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Recommended Citation

Samantha Barbas, *The Most Loved, Most Hated Magazine in America: The Rise and Demise of Confidential Magazine*, 25 Wm. & Mary Bill Rts. J. 121 (2016).

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THE MOST LOVED, MOST HATED MAGAZINE IN AMERICA: THE RISE AND DEMISE OF *CONFIDENTIAL* MAGAZINE

Samantha Barbas*

INTRODUCTION

Before the *National Enquirer*, *People*, and *Gawker*, there was *Confidential*.

In the 1950s, *Confidential* was the founder of tabloid, celebrity journalism in the United States. With screaming headlines and bold, scandalous accusations of illicit sex, crime, and other misdeeds, *Confidential* destroyed celebrities' reputations, relationships, and careers. Not a single major star of the time was spared the "*Confidential* treatment": Marilyn Monroe, Elvis Presley, Liberace, and Marlon Brando, among others, were exposed in the pages of the magazine.¹ Using hidden tape recorders, zoom lenses, and private investigators and prostitutes as "informants," publisher Robert Harrison set out to destroy stars' carefully constructed media images, and in so doing, built a media empire. Between 1955 and 1957, *Confidential* was the most popular, bestselling magazine in the nation.²

Confidential, published under Harrison's direction between 1952 and 1958,³ marked a watershed in the history of American media and celebrity culture. *Confidential* also played an important, little-known role in legal history and the history of freedom of the press. In the mid-1950s, the provocative, highly sexualized magazine became the subject of a nationwide campaign to eradicate it from the nation's newsstands. These efforts culminated in obscenity, criminal libel, and conspiracy charges

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¹ See, e.g., *infra* notes 23, 44, 423, 478 (discussing Liberace, Monroe, Brando, and Presley respectively).

² See *infra* notes 25–28 and accompanying text.

³ HENRY E. SCOTT, SHOCKING TRUE STORY: THE RISE AND FALL OF *CONFIDENTIAL*, "AMERICA'S MOST SCANDALOUS SCANDAL MAGAZINE" 10, 188 (2010). The magazine continued to publish until 1978, but it ceased publishing celebrity gossip in its original format in 1958 as a result of the legal campaign against it. See ANTHONY SLIDE, INSIDE THE HOLLYWOOD FAN MAGAZINE: A HISTORY OF STAR MAKERS, FABRICATORS, AND GOSSIP MONGERS 180 (2010); Robert Harrison, *Confidential's New Policy*, *CONFIDENTIAL*, Apr. 1958, reprinted in SAMUEL BERNSTEIN, MR. CONFIDENTIAL: THE MAN, HIS MAGAZINE & THE MOVIELAND MASSACRE THAT CHANGED HOLLYWOOD FOREVER 268 (2006).

brought by the state of California, and a star-studded 1957 Los Angeles trial, described as the “O.J. Simpson trial of its time.”⁴ The extensive litigation against *Confidential* killed the magazine, and Robert Harrison ceased publishing in 1958.⁵ Only sixty years ago, at a time when First Amendment protections for speech were fairly well-developed, the most popular magazine in the country was effectively run out of business by the law. How and why this happened is the subject of this Article.

Confidential magazine has been written about extensively in the context of celebrity history and film history, but its legal history has yet to be documented.⁶ Drawing on unpublished legal and archival sources, this Article tells the story of the rise and fall of *Confidential* between 1955 and 1957, and in so doing, illuminates a significant and transformative episode in the history of freedom of the press.

The decade after the Second World War was a time of uncertainty and tension around the meaning of freedom of the press and the legal limits of public expression. The 1950s were a crossroads in First Amendment history, a time when liberalizing trends of earlier decades were in retreat, and moral and political panics in the early Cold War years led to widespread support for official measures suppressing allegedly immoral and subversive publications.⁷ Censorship became a contested issue, pitting conservative social reformers against a coalition of publishers, journalists, and civil libertarians.⁸

Wildly popular and at the same time reviled for its salacious content, *Confidential* became a focal point in the debate over censorship and government restraints on

⁴ SCOTT, *supra* note 3, at 172.

⁵ See *infra* Part V.

⁶ For books and chapters on *Confidential* magazine and celebrity culture, see BERNSTEIN, *supra* note 3; MARY R. DESJARDINS, RECYCLED STARS: FEMALE FILM STARDOM IN THE AGE OF TELEVISION AND VIDEO (2015); SAM KASHNER & JENNIFER MACNAIR, THE BAD AND THE BEAUTIFUL: HOLLYWOOD IN THE FIFTIES (1st ed. 2002); SCOTT, *supra* note 3; Mary Desjardins, *Systematizing Scandal: Confidential Magazine, Stardom, and the State of California*, in HEADLINE HOLLYWOOD: A CENTURY OF FILM SCANDAL (Adrienne L. McLean & David A. Cook eds., 2001); Anne Helen Petersen, *The Gossip Industry: Producing and Distributing Star Images, Celebrity Gossip, and Entertainment News, 1910–2010* (May 2011) (unpublished Ph.D. dissertation, University of Texas, Austin) (on file with author). The dearth of scholarship on *Confidential*'s legal battles may result, in part, from a mistaken assumption that the trial records do not exist. See BERNSTEIN, *supra* note 3, at 11 (“[N]o copy of the transcripts seems to have survived anywhere . . .”). Records of the *Confidential* trial exist in the archives of the Los Angeles County Superior Court and also at the University of Illinois Urbana–Champaign Rare Books Library.

⁷ See *infra* Part II.

⁸ On censorship in the 1950s, see generally PAUL S. BOYER, PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE (James Danky & Wayne Wiegand eds., 2d ed. 2002); MORRIS L. ERNST & ALAN U. SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE (1964); ROBERT W. HANEY, COMSTOCKERY IN AMERICA: PATTERNS OF CENSORSHIP AND CONTROL (1960); TERENCE J. MURPHY, CENSORSHIP: GOVERNMENT AND OBSCENITY (1963); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 649 (1955).

publishing.⁹ While commentators across the political spectrum agreed that *Confidential* was trash and should be eliminated from newsstands, *how* to get rid of the magazine became a matter of dispute. Reformers proposed an array of restrictions on the magazine, including outright bans on *Confidential*.¹⁰ Civil libertarians denounced such measures as censorship—as unconstitutional prior restraints.¹¹

At the same time, the dialogue around the “*Confidential* problem” elicited consensus on fundamental points. Civil libertarians and conservative reformers agreed that freedom of speech was not absolute, and that the law had an important role to play in regulating publishing content.¹² Both sides agreed that legal procedures resulting in civil and criminal liability were preferable to prior restraints, and supported existing libel and obscenity laws as limitations on injurious speech.¹³ This consensus would soon unravel, as civil libertarians and the Supreme Court moved towards more absolutist positions on speech in the 1960s.¹⁴ The *Confidential* episode marked the beginnings of a transition in freedom of speech—a moment when older views of the First Amendment, in which authorities had greater latitude to restrain and punish offensive material, were beginning to be eclipsed by a more modern, civil libertarian framework.

Confidential was not the first “scandal magazine,” nor the first to write about Hollywood gossip. Sensational, tabloid-style magazines focusing on crime, immorality, and celebrity romances existed since the early twentieth century.¹⁵ But *Confidential*, with its revelations of homosexuality and interracial sex, may have been “the most scandalous scandal magazine” to that time.¹⁶ Part I explains the origins of *Confidential*, the career of publisher Robert Harrison, and the magazine’s inner workings. Part II describes the debate over censorship in the 1950s, and Part III the legal campaign against *Confidential*.

⁹ See *infra* Part I.B.

¹⁰ See *infra* Part III.

¹¹ See *infra* notes 294–99 and accompanying text.

¹² See *infra* Part II.C.

¹³ *Id.*

¹⁴ See *infra* notes 651–59 and accompanying text.

¹⁵ See BOYER, *supra* note 8, at 155. Paul Boyer writes of the “frankly erotic and sensational magazines” that became big business in the 1920s, among them *True Story Magazine*, “devoted to repentant tales of sexual misdeeds”; *True Confessions*; *Screen Secrets*; and *Modern Romance*; and newspaper tabloids “with lurid and prurient coverage” of high-profile divorce and murder trials. *Id.*; see also THEODORE PETERSON, *MAGAZINES IN THE TWENTIETH CENTURY* 339 (1956) (noting magazines from earlier decades trafficking in “uncomplicated sex and unsophisticated smut”).

¹⁶ Thomas K. Wolfe, *Public Lives: Confidential Magazine: Reflections in Tranquility by the Former Owner, Robert Harrison, Who Managed to Get Away With It*, *ESQUIRE*, Apr. 1964, at 87. As journalist Harold Conrad described it, “[i]t’s the devil’s diary. Harrison has undressed half of Hollywood on its pages with blow-by-blow descriptions of bedroom encounters—and I do mean blow-by-blow.” HAROLD CONRAD, *DEAR MUFFO: 35 YEARS IN THE FAST LANE* 97 (1982).

Part IV focuses on California's war on *Confidential*. The State's attack was a direct result of film industry pressure, and also the political ambitions of Attorney General Edmund "Pat" Brown, soon-to-be governor.¹⁷ Following a state congressional investigation of *Confidential*'s newsgathering methods, Brown sought criminal charges against *Confidential* for violations of obscenity and criminal libel laws.¹⁸ Part V details the spectacular trial of *Confidential* in 1957 and public reactions to it. Despite Brown's obvious political motivations, the pressures of the film industry, and the vagueness of California's criminal libel and obscenity laws, the trial was celebrated as a triumph of democracy and the legal process over more overt and authoritarian censorship methods.¹⁹

Not long after the trial, *Confidential* disappeared from the scene. In the end, it was not criminal charges, postal bans, or "anti-scandal" legislation that did it in, but rather the collective toll of the litigation it faced—in particular, staggering attorneys' fees.²⁰ The Conclusion contemplates the legacy of *Confidential* and its legal travails. However brief its scandalous life may have been, *Confidential* had an enduring impact on freedom of the press, the cult of celebrity, and popular publishing.

I. CONFIDENTIAL

The 1950s saw the rise of the "scandal magazines." Featuring celebrity gossip, shocking, breathless headlines, and titles like *Dynamite*, *Exposed*, *Hush-Hush*, *The Lowdown*, *Private Lives*, *Suppressed*, *Top Secret*, and *On the QT*,²¹ the staple of the scandal magazines was sin and sex: sexual transgressions and other misconduct by actors and other prominent persons.²² Articles were short, had glamorous pictures, and were easy to read.²³ Typical stories included exposés that "[a] singing star is wire-tapped and found to be constantly entertaining her ostensibly estranged husband. . . . A Hollywood ing[é]nue is shown to be a nymphomaniac. . . . A wealthy heiress may be addicted to artificial stimulants[.]" in *Newsweek*'s words.²⁴ In 1955, the sale of the scandal magazines reached around ten million copies per issue.²⁵

The leading scandal magazine was *Confidential*, the biggest newsstand seller in American history to that time, with a per issue sale of 4.6 million in July 1956.²⁶ In

¹⁷ SCOTT, *supra* note 3, at 161–62.

¹⁸ *Infra* Part IV.

¹⁹ *See infra* Part V.

²⁰ SCOTT, *supra* note 3, at 187.

²¹ *Id.* at 116.

²² *See generally* Petersen, *supra* note 6, at 86–127 (outlining how celebrity magazines, led by *Confidential*, presented stars as violating social morals).

²³ *See, e.g.*, Horton Streete, *Why Liberace's Theme Song Should Be . . . 'Mad About the Boy'*, CONFIDENTIAL, July 1957, at 16, 16–21, 59–60.

²⁴ *The Curious Craze for 'Confidential' Magazines . . .*, NEWSWEEK, July 11, 1955, at 50 [hereinafter *Curious Craze*].

²⁵ Richard Gehman, *Confidential File on Confidential*, ESQUIRE, Nov. 1956, at 67.

²⁶ *Id.*

the mid-1950s, around sixteen million Americans read *Confidential* each week.²⁷ Its nearest rival on the newsstands, *TV Guide*, could boast only about 2.3 million, and *Life* magazine, around 900,000.²⁸ “What our readers want is facts, gossipy facts, that they don’t get elsewhere,” publisher Robert Harrison told the *Wall Street Journal*.²⁹ Said a former editor of *Confidential* who became editor of *Suppressed Magazine*, “[w]hat we give them is what they can’t get on television.”³⁰

A. The Magazine

1. Origins

Confidential publisher Robert Harrison was no stranger to the world of sleazy publishing. Born in 1904 in New York, Harrison got his start in the publishing industry in the 1920s when he worked on the tabloid the *Evening Graphic*, and after that, a series of movie industry trade publications.³¹ In the early 1940s he started the first of his several “girlie” magazines, *Beauty Parade*, in his two-room apartment in New York.³² By the end of the forties, he had five such magazines.³³ His reign as the “Cheesecake King”³⁴ was short-lived, however. In 1952, his accountant informed him that his company was broke, and he began searching for a new concept.³⁵

Harrison got the idea for *Confidential* when he saw the public response to the televised 1951 Senate hearings on organized crime led by Senator Estes Kefauver.³⁶ Millions of Americans abandoned their work to watch gangsters and prostitutes testify against each other.³⁷

²⁷ 9 Transcript of Record at 1043, *California v. Meade*, No. 190871 (Cal. Super. Ct., L.A. Cty. Aug. 21, 1957).

²⁸ *Id.*

²⁹ J. Howard Rutledge, *Sin & Sex: Gossipy Private Peeks at Celebrities’ Lives Start Magazine Bonanza*, WALL ST. J., July 5, 1955, at 1.

³⁰ *Curious Craze*, *supra* note 24, at 51 (internal quotation marks omitted).

³¹ Gehman, *supra* note 25, at 144.

³² SCOTT, *supra* note 3, at 15. It was a “‘fetishist magazine.’ It featured nothing but pictures of almost-undressed girls, wearing very high-heeled shoes, threatening each other with whips . . .” Gehman, *supra* note 25, at 145.

³³ Gehman, *supra* note 25, at 145.

³⁴ Rutledge, *supra* note 29.

³⁵ Neal Gabler, *Confidential’s Reign of Terror*, VANITY FAIR (Apr. 1, 2003, 1:47 PM), <http://www.vanityfair.com/hollywood/2003/04/robert-harrison-confidential-magazine> [<https://perma.cc/HKY2-ZMP9>].

³⁶ Gehman, *supra* note 25, at 145.

³⁷ On the Kefauver hearings, see Thomas Doherty, *Frank Costello’s Hands: Film, Television, and the Kefauver Crime Hearings*, 10 FILM HIST. 359, 368 (1998) (“During the two-week run of the Kefauver Committee in New York, most of [New York City] stopped to watch the riveting real-time, real-life television drama. . . . [T]axi drivers cruised deserted streets, housewives neglected housework, and apartment dwellers held ‘Kefauver block parties’. [sic]”).

When the Kefauver Committee was conducting its TV hearings . . . people were nuts about it. . . . [E]verybody[—]office workers, housewives, average people[—]were . . . wrapped up in watching characters they'd read about—thieves, prostitutes, racketeers—get up on the stand and be questioned. I figured if that's what they wanted—real facts about people they constantly read about—something about their personal lives—I'd give it to them[,]

Harrison explained.³⁸

Six months later, *Confidential* hit newsstands. The name *Confidential* came from a series of recent, bestselling “exposé books” by journalists Lee Mortimer and Jack Lait, titled *New York Confidential*, *Chicago Confidential*, *Washington Confidential*, and *U.S.A. Confidential*.³⁹ Harrison intended *Confidential* to be a “fact magazine,” a muckraking news publication that would “expose rackets, phony consumer products, corrupt public officials, Reds, and show-business people who are fakes”⁴⁰—“an expos[é] type of magazine . . . that told the stories that the newspapers did not tell, or other magazines did not tell.”⁴¹ As Harrison promised in *Confidential*'s first issue:

The lid is off! The bunk is going to be debunked! In this, its first issue, CONFIDENTIAL will open your eyes and make them pop. It pulls the curtain aside and takes you behind the scenes, giving facts, naming names and revealing what the front pages often try to conceal!

You'll get plain talk without double-talk. You'll get what you've always wanted to get—the real stories behind the headlines—uncensored and off the record!⁴²

When the first few issues of *Confidential* had disappointingly low circulation, Harrison decided he needed “more and hotter stories on Hollywood personalities.”⁴³ In 1953, he hit upon a new formula when he published a sensational article on the

³⁸ *Confidential: Between You and Me and the Bedpost*, FORTNIGHT, July 5, 1955, at 24, 25 [hereinafter *Between You and Me*].

³⁹ See JACK LAIT & LEE MORTIMER, CHICAGO CONFIDENTIAL (1st ed. 1950); JACK LAIT & LEE MORTIMER, NEW YORK CONFIDENTIAL (1st ed. 1948); JACK LAIT & LEE MORTIMER, U.S.A. CONFIDENTIAL (1st ed. 1952); JACK LAIT & LEE MORTIMER, WASHINGTON CONFIDENTIAL (1st ed. 1951).

⁴⁰ Howard Rushmore, *I Worked for Confidential*, CHRISTIAN HERALD, Jan. 1958, at 32, 36 (internal quotation marks omitted).

⁴¹ 2 Transcript of Record (Aug. 9, 1957), *supra* note 27, at 125.

⁴² *Confidentially Speaking*, CONFIDENTIAL, Dec. 1952, at 4.

⁴³ 2 Transcript of Record, *supra* note 27, at 127.

breakup of Joe DiMaggio's marriage to Marilyn Monroe titled *Why Joe DiMaggio Is Striking Out with Marilyn Monroe!*⁴⁴ When it became apparent that the magazine would sell out, Harrison launched a new policy. "[W]e needed hot, inside stories from Hollywood," he told his staff.⁴⁵ He wanted readers to say, "[w]e never knew that before."⁴⁶ The new criteria for running a story was, "is the star's name big enough and well enough known to sell the magazine?"⁴⁷ The plan worked. At the height of the magazine's success in 1956, Harrison was earning a profit of over \$350,000 per issue, making him one of the most successful magazine publishers in American history.⁴⁸

2. 'Nothing But Smut'

Each issue of *Confidential* had around fifteen articles presenting "inside stuff" on entertainment celebrities, mostly having to do with sex.⁴⁹ Some of the magazine's most famous articles included a story alleging that Frank Sinatra ate Wheaties while lovemaking to enhance his sexual prowess,⁵⁰ an article on actress Maureen O'Hara engaging in romantic activities with a lover in the back of a movie theater,⁵¹ and a piece on a failed "raid" of the apartment of Marilyn Monroe's lover by Joe DiMaggio and Frank Sinatra.⁵² Exposés revealed negligent parents, drug addictions, and extra-marital affairs, with titles like *How Rita Hayworth's Children Were Neglected*,⁵³ *Gary Cooper's Lost Weekend with Anita Ekberg*,⁵⁴ and *Caught—Guy Madison in Barbara Payton's Boudoir*.⁵⁵ For the most part, news reporting on celebrities had been tame and sanitized—a product of Hollywood's power over the publishing industry, conservative social morals, and mainstream journalism's tendency to shun risqué

⁴⁴ Harrison L. Roberts, *Why Joe DiMaggio Is Striking Out with Marilyn Monroe!*, CONFIDENTIAL, Aug. 1953, at 3, 18.

⁴⁵ 2 Transcript of Record, *supra* note 27, at 130.

⁴⁶ *Id.* (internal quotation marks omitted).

⁴⁷ Rushmore, *supra* note 40, at 36.

⁴⁸ Gehman, *supra* note 25, at 143.

⁴⁹ *Sin, Sex, and Sales*, NEWSWEEK, Mar. 14, 1955, at 88, 88. Seventy-eight percent of articles in *Confidential* emphasized the value of "sex" and "sex-love." Jerome Michael Kelly, *The Credibility of Confidential Magazine and the Newspaper Compared* 35 (June 1957) (unpublished M.A. thesis, Stanford University) (on file with author).

⁵⁰ See Gabler, *supra* note 35.

⁵¹ R.E. McDonald, *It Was the Hottest Show in Town When . . . Maureen O'Hara Cuddled in Row 35*, CONFIDENTIAL, Mar. 1957, at 10, 10.

⁵² J. E. Leclair, *From a Private Eye's Confidential Report . . . The Real Reason for Marilyn Monroe's Divorce*, CONFIDENTIAL, Sept. 1955.

⁵³ Jay Breen, *How Rita Hayworth's Children Were Neglected*, CONFIDENTIAL, Sept. 1954, at 41.

⁵⁴ Horton Streete, *Gary Cooper's Lost Weekend with Anita Ekberg*, CONFIDENTIAL, Jan. 1956, at 20.

⁵⁵ Stephen James, *Caught—Guy Madison in Barbara Payton's Boudoir*, CONFIDENTIAL, Mar. 1956, at 23.

matter in order to court “respectable” audiences.⁵⁶ For their time, *Confidential*’s articles were truly shocking and groundbreaking.

