any other similar way to corrupt or deprave."³⁷ While the term "obscene" is also used, no definition is offered for it. A book or periodical may also be prohibited if it "advocates the unnatural prevention of conception or the procurement of abortion."³⁸ Finally, periodicals alone may be prohibited if they have "devoted an unduly large proportion of space to the publication of matter relating to crime."³⁹ Key provisions of the Act are excerpted in Table 1.

³⁵ MICHAEL ADAMS, *CENSORSHIP: THE IRISH EXPERIENCE* 17 (1968).

³⁶ "Since 1924 over 3,000 films have been banned and over 8,000 cut" in Ireland. See Shane Barry, *Who's Protecting Who?*, 44 *FILM IR.* 16 (1994).

³⁷ The Censorship of Publications Act, § 2 (1929) (Ir.). This definition relies heavily on the British standard created in *R. v. Hicklin* in 1868. See MARIE MCGONAGLE, *A TEXTBOOK ON MEDIA LAW* 228 (1996). In the United States, the *Hicklin* test was a point of departure for a Supreme Court eager to create more satisfactory criteria for obscenity. In contrast Irish law remains essentially fixed to an 1868 standard.

³⁸ The Censorship of Publications Act, §§ 6-7.

³⁹ *Id.* § 7.

Banning a book or periodical is alarmingly simple: a member of the public or a customs official can submit the material to the board for review. This process opens the door to interest groups, particularly those who are devoted to the protection of traditional Catholic morality. The CTS took full advantage of the opportunity. Perhaps the CTS saw its role as representing the "average person applying contemporary community values."⁴⁰ The Board has power to issue a prohibition order which, originally, only the Minister for Justice could revoke. Until 1946 there was no appeals process; until 1967 there was no time limit on the effect of a prohibition order.⁴¹

After 1967, a time limit of 12 years applied to every order. Because this provision applied retroactively its effect was that of a sudden and substantial repeal of most censorship decisions:

In one grand gesture over 5,000 titles were released from limbo. Some of them, it is true, would be rebanned but almost all the controversial books of the pre-1956 period and particularly the work of the many Irish writers rejected as unsuitable for their own society are now free to circulate in the country.⁴²

Very little protection for material appears in the 1929 Act. The one significant mitigating provision applies only to books—when considering prohibition the Board shall have regard to "all or any" of the following factors:

- * The book's literary, artistic, scientific or historic merit
- * its general tenor
- * the language in which the book is printed
- * its intended circulation
- * the class of its reader
- * any other relevant matter⁴³

Since only the outcome of the Board's decision is a matter of public record (a public register of prohibited works is required),⁴⁴ it is impossible to say how effective this provision was in the deliberative process. Certainly the Board was busy; in 1954 alone it examined over 1,200 books.⁴⁵ Between 1930 and 1968 some 6,116 books were banned.⁴⁶ A list of censored books that includes Heming-

⁴⁰ A central part of contemporary American law on obscenity, see *Miller v. California*, 413 U.S. 15 (1973).

⁴¹ See ADAMS, *supra* note 36, at 243-44. See also MCGONAGLE, *supra* note 38, at 233.

⁴² ADAMS, *supra* note 36, at 199.

⁴³ The Censorship of Publications Act, § 6.

⁴⁴ *Id.* § 11.

⁴⁵ WOODMAN, *supra* note 26, at 95.

⁴⁶ *Id.* at 126.

Table I Key Provisions of the 1929 Censorship of Publication Act*

<i>Material</i>	Material Subject to Prohibition by Censorship Board		Material Subject to Criminal Sanction				
	books	periodicals	books or periodicals	books or periodicals	pictures	judicial proceedings	divorce/separation proceedings
<i>Criteria for censorship</i>	indecent or obscene or advocates abortion or contraception	indecent or obscene or advocates abortion/contraception or undue devotion of space to crime	already subject to a prohibition order	advocates abortion or contraception	indecent	indecent matter calculated to injure public morals	anything beyond the names of the parties, counsel, charges, court, judge, points of law, summing up, or decision of the judge or jury
<i>process</i>	complaint from public or customs	complaint from public or customs	criminal investigation	criminal investigation	criminal investigation	criminal investigation	criminal investigation
<i>activity that is illegal</i>	not applicable	not applicable	exposed, advertised, sold, offered, kept for sale, or imported for sale	printed, published, sold, offered, kept for sale, distributed	sold, offered, kept for sale, or imported for sale	print or publish	print or publish
<i>qualities that protect material</i>	its literary, artistic, scientific or historic merit, general tenor, the language in which it is printed, its intended circulation, the class of its readers, any other relevant matter	none listed	none listed	none listed	none listed	none listed	none listed
<i>appeals</i>	minister's discretion to revoke (appeal board added in 1946 amendment)	minister's discretion to revoke (appeal board added in 1946 amendment)	criminal appeals process	criminal appeals process	criminal appeals process	criminal appeals process	criminal appeals process

* Several of these provisions were amended by the 1946 Censorship of Publications Act.

way's *A Farewell To Arms*, Huxley's *Brave New World*, Joyce's *Stephen Hero*, Mead's *Coming Of Age In Samoa*, Steinbeck's *The Grapes Of Wrath*, and Beckett's *Watt*, speaks for itself.⁴⁷

However, it must be noted that titles likely to be banned today are a far cry from *The Grapes Of Wrath* and *Brave New World*. There has been a radical change of emphasis in the criteria used by the Board, evident in the list of recently banned books in Table 2. A small number of other prohibited titles have raised some controversy, including *The Joy of Sex* (which became available after a successful appeal),⁴⁸ *The Erotic Art of India*, *The Gay World*, and *Sex (Madonna)*.⁴⁹ Nevertheless the difference between "censorship then" and "censorship now" in Ireland is immense. After decades of censorship, *Playboy* became legally available in Ireland (amid some protest) in 1995.⁵⁰ Yet it is clear from the data in Table 2 that the concession to *Playboy* did not signal a retreat on the prohibition of pornography in general. The recent surge of pornography prohibitions may indicate a new willingness of distributors to test the legal waters. Alternatively, it might reflect more effective police/customs investigations.⁵¹

More effective police work may also explain the surge of book prohibitions evident in 1996. While many of the book titles are ambiguous, hinting mildly at pornographic content, other available

⁴⁷ Other prohibited and illustrious titles include: Faulkner's *As I Lay Dying*; Freud's *Collected Papers* (Vol. 11); Graves' *I, Claudius*; Greene's *Brighton Rock*; Moore's *The Lonely Passion Of Judith Hearne*; O'Flaherty's *Land*, and Williams' *Cat On A Hot Tin Roof*. More obvious victims of censorship were titles such as: *A Lover Would be Nice*; *The Virgin's Progress*; *Strip-Tease Murders*; *Women as Pets*; and *Lady Chatterley's Second Husband*. See ADAMS, *supra* note 36, at 240-50 (1968).