The magazine featured what one writer described as a “neo-tabloid” style, with “screaming headlines,” “innuendo-laden blurbs,” and “smoking-car tone” writing.⁵⁷ *Confidential*’s language was “sexist, homophobic, and reactionary,” in the words of writer Steve Govoni.⁵⁸ “Women were referred to as *sirens, beauties, dishes, lassies, cuties, wenches, chicks, or pigeons.*”⁵⁹ “Prostitutes were called *chippies, play-for-pay honeys, love-for-loot dates, or cuddle-for-cash cuties.*”⁶⁰ *Confidential* was obsessed with interracial relationships,⁶¹ socially taboo at the time. The black women allegedly involved in such relationships were “*tan tootsies, chocolate bon-bons or night-blooming sepia sirens.*”⁶²

Confidential played on the public’s fear of, and fascination with, homosexuality.⁶³ Gay men were described as “limp-wrists” or “lavenders.”⁶⁴ Harrison was said to be obsessed with “outing” actors and other public figures.⁶⁵ A 1954 article revealed that

⁵⁶ See generally John Summers, *Whatever Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy*, 2000 J. AM. HIST. 826 (discussing norms of professional journalism that mandated concealing the sexual affairs of public figures). Before the 1950s, the primary publications featuring news about film celebrities were fan magazines, with titles like *Photoplay* and *Modern Screen*. See generally SLIDE, *supra* note 3. The fan magazines were essentially extensions of Hollywood studio publicity departments, presenting false and highly glorified descriptions of celebrities as upstanding, wholesome and moral. See generally *id.*; Petersen, *supra* note 6, at 46–53 (describing the editorial collusion between Hollywood and magazines to maintain stars’ images). Gossip columnists writing for major newspapers, such as Louella Parsons and Hedda Hopper, occasionally broke celebrity scandals, but like the fan magazines, these writers were generally beholden to the Hollywood studios and loath to print anything that might turn public opinion against the film industry. See generally SAMANTHA BARBAS, *THE FIRST LADY OF HOLLYWOOD: A BIOGRAPHY OF LOUELLA PARSONS* (2005); Petersen, *supra* note 6, at 53–69 (explaining the close relationships between gossip columnists and Hollywood studios).

⁵⁷ Gehman, *supra* note 25, at 67.

⁵⁸ Steve Govoni, *Now It Can Be Told*, AM. FILM, Feb. 1, 1990, at 28, 30.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ On the panic around homosexuality in the 1950s, see generally JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 292–95 (1988); George Chauncey, Jr., *The Postwar Sex Crime Panic*, in *TRUE STORIES FROM THE AMERICAN PAST* 160 (William Graebner ed., 1993); Fred Fejes, *Murder, Perversion, and Moral Panic: The 1954 Media Campaign Against Miami’s Homosexuals and the Discourse of Civic Betterment*, 9 J. HIST. SEXUALITY 305 (2000).

⁶⁴ Govoni, *supra* note 58, at 30.

⁶⁵ Gabler, *supra* note 35. See generally SCOTT, *supra* note 3, at 80–94 (detailing Harrison and *Confidential*’s rigorous pursuit of stories about homosexual stars in Hollywood).

actor Van Johnson was gay.⁶⁶ An article titled *Why Liberace's Theme Song Should Be . . . 'Mad About the Boy'* claimed that the pianist Liberace was gay and had been making advances on a male press agent.⁶⁷ "The Untold Story of Marlene Dietrich" reported that many of "Dietrich's dalliances . . . were not with men!"⁶⁸ "Dietrich going for dolls? Her adoring fans the world over will shriek, 'Impossible!' It's the truth, though. In the game of amour, she's not only played both sides of the street, but done it on more than one occasion."⁶⁹ The magazine also outed several prominent public officials. In 1956 *Confidential* published a story that outed President Eisenhower's former Appointments Secretary, Arthur H. Vandenberg, Jr.,⁷⁰ under-Secretary of State Sumner Welles was outed by the magazine in May 1956.⁷¹

In between these tawdry stories were so-called "public service exposés."⁷² *Confidential* described children being poisoned by aspirin and household insecticides, the dangers of smoking, and other risks to society.⁷³ Screaming headlines alerted the public to *THE ONE-HOUR PREGNANCY TEST!*,⁷⁴ *DANGER—BORIC ACID AS A POISON!*,⁷⁵ *SURGERY'S NEWEST BUST MIRACLE*,⁷⁶ *NEWTWO-WEEK ULCER CURE*,⁷⁷ *NOW—HOMOSEXUALS CAN BE CURED!*,⁷⁸ *NOW—SURGERY CURES FRIGID WIVES*,⁷⁹ *CIGARETTES DO NOT CAUSE CANCER*,⁸⁰ and *Warning! Coffee CAN Make You Fat*.⁸¹ Harrison would use these "public service" articles to defend himself against charges that the magazine was nothing but "smut."⁸²

⁶⁶ Bruce Cory, *The Untold Story of Van Johnson*, CONFIDENTIAL, Sept. 1954, at 13.

⁶⁷ Streete, *supra* note 23, at 17.

⁶⁸ Kenneth G. McLain, *The Untold Story of Marlene Dietrich*, CONFIDENTIAL, July 1955, at 22.

⁶⁹ *Id.*

⁷⁰ Truxton Decatur, *Why Ike Bounced Arthur Vandenberg, Jr.*, CONFIDENTIAL, Nov. 1956, at 22.

⁷¹ Truxton Decatur, *We Accuse . . . Sumner Welles*, CONFIDENTIAL, May 1956.

⁷² KASHNER & MACNAIR, *supra* note 6, at 19.

⁷³ *See id.* at 19–20.

⁷⁴ CONFIDENTIAL, Nov. 1955.

⁷⁵ CONFIDENTIAL, July 1955.

⁷⁶ CONFIDENTIAL, Jan. 1956.

⁷⁷ CONFIDENTIAL, July 1956.

⁷⁸ CONFIDENTIAL, May 1957.

⁷⁹ CONFIDENTIAL, July 1957.

⁸⁰ CONFIDENTIAL, Nov. 1957.

⁸¹ CONFIDENTIAL, Jan. 1958.

⁸² Harrison said,

[I]n each issue there are frequently one, two, three articles that are of a crusading type. For example: aspirin. . . . We found out that aspirin was the greatest number one killer of children. . . . Now to me that was doing a great deal of good. I can tell you this very frankly that if we didn't put our spicy stuff in there no one would ever read that.

Gehman, *supra* note 25, at 143 (internal quotation marks omitted); *see also* John Sisk, *The Exposé Magazines*, COMMONWEAL, June 1, 1956, at 223, 223 ("These magazines may conduct

3. How It Worked

Commentators speculated on the reasons behind *Confidential*'s success. Some saw the popularity of the magazine as an indication of a decline in social morals—"widespread emotional and spiritual immaturity."⁸³ Others saw the rise of the scandal magazines as a sign of Americans' growing boredom at the workplace.⁸⁴ Ray Fiore, the vice-president of the company that distributed *Confidential*, offered perhaps the most trenchant explanation: a cynical, world-weary public.⁸⁵

This is the age of cynicism. Right? Trace it back. Up to 1929 Americans had credulous minds. They believed everything they read in the papers and the magazines.

Then came the crash [of 1929]. Then came 12 years of hunger, people selling apples. Then six, seven years of war, and six, seven years of cold war.

So pretty soon the people begin to realize that life is tough. And they start not believing what they're told. About two, three years ago they reach a pinnacle of cynicism and doubt.

Along comes *Confidential*. It tells the people about crime, filth, vice, corruption. Just what the people want, just what they suspected was going on.⁸⁶

public-interest crusades against frauds or abuses of one sort or another and sometimes cultivate a moralistic tone, but this is . . . window dressing.”)

⁸³ Edith Roosevelt, *Who Are the 'Confidential' Readers? Sexually Lost, Uncultured, Doctors Say*, MANSFIELD NEWS-JOURNAL, Sept. 23, 1957, at 36.

⁸⁴ *Design Jobs for Workers, Executive Says*, DAILY REG., Apr. 5, 1956, at 4 (“People aren’t getting the satisfaction they used to from their work, an insurance company personnel director said today, because their jobs are boring. Workers are turning to TV, movies and scandal magazines . . . and the result is ‘creative sterility.’”).

⁸⁵ Jack Olsen, *Titans of Trash*, SUNDAY HERALD, Nov. 6, 1955, at M2; see also *Curious Craze*, *supra* note 24, at 50–51:

The U.S. public is the most communication-glutted group of people in world history. Daily bombarded by “facts” which conflict, daily told opposite versions of the same incidents, hopelessly incapable in this complicated world of sorting out the truth, a great many Americans have undoubtedly built a thick shell of skepticism around themselves.

Understandably, the shell often hardens into cynicism. Having seen more than his share of legitimate scandals and exposures, the reader begins to think that *every* story must have some kind of a “lowdown” beneath the surface, some “uncensored” facts known only to a “confidential” few.

⁸⁶ Olsen, *supra* note 85, at M2 (internal quotation marks omitted).

Confidential also rose to prominence because Harrison was able to play on the public's penchant for celebrity gossip. The magazine promised to explode the pristine celebrity narratives that had long circulated in popular culture and to reveal that sexual and moral deviance ran rampant in Hollywood. The rise of *Confidential* "bespoke a hunger for this type of coverage," wrote historian Anne Helen Petersen.⁸⁷

Harrison capitalized on recent developments in the film industry: the decline of the studio system and with it, Hollywood's tightly controlled system of celebrity publicity. Since the 1920s, the film industry had been organized into a "studio system."⁸⁸ Five vertically integrated film companies dominated film production, distribution, and exhibition.⁸⁹ In 1948, the Supreme Court, in *United States v. Paramount Pictures, Inc.*,⁹⁰ declared that the studios held a monopoly over film production, distribution, and exhibition, and forced them to divest.⁹¹ The studios sold off their theater chains.⁹² This spelled financial disaster for the studios, since exhibition had been their primary source of profit.⁹³ Hollywood was also undermined by the rise of television, which reduced film attendance.⁹⁴

The demise of the studio system transformed celebrity publicity. Under the studio system, studio publicity departments had been responsible for publicizing actors who were under contract to the studios. To conceal stars' "sexual preferences, illicit sexual dalliances, and illegal activities," publicists issued phony, laudatory biographies and news releases that portrayed actors as upstanding, wholesome, and moral.⁹⁵ Magazines showed actresses "in [their] kitchen[s], dicing carrots, and spouting . . . thoughts about motherhood, the sanctity of marriage, and the intrinsic goodness of God."⁹⁶ Writers for fan magazines were required to submit all articles to the studio publicity departments before publication, and interviews with celebrities had to be conducted with a studio publicist present.⁹⁷ Journalists who violated these rules were banned from studio lots.⁹⁸ "The Hollywood press corps . . . was about as autonomous as TASS, the Soviet news agency," observed journalist Sam Kashner.⁹⁹ "If you printed

⁸⁷ Petersen, *supra* note 6, at 118.

⁸⁸ On the origins of the studio system, see generally TINO BALIO, *GRAND DESIGN: HOLLYWOOD AS A MODERN BUSINESS ENTERPRISE 1930–1939* (1993); DOUGLAS GOMERY, *THE HOLLYWOOD STUDIO SYSTEM: A HISTORY* (2005).

⁸⁹ SCOTT, *supra* note 3, at 34–35.

⁹⁰ 334 U.S. 131 (1948).

⁹¹ *Id.* at 152.

⁹² MICHAEL CONANT, *ANTITRUST IN THE MOTION PICTURE INDUSTRY: ECONOMIC AND LEGAL ANALYSIS* 107 (1960).

⁹³ See generally *id.* at 129–35 (explaining the result of *Paramount* for studio profits).

⁹⁴ See Petersen, *supra* note 6, at 144–45.

⁹⁵ *Id.* at 121.

⁹⁶ John Crosby, *Liz's Libel Suit*, CUMBERLAND NEWS (Md.), Dec. 8, 1960, at 15.

⁹⁷ Petersen, *supra* note 6, at 51; see also Gordon Kahn, *The Gospel According to Hollywood*, ATLANTIC, May 1947, at 98.

⁹⁸ Petersen, *supra* note 6, at 51.

⁹⁹ Sam Kashner, *Confidential*, GQ, Mar. 2000, at 218.

something about, say, Rock Hudson that wasn't approved by Universal Pictures, you didn't get invited to press conferences anymore. You were blackballed from the Hollywood beat."¹⁰⁰

After the *Paramount* decision and the divestment decree, many stars were no longer under contract to the studios. Publicity came increasingly from the press agents that stars hired on their own.¹⁰¹ "Without studio mediation, a star's actions became increasingly transparent," wrote Petersen.¹⁰² If a star was arrested or caught in a tryst, the studio's "fixers" were no longer available to cover up for them.¹⁰³ "The gossip floodgates were essentially opened."¹⁰⁴

Confidential played on these vulnerabilities. With the help of his lawyers, Harrison devised an elaborate system for cultivating, channeling, and verifying gossip from anonymous Hollywood informants, who were paid between \$100 and \$1,000 for "tips."¹⁰⁵ "[C]ops, private detectives, prostitutes, B actors,"¹⁰⁶ and "friends of celebrities, enemies of celebrities . . . disgruntled discharged maids and butlers . . . press agents who formerly worked for celebrities and even press agents who currently work for celebrities" were happy to have a lucrative outlet for the tips they picked up.¹⁰⁷ Actors would rat on their colleagues when they were short of cash, and mainstream journalists were paid to "pass along gossip that their own newspapers deemed too hot to handle."¹⁰⁸ Informants reported to *Confidential*'s Hollywood agents or sent tips to the magazine's offices in New York, often in plain envelopes.¹⁰⁹ Harrison paid his sources in cash, or

¹⁰⁰ *Id.* In the words of Time, Inc.'s Hollywood writer Ezra Goodman, "The studios and the press agents have never favored an independent press. All they want from the journalists is paeans of praise and a constant quota of sweetness and light. . . . The resultant blackout on fact and truth has made the celluloid curtain as impenetrable as any supposed iron curtain." EZRA GOODMAN, *THE FIFTY-YEAR DECLINE AND FALL OF HOLLYWOOD* 41 (1961).

¹⁰¹ See Petersen, *supra* note 6, at 78–80.

¹⁰² *Id.* at 68.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Gehman, *supra* note 25, at 139.

¹⁰⁶ SCOTT, *supra* note 3, at 36.

¹⁰⁷ Gehman, *supra* note 25, at 142.

¹⁰⁸ VAL HOLLEY, MIKE CONNOLLY AND THE MANLY ART OF HOLLYWOOD GOSSIP 28 (2003).

¹⁰⁹ Gehman, *supra* note 25, at 142. Harrison told a potential contributor:

Look, you don't have to do the work. You don't write the story. You just type the idea on a piece of paper. We got men in the office that will write it up. Or you can telephone it in if you got an idea for a story. Nobody will know you gave us the idea. We could pay you in cash so no checks will be traced back to you.

Don't worry about nothing. We put private detectives on the trail to make sure the facts are right. I have spent thousands of dollars checking on a story. All we want is the tip. You hear a good rumor, you phone it in to me personally and you got yourself five hundred dollars.

Maurice Zolotow, *Confidentially, It's Pay Dirt*, DETROIT FREE PRESS, Nov. 13, 1955, at 4-C (internal quotation marks omitted).

checks signed to fictitious names, to protect their identities.¹¹⁰ Sometimes *Confidential* threatened actors and studio personnel, practically forcing them to divulge secrets. The Universal-International studio gave *Confidential* information about actor Rory Calhoun's jail record in exchange for *Confidential*'s agreement to withhold articles outing a star, Rock Hudson, who was more important to them than Calhoun.¹¹¹

In 1955, Harrison opened Hollywood Research Incorporated, a "research bureau" headquartered in Hollywood.¹¹² Hollywood Research became a clearinghouse for tips. It coordinated the gathering of data, payment to informants, and fact-checking—the important "authentication" or "verification" process.¹¹³ The bureau was run by Harrison's niece, Marjorie Meade, and her husband Fred.¹¹⁴ Harrison provided the Meades with \$5,000, bought them an expensive home for entertaining in Beverly Hills, and the Meades worked their way into Hollywood social circles.¹¹⁵ In 1955, the Meades pursued over 750 story leads.¹¹⁶

Established freelance writers were hired to turn the raw data into finished stories. Freelancers were often "rewrite men and reporters on the New York dailies who [were] looking to supplement their incomes; [or] former first-rate writers . . . who, for some reason, generally involving temperament or booze, can no longer work for the popular family magazines," noted *Esquire*.¹¹⁷ The articles, published pseudonymously, were edited and polished by *Confidential*'s small in-house staff of four writers and freelance writers.¹¹⁸ The editors put the articles into *Confidential*'s trademark "toboggan ride" style¹¹⁹—as Harrison described it, "racy and free of embroidery, [which] keeps the reader on the edge of his seat."¹²⁰

4. The Legal Department

Knowing the wrath his exposés would likely incur, Harrison structured *Confidential*'s operations around the possibility of legal threats and legal retribution.¹²¹ Though based in New York, *Confidential* had no corporate or jurisdictional connection to its printer, wholesaler, distributor, and sellers.¹²² The magazine was printed in

¹¹⁰ Gehman, *supra* note 25, at 142.

¹¹¹ GOODMAN, *supra* note 100, at 52.

¹¹² SCOTT, *supra* note 3, at 125.

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 125–26.

¹¹⁶ Gabler, *supra* note 35.

¹¹⁷ Gehman, *supra* note 25, at 139.

¹¹⁸ Rutledge, *supra* note 29, at 15.

¹¹⁹ HOLLEY, *supra* note 108, at 28.

¹²⁰ Rutledge, *supra* note 29, at 15 (internal quotation marks omitted).

¹²¹ SCOTT, *supra* note 3, at 125–26.

¹²² *Giesler Heads Committee to Protect Stars, Denounces Industry*, SAN BERNARDINO DAILY SUN, Apr. 19, 1957, at 8.

Illinois, by an independent publisher called the Kable Company, and its entire press run was purchased by a wholesale distributor, The Periodical Distribution Company, which sold the magazine to distributors in other states.¹²³ Most of the magazine's five million copies were sold at newsstands, rather than by subscription; newsstand copies were distributed by truck, rather than mail, to head off potential problems with the Post Office.¹²⁴

Harrison paid the small New York law firm Becker, Ross and Stone \$100,000 a year to advise him on *Confidential*.¹²⁵ Lawyers Daniel Ross and Albert DeStefano sat in on editorial conferences, read text, and consulted with staff writers.¹²⁶ *Confidential*'s lawyers read every word of every issue, considering the legal ramifications of each sentence, article, and photograph.¹²⁷

To head off libel lawsuits—*Confidential*'s primary concern—articles often implied, rather than stated, scandalous facts.¹²⁸ Many *Confidential* stories were based on so-called “composite facts.”¹²⁹ While the basic core facts of an incident might have occurred, such as an actor's past arrest, those facts were often juxtaposed with unrelated facts and sensational headlines and captions.¹³⁰ “Incidents having no causal, temporal or other significant relationship” to the event were “skillfully arranged to insinuate relationship.”¹³¹ “By sprinkling grains of fact into a cheesecake of innuendo, detraction and plain smut,” noted *Time* magazine, “*Confidential* creates the illusion of reporting the ‘lowdown’ on celebrities. Its standard method: dig up one sensational fact and embroider it for 1,500 to 2,000 words. If the subject thinks of suing, he may quickly realize that the fact is true, even if the embroidery is not.”¹³²

¹²³ SCOTT, *supra* note 3, at 167–68; *Giesler Heads Committee to Protect Stars, Denounces Industry*, *supra* note 122, at 8.

¹²⁴ Harrison's years as the “Cheesecake King” made him sensitive to the legal risks involved in magazine publishing. On one project for one of his girlie magazines in the 1940s, Harrison had driven a carload of models to a golf course and took pictures of them running across the fairways half-nude. SCOTT, *supra* note 3, at 17. Police arrested him for taking pornographic pictures. *Id.* Later, a “postal inspector [threatened] to rescind Harrison's second-class mailing privileges on the grounds that his magazines were obscene. Called in to advise him, the prominent civil-rights attorney Morris Ernst suggested that Harrison change the format and eliminate the semi-nudity. He did,” and circulation declined. Gabler, *supra* note 35. The magazines “‘may be mailable,’ he joked, ‘but they aren't salable.’” *Id.*

¹²⁵ Gabler, *supra* note 35.

¹²⁶ 2 Transcript of Record, *supra* note 27, at 281.

¹²⁷ *Id.*; Gabler, *supra* note 35.

¹²⁸ Gabler, *supra* note 35.

¹²⁹ Irwin O. Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 S. CAL. L. REV. 280, 282 (1957).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Success in the Sewer*, TIME, July 11, 1955, at 92. Harrison's “specialty is printing scandalous personal material, as libellous [sic] as he can make it while still including an admixture of provable fact, as a precaution against being sued,” observed one critic. *Dancing on a Tightrope*, LINCOLN EVENING J. (Neb.), July 12, 1955, at 4. “[He and his lawyers] . . . figure

Confidential's lawyers also checked the magazine for potentially obscene material, although they were less concerned with obscenity than libel.¹³³ The magazine did not explicitly describe sexual acts, and there were no nude images; there was nothing pornographic about it.

Harrison employed informants, including prostitutes and private detectives, to confirm every statement in the magazine.¹³⁴ "We have to have the exact time, exact date, the bungalow number, everything documented, just in case," Harrison boasted.¹³⁵ "There is not one word that goes into this book that is not thoroughly authenticated and documented."¹³⁶ DeStefano refused to approve any story with facts that could not be verified.¹³⁷

Using the latest surveillance technologies such as hidden cameras and miniature recording devices, *Confidential*'s informants bugged offices and homes to check facts.¹³⁸ Ronnie Quillan, a prostitute working in Hollywood, alleged that Harrison asked her to go to lunch with actress Lizabeth Scott, who was an alleged homosexual, and to use a concealed recording device to get "verification."¹³⁹ "Some of my exclusives cost me \$5000," Harrison said.

I can't just take the word of a maid or a butler—who would believe them in court? I got to get additional stuff. Why, I've sent people to Morocco to get stuff I needed. I sent a lawyer to Europe to check something on Marlene Dietrich—I spent \$7000 on that story alone.¹⁴⁰

DeStefano required affidavits from participants in, or witnesses to, the incidents described in a story.¹⁴¹ The affidavits read, "I swear that all the events described in

that a few actual facts stirred into the scurrilous mixture will be enough to persuade the victim that he had better just squirm and take it." *Id.* Harrison described it this way:

Once we establish the star in the hay and that's documented, we can say anything we want and I think we make [the stories] a hell of a lot more interesting than they really are. What's a guy gonna do, sue us and admit he was in the hay with the dame, but claim he didn't do all the other things we dress the story with?

CONRAD, *supra* note 16, at 99 (internal quotation marks omitted).

¹³³ See generally Desjardins, *supra* note 6, at 208–10 (comparing the state of libel and obscenity laws and their relationships to scandal magazines).

¹³⁴ Gehman, *supra* note 25, at 142.

¹³⁵ *Curious Craze*, *supra* note 24, at 51 (internal quotation marks omitted).

¹³⁶ *Between You and Me*, *supra* note 38, at 25 (internal quotation marks omitted).

¹³⁷ SCOTT, *supra* note 3, at 40.

¹³⁸ Desjardins, *supra* note 6, at 210; Govoni, *supra* note 58, at 29.

¹³⁹ SCOTT, *supra* note 3, at 98.

¹⁴⁰ Gehman, *supra* note 25, at 143 (internal quotation marks omitted).

¹⁴¹ See SCOTT, *supra* note 3, at 40 (noting that sworn affidavits "provided further legal protection").

the above story are true and that I was a participant in these events.”¹⁴² The affidavits were kept in a locked file cabinet in the *Confidential* office.¹⁴³ Until 1957, *Confidential* had an impressive track record when it came to libel. After five years of existence, *Confidential* had racked up only a dozen libel lawsuits out of 450 articles—“an imposing batting average,” according to *Esquire*.¹⁴⁴ Before 1956, Harrison could proudly claim that he never paid out a cent in libel suits.¹⁴⁵ It was not only Harrison’s lawyers who kept him out of court; *Confidential*’s greatest protection was the subjects’ natural disinclination to sue. Many who were smeared in the magazine did not want to draw attention to the accusations with a lawsuit.¹⁴⁶ Some worried that if they sued, *Confidential* would respond with more damaging disclosures in court.¹⁴⁷ “*Confidential*’s main leverage over celebrities was fear,” recalled the son of one of *Confidential*’s editors.¹⁴⁸ “The editors were convinced that . . . you could keep people from suing because there was always more dirt to be discovered.”¹⁴⁹

B. Responses

1. The Film Industry

Confidential hit the film industry at a time when it was vulnerable, and the magazine’s success struck terror in Hollywood.¹⁵⁰ “The effect [of *Confidential*] among

¹⁴² CONRAD, *supra* note 16, at 98–99; 2 Transcript of Record, *supra* note 27, at 140–41.

Working from a tip, the magazine . . . put a private investigator on the story, tailing the subject over a period of time. When a sufficiently detailed and documented dossier had been compiled, complete with vouchers from witnesses, the magazines would run a portion of the story, holding the rest of the evidence in abeyance should there be any kickback.

GOODMAN, *supra* note 100, at 51.

¹⁴³ See CONRAD, *supra* note 16, at 98.

¹⁴⁴ Gehman, *supra* note 25, at 142.

¹⁴⁵ See *Ssh!*, TIME, Apr. 2, 1956, at 86, 86. Observed *Newsweek*:

The impressive thing about Harrison’s current operation, apart from his sales, is that he has never been brought to court for libel. One reason: While *Confidential* often, and artfully, stretches small facts into huge insinuations, the facts he uses are painstakingly checked by detective agencies, by his excellent lawyers, by his own photostating service, and by other more intimate methods.

Sin, Sex, and Sales, *supra* note 49, at 88.

¹⁴⁶ *Success in the Sewer*, *supra* note 132.

¹⁴⁷ See *id.*

¹⁴⁸ Govoni, *supra* note 58, at 43.

¹⁴⁹ *Id.*

¹⁵⁰ GOODMAN, *supra* note 100, at 50–51 (“[T]he scandal magazines were feared—and also held a horrible fascination for most everyone.”).

Hollywood notables . . . amounts to general fright,” *Newsweek* reported in 1955.¹⁵¹ “Overnight, some of Hollywood’s biggest stars have been tagged as deviates, rakes, nymphomaniacs, lunatics, drunks and hopheads[,]” and the result was immediate havoc on relationships and careers.¹⁵² Theater bookings were cancelled because of *Confidential* exposés.¹⁵³ At least one star had no job offers after being featured in *Confidential*.¹⁵⁴ There was talk in the South of banning the films of a white actress who had been linked with a black actor in the magazine.¹⁵⁵

Fearing that any actions against the magazine would lead to reprisals, film executives at first did nothing.¹⁵⁶ “These are individual problems; it is up to the individuals whether they want to take action,” a spokesman for the Motion Picture Producers Association told the press.¹⁵⁷ Actors balked. “What do they mean by that double talk?” asked Humphrey Bogart.¹⁵⁸ “Actors belong to the movie industry; they’re products of the industry, and they should be backed up by the industry. If somebody kept writing that Cadillacs had lousy brakes, wouldn’t the Cadillac company take some action? The industry needs some guts.”¹⁵⁹ Eventually realizing “that the vast circulation of the magazines” would have “the cumulative effect of convincing the public that Hollywood is wild and wicked,” the film industry launched a campaign against *Confidential* in 1955.¹⁶⁰ The Motion Picture Industry Council, the industry’s public relations arm, set up a committee to run counter-publicity and combat attacks by scandal magazines.¹⁶¹ Hollywood created a list of writers and tipsters who supplied *Confidential*.¹⁶² Everyone on the list was to be blacklisted, banished from Hollywood socially and professionally.¹⁶³ Producer-director Mervyn LeRoy contacted a private detective, who said he would need \$350,000 to recruit former F.B.I. agents to investigate *Confidential*

¹⁵¹ *Curious Craze*, *supra* note 24, at 52.

¹⁵² Jack Olsen, *Film Stars Target of Smut Magazines*, TOLEDO BLADE (Ohio), Nov. 4, 1955.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Bob Thomas, *Hollywood Has Been Fair Game for All Scandal mongers Since 1920 Scandals*, KINGSPOUR NEWS (Tenn.), Sep. 30, 1957, at 8.

¹⁵⁷ *Id.* (internal quotation marks omitted).

¹⁵⁸ SCOTT, *supra* note 3, at 63 (internal quotation marks omitted).

¹⁵⁹ *Id.* (internal quotation marks omitted).

¹⁶⁰ Thomas, *supra* note 156, at 8. Secretly, some wondered whether *Confidential* wasn’t good for Hollywood. Journalist Bob Thomas wrote that “[t]here [was] a minority view, not expressed in the high councils of the town, that maybe the scandal mags [hadn’t] been all bad for Hollywood. Some . . . [felt] that much of the magic and excitement of Hollywood had vanished in its search for respectability; that the onrush of racy publicity . . . helped restore glamor to the town.” *Id.*

¹⁶¹ *Actor Raps Trial, Calls for Action*, HARTFORD COURANT, Aug. 18, 1957, at 12A; Jack Jones, *Magazine Lied About Her and Boxer, Mae West Says: Charges Chalky Wright was Tricked into Talking*, L.A. TIMES, Aug. 23, 1957, at 2.

¹⁶² *Id.*

¹⁶³ 12 Transcript of Record (Aug. 27, 1957), *supra* note 27, at 1594.

and prove its articles false.¹⁶⁴ The project was dropped when the studio heads became apprehensive, fearing that an attack would have a “boomerang” effect.¹⁶⁵

In 1957, Hollywood fought back against *Confidential* with a film. MGM released *Slander*, a movie about a sleazy, fictional magazine called *Real Truth*.¹⁶⁶ The story revealed the blackmail and extortion that scandal magazines used to get their stories.¹⁶⁷ In the end, the villainous publisher—based clearly on Robert Harrison—is murdered in cold blood.¹⁶⁸ The film not only took a swipe at Harrison, noted *Time*, but also at his many “accomplices”: “the readership which settles in cloudlike millions on the garbage which the scandal sheets provide.”¹⁶⁹

2. The Public Response

Among the reading public, *Confidential* struck a nerve. The magazine’s gritty exposés were wildly popular and, at the same time, denounced and deplored.¹⁷⁰ “[E]verybody reads it, but they say the cook brought it into the house,” Humphrey Bogart remarked famously.¹⁷¹ Subscription orders asked that *Confidential* be sent “in plain wrapper.”¹⁷² A Chicago society woman summarized the simultaneous disgust and attraction that she felt for the magazine: “I’ve read it from cover to cover, and I think it ought to be thrown out of the house.”¹⁷³

At a time of nationwide concerns with juvenile delinquency, critics worried about the effects of *Confidential*’s highly sexualized content on teenagers, children, and

¹⁶⁴ Charles Denton, *Scandal Mag Probers to View Nude Photos of Anita Ekberg*, BRIDGE-PORT POST, Mar. 1, 1957, at 7.

¹⁶⁵ *Id.*

¹⁶⁶ SLANDER (Metro-Goldwyn-Mayer 1957).

¹⁶⁷ *The Screen: Is it True What They Say About Oedipus?*, COMMONWEAL, Feb. 8, 1957, at 488, 488.

¹⁶⁸ SLANDER, *supra* note 166. “Scandal . . . Smear . . . Slander: See how careers are blasted and lives are broken by the yellow reporting in the vicious scandal magazines!” read an advertisement for the film. *See, e.g., Scandal! . . . Smear! . . . Slander! . . .*, GLOBE-GAZETTE (Mason City, Iowa), Mar. 29, 1957, at 6; *see also The Screen*, COMMONWEAL, Feb. 8, 1957, at 488.

¹⁶⁹ *Cinema*, TIME, Feb. 11, 1957, at 96.

¹⁷⁰ HANEY, *supra* note 8, at 84.

Many adults would doubtless be regular readers of the cheap magazines if they did not fear the social stigma that would result. They pass by *Confidential* in favor of *Reader’s Digest* because they demand reading that will bolster their social standing. . . . The pulp magazines, on the other hand, sell primarily to people who like such trash and don’t care who knows it.

Id. (internal citations omitted).

¹⁷¹ *Success in the Sewer*, *supra* note 132 (internal quotation marks omitted).

¹⁷² Rushmore, *supra* note 40, at 38.

¹⁷³ *Success in the Sewer*, *supra* note 132 (internal quotation marks omitted).

other suggestible persons. The scandal magazines “[were] dangerous because they encourage[d] unstable individuals to express sexual deviations and . . . provide[d] even average persons with ‘an extra incentive to practice adultery or promiscuity,’” noted one critic.¹⁷⁴ “[L]urid stories about the actions of . . . rich and beautiful people, invariably hint[] broadly that they have done something thrilling and against social mores—and gotten away with it.”¹⁷⁵ “One cannot but wonder how much of this sensational junk is taken into U.S. homes by mothers of families.”¹⁷⁶

By 1955 there was a broad consensus that *Confidential* should be eradicated from the nation’s newsstands—the question was how.¹⁷⁷ Some advocated bringing social pressures against the magazine—protests, boycotts, and moral suasion.¹⁷⁸ “The best . . . pressure that can be brought [on *Confidential*] . . . is moral condemnation by private groups,” wrote one commentator.¹⁷⁹ The answer to the *Confidential* problem is “educating the public against buying scandal magazines. If people could be made aware of how damaging such magazines can be[,] . . . [it] might dictate the best remedy—refusal to pay money to enrich the smut peddlers.”¹⁸⁰

Others sought government bans on *Confidential*. In 1957, the *Los Angeles Sentinel* published “man on the street” interviews with residents of the city, who agreed that “scandal magazines” should be “outlawed.”¹⁸¹ “All scandal magazines should be taken off the market. They are a menace to society. They carry nothing but trash and that is no good for our youth,” stated one observer.¹⁸² “Scandal magazines and the derogatory, vicious material they carry interfere with a person’s private and personal

¹⁷⁴ Roosevelt, *supra* note 83, at 36.

¹⁷⁵ *Libel is Mudslinging*, PANAMA CITY NEWS, Sept. 4, 1957, at 4.

¹⁷⁶ *Women Are Expose Fans*, AMERICA, Feb. 11, 1956, at 520; *see also* Rushmore, *supra* note 40, at 38 (“Several surveys taken by *Confidential*’s circulation department showed that about 75 per cent of the magazine’s readers were women. . . . I am sure that only a tiny percentage of *Confidential*’s readers are teen-agers, and a minority are men. Its appeal is directed primarily at feminine readers.”); Gehman, *supra* note 25, at 143 (according to Harrison, “the majority of our readers are women”) (internal quotation marks omitted). Complaining to a local newspaper about the “scandal magazines,” one Los Angeles resident observed that “42% of all major crimes are committed by young people under 18” and “J. Edgar Hoover has called lewd literature an ‘important contributory factor in juvenile delinquency.’ . . . It is about time we took some preventive measures before well over [1 million] delinquents grow to [2 million] by 1960, as has been predicted,” he advised. A.M. McMahon, Letter to the Editor, *Corrupting Influences*, L.A. TIMES, Mar. 4, 1957, at 46.

¹⁷⁷ A rare few praised *Confidential*’s exposés: “These magazines tell us many things, for instance the real story behind the cancer drug[.] . . . These scandal magazines expose rackets and tell us how to protect ourselves from them. The popularity of these magazines is caused by the fact [that] the people believe they are getting the truth.” M. A., Letter to the Editor, *The Real Scandal*, DECATUR SUNDAY HERALD & REV. (Ill.), Oct. 6, 1957, at 47.

¹⁷⁸ Editorial, *To Deflate Scandal*, TRAVERSE CITY REC.-EAGLE (Mich.), Sept. 24, 1957, at 4.

¹⁷⁹ Editorial, *Curbing Printed Smut*, N. ADAMS TRANSCRIPT (Mass.), Dec. 20, 1957, at 6.

¹⁸⁰ *To Deflate Scandal*, *supra* note 178, at 4.

¹⁸¹ *Inquiring Reporter*, L.A. SENTINEL, July 11, 1957, at 6.

¹⁸² *Id.*

business.”¹⁸³ “Yes, I certainly feel their publication and sale should be outlawed,” said another.¹⁸⁴ The Reverend Billy Graham, addressing a public rally in 1957, complained “that our laws are so lenient as to allow the scandal magazines . . . to be sold in almost every part of the United States.”¹⁸⁵ “I believe in freedom of the press but the law should be changed to protect individuals . . . from this type of journalism,” actress Joan Bennett told reporters.¹⁸⁶ A ban on *Confidential* did not violate freedom of the press, *Confidential*’s opponents argued, because the First Amendment did not protect “smut publishers.”¹⁸⁷

II. CENSORSHIP

The idea of a government ban on *Confidential* was not as jarring then as it would be today. In the 1950s, many believed that free speech rights could be sharply limited in the interest in enforcing public morals, and that governments could restrain or suppress publications that had the potential to create social discord or promote unrest.¹⁸⁸ As *Better Homes and Gardens* magazine opined in 1957, “the framers of the Constitution never meant the First Amendment to protect filth peddlers who poison minds.”¹⁸⁹ “[W]e are not ready to accept such junk as . . . the smut magazines as any part of the [constitutionally protected] press.”¹⁹⁰

Popular support for official restraints on publishing,¹⁹¹ and increased government restraints on publishing in the 1950s, marked something of a reversal in free speech trends.¹⁹² On the whole, the trend in free speech law between the early 1900s and 1950 had been in the direction of liberalization.¹⁹³ “An evolution” of free speech that began in the 1920s “amounted to a revolution” by the 1940s, one legal scholar observed.¹⁹⁴ By World War II, there was a “tendency on the part of . . . [the] courts to grant to the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Sound Moral Warning, Graham Asks President: Decadence Threatening U.S., He Says; Scandal Magazine Readers Are Scored*, ANNISTON STAR (Ala.), Aug. 22, 1957, at 12-A (internal quotation marks omitted).

¹⁸⁶ *Curious Craze*, *supra* note 24, at 52 (internal quotation marks omitted).

¹⁸⁷ Jack Harrison Pollack, *Newsstand Filth, a National Disgrace*, BETTER HOMES & GARDENS, Sept. 1957, at 10, 197 [hereinafter *Newsstand Filth*].

¹⁸⁸ *See, e.g., id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Cleanup Needed*, REDLANDS DAILY FACTS (Cal.), Feb. 20, 1957, at 12 (“Perhaps we should define the meaning of the word ‘Press,’ and decide if these sex and bedroom magazines can truly be considered a part of the press as it is properly conceived.”).

¹⁹¹ *See, e.g., Newsstand Filth, supra* note 187, at 197.

¹⁹² Comment, *Censorship of Obscene Literature by Informal Government Action*, 22 U. CHI. L. REV. 216, 216–17 (1955) [hereinafter *Censorship of Obscene Literature*].

¹⁹³ *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931) (holding that prior restraints on the press were generally unconstitutional); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment’s free speech principles to the states).

¹⁹⁴ MURPHY, *supra* note 8, at 101.

press an ever increasing freedom to print and publish.”¹⁹⁵ One critic, writing in the early 1950s, claimed that “sex censorship was almost *passé*.”¹⁹⁶ That would soon change.

A. A ‘Moral Panic’

The resurgence of legal restraints on publishing was spurred, in part, by an increase in mass communications. In the 1950s, newspaper circulation reached historic highs;¹⁹⁷ by 1960, there were 1.3 newspapers per American.¹⁹⁸ Television was introduced, and by the end of the decade eighty-eight percent of Americans owned a television set.¹⁹⁹ In the 1930s, a paperback revolution made books available for as low as twenty-five cents, and in 1953 a quarter of a billion paperback books were published.²⁰⁰ During the 1950s, Americans were spending \$18 billion annually on recreational pursuits, including books, magazines, and newspapers.²⁰¹

Encouraged by a climate of greater sexual openness after the war, popular media featured sensational and suggestive themes.²⁰² Pulp magazines and girlie publications, including *Playboy*, flooded newsstands.²⁰³ Comic books, many violent and sadistic, became nearly \$100 million a year business,²⁰⁴ and “lurid designs and suggestive copy” were prevalent in paperback books.²⁰⁵ Once limited to all-male environments such as “barbershops, saloons and Army posts,” suggestive material was being distributed to a mass audience through mainstream outlets such as drugstores, newsstands, dime stores, confectionaries, and supermarkets.²⁰⁶

The proliferation of racy publications contributed to the era’s moral panic. In the 1950s, there were deep anxieties in the culture around the effects of World War II on

¹⁹⁵ Frederick S. Siebert, *Legal Developments Affecting the Press*, 219 ANNALS OF AM. ACAD. POL. & SOC. SCI. 93, 93 (1942).

¹⁹⁶ MURPHY, *supra* note 8, at 101 (citing Eric Larrabee, *Morality and Obscenity*, in FREEDOM OF BOOK SELECTION 25 (Frederick J. Moshner ed., 1954)).

¹⁹⁷ SAMANTHA BARBAS, LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA 160 (2015).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 156.

²⁰⁰ Theodore Waller, *Paper-Bound Books and Censorship*, 47 AM. LIBR. ASS’N BULL. 474, 474 (1953).

²⁰¹ BARBAS, *supra* note 197, at 160.

²⁰² MURPHY, *supra* note 8, at 82 (“The World War II era saw paperback and pocket-size books, comic books, girlie and picture magazines become big business. A significant portion of the new publications brought in its wake a widespread and critical public reaction.”).

²⁰³ D’EMILIO & FREEDMAN, *supra* note 63, at 280.

²⁰⁴ BRADFORD W. WRIGHT, COMIC BOOK NATION: THE TRANSFORMATION OF YOUTH CULTURE IN AMERICA 155 (2001).