⁴⁸ See MCGONAGLE, *supra* note 38, at 235.

⁴⁹ See BANNED, *supra* note 23, at 2; Kevin Boyle, *Secrecy and Censorship*, in LET IN THE LIGHT 13 (Patrick Smyth & Ellen Hazelkorn eds., 1993).

⁵⁰ The decision, made by the Censorship of Publications Appeals Board, created some controversy. Alarmed Irish feminists were quick to comment: "[i]t doesn't matter much, but it does matter a little bit that the Republic of Ireland has signed up like the dutiful little consumer market that it is for the Disneyfication of sexual arousal." Nuala O'Faolain, *Sexual Impulse Wasted on Playboy*, IR. TIMES, Oct. 9, 1995, at 14. "The lifting of the ban [is a] declaration to the people of Ireland that the portrayal of women in degrading pictures is now acceptable." Sheila Farrell, *Letters to the Editor*, IR. TIMES, Oct. 12, 1995, at 15.

Bear in mind that even the ostensibly benign presence of fashion magazines in our public spaces, relentlessly teaching a particular body image, has caused young people to know the joys of the new epidemics of anorexia and bulimia. It is foolish to think the presence of *Playboy* will do nothing to alter the underlying tone of relations between men and women. And it is doubly foolish to think that the harm done to the cause of women by portraying them in such a way in publicly shared spaces is insignificant merely because other countries do so

.....
Dr. Sara Dillon, *Letters to the Editor*, IR. TIMES, Oct. 11, 1995, at 17.

⁵¹ "One of the biggest consignments" of pornography intended for distribution in Ireland was intercepted by Customs officials in 1996. See Emmet Oliver, *Pornographic Material Detained*, IR. TIMES, Nov. 2, 1996, at 6.

data indicates that "indecent" is prevalent in the vast majority of these cases. The publishers involved are obscure organizations (at least as far as academic or community libraries are concerned). Black Lace, the publisher of *Virtuoso* is also responsible for *Wicked Work*. A few publishing houses are responsible for the vast majority of titles in Table 2: Ryder Publishing (apparently limited to one author, Deborah Ryder), Star Distributors (responsible for *Men of the Twisted Cross*, *Wild Stud et al.*), Mascarade Books (responsible for *Big Shots*, the *Flesh Fables et al.*), and HOM (responsible for *Golden Wrists*, *Bound Ankles et al.*). The most frequent publishing house apparent in the last four years is Olympia Press International, which brought the public such works as *Britannia Rules*, *Blanca's Island*, *Emma's Secret World*, *Georgina*, *Julia In Captivity*, and *The Slave Girls of Quireme*.

B. Criminal Provisions

Four classes of material are the subject of criminal sanction in the 1929 Act. First, one can be punished for importing, offering for sale, or selling a prohibited book or periodical. Second, it is an offense to publish, distribute, sell, or offer for sale material that promotes abortion or contraception, whether or not it is prohibited. The intensity of conservative Catholic opposition to these issues of reproductive choice is plainly evident.⁵² Third, indecent pictures can result in criminal sanctions if one imports for sale, offers for sale, or sells them.⁵³ Finally, in the most bizarre category of illicit material, certain details from judicial proceedings may not be printed or published. The details that are publishable are the non-indecent, and the basic facts of divorce or separation proceedings (e.g., names of parties, judgements). The more scandalous/titillating details of divorce proceedings are the obvious target of this provision. Here the Catholic Church's goal of enshrining marriage as a permanent institution is evident. This goal was further promoted by the 1937 Constitution, which specifically outlawed divorce.⁵⁴

Unlike the 1923 legislation creating a film censorship system,

⁵² Some of the most recent changes in Ireland's Constitution eliminated these prohibitions—liberal contraception policy emerged slowly in the 1970s and 1980s, information on contraception has been protected since 1979. A 1992 referendum on abortion allowed access to abortion information. See generally HUSSEY, *supra* note 19, at 417-44; Jeffrey Weinstein, *An Irish Solution to An Irish Problem: Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165 (1993).

⁵³ Pictures alone do not fall under the prohibition provisions.

⁵⁴ IR. CONST. art. 41, § 3.

Table 2 Books and Periodicals Prohibited in Ireland 1993-1997

1993	1994	1995	1996	1997*
Dream 16 Lovers Nymphomania Black Buck Suck Off	Amour Hard Aura Claudine Darling Kwartet Sex Lechage de Chatte Love Italian Style Deep Throat II Double Fucking Memoirs Of Dolly Morton Pearl Of The Desert Phallus Of Osiris Prestige I Scharfste Seka Severa	The Boy on the Bicycle The Captive II & III Heart Throbs and the Hidden Gallery Images of Ironwood Ironwood IV Kim, My Beloved Kung Fu Nuns Mothers Loving Son Nurse's Weakness Run, Little Leather Boy Strange Catharsis Teacher's Orgy Three Women The Wild Heart	Anus Beating the Bounds Beauty and the Beast** Big Shots Blanca's Island Body to Body Bound Ankles Bound Wrists Britannia Rules Captives Afloat Captives of Sodom Chained Chicken Chamber of Horrors Cocker's Folly Cops in Training Domination Fascination Emma's Secret World The Fall of Barbara Georgina Golden Wrists Goodbye Jenny Blair The Governess Hard Throbs House of Dreams The Inquisition Invitation to Enslavement Julia In Captivity The Lawyer's Clerk A Lesson for Orla Lord of the Manor Mammoth Book of Erotica Men of the Twisted Cross	Death Scenes Do It Yourself Ehe in Wollust Les Filles du Sexe Penetrations Matinales
			Odalisque Original Bitch The Pagners papers Persuasion, Book Two Playing the Game Queen of a Conquered Country Queers Like Us Reformed Reform School 2077 AD Residential Course Return to Paradise Return to the New Order Sentenced to Serve Servitude in Limbo Slackhurst Book 2 Slave Girls of Quireme Southern Comfort Special Assignment Stramme Kerle The Taming of Julia A Tigress Toured I and II Triple Trouble The Uniform Journal Velvet Claws Virtuoso Whipped Heiress Wicked Work The Wild Heart Wild Stud	