²⁰⁵ D’EMILIO & FREEDMAN, *supra* note 63, at 280 (“After World War II, pornography, as well as other media products that titillated males by [sexualizing] women’s bodies, moved beyond their customary place in a marginal underground world. Soldiers who had graced their barracks . . . with photos and drawings of ‘pin-up’ girls returned . . . with pornography obtained abroad.”).

²⁰⁶ Margaret Culkin Banning, *Filth on the Newsstands*, READER’S DIG., Oct. 1952, at 116, 116.

family life, sexual attitudes, and gender norms.²⁰⁷ Women had entered the workforce during the war,²⁰⁸ sexual activity became freer,²⁰⁹ cities expanded, and with them came rising crime.²¹⁰ Communism was linked in the popular imagination to promiscuity and sexual deviance,²¹¹ and concerns with juvenile delinquency heightened the public's fear of suggestive books and magazines.²¹² The 1950s saw an alleged "epidemic" of juvenile delinquency. In 1954, one million youths were said to be involved with the police.²¹³ A Chicago police commissioner claimed that the influence of "lurid magazines and books" contributed to the "recent increase in rape and sex crimes."²¹⁴ FBI director J. Edgar Hoover alleged that racy periodicals "play[ed] an important part in the development of crime among the youth of our country."²¹⁵

These developments led to a series of efforts to suppress publications.²¹⁶ A "purity movement" battled against the public display of sexuality,²¹⁷ and by 1951, books,

²⁰⁷ See generally Joanne Meyerowitz, *The Liberal 1950s? Reinterpreting Postwar U.S. Sexual Culture*, in GENDER AND THE LONG POSTWAR: RECONSIDERATIONS OF THE UNITED STATES AND THE TWO GERMANYs, 1945–1989, at 295 (Karen Hagemann & Sonya Michel eds., 2014).

²⁰⁸ See generally Martha L. Hall, Belinda T. Orzada, & Dilia Lopez-Gydosh, *American Women's Wartime Dress: Sociocultural Ambiguity Regarding Women's Roles During World War II*, 38 J. AM. CULTURE 232 (2015).

²⁰⁹ D'EMILIO & FREEDMAN, *supra* note 63, at 242.

²¹⁰ See generally BARRY LATZER, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA 75–78 (2016) (describing the increase in urban crime in the 1950s).

²¹¹ MIRIAM G. REUMANN, AMERICAN SEXUAL CHARACTER: SEX, GENDER, AND NATIONAL IDENTITY IN THE KINSEY REPORTS 9 (2005).

²¹² Fred Millett, *The Vigilantes*, 40 AM. ASS'N PROFESSORS 47, 54–55 (1954). In the view of one critic, one of the most "immediate" causes of censorship was the:

general atmosphere of hysteria and fear of communism that [was] being systematically engendered in America The conversion of communism into the national bogey-man [had] encouraged the transference of distrust, hostility, and fear to a great many other entities than communism. . . . The irrational fear that [made] it impossible for people to study or discuss communism dispassionately quickly spill[ed] over and inundat[ed] any other product of contemporary culture that for some reason seem[ed] strange or baffling or threatening to the half-educated mind.

Id.

²¹³ MURPHY, *supra* note 8, at 92.

²¹⁴ Banning, *supra* note 206, at 116.

²¹⁵ *Newsstand Filth*, *supra* note 187, at 10.

²¹⁶ See Charles G. Bolte, *Security Through Book Burning*, 300 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 91 (1955) ("At the moment, the chief censorship activity in this country is directed against publications not on political but on moral grounds."). On political censorship during the anticommunist hysteria of the late 1940s and 1950s, see Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1336–38 (1991).

²¹⁷ D'EMILIO & FREEDMAN, *supra* note 63, at 280 ("Every step toward greater [sexual] openness was matched by renewed efforts to hold the line against 'filth.'").

radio, television, magazines, and newspapers were “all feeling increased pressure from advocates of censorship,” noted the *New York Times*.²¹⁸ “A recrudescence of Puritanism is . . . epidemic in the United States,” observed two critics in 1955.²¹⁹ “As in the years following both the Civil War and World War I,” printed matter was “under general attack because of [its] alleged” immorality.²²⁰ Lawmaking bodies were “passing censorship laws so fast that it [was] difficult to make an accurate count.”²²¹

By the middle of the decade, state legislatures were inundated with demands for new laws against obscene literature.²²² Several cities and states passed laws regulating the sale and distribution of violent comic books.²²³ Some criminalized what they characterized as lewd and indecent publications, and even all material “inimical to the public health, safety and morals.”²²⁴ Some proposed measures that “declare[d] the newspaper, magazine and periodical publishing business [to be] ‘clothed with a public interest and subject to [content-based] regulation.’”²²⁵ These measures generated widespread support. Sixty percent of Americans in one poll believed that “police and other groups should have the right to censor or ban books and movies.”²²⁶ Less than half of students at Purdue University thought that “[n]ewspapers and magazines should be allowed to print anything they want except military secrets.”²²⁷ A Gallup poll found that half of Americans were in favor of “freedom of speech for everybody,” but that forty-five percent would seriously limit or qualify that right.²²⁸

²¹⁸ Murray Schumach, *Censorship Fight Waged on a Nation-Wide Front*, N.Y. TIMES, Nov. 1, 1953, at E7. A writer in 1954 noted “the wave of suppression that . . . swept over this free land of ours during the past two or three years.” Millett, *supra* note 212, at 48. *Publishers’ Weekly* in 1953 wrote that “book censorship [was] reaching epidemic proportions.” *Book Censorship Is Reaching Epidemic Proportions*, PUBLISHERS’ WKLY., Feb. 28, 1953, at 1058.

²¹⁹ William B. Lockhart & Robert C. McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROBS. 587, 587 (1955).

²²⁰ *Id.*; see also Eric Larrabee, *The Cultural Context of Sex Censorship*, 20 LAW & CONTEMP. PROBS. 672, 676–77 (1955) (questioning the decade’s association between obscenity, moral decay, and crime).

²²¹ Lewis C. Smith, Jr., *The Truth Beaten Down*, 4 C. COMPOSITION & COMM. 138, 139 (1953).

²²² *Newsstand Filth*, *supra* note 187, at 205 (discussing that there were proposals for “stricter, tougher, clearer, more enforceable anti-obscenity laws,” with heavier fines and jail terms). In 1953 alone, “fifteen state legislatures considered bills to control, penalize, or change the penalties for the distribution of literature.” James Rorty, *The Harassed Pocket-Book Publishers*, 15 ANTIOCH REV. 411, 422 (1955).

²²³ *Crime Comics and the Constitution*, 7 STAN. L. REV. 237, 237–38 (1955).

²²⁴ Henry E. Schultz, *Censorship or Self Regulation?*, 23 J. EDUC. SOC. 215, 217 (1949).

²²⁵ *Bill Sent to Florida Aims at Ruling Press*, N.Y. TIMES, Apr. 8, 1951, at 46.

²²⁶ Leslie G. Moeller, Dir., Sch. of Journalism, State Univ. of Iowa, *How Free is the Press?: the Proper and Judicious Use of Freedom* (Sept. 9, 1957), in 23 VITAL SPEECHES 750, 751 (1957).

²²⁷ *Id.* (internal quotation marks omitted).

²²⁸ *The Quarter’s Polls*, 13 PUB. OPINION Q. 709, 726 (Mildred Strunk ed., 1950).

In some jurisdictions, official “review boards” were set up to screen and ban publications offered for sale.²²⁹ In Detroit, the police department and its review board vetted all material on newsstands; if they found a publication objectionable, it was submitted to the district attorney, who pressured the vendor to remove it under threat of prosecution under obscenity laws.²³⁰ In 1956, Georgia established a “state literature commission” to study “questionable literature” “violating normal, traditional and contemporary patterns of decency” and to make reports to the state solicitor general for prosecution for obscenity.²³¹ The St. Cloud, Minnesota City Council passed an ordinance creating a “board of review” to screen literature sold in the city and to order distributors and newsdealers to cease selling material condemned by the board.²³²

Citizens’ committees for “decent literature” sprung up across the country.²³³ The National Organization for Decent Literature, a Roman Catholic group, was described as “the most potent force against comic books, paper-bound books, and pulp magazines in America.”²³⁴ Along with women’s clubs, veterans’ organizations, PTA groups, and other civic associations, NODL branches pressured newsstands and booksellers to remove books and magazines.²³⁵ Citizens’ committees provided lists of disfavored publications to police, who warned vendors that material they were selling was objectionable and must be removed from sale.²³⁶ Implicit in these requests were threats

²²⁹ See, e.g., *Indiana Governor Backs Smut Drive*, N.Y. TIMES, Aug. 30, 1959, at 45 (discussing “literature review boards” in Indiana).

²³⁰ William J. Hempel & Patrick M. Wall, Note, *Extralegal Censorship of Literature*, 33 N.Y.U. L. REV. 989, 999–1000 (1958).

²³¹ James P. Wesberry, *Georgia Scrubs Its Newsstands*, CHRISTIAN CENTURY, Dec. 23, 1953, at 1498–99.

²³² *How Far Should Book Censors Go*, DECATUR HERALD (Ill.), Mar. 16, 1953, at 6.

²³³ Hempel & Wall, *supra* note 230, at 992; *Censorship of Obscene Literature*, *supra* note 192, at 220–21. See generally Arthur E. Farmer, *Pressure-Group Censorship—and How to Fight It*, 42 AM. LIBR. ASS’N BULL. 356 (1948) (distinguishing public review boards from private interest groups who sought to ban publications).

²³⁴ HANEY, *supra* note 8, at 88. On the NODL, see generally Rorty, *supra* note 222.

²³⁵ *Slugging the “Exposé” Magazines*, NEWSWEEK, June 1955, at 75.

In most cases the group conducting a drive against literature it deems objectionable is one informally organized by local citizens who are supported by no outside organization. Sometimes, however, the campaign is either initiated or supported by influential national organizations, or their local branches, whose main function is unrelated to the control of literature. . . . [such as] the Veterans of Foreign Wars, the Women’s Christian Temperance Union, and various P.T.A. groups. Hempel & Wall, *supra* note 230, at 992–93 (internal citations omitted).

²³⁶ One police chief sent a letter: “Enclosed is a list of objectionable or obscene magazines which you are requested to remove permanently from sale by local output. . . . I would like this to become effective immediately upon receipt of this communication.” HANEY, *supra* note 8, at 87. Certificates were given to newsdealers who complied, and boycotts threatened against those who resisted. In some communities, signs were placed in store windows calling attention to dealers who cooperated in magazine clean-up drives. William B. Lockhart &

that noncooperation would produce “trouble,” including prosecution under obscenity laws or visits by building and health inspectors.²³⁷ “[W]ithout judicial determination of obscenity” or other criminal violations, noted one critic, “a sizable number” of publications disappeared from public consumption.²³⁸

B. Freedom of Speech

1. Prior Restraints

The constitutionality of these measures was unclear in most cases, generally untested, and often dubious.²³⁹ Although many areas of First Amendment law were still poorly defined and had yet to be addressed by the Supreme Court, there were fairly well-developed protections for freedom of publishing within existing First Amendment law.

Since the 1930s, it was a fundamental tenet that the First Amendment prohibited prior restraints.²⁴⁰ A prior restraint, in its most basic form, was an “official restriction[] imposed upon speech . . . in advance of actual publication.”²⁴¹ The rule against prior restraints, derived from Blackstone’s *Commentaries* on the English common law,²⁴² became a First Amendment requirement in *Near v. Minnesota*.²⁴³ In *Near*, the Supreme Court struck down a Minnesota law that prohibited the publication of a “malicious, scandalous and defamatory newspaper, magazine or other periodical.”²⁴⁴ The law provided that all such “nuisances” could be enjoined from further publication.²⁴⁵ The majority in *Near* characterized the Minnesota law as a prior restraint, “the essence of censorship.”²⁴⁶ The “chief purpose” of freedom of the press, it declared, is “to prevent previous restraints upon publication.”²⁴⁷ The rule against prior restraints

Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 310 & n.93 (1954).

²³⁷ *Censorship of Obscene Literature*, *supra* note 192, at 230 (“Police threats need not involve criminal prosecutions under the obscenity laws. . . . The threat ‘to send the inspectors around’ can be extremely effective in any city where there are lengthy, strict, or outmoded health and safety ordinances.”); *see also* Bolte, *supra* note 216, at 92 (“The consequence of [noncooperation] is nontrade. Most dealers go along.”).

²³⁸ HANEY, *supra* note 8, at 87 (giving the example of Stamford, Connecticut).

²³⁹ *See* Bolte, *supra* note 216, at 91.

²⁴⁰ *See generally* Emerson, *supra* note 8.

²⁴¹ *Id.* at 648.

²⁴² *See* DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 132 (1997).

²⁴³ 283 U.S. 697, 713 (1931).

²⁴⁴ *Id.* at 701–02 (quoting MINN. STAT. §§ 10123-1–3 (1927)) (internal quotation marks omitted).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 713.

²⁴⁷ *Id.*

was not absolute; prior restraints could be justified in “exceptional cases. . . . No one would question but that a government might prevent . . . publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications,” according to the *Near* majority.²⁴⁸

The prior restraint in *Near* was a judicial injunction.²⁴⁹ In the 1930s and 40s, the Court applied the concept of prior restraint to provisions other than injunctions, including permit requirements²⁵⁰ and license taxes.²⁵¹ In *Thomas v. Collins*,²⁵² the Court held a statute requiring the registration of union organizers before permitting them to carry on solicitation to be an unconstitutional prior restraint.²⁵³ In cases involving the proselytizing efforts of Jehovah’s Witnesses, the Court said that a tax upon sellers of wares, as applied to purveyors of religious tracts, was a prior restraint.²⁵⁴ Since the early twentieth century, films had been censored in several states; movies could not be exhibited unless approved by a government board of review.²⁵⁵ In *Burstyn v. Wilson*,²⁵⁶ the Court declared film licensing to be an unconstitutional prior restraint.²⁵⁷

Though the term was widely used, there was “no common understanding as to what constitute[d] ‘prior restraint,’” observed First Amendment scholar Thomas Emerson in 1955.²⁵⁸ “The term [was] used loosely to embrace a variety of different situations.”²⁵⁹ One distinguishing feature of a prior restraint was that a banned communication never reached the public.²⁶⁰ The decision to ban a publication often “rest[ed] with a single government functionary rather than with a jury”; prior restraints were often determined by administrative rather than criminal procedures, meaning that “[t]he presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, [and] the immeasurably tighter and more technical procedure” did not apply.²⁶¹ In Emerson’s words:

²⁴⁸ *Id.* at 716.

²⁴⁹ *Id.* at 705.

²⁵⁰ See *Thomas v. Collins*, 323 U.S. 516 (1945).

²⁵¹ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

²⁵² 323 U.S. 516 (1945).

²⁵³ *Id.* at 534.

²⁵⁴ *Follett v. McCormick*, 321 U.S. 573, 577 (1944) (invalidating a license tax as applied to religious tracts); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (invalidating a law taxing the sale of books or other literature); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (invalidating a municipal law requiring a permit to distribute “literature”).

²⁵⁵ *Burstyn*, 343 U.S. at 495, 510–11 (Frankfurter, J., concurring).

²⁵⁶ 343 U.S. 495 (1952).

²⁵⁷ The “previous restraint” was a “form of infringement upon freedom of expression to be especially condemned.” *Id.* at 503 (citing *Near v. Minnesota*, 283 U.S. 697 (1931)).

²⁵⁸ Emerson, *supra* note 8, at 655.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 648.

²⁶¹ *Id.*

A system of prior restraint usually operates behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal and increases the chances of discrimination and other abuse. Decisions are less likely to be made in the glare of publicity that accompanies a subsequent punishment. The policies and actions of the licensing official do not as often come to public notice; the reasons for his action are less likely to be known or publicly debated; material for study and criticism are less readily available; and the whole apparatus of public scrutiny fails to play the role it normally does under a system of subsequent punishment.²⁶²

2. Subsequent Punishments

Since the 1930s, subsequent punishments had been governed by a “clear and present danger” standard, as a constitutional requirement.²⁶³ When determining whether to uphold punishments for speech, courts had to ask, “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about [a] substantive evil[] that [the government] ha[d] a right to prevent.”²⁶⁴ The Supreme Court’s adoption of the “clear and present danger” test marked a revolution in First Amendment law. The earlier standard for judging free speech claims had been a “bad tendency” test; governments could employ their police power broadly to punish speech that had a propensity, however slight or remote, to promote unrest or corrupt public morals.²⁶⁵ The Court’s adoption of “clear and present danger” reflected emerging ideals of pluralist democracy—the notion of democracy as a participatory enterprise built on discussion involving all members of society.²⁶⁶ Democracy depended on vigorous debates on “matters of public concern”—“all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”²⁶⁷

²⁶² *Id.* at 658. The line between a prior restraint and subsequent punishment was not always clear. As commentators and the Supreme Court recognized, the threat of criminal punishment could suppress speech as thoroughly as a prior restraint. *See, e.g.*, Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 573 (1951). “An injunction running against a particular individual may, to be sure, deter him more sharply than the broad command of a criminal statute; but just as possibly the underlying statutory prohibition, whether enforceable by injunction or by criminal sanctions, may have a deterrent effect,” noted one law review writer. *Id.* “It will hardly do to place ‘prior restraint’ in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances.” *Id.* at 539.

²⁶³ *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

²⁶⁴ *Id.*

²⁶⁵ *See* RABBAN, *supra* note 242, at 132.

²⁶⁶ Lester E. Moshier, *Mr. Justice Rutledge’s Philosophy of Civil Rights*, 24 N.Y.U. L. REV. 661, 666 (1949).

²⁶⁷ *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

Before the 1960s, the Supreme Court applied “clear and present danger” only to political speech, not morals regulations involving literature or entertainment media.²⁶⁸ The Court indicated, however, that overly broad, vague, or subjective content-based restrictions on art, literature, and entertainment could potentially violate freedom of the press.²⁶⁹ *Winters v. New York*²⁷⁰ invalidated a New York law that criminalized the publication of material depicting “bloodshed, lust or crime,” holding it to be unconstitutionally vague.²⁷¹ The case involved a magazine called *Headquarters Detective, True Cases from the Police Blotter, June 1940*,²⁷² containing “a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue.”²⁷³ While recognizing a state’s interest in “minimiz[ing] all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency,” the Court limited a state’s ability to exercise value judgments about the worth of a publication under the guise of the police power.²⁷⁴

At the same time, some categories of speech, including libel and obscenity, were said to be entirely unprotected by the First Amendment.²⁷⁵ “Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase ‘clear and present danger,’” declared the majority in *Beauharnais v. Illinois*.²⁷⁶ As the majority wrote in *Chaplinsky v. New Hampshire*,²⁷⁷ “it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem.”²⁷⁸ The Court went on to note that:

These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.²⁷⁹

²⁶⁸ See, e.g., *Winters v. New York*, 333 U.S. 507 (1948); *Fox v. Washington*, 236 U.S. 273 (1915) (upholding a law that prohibited publication of material advocating illegal conduct).

²⁶⁹ *Winters*, 333 U.S. at 515–18.

²⁷⁰ 333 U.S. 507 (1948).

²⁷¹ *Id.* at 508, 519–20.

²⁷² *Id.* at 508 n.1.

²⁷³ *People v. Winters*, 48 N.Y.S.2d 230, 231 (N.Y. App. Div. 1944), *rev’d*, 333 U.S. 507 (1948).

²⁷⁴ *Winters*, 333 U.S. at 510.

²⁷⁵ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 922 n.52, 937 (1963).

²⁷⁶ 343 U.S. 250, 266 (1952).

²⁷⁷ 315 U.S. 568 (1942).

²⁷⁸ *Id.* at 571–72 (citations omitted).

²⁷⁹ *Id.* at 572.

C. The Anticensorship Movement

The formal and informal suppression of publications led to a nationwide anticensorship movement. Various organizations denounced “the outbreak of censorship of paper-bound books and other media.”²⁸⁰ “Slowly, at first, but with increasing vigor, anti-censorship groups have begun a nation-wide fight,” noted the *New York Times* in 1953.²⁸¹ “Industries concerned with movies, books, radio, television, newspapers, magazines have joined with teachers and librarians to help form community groups to combat censorship that they regard as unwarranted.”²⁸² “The freedom to read is essential to our democracy [and i]t is under attack,” the American Library Association announced in a public statement.²⁸³

Private groups and public authorities in various parts of the country are working to remove books from sale, to censor textbooks, to label “controversial” books, to distribute lists of “objectionable” books or authors, and to purge libraries. These actions apparently rise from a view that our national tradition of free expression is no longer valid; that censorship and suppression are needed to avoid the subversion of politics and the corruption of morals.²⁸⁴

Some of the “decency” reformers, while supporting government restrictions on publications, were uncomfortable with more aggressive forms of official control, such as the “police threat” or review board systems. In the context of the early Cold War, the public was highly sensitive to restrictions on speech that could be seen as totalitarian or undemocratic.²⁸⁵ Many of the so-called “decency advocates” maintained that bans on publications were a last resort; self-regulation by publishers, liability for libel and obscenity, and pressure on newsdealers were preferred alternatives to “precensorship.”²⁸⁶ If “good citizens . . . get a cleanup of newsstands without censorship, they will be satisfied,” wrote the author Margaret Culkin Banning, one

²⁸⁰ *Censorship Called Threat*, N.Y. TIMES, Mar. 15, 1953, at 54.

²⁸¹ Schumach, *supra* note 218, at E7.

²⁸² *Id.*

²⁸³ *The Freedom to Read*, 47 AM. LIBR. ASS’N. BULL. 481 (1953).

²⁸⁴ *Id.*

²⁸⁵ In the 1950s, “references to totalitarianism cropped up with particular frequency in the litigation surrounding restrictions on expression,” observed legal historian Reuel Schiller. Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 82 (2000). Litigants in free speech cases “often reminded the courts that such an action was typical of the behavior of totalitarian governments.” *Id.*

²⁸⁶ See generally H.R. REP. NO. 2510, at 81–84 (1952) (testimony of Joseph Carlino, Chairman, Joint Legislative Committee to Study the Publication of Comics).

of the leaders of the “decency” movement.²⁸⁷ Otherwise government restraint “is on its way.”²⁸⁸

The desire to restrain objectionable material, and simultaneous concern with more overt forms of repression, can be seen in the work of the Gathings Committee. In May 1952, the House of Representatives created a Select Committee on Current Pornographic Materials “to determine the extent to which current literature—books, magazines, and comic books—containing immoral, obscene, or otherwise offensive matter . . . are being made available to the people of the United States” and the “adequacy of existing law to prevent the[ir] publication and distribution.”²⁸⁹ “In December 1952, the Committee filed its report.”²⁹⁰ It disavowed prior restraints—“[t]here are other means of handling this problem than by the ban of the censor, means which can be applied without danger of infringing on the freedom of the press”²⁹¹ The Committee instead called on publishers to eliminate, on their own initiative, “borderline” and “objectionable” literature,²⁹² recommended the enactment of federal legislation to prohibit interstate transportation of obscene literature by private carriers, and “[g]ranting authority for the Post Office to impound mail addressed to merchants of pornography and pertaining to the sale of obscene material.”²⁹³

While some conservative reformers were uneasy about more authoritarian restraints on expression, civil libertarians were not entirely opposed to government restrictions on publishing. The American Civil Liberties Union was the nation’s foremost defender of free speech, noted for litigating the rights of unpopular speakers from socialists and anarchists to nudists.²⁹⁴ The ACLU opposed prior restraints or “precensorship”—the “essence of censorship”²⁹⁵—but it was not yet “absolutist” on speech, as it would become in later years. It accepted the Supreme Court’s position that libel and obscenity were not included in the First Amendment, and political theorist “Alexander Meikeljohn’s distinction between political speech, which enjoyed full protection, and other forms of expression.”²⁹⁶ Though it discouraged obscenity prosecutions, expressed concerns about vague definitions of obscenity in statutes and judicial opinions, and believed that matters of taste and morals were better worked out in the marketplace of ideas than legislatures and courts, ACLU leaders believed that

²⁸⁷ Banning, *supra* note 206, at 119.

²⁸⁸ *Id.*

²⁸⁹ H.R. RES. 596, 82nd Cong. (1952) (enacted).

²⁹⁰ MURPHY, *supra* note 8, at 93.

²⁹¹ H.R. REP. NO. 2510, at 5 (1952).

²⁹² Larrabee, *supra* note 220, at 678.

²⁹³ MURPHY, *supra* note 8, at 94; *see also* Bernard DeVoto, *The Easy Chair: The Case of the Censorious Congressmen*, HARPER’S, Apr. 1953, at 44.

²⁹⁴ For a history of the ACLU’s activism in the postwar period, *see generally* SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 173–257* (S. III. Univ. Press 2d ed. 1999).

²⁹⁵ *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

²⁹⁶ WALKER, *supra* note 294, at 228; *see also* H.R. REP. NO. 2510, at 111.

a workable legal definition of obscenity could be achieved and that obscene material deserved less protection than other forms of speech.²⁹⁷

The ACLU's "primary goal" since the 1920s, writes historian Samuel Walker, was to transfer "[c]ensorship powers . . . from government bureaucrats to the courts for a judicial hearing."²⁹⁸ Wrote the ACLU's Alan Reitman in 1955:

If reading matter is obscene it can be prosecuted under the law, in an orderly manner, and a court and a jury can decide the facts of the case. This is vastly superior to the idea of a single government administrator or agency selecting what magazines should be read by the people.²⁹⁹

"Pressure groups" and government review boards operated without principle or process:

[a]n overzealous American Legion post, a D.A.R. chapter, a religious or national group, or even an individual may feel so antagonistic toward . . . another faith or philosophy that it would deprive everyone else of the opportunity to read about them. They do not apply the "clear and present danger" principle; in fact, they apply no rational principle at all but act from a deeply felt emotion.³⁰⁰

III. THE WAR ON *CONFIDENTIAL*

By 1955, Robert Harrison and his associates faced a massive, nationwide legal assault. *Confidential*'s opponents sought postal bans on the magazine, filed lawsuits for libel, brought obscenity prosecutions, and proposed legislation that would criminalize publishing and selling a "scandal magazine." The attack on *Confidential* represented one of the most extensive legal campaigns against a magazine in American publishing history.

A. The Post Office

The Post Office Department launched one of the first major attacks on *Confidential* in 1955.³⁰¹ Under the Comstock Act of 1873,³⁰² the Postmaster General had

²⁹⁷ See WALKER, *supra* note 294, at 228, 233.

²⁹⁸ *Id.* at 228.

²⁹⁹ Letter from Alan Reitman to the *Reporter* and *Confidential* (Nov. 1, 1955), ACLU Papers, Mudd Library, Princeton University (on file with author).

³⁰⁰ Leon Carnovsky, *The Obligations and Responsibilities of the Librarian Concerning Censorship*, 20 LIBR. Q.: INFO., COMMUNITY, POL'Y 21, 25 (1950).

³⁰¹ *Confidential Fights Order Barring Mails to Magazine*, HARTFORD COURANT, Sept. 10, 1955, at 8 [hereinafter *Confidential Fights*].

³⁰² Comstock Act, ch. 258, 17 Stat. 598 (1873) (repealed 1909).

the power to prohibit “obscene” or “immoral” publications from the mails.³⁰³ This prerogative, the Supreme Court concluded, did not violate the First Amendment, as Congress’s power to establish a postal system, granted by the Constitution, gave it near-absolute authority of the mails.³⁰⁴ In the early 1950s, the conservative, hyper-vigilant Postmaster General Arthur Summerfield announced a “clean up the mails” campaign designed to block a rising tide of obscene books, magazines and similar material.³⁰⁵ Summerfield claimed that his staff had been recently faced with a seventy-three percent increase in “pornographic magazines and books.”³⁰⁶ The Postal-Inspection Department was receiving 700 letters a day “from parents protesting the corrupting of their children and demanding [that the Post Office take] action.”³⁰⁷ Summerfield believed that “material should be barred from the mails if it violate[d] . . . ‘the “ordinary standard of common decency of average representative citizens,”’” and that “‘abysmal ignorance’ [was] displayed by those who cr[ie]d [‘censorship’]” when risqué material was banned from the mail.³⁰⁸

On August 27, 1955, Summerfield issued a “withhold from dispatch” order barring the November edition of *Confidential* from the mails.³⁰⁹ The order instructed the postmaster at Mt. Morris, Illinois, where the magazine was printed, to halt distribution and to send copies to the Post Office Department in Washington for examination.³¹⁰ The Department claimed that it had received complaints from concerned citizens alleging that the magazine was “objectionable.”³¹¹ Summerfield had also gotten frantic calls from Hollywood executives, imploring him to take action.³¹² No one in the Post Office Department had seen a copy of the November edition before issuing the order.³¹³ The Department made no official announcement of the order and did not offer Harrison a hearing to contest it.³¹⁴

The Post Office Department had recently come under criticism for its arbitrary mail ban procedures.³¹⁵ Under existing procedures, when the Postmaster General

³⁰³ Schiller, *supra* note 285, at 38.

³⁰⁴ *Id.* at 39 (citing *In re Rapier*, 143 U.S. 110, 134 (1892)).

³⁰⁵ *Public Help Sought in Clean Mail Drive*, BRIDGEPORT POST (Conn.), Mar. 17, 1955, at 6.

³⁰⁶ *Id.*

³⁰⁷ *Rackets: The Spread of Smut*, NEWSWEEK, Apr. 27, 1959, at 36, 41.

³⁰⁸ *Public Help Sought in Clean Mail Drive*, *supra* note 305, at 6.

³⁰⁹ *Confidential Fights*, *supra* note 301, at 8D (internal quotation marks omitted).

³¹⁰ *Id.*

³¹¹ *Magazine’s Suit Seeks to Block Postal Ban*, WASH. POST, Sept. 10, 1955, at 40.

³¹² *See, e.g.*, Gehman, *supra* note 25, at 146. “Unless they take away that bastard Harrison’s mailing privileges, this industry is done for,” one producer said to him. *Id.* (internal quotation marks omitted).

³¹³ EDWARD BENNETT WILLIAMS, *ONE MAN’S FREEDOM* 265 (1962).

³¹⁴ *Id.*

³¹⁵ *See generally* ZECHARIAH CHAFEE, JR., 1 *GOVERNMENT AND MASS COMMUNICATIONS* 276–366 (1947); Edward de Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 *LAW & CONTEMP. PROBS.* 608, 608–09 (1955); James C.N. Paul & Murray L. Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*,

determined that material was obscene, he notified the local postmaster not to carry it.³¹⁶ The mailer was notified and given a short time to contact the Post Office Department to object.³¹⁷ In the meantime, the publication was not delivered.³¹⁸ If the sender did protest, he could argue only to the lawyers who had decided initially against him, and there was no appeal.³¹⁹ On issues of fact and the application of statutory standards like “obscene” to the facts, the determination of the Postmaster General and his subordinates was treated as final.³²⁰

In 1945, this practice was deemed illegal by the U.S. Court of Appeals for the District of Columbia.³²¹ The court held that the Post Office Department must provide open, formal hearings before an adjudicator who had not already decided the case against the mailer.³²² The Post Office ignored the decision.³²³ Then, a year later, Congress adopted the Administrative Procedure Act,³²⁴ which required that any agency determination must be preceded by a hearing with notice and opportunity to present evidence and cross-examine adverse witnesses.³²⁵ The Post Office refused to apply the Act’s provisions to postal proceedings, claiming that if it applied, every “disappointed purveyor of obscenity” could force them to undergo a “time-consuming, expensive administrative hearing,” and that if material could still be mailed while a hearing was under way, the effectiveness of a mail ban would be vitiated.³²⁶

This was where things stood when Robert Harrison called on the famed criminal defense lawyer Edward Bennett Williams, who had recently represented Senator Joseph McCarthy in his Senate censure hearings.³²⁷ In September 1955, Williams,

106 U. PA. L. REV. 214 (1957) [hereinafter *Problems of Federal Censorship*]; Harvey Lyle Zuckerman, *Obscenity in the Mails*, 33 S. CAL. L. REV. 171 (1960); Comment, *Obscenity and the Post Office: Removal from the Mail under Section 1461*, 27 U. CHI. L. REV. 354 (1960).

³¹⁶ JAMES C.N. PAUL & MURRAY L. SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* 94 (Greenwood Press 1977).

³¹⁷ *Id.* at 92.

³¹⁸ *Id.*

³¹⁹ *Id.* at 94.

³²⁰ See CHAFEE, *supra* note 315, at 316–17.

³²¹ *Walker v. Popenoe*, 149 F.2d 511, 513 (D.C. Cir. 1945); Zuckerman, *supra* note 315, at 177–78.

³²² *Walker*, 149 F.2d at 513.

³²³ de Grazia, *supra* note 315, at 610.

³²⁴ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551 et seq. (2012)).

³²⁵ 5 U.S.C. § 556(d).

³²⁶ PAUL & SCHWARTZ, *supra* note 316, at 96.

³²⁷ WILLIAMS, *supra* note 313, at 266; *Confidential Fights*, *supra* note 301, at 80. Said Williams,

It seemed to me that the action of the Post Office Department constituted a shocking abridgement of freedom of expression

If the Postmaster General could bar *Confidential* from the mails without notice, without charges and without a hearing he could do the

a noted civil libertarian and defender of free speech, helped Harrison file suit against Postmaster General Summerfield, asking for an injunction requiring the Post Office to lift its ban, and claiming that the order violated the First Amendment, the Fifth Amendment, and the Administrative Procedure Act.³²⁸ “The First Amendment guarantees one thing minimally, and that is freedom from previous restraint, freedom from prior censorship,” Williams said.³²⁹ The ACLU issued a press release describing the Post Office’s action as “unbridled censorship.”³³⁰

“We offer no comment on the content of the articles published in *Confidential* or the kind of journalism it reflects However, as long as the First Amendment is to have meaning and force with respect to the distribution of published material, the Post Office has no right to pre-censor.”

“If a publication has violated the law, then it should be properly charged and its case heard in a court of law. Under our democratic system, we do not rely on individual Government administrators to decide what material should be read by the public.”³³¹

According to Williams, “Harrison swore in his complaint that he would be forced to discontinue publication if the order remained in effect”³³² This claim was not true, since most issues were sold to newsstands and delivered by truck,³³³ and only around 30,000 were sold by subscription.³³⁴

same to any periodical. . . . I respected Arthur Summerfield, but I didn’t think he or anyone else was qualified to be the literary dietitian of America.

WILLIAMS, *supra* note 313, at 266.

³²⁸ Andrew W. Bingham, *Inside Confidential*, HARV. CRIMSON (Oct. 27, 1955), <http://www.thecrimson.com/article/1955/10/27/inside-confidential-pbob-harrison-publisher-of/> [<https://perma.cc/TN5J-JK4W>]; *Confidential Fights*, *supra* note 301, at 8; *Magazine’s Suit Seeks to Block Postal Ban*, *supra* note 311, at 40.

³²⁹ ROBERT PACK, EDWARD BENNETT WILLIAMS FOR THE DEFENSE 56 (1983) (internal quotation marks omitted). Harrison alleged in his complaint that *Confidential* “has expended substantial sums of money in carefully building up among the American public a valuable reputation and good will for impartial, objective and fearless reporting of newsworthy events.” *Confidential Fights*, *supra* note 301, at 8D (internal quotation marks omitted).

³³⁰ Press Release, ACLU (Sept. 23, 1955) (on file with author).

³³¹ *Liberties Union Protests Mailing Ban on Magazine*, WASH. POST & TIMES HERALD, Sept. 26, 1955, at 19.

³³² WILLIAMS, *supra* note 313, at 266–67.

³³³ See *supra* note 124 and accompanying text.

³³⁴ *Success in the Sewer*, *supra* note 132, at 92.

On October 7, 1955, Judge Luther Youngdahl of the U.S. District Court of the District of Columbia ordered the Post Office to rescind the order.³³⁵ He declared that “to withhold [the magazine] from the mails without notice, charges and a hearing constituted a violation of due process of law.”³³⁶ Henceforth, if the Post Office considered any issue nonmailable, it would have to notify the publisher, and an administrative hearing would have to be held.³³⁷ In order for the Post Office to bar *Confidential* from the mails while the hearing was under way, it would have to obtain an injunction.³³⁸ Voluntarily, in response to the Post Office’s request, *Confidential* agreed to submit each successive issue to the Post Office Department for an informal review, within 24 hours after printing and binding.³³⁹

Confidential’s lawyers described the decision as a triumph: “If the officials think any particular issue is obscene, they must ask for a hearing and can’t interfere with the distribution of that number,” Daniel Ross told reporters.³⁴⁰ The victory was short-lived, however. Harrison had just submitted the March issue to the Post Office for review when it declared the issue “obscene, lewd, lascivious . . . filthy” and non-mailable.³⁴¹ An article, *The Pill that Ends Unwanted Pregnancy*—a commentary on a new antileukemia drug, aminopterin, that was being used by some doctors for therapeutic abortions³⁴²—allegedly made the magazine not only obscene, but unfit for mailing under a law that prohibited from the mails “[e]very paper, writing, advertisement, or representation that any . . . drug, medicine, or thing may, or can, be used or applied for . . . producing abortion”³⁴³ The Post Office Department, after giving *Confidential* only one hour’s notice, had gone to the federal district court and asked for a temporary restraining order barring the issue from the mails.³⁴⁴

In the hearing before Judge Joseph C. McGarraghy of the U.S. District Court for the District of Columbia in January 1956, Williams cited *Near v. Minnesota*,

³³⁵ Bingham, *supra* note 328.

³³⁶ WILLIAMS, *supra* note 313, at 267.

³³⁷ *Id.* at 268.

³³⁸ *Id.*

³³⁹ *Confidential Wins a Round*, TIME, Oct. 17, 1955, at 91. Under the agreement, *Confidential* should not begin to ship the magazine in any way, that is whether by freight, or express, or truck, or mail, until the Postmaster General had . . . opportunity to check it; and if the Postmaster . . . did find any fault with any particular issue, he had to go into court and convince the court to that effect.

⁷ Transcript of Record (Aug. 19, 1957), *supra* note 27, at 874.

³⁴⁰ Bingham, *supra* note 328 (internal quotation marks omitted).

³⁴¹ PACK, *supra* note 329, at 57 (internal quotation marks omitted).

³⁴² SCOTT, *supra* note 3, at 103; *Confidential Revisited*, TIME, Mar. 18, 1957, at 76, 76.

³⁴³ 18 U.S.C. § 1461 (1952).

³⁴⁴ The district court issued a restraining order, and the Court of Appeals refused to stay it. “The government came back into court . . . seeking to convert its temporary restraining order into a preliminary injunction.” *Confidential Case*, Feb. 17, 1956, ACLU Papers, Mudd Library, Princeton University.

prohibiting prior restraints under the First Amendment.³⁴⁵ For Williams, *Near* stood for the proposition that “the appropriate remedial action is not injunction, but it is subsequent punishment.”³⁴⁶ In the point that ultimately settled the case, Williams told McGarraghy that the Post Office was trying to ban *Confidential* by filing a motion in a case that had been dismissed three months earlier by Judge Youngdahl.³⁴⁷ McGarraghy turned down the Post Office’s motion for a preliminary injunction.³⁴⁸ The temporary restraining order lapsed, and *Confidential* was mailed on schedule.³⁴⁹ The *Confidential* decision had impact: in 1959, the Post Office Department promulgated regulations consistent with the decision.³⁵⁰ The regulations provided that the mailers of allegedly obscene material must receive notice from the Post Office Department of the charges against them, must have the opportunity to answer the

³⁴⁵ PACK, *supra* note 329, at 57 (citing *Near v. Minnesota*, 283 U.S. 697 (1931)).

³⁴⁶ *Id.* (internal quotation marks omitted).

³⁴⁷ “Your honor, . . . I must call your attention to the fact that . . . it is basic hornbook law that one cannot use as a vehicle for obtaining injunctive relief a case that has been dismissed from the dockets of the Court.” *Id.* at 59 (internal quotation marks omitted).

³⁴⁸ *Another Attempt To Bar Magazine Is Refused*, HARTFORD COURANT, Jan. 5, 1956, at 4B; *Magazine Wins Round with P.O. on “Obscenity,”* WASH. POST & TIMES HERALD, Jan. 5, 1956, at 21.

³⁴⁹ *Magazine Wins Round with P.O. on “Obscenity,” supra* note 348, at 21. Shortly afterwards, on January 13, 1956, the Post Office tried to appeal “Youngdahl’s order claiming that it [was] inequitable and that the Mailability Section of the Post Office Department cannot live under it.” *Confidential Case, supra* note 344, at 3. They asked to again be allowed to bar periodicals which they deemed nonmailable without a hearing and a court order. The ACLU sent a letter to postal officials urging them to drop their appeal:

“Under our democratic form of government . . . censorship and denial of due process of law are abhorrent. . . . The reasons for . . . our repeated protests concerning the Post Office Dept.’s power is the concern that a serious abuse of power, which denies civil liberties, results from the Dept.’s action. . . . Pre-publication censorship is the mark of totalitarianism and our country is vigorously challenging this kind of attack on the press in Iron Curtain countries. Yet should we imitate it in our democracy?”

“Our concern about the civil liberties issues in the [*Confidential*] case should not be construed as support for the content of the magazine or the kind of journalism it represents. We are disturbed only by the wide-reaching implications of the Post Office Dept.’s action, and for this reason we again urge that it reconsider its appeal of Judge Youngdahl’s order.”

Press Release, ACLU (Feb. 24, 1956) (on file with author).

Youngdahl did not revise his order. “I am informed by the Assistant United States Attorney in charge of the *Confidential* case that your release created quite a stir inside the Post Office Department—all to the good[.]” Williams wrote to the ACLU’s Alan Reitman. Letter from Edward Bennett Williams to Alan Reitman, Assistant Dir., ACLU (Mar. 1, 1956) (on file with author).