PERIODICALS

1993	1994	1995	1996		1997*	
Escort Daily Sport	Electric Blue Knave	Ireland's Daily Sport Ireland's Weekend Sport (both incorporating Daily Sport)	Adam Film World Amateur Hours Backdoor Lovers Big Ones Black and Blue Bound to Please Casanova Blue Celebrity Skin Cheri Chic Electric Blue Eros Erotic Fire Explosive Februs 40 Plus Fox Freshmen Gallery Gem Genesis Giant Balloons	Hurricane of Lust Hustler Hustler's Barely Legal In Touch Jock Leg Parade Live Girls NAMBLA Bulletin Nude Reader's Wives Orgas Oui Pleasure Bound Reader's Wives Sex Match Small Tops Studio Swank Sweet Chics Talent Velvet Young Girls Ecstasy Young Girls Flesh	40+ Adam Gay Video Anal Sex Asian Babes Bear Big Ones Int'l Blue Climax Blueboy Blushes Bustin' Out Busty Chic Color Climax Climax Bestsellers Dressing for Pleasure Exciting Expose Extreme Fantasy X Februs First Hand Experiences for Loving Men Foxy Lady's Lovers FQ Freshmen Gallery Genesis Gent Girl Crazy Hard Love High School High Society	Honcho Hot Buns Hot Erotica Hot Legs Inch Int'l Leatherman Intimacy Ireland's Only Contact Magazine Janus Japan Bondage Positions L'Amour Letters Magazine Lipstick Magma Mandate Mankind Manscape Manshots New Blushes New Cunts Open Door Panther Photo Pirate Playguy Powerplay Private Privilege Plus Real Wives Rodox Rump Satisfaction

PERIODICALS—cont'd				
1993	1994	1995	1996	1997*
				Hombres Latinos Score Seventeen Temptation Sex Orgies The Young One Sexcapade Thrust Shiny Torso Skinflicks Triple X SM Stories Video Busty Stallion Voluptuous Stroke Working Girls Talent X Stars Teenage Dream Girls X-Quisite Teenage School Girls XXX Teenage Sex Zipper

* January to July only.

** (Same author as Captives Afloat)

Source: data received directly from censor's office by author, available on request.

the 1929 Act was passed amid considerable controversy.⁵⁵ It has been the subject of repeated attack and modification,⁵⁶ over the years. The Act was preceded by determined efforts of the Church to clamp down on immoral behavior. In 1927 the Bishops warned that "the dance hall, the bad book, the indecent paper, the motion picture, the immodest fashion in female dress" were all the traps of the "evil one."⁵⁷ The government had already established a "Committee on Evil Literature" which devoted most of its time to listening to the concerns of the CTS.⁵⁸ Ireland was not alone in its concern over immoral literature; the League of Nations had sponsored an International Convention for the Suppression of Obscene Materials in 1923.⁵⁹ The Committee on Evil Literature heard dire warnings about the pervasive effect of the media, e.g., "At present the spiritualized Irishman is quickly passing away, and all of the brute that is in him is being fed almost to the point of moral leprosy, to be followed by a tempest of fire from heaven."⁶⁰ The CTS provided empirical data on seven English Sunday newspapers and five other journals (some concerned gambling, while one was titled *Health and Strength*).⁶¹ The Committee also learned about widespread prohibition of contraceptive information in the United States. The official title of the 1929 Act is a reflection of the times by calling for the prohibition of the sale and distribution of unwholesome literature. The world of art was affected too. By 1930 all nudes were removed from Dublin's Municipal Gallery.⁶²

There was debate in the Dail (the Lower House) about the possible impact of this legislation. Some thought that the censor's sweep might reach too far. One legislator feared that an eighteenth century poem by Brian Merriman would be prohibitable. Supporters of the Bill assured him he was wrong. Sixteen years later the poem was banned.⁶³ Prominent Irish authors lamented the entire movement. George Russell described the Bill as "a consequence of arrested growth . . . [a form of] moral infantilism."⁶⁴ To

⁵⁵ For a full account of the controversy see BANNED, *supra* note 23, at 3-12; ADAMS, *supra* note 36.

⁵⁶ For example, the Health (Family Planning) Act of 1979 substantially eroded the ban on contraception information. See MCGONAGLE, *supra* note 38, at 233.

⁵⁷ BANNED, *supra* note 23, at 9.

⁵⁸ ADAMS, *supra* note 36, at 24.

⁵⁹ *Id.* at 24. "There was nothing unusual about the enactment of censorship legislation at the time." MCGONAGLE, *supra* note 38, at 232.

⁶⁰ ADAMS, *supra* note 36, at 27.

⁶¹ *Id.* at 28.

⁶² BANNED, *supra* note 23, at 10.

⁶³ ADAMS, *supra* note 36, at 53-54.

⁶⁴ *Id.* at 49.

William Butler Yeats it was "medieval legislation."⁶⁵ George Bernard Shaw concluded, "Ireland is going to relapse into the dark ages."⁶⁶

C. *The 1989 VRA*

In the sixty years that passed after the Censorship of Publications Act, fundamental changes occurred in Irish society and law. Foreign media are now more prominent than ever before.⁶⁷ Ireland and Britain joined the European Union in 1972. One effect of that decision has been some liberalization of fundamental rights in Irish law. The stranglehold of Fianna Fail over electoral politics has weakened. The isolationism that DeValera valued so much has been replaced by a strong popular commitment to the European Union. The hold of the Catholic Church on younger generations is not as firm. A new generation of political elites has taken power, and allegiance to the touchstones of classic Irish republicanism is less important. The political landscape has changed so much that President Mary Robinson, an avowed liberal, thanked voters who "stepped out from behind the faded flags of the Civil War"⁶⁸ in her 1990 acceptance speech. To most of Ireland's political leaders over the last sixty years, those "faded flags" were objects of veneration.

Some things had not changed by 1989—the vast majority of Ireland's population remained Catholic, and the power of the church on matters of sexuality and family was, and is, still evident. Divorce was forbidden by the Constitution until 1995, when a referendum, decided by the slimmest of margins, repealed that provision.⁶⁹ An earlier attempt to undo the divorce ban had been overwhelmingly rejected by voters in a 1986 referendum. A pro-life amendment to the Constitution was adopted by a substantial majority in a 1983 referendum.⁷⁰ Attempts to relax Ireland's anti-

⁶⁵ *Id.*

⁶⁶ *Id.* at 48-49.