³⁵⁰ See Zuckerman, *supra* note 315, at 178.

charges and to seek an informal compromise with the Department, and the right to a fair hearing.³⁵¹

B. Confidential's Allies

Despite its millions of readers, *Confidential* “had few friends,” observed Edward Bennett Williams.³⁵² Though ACLU leaders made clear they found the magazine distasteful and offensive, the ACLU was *Confidential*'s only real legal ally, having embarked on an extensive campaign against censorship through its National Council on Freedom from Censorship (NCFC),³⁵³ an affiliate of the national ACLU.³⁵⁴ In 1955, the executive director of the ACLU Patrick Murphy Malin monitored *Confidential*'s legal entanglements through newspaper accounts and reports from ACLU members.³⁵⁵ They also cultivated a connection with *Confidential* editor Howard Rushmore, who kept them informed of government and “pressure group” efforts against the magazine.³⁵⁶

The mainstream press, historically one of the most vocal advocates of freedom of the press, had a conflicted relationship with *Confidential*. A few journalists and press organizations came to *Confidential*'s aid in its battles with the Post Office. The Postmaster General's order was easy to criticize; a prior restraint, a mail ban was censorship in its purest form. “Can the Post Office Department, without a hearing, bar [*Confidential*] from the mails?” asked Ed Creach of the Associated Press, “If so, couldn't any other publication be similarly barred?”³⁵⁷ “Precensorship invites arbitrariness and encourages . . . the sort of disregard for due process displayed by Mr. Summerfield in regard to *Confidential*.”³⁵⁸

Yet others in the publishing world supported the Post Office's actions against *Confidential*. At a time when the mainstream press was itself under attack—accused of inaccuracy, bias, and sensationalism³⁵⁹—journalists sought to distance themselves from Harrison's sleazy operations. Several publishers denied that *Confidential* had the same First Amendment rights as traditional news publications. When it came to

³⁵¹ 39 C.F.R. §§ 203.2–14 (Supp. 1959); Zuckerman, *supra* note 315, at 178.

³⁵² WILLIAMS, *supra* note 313, at 264.

³⁵³ WALKER, *supra* note 294, at 228.

³⁵⁴ See *Censorship Curb on Books Is Seen: More Authors Are Suffering in U.S. Because of Political Views, Group Hears*, N.Y. TIMES, May 10, 1951, at 7; *New Group Planned to Fight Censorship*, N.Y. TIMES, May 22, 1948, at 5 (covering a meeting called by the Council).

³⁵⁵ Letter from Alan Reitman, Assistant Director, ACLU, to Victor Lasky (Aug. 9, 1955) (on file with author).

³⁵⁶ *Id.*

³⁵⁷ *Confidential Case Arouses Some Editors*, CORPUS CHRISTI TIMES, Oct. 22, 1955, at 3.

³⁵⁸ Editorial, *Holding Up the Mail*, WASH. POST & TIMES HERALD, Sept. 30, 1955, at 20.

³⁵⁹ See, e.g., Editorial, *War on Slander*, DELTA DEMOCRAT-TIMES (Greenville, Miss.), June 2, 1957 [hereinafter *War on Slander*].

scandal magazines, “censorship [was] a benefit rather than a handicap,” wrote one editor.³⁶⁰ “[C]ensorship of publications which thrive on gossip, tearing down reputations and libeling individuals cannot be argued against,” claimed one student newspaper.³⁶¹ In 1955 the magazine *The Reporter*, usually known for its liberal, progressive positions, published an editorial in favor of the Post Office ban on *Confidential*.³⁶²

We cannot agree with [those] who, as soon as something like the attempted suppression of *Confidential* occurs, intone the old Voltaire singsong: “I disapprove of what you say, but I will defend to the death your right to say it.” As a matter of fact, we cannot imagine ourselves dying for *Confidential*.³⁶³

Publications like *Confidential* gave “a bad name to journalism as a profession,” and were “through their extreme sensationalism endangering a basic principle of freedom of the press.”³⁶⁴

C. State and Local Attacks

1. Pressure Groups and Obscenity Prosecutions

Between 1955 and 1957, citizens’ groups across the country pressured booksellers and newsstands to stop the sale of *Confidential*.³⁶⁵ *Confidential* was on several lists of “disapproved” periodicals that were given to newsdealers with a demand that they be taken off sale.³⁶⁶ Irving Ferman, head of the Washington ACLU, was an “avid reader” of *Confidential*.³⁶⁷ In August 1955, when he went to purchase it from a drugstore, he was told that it was no longer sold there.³⁶⁸ A local organization “had approached the druggist and threatened to boycott the store if he continued to sell

³⁶⁰ Editorial, *Stock in Scandal*, CHARLESTOWN COURIER (Ind.), Feb. 21, 1957.

³⁶¹ Editorial, *A Perspectus of Publications*, DAILY TAR HEEL (Chapel Hill, N.C.), May 15, 1957, at 2.

³⁶² *Confidentially*, REPORTER, Nov. 3, 1955, at 6.

³⁶³ *Id.* at 6. The ACLU responded with a curt letter: “The American Civil Liberties Union disagrees with your comment. In our opinion it cuts across the civil liberties framework which [*The Reporter*] itself laudably has defended on numerous occasions, and which is the basis of our American democracy.” Memorandum from Alan Reitman on *The Reporter* and *Confidential* (Nov. 1, 1955) (on file with author).

³⁶⁴ *War on Slander*, *supra* note 359.

³⁶⁵ On these censorship “pressure groups,” see Farmer, *supra* note 233; Hempel & Wall, *supra* note 230; *Censorship of Obscene Literature*, *supra* note 192.

³⁶⁶ *Slugging the “Exposé” Magazines*, *supra* note 235, at 75.

³⁶⁷ Letter from Victor Lasky to Patrick Murphy Malin, Exec. Dir., ACLU (Aug. 5, 1955) (on file with author).

³⁶⁸ *Id.*

[*Confidential*].”³⁶⁹ “[C]itizens’ groups . . . have begun to exert ‘book-burning’ pressure aimed at preventing sales of [*Confidential*],” newspaper columnist Victor Lasky warned ACLU leaders.³⁷⁰ “I am no devotee of [*Confidential*]; but . . . I am troubled by some of the methods being employed by well-meaning citizens in their efforts to put [*Confidential*] out of business.”³⁷¹

Urged by civic and religious groups, police and prosecutors seized copies of *Confidential* and threatened retailers with obscenity prosecutions and the loss of their licenses if they sold it.³⁷² In 1957, nineteen magazines, including *Confidential*, were named as “objectionable” in Baton Rouge in a warning to dealers from the district attorney.³⁷³ In several jurisdictions, *Confidential* was targeted by official literature review boards.³⁷⁴ A Burlington, New Jersey, Literary Control Board banned *Confidential* and twenty-six other magazines.³⁷⁵ The police chief and his department were authorized to arrest dealers who sold banned material and to bring them to trial.³⁷⁶ In November 1957, the North Carolina Sheriff’s Association put fifty-one “objectionable” publications on a list, including *Confidential*.³⁷⁷ In Knoxville, the City Board of Review banned issues of magazines containing “offensive text,” including *Confidential*, and secured the agreement of city’s two main magazine distributors “not to distribute anything banned.”³⁷⁸

Civil liberties groups condemned these measures as unconstitutional prior restraints. The American Library Association described official and unofficial “literature committees” as unconstitutional, leaving newsdealers and booksellers “without recourse to the courts or to any due process of law.”³⁷⁹ “The current censorship movement is characterized by voluntary or semi-official ‘literature committees’ and by law enforcement officers operating extra-legally,” observed a critic from the American Library Association.³⁸⁰ “The more extortionary of these police practices [were] prior restraints on a free press.”³⁸¹ The Bar Association of the City of New

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² See, e.g., Kay Blincoe, *Burlington Eases Ban on Magazine If It Toes Line*, BRISTOL DAILY COURIER, March 27, 1957, at 1; *War on Slander*, *supra* note 359.

³⁷³ *War on Slander*, *supra* note 359.

³⁷⁴ See, e.g., *Burlington Places Ban on 9 Magazines*, COURIER POST (N.J.), Apr. 2, 1957, at 26; Whit Whitfield, *Lewd and Lascivious? Or Puritanical Prowess*, DAILY TAR HEEL (N.C.), Nov. 9, 1957, at 2.

³⁷⁵ *Burlington Places Ban on 9 Magazines*, *supra* note 374, at 26.

³⁷⁶ Blincoe, *supra* note 372, at 1.

³⁷⁷ Whitfield, *supra* note 374, at 2.

³⁷⁸ *City Bans Six Mags to Keep Knox ‘Pure,’* KINGSPORT TIMES (Tenn.), Feb. 6, 1957, at 15 (internal quotation marks omitted).

³⁷⁹ Waller, *supra* note 200, at 475.

³⁸⁰ *Id.*

³⁸¹ *Crime Comics and the Constitution*, *supra* note 223, at 244.

York issued a statement protesting “pressure-group tactics” against books and magazines: when “one group within the community is compelling the balance of the community to conform to its standards[,] . . . censorship [is] exercised[.] [S]ince it is that of a private group, [it] is without the benefit of the procedural safeguards established by law.”³⁸²

In some jurisdictions, formal obscenity charges were brought against *Confidential*,³⁸³ but threats of prosecution were more common than actual prosecutions.³⁸⁴ The publicity surrounding an obscenity trial only increased demand for the material, and prosecutions were costly and likely to be unsuccessful.³⁸⁵ The legal definition of obscenity in most states was amorphous and elastic; obscenity was what was “disgusting, filthy, indecent, immoral, improper, impure, lascivious, lewd, licentious, [or] vulgar.”³⁸⁶ Even in conservative jurisdictions, there was

³⁸² Bolte, *supra* note 216, at 93. Newsdealers and publishers brought court actions against “pressure-group censorship” and “police censorship” and were successful in some cases. Waller, *supra* note 200, at 475–76. In Youngstown, Ohio, a publisher sought an injunction in federal district court against the police chief, who screened and banned objectionable publications. *New Am. Library of World Literature v. Allen*, 114 F. Supp. 823, 825 (N.D. Ohio 1953). The judge sided with the publisher, declaring that the police chief’s actions were invalid as an arbitrary exercise of power and a violation of due process. *Id.* at 832–34. A similar case in New Jersey resulted in an injunction against the police. *Bantam Books v. Melko*, 96 A.2d 47, 63 (N.J. Super. Ct. Ch. Div. 1953), *modified*, 103 A.2d 256 (N.J. 1954). The “decision should give pause to all would-be censors,” said Walter Pitkin, Executive Vice President of Bantam Books. Walter Pitkin, Jr., Letter to the Editor, *To Defeat Censorship: Affirmation of Press Freedom Seen in Recent Ruling on Books*, N.Y. TIMES, Apr. 15, 1953, at 30. “This important decision reaffirms the liberty of the press which the First Amendment guarantees.” *Id.*

³⁸³ *Infra* notes 388–402 and accompanying text.

³⁸⁴ *Cf.* Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489, 494–99 (1955) (providing an overview of informal censorship tactics used by police and prosecutors). According to one law review article, there were “very few” criminal prosecutions under obscene literature ordinances and statutes. Lockhart & McClure, *supra* note 236, at 309.

³⁸⁵ Lockhart & McClure, *supra* note 236, at 309.

[T]hose anxious to suppress [material] that offend[s] them [were] reluctant to use the normal and traditional legal procedure A judicial proceeding is a public affair in which the merits as well as the demerits of a questioned book may be considered, in which those interested in the preservation of a free literature as well as the censorious may be heard.

Id.

³⁸⁶ *Id.* at 323. “In the forty-seven states where statutes relating to obscenity exist[ed], all but six define[d] it by adding one or more of the following words: disgusting, filthy, indecent, immoral, improper, impure, lascivious, lewd, licentious, [or] vulgar.” Larrabee, *supra* note 220, at 674 (quoting *id.*).

Prior to the 1930s, the leading judicial definition of obscenity came from the English case *Regina v. Hicklin*; the test of obscenity was whether “the tendency of the [matter charged as obscene] to deprave or corrupt any whose minds are open to immoral influence”—namely,

often significant disagreement as to what was obscene, indecent, lustful, impure, or lewd.³⁸⁷

In 1957, *Confidential* and its distributors faced obscenity charges in New Jersey and New York.³⁸⁸ Following a five-month investigation in Albany, two book and magazine distributors were charged with distributing obscene literature, including *Confidential*.³⁸⁹ In New Jersey, the publishers and distributors of *Confidential* and six men's magazines were indicted on charges of conspiracy to violate a law forbidding the sale of indecent literature.³⁹⁰ The action followed complaints by the mother of a nine-year-old boy, who said her son had brought two of the magazines home.³⁹¹ The judge agreed to place *Confidential* on probation when its lawyers promised that the magazine would “eliminate expos[é] stories on the private lives of celebrities” and become as innocuous as “the Saturday Evening Post.”³⁹²

In early 1957, *Confidential* and its Illinois publisher, the Kable Company, were indicted under the federal obscenity statute,³⁹³ which prohibited mailing any “obscene, lewd, lascivious . . . article, matter, [or] thing . . . intended for preventing contraception or producing abortion”³⁹⁴ The charges, noted the *Hartford Courant*, “typif[ied] those that people of conscience [had] wished on the magazine for years.”³⁹⁵ The indictment was based on the March 1956 article, “The Pill that Ends Unwanted

children. Lockhart & McClure, *supra* note 236, at 394. By the 1950s, most courts had abandoned that standard; newer tests—albeit vague and poorly defined—looked at the effect of material on normal adults, whether it incited “lustful thoughts” or “stir[red] the sex impulses.” *Id.* at 329–30 (describing the various phrases courts used to describe obscene material); *see also* Roth v. United States, 354 U.S. 476, 487 (1957) (“Obscene material is material which deals with sex in a manner appealing to prurient interest.”).

³⁸⁷ *See* Times Film Corp. v. Chicago, 365 U.S. 43, 69–73 (1961) (Warren, C.J., dissenting) (discussing the disparity of censorship standards in various U.S. cities for films). Edward Bennett Williams believed that *Confidential* could not be considered obscene under any existing test; it was not “hard-core pornography,” did not appeal to “prurient interests,” and “did not tend to excite lustful thoughts and desires in the normal reader.” WILLIAMS, *supra* note 313, at 280.

³⁸⁸ *Confidential, 6 Other Publishers Indicted: New Jersey Charges Magazines with Plot to Sell Indecent Literature*, L.A. TIMES, Apr. 30, 1957, at 7.

³⁸⁹ Memorandum from Alan Reitman, ACLU, to Censorship Panel (Dec. 13, 1957) (on file with author).

³⁹⁰ *Publishers of Seven Spicy Magazines Are Indicted*, SAN BERNARDINO DAILY SUN, Apr. 30, 1957, at 6.

³⁹¹ *7 Magazines Face Charges of Indecency*, KINGSPORT TIMES, Apr. 30, 1957, at 1.

³⁹² *Confidential Magazine Has No Defense Plea to Charge*, LUBBOCK MORNING AVALANCHE (Tex.), Dec. 18, 1957, at 11 (internal quotation marks omitted).

³⁹³ *Confidential Indicted: Magazine Accused of Mailing Abortion Information*, N.Y. TIMES, Mar. 8, 1957, at 23; *U.S. Judge Rips Magazine, but Drops Charge*, CHI. DAILY TRIBUNE, June 7, 1957, at C13.

³⁹⁴ 18 U.S.C. § 1461 (1952 & Supp. IV 1956).

³⁹⁵ *A Federal Court Bears Down on Confidential*, HARTFORD COURANT, Mar. 9, 1957, at 8.

Pregnancy.”³⁹⁶ *Confidential*’s attorney described the article as a warning against the use of the pill,³⁹⁷ but the indictment said the story gave information on how abortions could be produced.³⁹⁸

In a statement reprinted widely in the press, Judge Joseph Sam Perry of the U.S. District Court for the Northern District of Illinois described *Confidential* as a magazine that is “a purveyor of social sewage.”³⁹⁹ *Confidential* was “like a bad boy and ought to be whipped for that.”⁴⁰⁰ He proceeded to find that *Confidential* was not legally obscene, and he dismissed the indictment.⁴⁰¹ *Confidential*’s attorney “hailed the ruling as upholding the constitutional guarantee of freedom of the press.”⁴⁰²

2. “Anti-Scandal” Legislation

With *Confidential* and other “exposé magazines” in mind, many state legislatures considered bills dealing with “indecent literature,” and several states expanded the definition of obscenity in existing laws to cover scandal magazines. The North Carolina legislature granted a local judge the authority to ban “publications which he deem[ed] unfit for public consumption.”⁴⁰³ “The legislation [was] aimed at curbing [*Confidential* and] the [other] sex and scandal magazines which have flooded the newsstands in recent years,” reported the *Daily Tar Heel*.⁴⁰⁴

Vermont considered a law that would impose fines “with possible jail terms . . . for persons who provide minors with corruptive literature,” including *Confidential*.⁴⁰⁵ In 1957, Oklahoma passed a law, aimed at *Confidential*, to create “a censorship board to ban ‘obscene literature on the newsstands.’”⁴⁰⁶ The New York Assembly proposed

³⁹⁶ *Confidential Magazine is Indicted*, INDIANAPOLIS STAR, Mar. 8, 1957, at 23.

³⁹⁷ *Kable Co., Confidential Acquitted*, FREEPORT J.-STANDARD (Ill.), June 7, 1957, at 1.

³⁹⁸ *Confidential Magazine is Indicted*, *supra* note 396, at 1.

³⁹⁹ *Kable Co., Confidential Acquitted*, *supra* note 397, at 1 (internal quotation marks omitted).

⁴⁰⁰ *Id.* (internal quotation marks omitted).

⁴⁰¹ *United States v. Confidential*, No. 57 CR 163 (N.D. Ill. June 6, 1957) (on file with author); *Kable Co., Confidential Acquitted*, *supra* note 397, at 1.

⁴⁰² *Find Confidential ‘Not Guilty’ of Obscenity Charge*, ANDERSON HERALD (Ind.), June 7, 1957, at 25.

⁴⁰³ George W. Wolff, *Censorship and Civil Liberty*, DAILY TAR HEEL (N.C.), May 21, 1957, at 2.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Crackdown: Sale of Corruptive Literature to Minors Now Illegal; State is Preparing to Enforce Law*, BENNINGTON EVENING BANNER (Vt.), July 23, 1957, at 1. “Covered under the [law were] magazines and printed matter ‘tending to the corruption of the morals of youth’ because of obscenity, or ‘devoted to the publication of criminal news, police reports, criminal deeds or horror situations.’” *Id.*

⁴⁰⁶ Bill Crawford, *Did Lack of Parental Supervision in Reading Create Censor Board?*, LAWTON CONST., June 13, 1957, at 15. The bill was met with opposition from Oklahoma Press Association officials, who denounced it as a violation of freedom of the press. *Id.*

measures to “curb traffic in sexy ‘girlie’ magazines.”⁴⁰⁷ One of the bills would restrict “tie-in sales,” in which magazine distributors forced newsstands “to handle sex and ‘expos[é]’ magazines” to obtain standard magazines,⁴⁰⁸ which was a common distribution practice at the time.⁴⁰⁹ A similar bill was passed in Idaho.⁴¹⁰ Declaring that the “traffic in immoral publications . . . creates an emergency,” a bill was introduced in Texas in 1953 that would penalize the publishers of printed matter devoted to “scandals, whoring, [and] lechery.”⁴¹¹

In 1957, Illinois proposed one of the most far-reaching legislative measures against *Confidential*.⁴¹² That May, the state Senate approved an “exposé type of publication bill” that prohibited the “sale, distribution, lending, or giving away of publications which are devoted primarily to the publication of information concerning improper, indecent, or scandalous marital, sexual, moral and social conduct and behavior of well-known personalities”⁴¹³ Any person who willfully or knowingly sold, distributed, or possessed any “exposé-type of publication” would be guilty of a misdemeanor, punishable by a fine or by imprisonment in a county jail.⁴¹⁴ The

⁴⁰⁷ *Assembly Passes Two Bills to Curb Obscene Matter*, TROY REC. (N.Y.), Mar. 7, 1957, at 1.

⁴⁰⁸ *Id.* (internal quotation marks omitted).

⁴⁰⁹ *Regulation of Comic Books*, *supra* note 384, at 502.

⁴¹⁰ *Banning*, *supra* note 206, at 118. The bill “in the state legislature provid[ed] for punishment of any person or firm which should ‘require a retail dealer to take all or certain groups of such publications at the sole discretion of [the] distributor.’” *Id.* at 118; *see also* 1951 Idaho Sess. Laws 421.

⁴¹¹ S.B. 105, 48th Leg. Reg. Sess. (Tex. 1953).

⁴¹² *See Bill Would Ban ‘Expose’ Magazines*, ALTON EVENING TELEGRAPH, May 21, 1957, at 10.