⁶⁷ British television and radio broadcasts are readily available to most of the population in Ireland. American television programs are a staple of British and Irish channels. Satellite cable channels are also available.

⁶⁸ FERGUS FINLAY, MARY ROBINSON 8 (1990).

⁶⁹ Efforts to change divorce law were frustrated for over a decade. Nevertheless, by a slim majority, a referendum to allow limited divorce options was approved in November of 1995. The referendum result was immediately challenged in Irish courts by groups resistant to this reform. See Geraldine Kennedy, *Poll Favours Removal of Divorce Ban*, IR. TIMES, Oct. 5, 1995, at 1; *Divorce Bill Attracts General Support from All Sides*, IR. TIMES, Oct. 4, 1995, at 1; Christine Newman, *Courts Have No Role on Vote, Says State*, IR. TIMES, Dec. 22, 1995, at 4.

⁷⁰ The Amendment reads: "[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

abortion law met with mixed success in 1992.⁷¹

In this context it is interesting to note that the VRA enlarges the censorship power of the State. As one Irish lawyer noted, the video censor (a second duty for the film censor) "has powers more extensive than the film censor in that his criteria are wider—a new addition to our panoply of censoring mechanisms."⁷² The central provision of the act is set out below:

§ 3(1) The Official Censor shall, on application to him in relation to a video work, grant to the person making the application (referred to in this section as the applicant) a certificate (referred to in this Act as a supply certificate) declaring the work to be fit for viewing unless he is of opinion that the work is unfit for viewing because—

(a) the viewing of it—

(i) would be likely to cause persons to commit crimes, whether by inciting or encouraging them to do so or by indicating or suggesting ways of doing so or of avoiding detection, or

(ii) would be likely to stir up hatred against a group of persons in the State or elsewhere on account of their race, color, nationality, religion, ethnic or national origins, membership of the traveling community or sexual orientation, or

(iii) would tend, by reason of the inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it, or

(b) it depicts acts of gross violence or cruelty (including mutilation and torture) towards humans or animals.⁷³

The VRA relies on mechanisms already in place to handle films. A certificate for public exhibition is required and that certificate can only be issued by the censor. The censor has the power to issue certificates for exhibition to certain classes of audiences (e.g., "Under 12 must be accompanied by an adult"). The censor also has power to deny a certificate. Finally, in the case of films, distributors have been willing to make cuts as requested by the censor in order to receive a certificate. In the case of videos the VRA does not permit that compromise.⁷⁴

Under the VRA it is an offense to possess, in order to supply, or to offer to supply, or to actually supply, a video that is either uncertified or is prohibited. It is also an offense to display for the

⁷¹ James F. Clarity, *Women in Irish Parliament Vow a Fight Over Abortions*, N.Y. TIMES, Nov. 28, 1982, at A4.

⁷² Patrick MacEntee, *Publish and be Banned*, in LET IN THE LIGHT, *supra* note 50, at 109.

⁷³ Video Recordings Act, § 3 (1989) (Ir.).

⁷⁴ Eileen Battersby, *Movie Mad*, IR. TIMES, Dec. 29, 1994, at 13.

public an uncertified or prohibited video.⁷⁵ To complete the regulatory scheme, a licensing system is established for video retailers and video rental companies. Finally, it is an offense to import a prohibited video. Following the example set in prior legislation, mere possession is not criminalized.

The criteria for denying a certificate are set out above. The terms "obscene" or "indecent" are now so common that the VRA offers no definition for them. Presumably, definitions from earlier legislation will suffice. The other criteria for banning are remarkably broad. "Gross violence" is not defined in the act. (The film version of *Natural Born Killers* has already been banned from theaters,⁷⁶ and its prospects under the VRA are slim.) The entire film noir genre seems threatened by the criterion of suggesting ways of avoiding detection of crime.⁷⁷ While the current censor is remarkable for his interest in film and his liberal views, the powers granted to his office under the VRA are immense. As the data below indicate, the power to prohibit is in use more frequently with each passing year.

Table 3
Number of Video Prohibition Orders Issued 1991-97

1991	1992	1993	1994	1995	1996	1997*
34	253	304	931	407	527	58

* January to July only.

Source: Data received directly from Censor's Office by author and is available upon request.

Table 3 appears to support the liberal view that expanding powers of censorship lead to greater invasions of the market of ideas. However, further investigation of the data reveals a more complex reality. The surge in prohibition orders in 1994 reflects important changes in the administration of the act. First, the requirement that all videos available for sale or rent be submitted to the censor's office was first implemented in 1994. Second, the censor's office increased its staff significantly to cope with the volume of submissions. Finally, the police were more active in cracking down on illegal video duplication operations—businesses which

⁷⁵ Specific provision is made for mere possession and purely private showing of an uncertified or prohibited video. Those acts are not affected by the VRA.

⁷⁶ See Barry, *supra* note 37, at 16. Section 7 of The Censorship of Films Act makes no reference to gross violence—its criteria for banning are instead: indecent, obscene, blasphemous, or tending to inculcate principles contrary to public morality.

⁷⁷ See *supra* text accompanying note 74.

specialized in pornographic material.⁷⁸ A random survey of twenty titles from the list of 1994 prohibition orders, conducted by this author, found that 50% had obviously pornographic titles, while the remaining 50% had sexually suggestive titles.⁷⁹ The only controversial title this author could find among the 1994 orders was *Dangerous Game*.⁸⁰ All indications suggest that over 95% of prohibition orders affected pornographic/obscene material. While the volume of prohibition orders in 1994 might have been high, the damage to the "marketplace of ideas" was, at most, minuscule.

D. *Exceptions to the Censor's Reach*

Under the Censorship of Films Acts, only films destined to be exhibited to the general public need be submitted to the censor. Films exhibited in private clubs are not restricted. Thus, events at which admission is substantially restricted can evade censorship. Film festivals, student film societies, and art-film houses (based on membership) operate free of legal pressure. In the 1970s a prominent art-house cinema, the Irish Film Theater, presented many foreign language and independent films that would have easily run afoul of the censor, (e.g., Pasolini's *Salo*).⁸¹ This loophole may be a case of an "Irish solution"⁸² to the extremity of the formal powers of repression. In this way the moral guardians can have their cake and eat it too. This loophole might also indicate a class bias. It has been suggested that censorship in Ireland is based primarily on the fear that if the masses have access to immoral material they will not be able to withstand the allure of the message.⁸³

One goal of early censorship legislation was to reduce exposure to material promoting a non-Catholic view of sexuality. One of the most prominent sources of such material is British broad-

⁷⁸ Interview with Gregory Whelan, Film Censor's Office, Dublin.

⁷⁹ The ten obvious pornographic titles included: *X Dreams*, *Tricks of the Trade*, *the Institute of Perversity 2*, *Swedish Sex Games*, *She Male Surprise*, *Nympho Message*, *Maids for Sex*, *Cuming of Age*, *Candy's Little Sister-Sugar*, and *"Chris" and His Boarding School Boys*. The more ambiguous titles included: *Army Brat*, *Black Hammer*, *Down Under*, *Finishing Out*, *Good Vibrations*, *Hot Rackets*, *Just for the Hell of It*, *Schoolgirls Holyday*, and *Straw Dogs* (a three minute video, not the 1977 film). Non-English titles were excluded from the survey. Most of the production companies listed on the prohibition orders are not mainstream names, e.g., *Private Video Nederland*, *X-plicit Video*, *Color Climax Corporation*. See *supra* note 79 and accompanying text.

⁸⁰ *Dangerous Game* is an independent film directed by Abel Ferrara, starring Harvey Keitel and Madonna. It gained some notoriety as a voyeuristic exercise in sex and violence.

⁸¹ Since the 1990s the Irish Film Theater has been replaced by the Irish Film Centre.

⁸² Irish solutions are known for their lack of direction or contradictory elements. See Weinstein, *supra* note 53, at 165.

⁸³ See ADAMS, *supra* note 36, at 39-63; WOODMAN, *supra* note 26, at 8-70. It has also been suggested that censorship of books was applied only to paperbacks for the same reason. See Luke Gibbons & Robert Ballagh, Censorship and the Arts, in LET IN THE LIGHT, *supra* note 50, at 123, 125. However, the 1929 Act makes no reference to that distinction.

casting, particularly the British Broadcasting Corporation ("BBC"). Documentary and fictional displays of sexual behavior on British television are sometimes very explicit (comparable to premium cable channels in the United States). That material is widely available in Ireland and remains unaffected by the censorship drives of the Irish legislature.

The original prime target of Irish censorship efforts was the scandalous British Sunday newspaper, the origin of what is now called tabloid journalism. These papers, now available as dailies, are famous for their coverage of the sex scandals of Tory MPs, scandals involving the Royal Family, and ubiquitous pictures of topless models. Ironically, these papers have thrived in Ireland and have even spawned their Irish imitators.⁸⁴ Why censorship power has been ineffective in this regard is not clear—the criteria of the Censorship of Publications Acts are certainly sufficient to attack those types of media.

E. *A Film Censor for the 1990s*

The surest sign of change in the repressive nature of Irish censorship is the transformation that has occurred in the film censor's office. Sheamus Smith became Ireland's film censor in 1986. Under his leadership only eleven films have been cut in eight years;⁸⁵ in the two years before his tenure some thirty-eight films were cut.⁸⁶ His predecessor cut no less than 4,976 films in a sixteen year period.⁸⁷ Smith believes, "a film is a director's work and he is the only one really entitled to cut it. Therefore, I avoid it."⁸⁸

Smith's approach, evident in his actions since 1986, is obviously different from that of earlier film censors. The first film censor, when asked what he knew about film, responded: "Nothing. But I know the Ten Commandments."⁸⁹ The second censor saw the need to protect Ireland from foreign ideologies: "Anything advocating communism or presenting it in an unduly favorable light gets the knife."⁹⁰ Another censor explained his approach this way:

I interpret a film through what I would like my children—and they range from 10 to 19—to see. The kind of book I might like

⁸⁴ Typical examples from Britain are the *Mirror*, the *Sun*, the *News of the World* (known in some circles as *The Nudes of the World*), and from Ireland: *The Sunday World* and *The Star*.

⁸⁵ The censor's policy appears to have changed to avoid cutting any film. Letter from the Censor's Office to Jerome O'Callaghan, (July 1997) (on file with author).

⁸⁶ Barry, *supra* note 37, at 18.

⁸⁷ Battersby, *supra* note 75, at 13.

⁸⁸ Barry, *supra* note 37, at 17.

⁸⁹ *Id.*

⁹⁰ *Id.*

to read I won't leave lying around at home for my son to read. I certainly wouldn't put a picture on the wall that I thought might give my children wrong ideas about life. We have certain moral standards that we must uphold.⁹¹

The same censor also believed that there were "many insidious elements in our midst who were attempting to corrupt society by upsetting many of our long-established institutions and traditions."⁹² It is not surprising that prior to Smith some very remarkable films ran into trouble with the censor's office; they include *The Great Dictator*, *Don't Look Now*, *M.A.S.H.*, *Sunday*, *Bloody Sunday*, and *Five Easy Pieces*.⁹³ In contrast Smith's most controversial decision has been to deny a certificate to *Natural Born Killers*. The only published explanation for that decision is, "I thought it was violent, too violent But I've liked Stone's other films."⁹⁴ For all his moderation, Smith's comment reveals the idiosyncratic nature of the decisions of the film censor. The power vested in his office raises the central dilemma of how to protect viewers from truly harmful material without patronizing the public or undermining its autonomy.

Two of Smith's decisions concerning film advertisements have also gained notoriety in recent years. Smith's concern about pornographic depictions of women extended to movie posters—he preferred to ban the poster for *Striptease* (featuring a naked actress), but eventually allowed its use *inside* a cinema; however, it was forbidden from being used outside the building.⁹⁵ Smith also made it clear that a poster for *The People v. Larry Flynt* (1997) would be banned in Ireland.⁹⁶ The poster depicted the lead actor in a crucifixion pose with his face superimposed "against a woman's bikini clad lower abdomen."⁹⁷ The Christ-on-a-crotch motif also became a problem in France, where the poster was eventually exhibited.⁹⁸ American movie-goers did not get to see this poster; according to the *Irish Times*, "[a]fter the poster was banned in the United States, the Czech-born director Milos Forman substituted a headshot of Harrelson with a U.S. flag as a gag over his mouth."⁹⁹

The number of films denied a certificate by Smith is remarka-

⁹¹ David Collins, *Censorship and the Arts*, in *LET IN THE LIGHT*, *supra* note 50, at 142.