⁴¹³ An “exposé type of publication” included

books, pamphlet [sic], magazines, periodicals and other publications which are devoted primarily to the publication of information concerning the lives, behavior and conduct of well-known personalities through the exposé or revelation of incidents or information concerning improper, indecent or scandalous marital, sexual, moral and social conduct and behavior of such personalities;

S.B. 361, 70th Gen. Assemb. Reg. Sess. (Ill. 1957).

[T]he emphasis of such publications on sex, immorality, depravity, scandalous conduct and, at times, even obscenity . . . causes irreparable damage to the character and reputation of the subjects of such publications, [and] also endangers the public morals, stimulates lewd and lascivious conduct, threatens basic concepts of decency and honesty, improperly influences the ethical and moral development of youth, and constitutes a threat to the fundamental concepts regarding the proper ideals and principles of human conduct and behavior.

Id.

⁴¹⁴ *Id.* There was also a “tie-up” provision:

Any person, firm or corporation, or any agent, officer or employee thereof, engaged in the business of distributing books, magazines,

measure received the minimum thirty votes necessary for passage with thirteen opposed in the state senate. The Illinois House of Representatives opposed the bill because it was a “dangerous step toward censorship.”⁴¹⁵

Even though the bill exempted news publications, the ACLU and several newspaper publishers branded the measure as vague, overbroad, and unconstitutional.⁴¹⁶ “The Illinois Senate struck a low blow against freedom of the press this week when it passed a bill aimed at the expos[é] types of magazines such as [*Confidential*],” wrote the *Alton Telegraph*.⁴¹⁷ “It would be an initial movement to tell the press what it must avoid in its published contents. . . . Soon the press would be operating in an endless morass of censorship.”⁴¹⁸ The *Chicago Tribune* likened the measure to the “gag law” invalidated in *Near v. Minnesota*, and cited the opinion by Justice Hughes in that decision: “[s]ubsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.”⁴¹⁹ The Illinois House of Representatives tabled the bill on June 27, 1957.⁴²⁰

D. Libel

Libel suits were often proposed as a remedy to the “*Confidential* problem”—a means of bankrupting the magazine, compensating its victims, and avoiding the

periodicals or other publications to retail dealers who refuses to furnish to any retail dealer such quantity of books, magazines, periodicals or other publications as the retail dealer normally sells because said retail dealer refuses to sell or offer for sale any expos[é] type of publication, is guilty of a misdemeanor, and upon conviction thereof is punishable by a fine of not less than \$10 nor more than \$100.

Id.

⁴¹⁵ *Stratton’s Program Made Big Strides Last Week*, ALTON EVENING TELEGRAPH (Ill.), May 22, 1957, at 23. A state senator who was a “publisher of a weekly newspaper, said the bill was ‘bad, unconstitutional and unnecessary,’ [since] persons ‘pilloried in such “expose” magazines’ . . . [had] recourse to libel laws.” *Id.*

⁴¹⁶ *See Illinois Law to Ban Lewd Literature Receives Challenge*, TERRE HAUTE TRIBUNE-STAR (Ind.), May 18, 1957, at 28. The director of the Illinois Division of the ACLU argued that “the bill could not stand a single court test.” *Id.* (internal quotation marks omitted).

⁴¹⁷ Editorial, *Foot in Freedom’s Door*, ALTON TELEGRAPH (Ill.), May 17, 1957, at 4.

⁴¹⁸ *Id.* The bill “is as repugnant to the American concept of freedom of the press as the magazines themselves While the scandal magazines may be reprehensible to most Americans, legislation cannot put them out of business without threatening the freedom of all magazines and newspapers. What is improper? Indecent? Scandalous?” Editorial, *Confidential-ly, It’s a Bad Law*, SOUTHERN ILLINOISIAN, May 17, 1957, at 4.

⁴¹⁹ *The “Expose Magazine” Bill*, CHI. DAILY TRIBUNE, May 17, 1957, at 14 (citing *Near v. Minnesota*, 283 U.S. 697, 720 (1931)) (“The bill is unconstitutional and an infringement of freedom of speech and of the press, no matter how offensive to good taste the publications in question may be.”).

⁴²⁰ S.B. 361, 70th Gen. Assemb. Reg. Sess. (Ill. 1957).

difficulties of prior restraints—but it was far from ideal. Most victims of *Confidential* were reluctant to sue for libel.⁴²¹ “So you sue ‘em and it takes years to get into court. Leave ‘em alone and it’s forgotten. People have forgotten it already,” observed actor Gary Cooper.⁴²² “Filing a suit would only give [magazines] the publicity they want. By the time the suit was tried, they’d get more in publicity than the judgment could ever cost them,” commented Marlon Brando.⁴²³ There were other difficulties with libel suits: truth was a defense in libel cases, and much of what appeared in *Confidential* was true.⁴²⁴ In California, where most potential plaintiffs resided, statements of “defamation by implication”—statements that were not defamatory on their face—were not actionable without a showing of special damages.⁴²⁵

By mid-1955, a few celebrities had filed libel suits against *Confidential*.⁴²⁶ Errol Flynn sued over two stories, one about an alleged two-way mirror in his bedroom and another that said he’d walked out on his wife on their wedding night to sleep with

⁴²¹ As one newspaper noted:

This question arises: Why are not these magazines sued out of existence? For the simple reason that most public figures do not like to bear the expense in publicity and popularity of a lengthy and filthy libel suit. And it is difficult to litigate damages in any type [of] libel suit There are hundreds of legal loopholes in libel statutes and libel cases are among the most difficult to try. Criminal libel suits, for the most part, would gain the victims nothing. So they bear the brunt of attacks and hope their public is mature enough to hear the stories with an objective ear. Pending suits against the publications merely increase their popularity.

The “expos[é]” magazines also play vulture to those public figures who have previously been in trouble, knowing full well that once an individual has a charge against him it is much more difficult to establish a reputation that is damageable.

Editorial, *Yellow Streaks in the Ink*, DAILY J.-GAZETTE AND COMM. STAR (Ill.), Feb. 6, 1956, at 4.

⁴²² Erskine Johnson, *Hollywood Today*, IRONWOOD DAILY GLOBE (Mich.), Dec. 8, 1955, at 7. Harvard University declined to sue *Confidential* over accusations in the May 1953 issue, in an article by Howard Rushmore titled “There’s Plenty of Red in the Harvard Crimson.” J. Anthony Luk, *Harvard Confidential: The Fourth Estate*, HARV. CRIMSON (Mar. 11, 1954), <http://www.thecrimson.com/article/1954/3/11/harvard-confidential-plike-any-controversial-public/> [<https://perma.cc/3DMG-5YF2>]. The article described Harvard as the center of “widespread Communist infiltration.” *Id.* Officials declined to bring a libel case “and thus bring the issue of Communism at Harvard into the newspapers again.” *Id.* It had been the university’s policy “to ignore such articles, reasoning that the resultant publicity from a libel suit would be far worse for Harvard than the effect of one such article.” *Id.*

⁴²³ *Brando Ignores Scandal Mags*, TUCSON DAILY CITIZEN (Ariz.), July 20, 1957, at 10.

⁴²⁴ See *supra* notes 128–43 and accompanying text.

⁴²⁵ CAL. CIV. CODE § 45a (West 2016); see also Irwin O. Spiegel, *Defamation by Implication—In the Confidential Manner*, 29 S. CAL. L. REV. 306, 316–20 (1956).

⁴²⁶ See generally SCOTT, *supra* note 3, at 122–25.

a prostitute.⁴²⁷ In May 1955, Robert Mitchum sued for \$1 million over an article, *Robert Mitchum . . . the Nude Who Came to Dinner*,⁴²⁸ that claimed that Mitchum had appeared nude at a party, lathered with catsup, and told a roomful of guests, “[t]his is a masquerade party, isn’t it? Well, I’m a hamburger . . . well done.”⁴²⁹

Mitchum was represented by the famous, flamboyant Hollywood lawyer Jerry Giesler.⁴³⁰ Giesler was a longtime supporter of the film industry, and he saw Mitchum’s suit as an opportunity to strike a blow against the magazine.⁴³¹ “Heretofore the circulation of these [scandal] magazines has been rather small,” he said in a television interview.⁴³² “But recently one of them in particular has grown to quite some dimension and because of that it cannot be ignored [any] longer. Therefore, people have to, to protect their good name, come out and bring the action.”⁴³³ “We’ll file civil suits and criminal libel complaints. We’ll sue the publishers, the writers, the printers, the distributors. . . . This smut is going to stop.”⁴³⁴

In July 1955, actress Lizabeth Scott, represented by Giesler, sued over an article implying that she was a lesbian, “prone to indecent, illegal and highly offensive acts in her private and public life.”⁴³⁵ Socialite and tobacco heiress Doris Duke, another client of Giesler’s, sued for \$3 million, claiming that an article in the May 1955 issue describing her as having an affair with a “[n]egro handyman and chauffeur,”⁴³⁶ caused her “mental anguish, shame, and humiliation.”⁴³⁷ Harrison was reported to have been delighted by the court actions, which he regarded as “good publicity.”⁴³⁸ “Not one of them will dare risk a jury trial,” he told his editors confidently.⁴³⁹

The Mitchum, Duke, and Scott libel suits failed; *Confidential* was a New York corporation and immune from suit in California.⁴⁴⁰ More libel suits followed. Dennis

⁴²⁷ *Flynn v. Confidential, Inc.*, 169 N.Y.S.2d 784, 785–86 (N.Y. Sup. Ct. 1957); *Flynn v. Confidential, Inc.*, 145 N.Y.S.2d 499 (N.Y. App. Div. 1955); *Errol Flynn Sues Confidential Magazine \$1 Million for Libel*, FREEPORT J.-STANDARD (Ill.), June 18, 1955, at 12.

⁴²⁸ Charles Jordan, *Robert Mitchum . . . The Nude Who Came to Dinner*, CONFIDENTIAL, July 1955, at 18–19, reprinted in SCOTT, *supra* note 3, at 120–21.

⁴²⁹ *Bob Mitchum Sues Magazine*, PLAIN SPEAKER (Pa.), May 10, 1955, at 23; accord LEE SERVER, ROBERT MITCHUM: “BABY I DON’T CARE” 287–88 (1st ed. 2001).

⁴³⁰ SCOTT, *supra* note 3, at 122.

⁴³¹ *Id.*

⁴³² *Id.* (internal quotation marks omitted).

⁴³³ *Id.* (internal quotation marks omitted).

⁴³⁴ *Id.* at 123 (internal quotation marks omitted).

⁴³⁵ *Lizbeth Scott Sues Confidential*, SAN MATEO TIMES, July 26, 1955, at 14 (internal quotation marks omitted); accord SCOTT, *supra* note 3, at 122.

⁴³⁶ *Sewer Trouble*, TIME, Aug. 1, 1955, at 50; SCOTT, *supra* note 3, at 122.

⁴³⁷ *Heiress Doris Duke Files \$3,000,000 Suit Against Confidential Magazine*, L.A. TIMES, July 19, 1955, at 1.

⁴³⁸ Rushmore, *supra* note 40, at 36 (internal quotation marks omitted).

⁴³⁹ *Id.* (internal quotation marks omitted).

⁴⁴⁰ *Lizabeth Scott’s Suit Loses Out in Court Here*, L.A. TIMES, March 8, 1956, at 36; *Scandal Mag Trial Record*, SAN MATEO TIMES, Aug. 15, 1957, at 20 (stating that Mitchum’s

Hamilton, the husband of British actress Diana Dors, brought a million-dollar libel suit over an article headlined *What Diana Dors never knew about her ever-loving hubby*.⁴⁴¹ In New York, socialite Robert Goelet brought a privacy lawsuit against *Confidential*, alleging that a January 1956 article used “photographs, images or likenesses, incorporating my name as part of a sordid, fictional article entitled *Bobby Goelet’s Rock ‘n’ Roll Romance*.”⁴⁴²

Dorothy Dandridge filed a libel suit over an article accusing the actress, who was black, of engaging in sexual activity with a white bandleader.⁴⁴³ Maureen O’Hara sued

suit was dismissed for “a question of jurisdiction”); *see also Takes Up Battle Against Scandal Mags*, PORT ANGELES EVENING NEWS, Apr. 20, 1957, at 11 (“Giesler has filed suits totalling 10 million dollars against Confidential magazine on behalf of Robert Mitchum, Lizabeth Scott, Doris Duke, and other clients. He said the magazine apparently is immune to legal attack in California . . .”). *Confidential* then filed a libel suit against syndicated columnist Inez Robb of the *United Feature Syndicate. Cat-o’-Nine-Tale*, TIME, Aug. 8, 1955, at 66. Robb had written,

Miss Duke has just struck a blow for Liberty, freedom and decency by filing a libel action . . . against the most putrid of the so-called “expos[é]” magazines now defiling the newsstands.

Let us hope she not only collects the three [million], but that she is also awarded attorneys’ fees and costs in the sum of another million or so. . . .

In a way, I am sorry Miss Duke is suing. I am sorry that, instead, she didn’t organize an old-fashioned vigilante party and horsewhip the shabby crew responsible for this verbal assault. A cat-o’-nine-tails speaks a powerful language that might even penetrate the elephant hide and conscience of these lice.

Inez Robb, *Gutter Journalism*, PITTSBURGH PRESS, July 22, 1955, at 15. The ACLU sent a letter to the *New York World Telegram and Sun*: “We must not resort to lynch law to curb free speech as Miss Robb suggests. That is the totalitarian way. The democratic way of meeting abusive speech is through the persuasiveness of free speech itself, and not ‘horse whipping.’” Letter from Patrick Murphy Malin, Exec. Dir, ACLU, to Lee B. Wood, Editor, *N.Y. World Telegram & Sun* (Sept. 1, 1955) (on file with author).

⁴⁴¹ *Briton Suing the Magazine*, N.Y. TIMES, Aug. 20, 1957, at L53.

⁴⁴² N.Y. SOCIETY FIGURE SUES CONFIDENTIAL, L.A. TIMES, July 2, 1957, at B1 (internal quotation marks omitted).

In defending the article, Confidential’s lawyers asserted that it had dealt with the “then curren[t] and always newsworthy fact that Robert Goelet, Jr. a member of one of New York’s oldest and most socially prominent families, grandnephew of Mrs. Cornelius Vanderbilt . . . was seeking to divorce his wife in order to marry Gloria Green, a colored beautician he had found working in a minor Broadway hotel.”

‘Confidential’ Mag-Suit Switches to Manhattan, ATLANTA DAILY WORLD, Sept. 11, 1957 (quoting Confidential’s legal counsel). *See also Goelet v. Confidential, Inc.*, 17 N.Y.S.2d 223 (N.Y. App. Div. 1958).

⁴⁴³ SCOTT, *supra* note 3, at 78; “Preposterous,” Says Dorothy Dandridge, AFRO-AM. (Balt.), Sept. 14, 1957, at 8.

over the article *It Was the Hottest Show in Town when Maureen O'Hara Cuddled in Row 35*.⁴⁴⁴ *Confidential* alleged that O'Hara had been spotted in a passionate encounter with a "Latin Lothario" in a theater.⁴⁴⁵ Liberace also brought a libel suit, charging that a story that implied he had romantically pursued a male press agent was "false and malicious."⁴⁴⁶

In addition to filing libel suits, Giesler urged the California legislature to pass a law forcing "scandal magazines . . . who do business in California [to be] responsible in California."⁴⁴⁷ He also asked Congress to act.⁴⁴⁸ "It is our hope that some government agency will step in and put a stop to the publication and distribution of such scandal sheets," he told the press.⁴⁴⁹ "Such magazines should be completely suppressed. . . . I hope that Congress in the near future will bar interstate shipment of such publications."⁴⁵⁰ Giesler's comments provoked alarm among ACLU leaders. Columnist Victor Lasky sent a letter to Patrick Murphy Malin alerting him to "recent statements attributed to Jerry Giesler" "lobbying for federal legislation aimed at banning magazines like [*Confidential*]."⁴⁵¹ Lasky feared that "in this period of hysteria, a person of Mr. Giesler's eminence could well persuade Congress to ban publications of the expos[é] variety."⁴⁵² The ACLU's Alan Reitman proposed writing an "open letter to Giesler, presenting our views on pressure group censorship and prior restraint."⁴⁵³

Giesler also asked California Attorney General Edmund "Pat" Brown to take action, sending him depositions of Harrison he had taken for the libel suits.⁴⁵⁴ Brown, a liberal Democrat who was considering running for governor, was sympathetic.⁴⁵⁵ In the coming months, Giesler and film industry leaders pressured Brown to crack

⁴⁴⁴ *Maureen O'Hara Sues Confidential for Million: Actress Charges Article Was False and 'Did Maliciously Degrade Her'*, L.A. TIMES, July 10, 1957, at 14; see also McDonald, *supra* note 51, at 10.

⁴⁴⁵ Gabler, *supra* note 35.

⁴⁴⁶ *Confidential Defends its Story on Liberace*, L.A. TIMES, July 18, 1957, at 4; see *supra* notes 23, 67 and accompanying text.

⁴⁴⁷ *Giesler May Be Called in Scandal Hearings*, L.A. TIMES, Feb. 21, 1957, at 8.

⁴⁴⁸ *Giesler Declares War on Scandal Magazines*, L.A. TIMES, July 27, 1957, at 15.

⁴⁴⁹ *Screen Star Sues; Scott Joins Others Against Magazine*, CINCINNATI ENQUIRER, July 26, 1955, at 14 (internal quotation marks omitted).

⁴⁵⁰ *Magazine Sued for \$3 Million*, SAN BERNARDINO DAILY SUN, July 19, 1955, at 3 (internal quotation marks omitted).

⁴⁵¹ Letter from Victor Lasky, *supra* note 367.

⁴⁵² *Id.*

⁴⁵³ Letter from Alan Reitman, Assistant Dir., ACLU, to *Confidential* (Aug. 9, 1955) (on file with author).

⁴⁵⁴ See *Indictments Name 11 in Confidential Quiz*, L.A. TIMES, May 16, 1957, at 1; Lloyd Shearer, "The Stars Won't Be Hurt," PARADE, Oct. 6, 1957, at 20.

⁴⁵⁵ SCOTT, *supra* note 3, at 162. On Brown's campaign, see DONALD CRICHTLOW, WHEN HOLLYWOOD WAS RIGHT: HOW MOVIE STARS, STUDIO MOGULS, AND BIG BUSINESS REMADE AMERICAN POLITICS 135–37 (2013).

down on *Confidential*, knowing he would need the industry's financial support in his gubernatorial bid.⁴⁵⁶

IV. CALIFORNIA V. *CONFIDENTIAL*

Against a backdrop of legal actions against *Confidential* around the country, and under pressure from the film industry and social reformers, California moved against *Confidential* in 1957.⁴⁵⁷ The state's efforts attracted the interest of the nation.⁴⁵⁸ It was thought that if California were successful in eradicating *Confidential*, its actions could guide other states,⁴⁵⁹ or that if *Confidential* could be eliminated in California, Harrison would simply shut down the magazine.⁴⁶⁰

A. *The Kraft Committee*

In early 1957, California established the Senate Interim Committee on Collections Agencies, known as the Kraft Committee, after its chairman, Republican State Senator Fred Kraft.⁴⁶¹ The committee, formed to look into allegations of misconduct by private detectives, was an effort to undermine *Confidential* by going after the magazine's newsgathering methods, rather than its content.⁴⁶² Kraft believed—correctly—that private detectives were selling information to *Confidential*,⁴⁶³ and alleged that the

⁴⁵⁶ SCOTT, *supra* note 3, at 161–62; *Giesler to Head Fight on Scandal Magazines*, L.A. TIMES, Apr. 19, 1957, at 4. According to Hollywood historian Jeannette Walls, “[Brown] was tight with Frank Sinatra, who would be a big contributor to his gubernatorial campaign. He was friendly with the Kennedy brothers, who knew that *Confidential* had the goods on their sexual escapades.” JEANNETTE WALLS, *DISH: HOW GOSSIP BECAME THE NEWS AND THE NEWS BECAME JUST ANOTHER SHOW* 19 (2000).

⁴⁵⁷ *Indictments Name 11 in Confidential Quiz*, *supra* note 454, at 1.

⁴⁵⁸ SCOTT, *supra* note 3, at 172; *see also* *Publisher of Confidential Reported Indicted on Coast*, CHI. DAILY TRIBUNE, May 16, 1957, at 17; *Grand Jury Indicts “Confidential,”* WASH. POST & TIMES HERALD, May 16, 1957, at B6.; *Indictments Name 11 in Confidential Quiz*, *supra* note 454, at 1.

⁴⁵⁹ *See, e.g., Libel is Mudslinging*, *supra* note 175 (“Mudslinging and scandal mongering never has done as much good as it has harm. If Confidential magazine is found guilty of libel in California, then it has violated Florida laws and should not be distributed in Florida cities.”).

⁴⁶⁰ *Scandal Magazine Faces Showdown on West Coast*, DELTA DEMOCRAT-TIMES, May 3, 1957, at 4.

⁴⁶¹ *See Subpoena on Sinatra Defended*, INDEP. (Long Beach), Feb. 22, 1957, at 16.