⁹² Barry, *supra* note 37, at 17.

⁹³ *Id.*

⁹⁴ Battersby, *supra* note 75, at 13.

⁹⁵ Michael Dwyer, *Display of Film Poster Restricted*, *IR. TIMES*, Sept. 19, 1996, at 8.

⁹⁶ Lara Marlowe, *Risque Film Poster Granted All-Clear by Paris Tribunal*, *IR. TIMES*, Feb. 21, 1997, at 9.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

bly low; between 1986 and 1997 eight films were banned (including *Bad Lieutenant*, *Natural Born Killers*, *From Dusk Til Dawn*, and *Showgirls*).¹⁰⁰ Smith has “loved movies” all his life, raves about *Casablanca*, and describes himself as “movie mad.”¹⁰¹ He made a courageous decision in 1988 in allowing *The Last Temptation of Christ* an “Over-18 Certificate” despite many protests. In 1996, he issued a “PG Certificate” for *Michael Collins* in order to insure the “widest possible” audience for the film, while he also warned parents of its “explicit cruelty, violence . . . and crude language.”¹⁰² Technically the censor may not discuss the reason for banning a film;¹⁰³ nevertheless, Smith is reported to have banned *Bad Lieutenant* on the basis that it was demeaning to women.¹⁰⁴ If this report is accurate, he may be the first censor in Ireland to be influenced by a feminist sensibility. Smith’s reason for the prohibition of *From Dusk Til Dawn* was its “irresponsible and totally gratuitous violence”—yet Smith expressed admiration for the screenplay’s author, Quentin Tarantino.¹⁰⁵ With few exceptions, Smith’s decisions have been uncontroversial in Ireland. This may be an indication that the censor’s office now holds a better view of contemporary community standards. Again, the contrast between censorship “then” and censorship “now” is striking.

IV. THE VIEW FROM ABROAD

From an American perspective, the Irish regime of censorship is remarkable for its simplicity. The Constitution explicitly tolerates censorship, while religious homogeneity has aided the development of widely accepted community standards. (Perhaps the Irish know it when they see it.) More remarkable still, is the dearth of free speech litigation.¹⁰⁶ In the last decade one controversial

¹⁰⁰ The titles are: *Working Girls* (1987), *Whore* (1991), *The Bad Lieutenant* (1993), *U.F.O., Lake Consequence*, *Natural Born Killers* (1994), *From Dusk Til Dawn* (1996), and *Showgirls* (1996). Data received by author directly from Censor’s Office.

¹⁰¹ Battersby, *supra* note 75, at 13.

¹⁰² Michael Dwyer, *Censor Gives ‘Collins’ PG Cert*, IR. TIMES, Sept. 21, 1996, at 1.

¹⁰³ Barry, *supra* note 37, at 16.

¹⁰⁴ Michael Dwyer, *Madonna Film is Banned by the Censor*, IR. TIMES, Nov. 23, 1994, at 1. See also MCGONAGLE, *supra* note 38, at 236. However, Smith has been quoted elsewhere saying that the film is blasphemous and profane. See Barry, *supra* note 37, at 17.

¹⁰⁵ According to the *Irish Times*, Smith believes that: “[s]omebody has to say ‘stop’ to this extraordinary violence on the screen. I admire Harvey Keitel and Quentin Tarantino, and I’m not saying everyone in Ireland would be affected by this film. But even if one person were affected, I wouldn’t like to have it on my conscience.” The *Times* also noted that “*From Dusk Till Dawn* is the first film to be rejected by Mr. Smith since Paul Verhoeven’s *Showgirls* five months ago. That film was turned down chiefly because of a very violent rape scene.” Michael Dwyer, ‘*Gratuitously Violent’ Film Banned*, IR. TIMES, May 3, 1996, at 1.

¹⁰⁶ “The freedom of expression guarantee has received little attention from the courts,

free expression decision has been decided in the Irish Supreme Court, and that was a byproduct of the abortion reform controversy.¹⁰⁷ Yet it is easy to overestimate the censorious nature of Irish law, and likewise, to underestimate the desire for more censorship in the United States.

Close observers of American law recognize that the apparently unambiguous guarantee of free speech in the First Amendment is a code—it is not an absolute to be taken literally.¹⁰⁸ In the twentieth century the Supreme Court has “blessed” an elaborate pro-censorship scheme¹⁰⁹ that supports the desires of legislators and executives, at both federal and state levels, to control some speech. The Supreme Court has, in its effort to protect/control the “marketplace of ideas,” maintained a precarious balance between maximizing freedom for the individual speaker and avoiding absolutist interpretations of free speech. The Court’s First Amendment jurisprudence has essentially added a “subject to public order and morality” qualifier to the free speech guarantee.¹¹⁰ The bare command of the Constitution has resulted in the Court carrying the weight of national censorship supervision. While the United States has the reputation of keeping a high regard for free speech, the reality of its constitutional history is more complex. More often than not, censorship occurs at the local or state level.¹¹¹ The result is a crochet system of free speech restrictions. Nowhere is

which may reflect a low level of public concern on this issue. Certainly there has been nothing remotely resembling the volume of litigation under the First Amendment in the U.S.” JAMES CASEY, *CONSTITUTIONAL LAW IN IRELAND* 435 (1992).

¹⁰⁷ In *Attorney Gen. (Soc’y for the Protection of Unborn Children) v. Open Door Counseling*, [1988] I.R. 593, the Irish Supreme Court held that counseling women to travel abroad for abortions, or to get advice on abortions, was unconstitutional. The defendants had alleged that their counseling activities were related to a right of free expression and were ancillary to a right to obtain information. The Court held that “no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right of the unborn child.” *Id.* at 625.

¹⁰⁸ From the very beginning the Supreme Court has been circumspect in its interpretation of free speech (e.g., Justice Holmes’ concern about the false shout of fire in a crowded theater). See *Schenck v. United States*, 249 U.S. 47 (1919).

¹⁰⁹ The clearest view of the Supreme Court’s censorship doctrine comes by way of the categorical approach: the Court has declared five categories of speech to be essentially outside the reach of the First Amendment. The five categories are: speech that is likely to incite imminent lawless action; defamation; obscenity; fighting words; and child pornography. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 398-401 (White, J., concurring) (1992).

¹¹⁰ The terms “public order and morality” are central to the Supreme Court’s fighting words decision. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Though the Court has neglected *Chaplinsky*, its validity can hardly be doubted after Justice Scalia’s endorsement in *R.A.V.*

¹¹¹ Congress takes to censorship as well, usually on national security grounds. Occasionally other issues will stoke the desire to limit expression—most recently, concerns about the distribution of pornography over the Internet have been the topic of legislative discourse.

this more evident than in the instance of material found "obscene" under the *Miller* test.¹¹² *Miller's* elevation of "community standards" to a central role in obscenity prosecutions pre-empts the creation of a single national standard. The legal borderline between acceptable indecent/erotic material and sanctionable obscenity fluctuates according to variations in local culture.

While the Court maintains a commitment to vigorous debate and a bustling marketplace, lower level political officials are quick to use censorship as a panacea. Following censorship practices in fifty state jurisdictions is enormously difficult because of variations in legislation, case law, and prosecutorial discretion. State film censors, active and powerful for several decades, approached pornography in film with the "familiar triad of prohibitions: obscenity, indecency and immorality."¹¹³ However, in contrast to the Irish censor, the last state censor's office closed in 1981.¹¹⁴ State laws must now comply with the Court's *Miller* standard,¹¹⁵ which, much to the distress of some feminists and conservatives, has had little apparent effect on a thriving pornography market.¹¹⁶

Censorship of books in the United States is a phenomenon limited primarily to educational institutions and public libraries. Scholars in this field describe a substantial, and unending, barrage of attempts at repression.¹¹⁷ Frequently targeted titles include: *Catcher in the Rye*, *Go Ask Alice*, *Of Mice and Men*, and *To Kill a Mock-*

¹¹² *Miller v. California*, 413 U.S. 15 (1973).

¹¹³ RICHARD RANDALL, *CENSORSHIP OF THE MOVIES* 87 (1968). Other criteria used to censor included: incitement to crime, glorification of crime and incitement of religious, racial, or class hatred, and the presentation of "gruesome, revolting or disgusting scenes." *Id.* at 88-89. These criteria are strikingly familiar. Government-sponsored censor offices used their power to demand cuts in movies; the usual targets of this practice were scenes involving nudity, intercourse, profanity (e.g., "bitch," "whore," or "bastard"), sexual education, brutality, drug use, racial, or religious defamation. *See Id.* at 92-103.

¹¹⁴ EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE* 47 (1992).

¹¹⁵ *Miller*, 413 U.S. at 15.

¹¹⁶ In contrast, Irish censorship regimes were successful, at least until the mid-1990s, in keeping mainstream pornography, such as *Playboy* magazines and videos from the market. The difference between the two is partly attributable to the failure of the Supreme Court's current obscenity standard (see *Miller*, *supra* note 113). As a practical means of combating obscenity *Miller* seems to have floundered. Theoretically *Miller* is a stimulus to more prosecution of obscenity. The vague and contradictory elements of the *Miller* standard allow prosecutors substantial lee-way in its application. However, scholars have not been impressed by its impact. "The state of bewilderment that marked obscenity law remained largely unchanged. . . . The *Miller* tale was one of continuing confusion." *See* DE GRAZIA, *supra* note 115, at 145.

¹¹⁷ *See, e.g.*, HERBERT N. FOERSTEL, *BANNED IN THE U.S.A.* (1994); JOAN DELFATTORE, *WHAT JOHNNY SHOULDN'T READ* (1992); WILLIAM NOBLE, *BOOKBANNING IN AMERICA* (1990); L.B. WOODS, *A DECADE OF CENSORSHIP IN AMERICA* (1979). One author concludes from his 1966-75 sample that 36% of banning attempts at public libraries were successful, while 64% of such attempts at college and university libraries were successful. *Id.* at 138. Generally the number of banning attempts was on the increase. *Id.* at 40.

ingbird.¹¹⁸ Sporadic censorship efforts appear outside the school environment as well.¹¹⁹ A Massachusetts Attorney General sought to end distribution of a comic book at newsstands because it mocked Christmas.¹²⁰ Civil liberties groups often attack new censorship efforts, yet they face a relentless enemy. One commentator laments:

History demonstrates that no matter how many times censorship is defeated, it continues to return. And if the recent decade is any indication, censorship attempts are not only persisting, but increasing.

Since censorship has never been resolved, in the sense that its social foundations have not been discovered and addressed, it has had a snowball or cumulative effect over time. Even though particular censorship attempts . . . may fail on a regular basis, they contribute to a snowball effect insofar as they continually recur and their underlying causes remain unaddressed. As society becomes increasingly familiar and comfortable with censorship, the recurrent pattern of censorship is further solidified.

Court judgments on censorship disputes have not fundamentally resolved the public's concerns or censorship desires. . . . [D]espite the volume of case law, censorship attempts keep surfacing in the public—a public whose attitudes and concerns underlying and motivating its censorship impulse have not been settled by any court decree.¹²¹

A. Law and Culture

At first glance, the contrast between Ireland's crusade for a wholesome public morality and the American "system of free expression"¹²² appears to be quite strong. In the United States, censor offices are a thing of the past—in Ireland they remain part of

¹¹⁸ Woods, *supra* note 118, at 91. In a list compiled by *People* for the American Way in 1992, the same titles reappear; other new targets include: *The Adventures of Huckleberry Finn*, *The Handmaid's Tale*, *Christine*, *Little Red Riding Hood*, and *The Color Purple*. See FOERSTEL, *supra* note 118, at 135-219. Dictionaries have been targeted as well; words such as "bed" (defined as a verb), "knocker" (slang use), and "balls" (slang use) have raised censors' ire. NOBLE, *supra* note 118, at 214. The Anchorage School Board banned the American Heritage Dictionary in 1987. *Id.* at 215.

¹¹⁹ See generally NAT HENTOFF, *FREE SPEECH FOR ME, BUT NOT FOR THEE* (1992); DAVID COPP & SUSAN WENDELL, *PORNOGRAPHY AND CENSORSHIP* (1983); JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR* (1992); DONNA A. DEMAC, *LIBERTY DENIED: THE CURRENT RISE OF CENSORSHIP IN AMERICA* (1990); RICHARD O. CURRY, *FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980s* (1988).

¹²⁰ See NOBLE, *supra* note 118. Book burnings, based on religious passions, have been recorded in Colorado (1985), Oklahoma (1987), and Nebraska (1988).

¹²¹ PATRICK GARRY, *AN AMERICAN PARADOX* 35-36 (1993).

¹²² This phrase also serves as the title of Thomas Emerson's 1970 treatise on the First Amendment.

government bureaucracy. In the United States there are powerful judicial and legal elites devoted to values of freedom and maximization of liberty (whether it be of contract, of property, or of expression), and there is a public that is notoriously rights-conscious.

What distinguishes these countries is both law and culture. The most surprising thing about Irish free-expression law, from an American perspective, is its scarcity. The boundaries of the free speech guarantee have hardly been tested.¹²³ Why is that the case? The relatively conservative nature of the Irish Supreme Court could stand as a barrier to expanding boundaries, but in fact it has had few opportunities to advance a conservative, or liberal, view of free speech. In contrast, both conservative and liberal courts in the United States have devoted many pathbreaking cases to explicating "freedom of speech." The term "indecent" which is so prevalent in Irish law is not legally contested.¹²⁴ Again, in contrast, the term "obscene" tried the patience of the U.S. Supreme Court for at least two decades. The problem of "obscene" material was theoretically solved in 1973, in the *Miller* decision,¹²⁵ but the issue burns on in the lower courts today.¹²⁶ Furthermore, the Irish appear to be both adverse to litigation (in stark contrast with their U.S. counterparts) and unconcerned about the absence of certain books, videos, and magazines from the stores.

Another distinguishing feature is the age of the Irish Constitution. As the Constitution approaches its sixtieth anniversary, it has been the focus of remarkably few constitutional rights battles. Likewise, the early days of American constitutional development were devoted not to free speech issues, but to the fundamentals of the arrangement of power; first, between the states and the federal government, and second, between the three branches of the federal government.

A final distinguishing feature is the amendment process. In the United States the process is cumbersome, slowing the pace of constitutional change and thereby placing more pressure on the Supreme Court to "update" the document to the needs of contemporary society. In Ireland, amendment of the Constitution is relatively easy: a simple majority in a national referendum has all the

¹²³ See CASEY, *supra* note 107.

¹²⁴ The repression of indecent material is explicitly endorsed in the Constitution. See *supra* note 2.

¹²⁵ *Miller v. California*, 413 U.S. 15 (1973).

¹²⁶ A good example of recent controversy over the meaning of obscenity is the trial of members of the rap group 2 *Live Crew* over a sexually explicit musical recording. See *Skywalker v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990).

power. Amendments have been approved on the following subjects: integration into Europe; voting age; religious preference; divorce; and abortion. As peace in Northern Ireland becomes more feasible, it is likely that future amendments will address the "national territory" claim in Article 2, and other provisions that elevate a Catholic ethos.¹²⁷ Unpopular decisions of the Irish Supreme Court are not likely to survive.¹²⁸ Instead, referenda become the locus of constitutional debate—they involve a community's vision of what is best for the people as a whole. This contrasts with the individual rights focus (or "rights talk")¹²⁹ that is so prominent in American political and constitutional debate.

There has been an interesting overlap in the Irish and American experiences of censorship on one issue. As already noted, the distribution of contraception information was a prohibited activity in Ireland in the 1920s. It is interesting to recall that Margaret Sanger, an Irish-American and a pioneer in the development of the planned-parenthood movement,¹³⁰ constantly ran into censorship problems in the United States.¹³¹ Her hopes of using film as a medium of birth-control education were immediately frustrated.¹³² When the Irish parliament debated its Censorship of Publications Act, it was reminded by the CTS that twenty-three U.S. states, and the federal government, criminalized publication of contraceptive information. Only seven of the twenty-three states made exemptions to this rule for physicians and medical books.¹³³ The U.S. Supreme Court eventually came to support the liberalization of contraception law in 1965.¹³⁴ The Irish Supreme Court took a similar step in 1974.¹³⁵

V. CONCLUSION

Censorship regimes are quickly condemned by journalists,

¹²⁷ The issue of divorce (in both referendum and legislative forms) is one of the contemporary policy problems that the government seeks to solve by substantial liberalization of the law. See *supra* note 70.

¹²⁸ In this respect the Irish Constitution does not maintain, over the long run, the anti-majoritarian tenor that the American Bill of Rights embraces.

¹²⁹ Occasionally, scholars challenge the pre-eminence of rights in American thought. See MARY ANN GLENDON, *RIGHTS TALK* (1991).

¹³⁰ Sanger, born Margaret Higgins, was baptized in the Catholic Church and proceeded to become the first radical female Irish-American reformer. MADELINE GRAY, *MARGARET SANGER* 13 (1979).

¹³¹ Elizabeth Hovey, *Obscenity's Meaning, Smut-fighters, and Contraception: 1872-1936*, 29 *SAN DIEGO L. REV.* 13 (1992).

¹³² DE GRAZIA, *supra* note 115, at 16.

¹³³ ADAMS, *supra* note 36, at 33.

¹³⁴ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); DE GRAZIA, *supra* note 115, at 17.

¹³⁵ *McGee v. Attorney Gen.* [1974] I.R. 284.

civil libertarians, and most scholars. Irish censorship prompted George Bernard Shaw to warn of a "relapse into the dark ages." A contemporary observer is similarly pessimistic: "[c]ensorship has created a rift in Irish society, fostering the ignorance and provincialism of the Irish people."¹³⁶ The irony is that Ireland has not relapsed into the dark ages, and, today, its censorship-induced ignorance is of the content of films such as *Natural Born Killers* and *Flesh Gordon*; videos such as *Maids for Sex* and *Swedish Sex Games*; books such as *Suck Off* and *Teacher's Orgy*; and periodicals such as *Hustler* and *Leg Parade*. While the government's power to censor in Ireland has expanded more than it has contracted, the regime of censorship is far less extensive now than it has ever been. Ireland's "marketplace of ideas" thrives, and the specter of the omnivorous censor has been dispelled. The slippery slope that is thought to accompany expansive censorship legislation has failed, at least in this one instance, to materialize. Because the censorship of the 1990s has been far less intrusive on freedom of thought than anything preceding it, the Irish regime of "free speech" counts as a remarkable example of compromise between two legitimate governmental goals. One is to maximize the liberty/autonomy of the individual and the other is to protect the community's quality of life. In this respect the Irish and American systems of censorship have a great deal in common.

¹³⁶ BANNED, *supra* note 23, at 2.

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