⁴⁶² *See Giesler May Be Called in Scandal Hearings*, *supra* note 447, at 8.

⁴⁶³ “The scandal magazines and the unscrupulous collection agencies both employ professional goons who will stop at nothing—even to the breaking of an arm or a leg—to collect an unpaid debt from a working man,” Kraft said.

“Our investigators have found that these same floaters, all ex-convicts and known hoodlums, also work at gathering material for the scandal magazines.”

practice was compromising the integrity of the state's private detective industry.⁴⁶⁴ The Kraft investigation was a result of film industry pressure.⁴⁶⁵ According to the Associated Press, film "executives believ[ed] that a thorough airing of how the magazines [got] their stories can all but kill their mass circulation appeal."⁴⁶⁶

Detective Fred Otash testified before the committee in March 1957.⁴⁶⁷ Otash admitted that he had a retainer agreement with *Confidential*, and that his work involved bugging celebrities' homes and taking pictures of them using zoom lenses and hidden cameras.⁴⁶⁸ Otash's sensational testimony made national news: it was the first the public had heard about *Confidential*'s inner workings.⁴⁶⁹

The Kraft committee concluded:

The committee is satisfied that a definite tieup between some private detective agencies and the scandal and exposé magazines does exist. . . . To spy on Hollywood celebrities in an arbitrary

James Bacon, *California Begins Probe of Scandal Publication*, ABILENE REPORTER-NEWS (Tex.), Feb. 27, 1957, at 11-A (quoting Sen. Fred Kraft).

⁴⁶⁴ See REPORT OF THE SENATE INTERIM COMMITTEE ON COLLECTION AGENCIES, PRIVATE DETECTIVES AND DEBT LIQUIDATORS, S. Res. 21, at 5 (Cal. 1957) [hereinafter KRAFT COMMITTEE REPORT].

The present committee has focused its attention on violations of constitutional rights of private citizens and other unethical practices by private investigators, collection agencies, and the proraters.

While the hearing involved scandal-type magazines, this was actually a side issue growing out of the committee's major study, but it surely attracted much more attention. The problem of what can be done to get such publications out of interstate commerce, or out of the retail outlets within this State, is a big one. Their regulation is outside the scope of this committee's investigation, except insofar as private detectives are used either to verify or obtain information for them.

Id.

⁴⁶⁵ *Scandal Magazines Facing Thorough Legislative Probe*, DAILY J. (Tex.), Feb. 27, 1957, at 1.

⁴⁶⁶ *Id.* Kraft's investigation focused on the famous "Wrong Door Raid" of 1954, in which Frank Sinatra, Joe DiMaggio, and two private detectives were accused of breaking into a Hollywood apartment, looking for DiMaggio's wife, Marilyn Monroe, allegedly with a lover. They broke down the wrong door, frightening a middle-aged woman named Florence Kotz. The true story of the incident appeared in *Confidential*. See Gabler, *supra* note 35.

⁴⁶⁷ Gladwin Hill, *Detective Tells Inquiry He "Checked Out" 150 "Scandal" Articles from Confidential*, N.Y. TIMES, Mar. 1, 1957, at 13.

⁴⁶⁸ *Questions and Answers of Otash at Hearing*, L.A. TIMES, Mar. 1, 1956, at 2.

⁴⁶⁹ Otash told of an assignment for *Confidential* in which he was to document a "pre-marital tryst" between actress Anita Ekberg and her husband, actor Anthony Steel. Otash described how he made "hidden movies" of the actress while she was relaxing on the beach and in her apartment. Hill, *supra* note 467, at 13; *Private Eye Tells About Anita Ekberg*, PITTSBURGH POST-GAZETTE, Mar. 1, 1957, at 2. On Otash, see generally FRED OTASH, INVESTIGATION HOLLYWOOD! (1st ed. 1976).

manner for the express purpose of furnishing material and photographs for scandal magazines is an abuse of the privilege to hold an investigator's license.⁴⁷⁰

The committee recommended that private detectives be regulated by the Attorney General, who would revoke the licenses of detectives who hired "strong arm goon squads,"⁴⁷¹ which "would go far toward drying up the source for these scandal stories."⁴⁷² Kraft proposed that the California legislature authorize a committee to delve further into *Confidential's* operations.⁴⁷³ "You have a very bad situation in Southern California," he said.⁴⁷⁴ "My committee has merely hit on the highlights. We now must dig below the surface . . . I shall ask for authority to do so."⁴⁷⁵ In the spring

⁴⁷⁰ KRAFT COMMITTEE REPORT, *supra* note 464, at 10.

⁴⁷¹ *Scandal Magazine Quiz by U.S. Urged: Sen. Kraft Sums Up Hearing in L.A., Calls for Congress to Study Situation*, L.A. TIMES, Mar. 5, 1957, at 1 (internal quotation marks omitted).

⁴⁷² *State Sen. Kraft Asks U.S. Scandal-Mag Quiz*, INDEPENDENT (Cal.), Mar. 5, 1957, at A-2 (internal quotation marks omitted).

The Legislature should consider the passage of a new section making it unlawful for any licensee to accept employment for verifying, or the sale of, information of a scandalous nature to such magazines. . . . An effective law should be drafted to protect the right of privacy of our citizens and not at the same time to hamper the freedom of the press.

KRAFT COMMITTEE REPORT, *supra* note 464, at 10. Kraft also sought legislation aimed at Hollywood 'party girls' who sold information to *Confidential*. *Solon Seeks Laws Aimed At Party Girls*, INDEPENDENT (Cal.), May 17, 1957, at A-3.

In addition, Kraft and California officials called for a federal investigation of *Confidential*. *State Sen. Kraft Asks U.S. Scandal-Mag Quiz*, *supra*, at A-2. U.S. Representative Pat Hillings, a member of the House Judiciary Committee, said he was interested in "[Kraft's] views on public interstate extortions by private investigators and scandal publications." *US Action Vowed on Scandal Magazines*, L.A. TIMES, Mar. 6, 1957, at 7. Another Congressman "asked Postmaster General Summerfield . . . what [could] be done to preven[t] [*Confidential*] from circulating through the mails[;]" he was "particularly concerned because his district include[d] Hollywood, many of whose prominent residents have been victimized by practices exposed in the Kraft investigation." *Id.*

⁴⁷³ *See Senators May Extend Scandal Magazine Probe*, REDLANDS DAILY FACTS, Mar. 2, 1957, at 1.

⁴⁷⁴ *Id.* (internal quotation marks omitted).

⁴⁷⁵ *Id.* (internal quotation marks omitted). Liberal publications such as *The Nation* protested Kraft's call for "special legislation" against *Confidential*:

[L]egislative inquiries of the type being conducted in Hollywood merely bring the scandal to the front pages of the nation's press and give rise to dangerously half-baked suggestions that "something must be done" about the scandal magazines. To date there has been no showing that the existing libel and slander laws are inadequate to protect individuals against the type of scandal-mongering in which these magazines indulge.

Editorial, *The Scandal Business*, NATION, Mar. 30, 1957, at 266.

of 1957, two proposals were introduced into the state assembly—one that would permit “court action against scandal magazines published outside [the] state if they are distributed in California,”⁴⁷⁶ and another asking for a “judiciary committee study of scandal magazines.”⁴⁷⁷

Independent of the Kraft probe, the state attorney general’s office had been investigating the possibility of bringing criminal charges against *Confidential*.⁴⁷⁸ During the Kraft hearings, the attorney general’s investigators were “busily subpoenaing financial records of [*Confidential*], Hollywood Research, the Meades and other persons purported to be supplying the smear magazine.”⁴⁷⁹ In March 1957, Brown announced that his office was ready to go after the “agents, the printers, [and] the guy behind” *Confidential*.⁴⁸⁰ State officials began a series of conferences to prepare evidence for prosecution on criminal libel and obscenity charges.⁴⁸¹ “[W]e want to put a crimp in the operation of *Confidential* and its breed in California and we’re going to try every way we can,” said a spokesman for the California Department of Justice.⁴⁸² California’s attorneys claimed that the State did have jurisdiction over *Confidential*; the magazine had a corporate presence in California through Hollywood Research Incorporated, a branch of *Confidential, Incorporated*.⁴⁸³ Brown told the press that criminal charges against *Confidential* were not censorship, and that he did “not intend to act as censor.”⁴⁸⁴ He denied that the film industry had pressured him, alleging he

⁴⁷⁶ *Day in Sacramento*, SAN MATEO TIMES, Apr. 23, 1957, at 6; see also *S.B. County Loses Bid For Second State Senator*, SAN BERNARDINO DAILY SUN, Apr. 23, 1957, at 5.

⁴⁷⁷ *Day in Sacramento*, SAN BERNARDINO DAILY SUN, June 1, 1957, at 7.

⁴⁷⁸ This investigation apparently had been underway for two years. See Leonard Lyons, *Lyon’s Den: Bombing Japan*, INDEPENDENT (Cal.), Sept. 14, 1955, at 28 (“If a Hollywood actress agrees to testify before the Grand Jury, the District Attorney will seek an indictment for criminal libel against the editor of an expose magazine.”). One reason Brown allegedly took so long to bring charges was that he couldn’t find “big-name witnesses,” Hollywood actors, to testify before a grand jury. Drew Pearson, *Magazine Under Fire to Reform*, DETROIT FREE PRESS, May 13, 1957, at 1 (stating that Marilyn Monroe and Elvis Presley, subjects of *Confidential* articles, declined to testify); see also *Grand Jury Quiz Looming Over Scandal Magazines: Brown Aide in Huddle Here with M’Kesson*, L.A. TIMES, Mar. 28, 1957, at B1.

⁴⁷⁹ *Indictments Name 11 in Confidential Quiz*, supra note 454, at 23.

⁴⁸⁰ *Indictments on Scandal Stories Eyed: Brown Indicates Magazine Publishers May Be Prosecuted*, L.A. TIMES, Mar. 26, 1957, at 2.

⁴⁸¹ See, e.g., *Scandal Mag Owners Face Indictments*, MIRROR NEWS (Cal.), Mar. 27, 1957, at 1.

⁴⁸² *Grand Jury Quiz Looming Over Scandal Magazines*, supra note 478, at B1 (internal quotation marks omitted).

⁴⁸³ *Scandal Magazines Face Trouble in the Courts*, N.Y. TIMES, May 5, 1957, at 208.

⁴⁸⁴ *Confidential Publisher to Fight Extradition to L.A.: Harrison and Five of Staff Surrender in N.Y.*, L.A. TIMES, June 12, 1957, at 4 [hereinafter *Confidential Publisher*]. “[T]he censorship question is worthy of serious study by public groups, including newspapers, the American Civil Liberties Union and public officials,” Brown told the press. *Brown Outlines*

had been motivated to act because of “the effect of such publications on children.”⁴⁸⁵ Brown said he believed that *Confidential* “caused divorces and broken homes, and [led] to blackmail.”⁴⁸⁶

On May 15, 1957, a Los Angeles County grand jury charged *Confidential*, its staff, printer, and distributor, and Hollywood Research, Inc., with conspiracy to circulate material pertaining to abortion, conspiracy to circulate material pertaining to “lost manhood,” conspiracy to circulate “obscene and indecent” material, and conspiracy to commit criminal libel.⁴⁸⁷ The libel⁴⁸⁸ and obscene literature⁴⁸⁹ charges were misdemeanors, as was the “lost manhood” charge.⁴⁹⁰ Conspiracy to commit a misdemeanor was a felony, carrying imprisonment up to three years or a \$5,000 fine.⁴⁹¹ The abortion count was a felony per se, and penalty for conviction was up to five years imprisonment.⁴⁹² *Confidential*, noted columnist Drew Pearson, had been slapped with “one of the toughest criminal suits in the history of American magazines.”⁴⁹³

B. Conspiracy

To be clear, *Confidential* was charged with a single crime, *conspiracy* to commit obscenity and criminal libel, not obscenity and criminal libel, as reported in many

Steps to Halt Crime Rise: District Attorney Told He Will Call Conference to Tackle Problem, L.A. TIMES, June 20, 1957, at B9.

⁴⁸⁵ *Confidential Publisher*, *supra* note 484, at 4.

⁴⁸⁶ Drew Pearson, *Scandal Magazine Faces Showdown on West Coast*, DELTA DEMOCRAT-TIMES (Miss.), May 3, 1957, at 4. In an interview years later, Brown also claimed that “[i]t was a rather personal thing. Dorothy Dandridge . . . came to Sacramento for a benefit and told me that a story about her in *Confidential* came from a God-damned liar. I was so outraged that I turned the matter over to one of my deputies.” Govoni, *supra* note 58, at 32.

⁴⁸⁷ See Indictment, *People v. Harrison*, No. 190871 (Cal. Super. Ct., L.A. Cty. May 15, 1957). An article, *Pega Palo—the Vine that Makes You Virile*, was the state’s evidence of conspiracy to circulate material pertaining to male rejuvenation. See THEO WILSON, HEADLINE JUSTICE: INSIDE THE COURTROOM: THE COUNTRY’S MOST CONTROVERSIAL TRIALS 54 (1996). The article *Beware The Newest Abortion Menace: The Pill that Ends Unwanted Pregnancy* was evidence of a conspiracy to “circulate material pertaining to abortion.” See *id.*

⁴⁸⁸ CAL. PENAL CODE §§ 248–257 (West 1955) (repealed 1986), *invalidated in part by*, *Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976).

⁴⁸⁹ CAL. PENAL CODE § 311 (West 1955) (current version at CAL. PENAL CODE § 311–311.12 (West 2016)).

⁴⁹⁰ CAL. BUS. & PROF. CODE § 600 (West 1955) (repealed 1978). For statutory definitions for felonies and misdemeanors in California, see CAL. PENAL CODE § 17 (West 1955) (current version at CAL. PENAL CODE § 17 (West 2016)).

⁴⁹¹ CAL. PENAL CODE § 182 (West 1955) (current version at CAL. PENAL CODE § 182 (West 2016)).

⁴⁹² CAL. BUS. & PROF. CODE § 601 (West 1955) (amended 1965, 1971), *invalidated by* *People v. Orser*, 107 Cal. Rptr. 458 (Cal. Ct. App. 1973).

⁴⁹³ Pearson, *supra* note 478, at 1.

newspapers of the time.⁴⁹⁴ So what mattered legally was not only the content of *Confidential*'s articles, but the intent behind them—whether Harrison and his associates intended and conspired to publish libelous and obscene material, and material violating the abortion and “lost manhood” sections of the state penal code.

Like most obscenity statutes, California's obscenity law did not specifically define “obscenity.”⁴⁹⁵ Under California Penal Code section 311, “every person who willfully and lewdly . . . [w]rites, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book” was guilty of a misdemeanor.⁴⁹⁶ The dominant test of obscenity used by the California courts was that a book was obscene “if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.”⁴⁹⁷ The indictment described the entire May 1955, May 1956, and September 1956 issues of *Confidential* as being “lewd and obscene.”⁴⁹⁸

Under section 248 of the California Penal Code, criminal libel was the publication of defamatory matter with malicious intent.⁴⁹⁹ A defamatory publication was presumed to be false unless the defendant could prove it to be true, and presumed malicious if no justifiable motive for publishing it could be shown.⁵⁰⁰ A justifiable motive included publishing “matters of actual public interest,” such as “matters of public health, safety, and security, and all facts pertaining to them, as causes of epidemics . . . and the news of crime waves.”⁵⁰¹ The state's libel charge implicated only half a dozen

⁴⁹⁴ See, e.g., *Grand Jury Indicts “Confidential,” supra* note 458, at B6; Pearson, *supra* note 486, at 4.

⁴⁹⁵ Hunter Wilson, *California's New Obscenity Statute: the Meaning of “Obscene” and the Problem of Scierter*, 36 S. CAL. L. REV. 513, 513 (1963).

⁴⁹⁶ CAL. PENAL CODE § 311 (West 1955). The words “obscene” or “indecent” were nowhere defined in the statute; scierter was not a required element of the offense. See *id.* “[T]he infrequency of prosecution, and, hence, of judicial construction, under the statute, and . . . the flexibility of the statute, which made no effort to define ‘obscene,’ [left] the courts free to develop socially workable and constitutionally acceptable definitions of obscenity.” Wilson, *supra* note 495, at 513 (internal quotation marks omitted).

⁴⁹⁷ *People v. Wepplo*, 178 P.2d 853, 855 (Cal. App. Dep't Super. Ct. 1947) (quoting *Commonwealth v. Isenstadt*, 62 N.E.2d 840, 844 (Mass. 1945)).

⁴⁹⁸ WILSON, *supra* note 487, at 54.

⁴⁹⁹ See CAL. PENAL CODE § 248 (West 1955) (“A libel is a malicious defamation . . .”) (repealed 1986), *invalidated by Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976).

⁵⁰⁰ CAL. PENAL CODE §§ 250–251 (West 1955) (repealed 1986), *invalidated by Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976). The defendant would be acquitted if it could prove to the trier of fact that the matter was true and published with “good motives” and for “justifiable ends.” *Id.* See generally Jon H. Sylvester, *How California Governs the News Media*, 26 SANTA CLARA L. REV. 385–86 (1986); Alvin M. Glick, Comment, *Group Libel and Criminal Libel*, 1 BUFF. L. REV. 258, 261 (1952).

⁵⁰¹ WILLIAM R. ARTHUR & RALPH L. CROSMAN, *THE LAW OF NEWSPAPERS* 220–21 (2d ed. 1940).

articles, including *Robert Mitchum—the Nude Who Came to Dinner*, which the prosecution thought sufficient to demonstrate malicious intent.⁵⁰²

The criminal libel charge against *Confidential* was unusual, as the crime of libel was practically defunct by the 1950s.⁵⁰³ Criminal libel laws had originated in the fifteenth century with the English Star Chamber;⁵⁰⁴ criminal libel statutes were adopted in the American colonies and remained on the books in most states into the twentieth century.⁵⁰⁵ The premise of criminal libel was that libels caused violence, and could thus be punished by the state: “libels, regardless of what actual damage results to the reputation of the defamed, may be penalized by the state because they tend to create breaches of the peace [i.e., duels and fistfights] when the defamed or his friends undertake to revenge themselves on the defamer.”⁵⁰⁶ While the action for civil libel was based upon the damage done to the individual, the basis for criminal libel was the injury done to society.⁵⁰⁷ A criminally libelous publication did not have to lead to a breach of the peace; it only had to have a “tendency” to cause the libeled person to breach the peace.⁵⁰⁸

One reason for the decline of criminal libel by the mid-twentieth century was that civil actions had largely replaced physical violence as a remedy for defamation.⁵⁰⁹ Criminal libel was also disfavored as officials recognized its potential conflict with modern views on freedom of the press.⁵¹⁰ As First Amendment scholar Zechariah Chafee observed in 1948, criminal libel was a “pretty loose kind of crime.”⁵¹¹ “[A]

⁵⁰² WILSON, *supra* note 487, at 54.

⁵⁰³ David Riesman, *Democracy and Defamation, Control of Group Libel*, 42 COLUM. L. REV. 727, 745–50 (1942); *see also* John Kelly, *Criminal Libel and Free Speech*, 6 U. KAN. L. REV. 295, 317 (1958) (“Prosecutions have been rare and in spite of the paucity of judicial statistics, it is clear that libel actions, especially criminal actions, are unusual.”).

⁵⁰⁴ Kelly, *supra* note 503, at 300.

⁵⁰⁵ *Id.* at 305–06, 320. “The most ancient and direct instrument for the legal control of communication has been the law of criminal libel.” *Id.* at 295.

⁵⁰⁶ Kelly, *supra* note 503, at 301.

⁵⁰⁷ ARTHUR & CROSMAN, *supra* note 501, at 206 (“The state’s sole interest in preventing the publication of libels is the preservation of the peace and tranquillity of the realm, and the prevention of turmoil and riots among citizens.”(internal quotation marks omitted)); Glick, *supra* note 500, at 260; Kelly, *supra* note 503, at 319. By the 1950s, some states had eliminated the “breach of peace” requirement; many statutes declared the nub of criminal libel to be the publication of matter tending to injure “reputation,” the same definition as in civil cases. Kelly, *supra* note 503, at 320.

⁵⁰⁸ ARTHUR & CROSMAN, *supra* note 501, at 207.

⁵⁰⁹ Robert A. Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 431 (1952); *see* Garrison v. Louisiana, 379 U.S. 64, 69 (1964) (“[P]reference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification . . .”).

⁵¹⁰ *See, e.g.,* *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521, 526–33 (1952).

⁵¹¹ CHAFEE, *supra* note 315, at 115.

publisher never knows when the law may be applied to him; arbitrary and discriminatory prosecutions are encouraged by such an unclear . . . rule.”⁵¹² A 1956 study in the *Texas Law Review* found that many criminal libel cases since the 1920s involved “political controversies” and were used by in-groups to punish their enemies.⁵¹³ In a press release in 1955, the ACLU argued that a Pennsylvania criminal libel statute “endanger[ed] press freedom throughout the nation.”⁵¹⁴ Criminal libel was “easily used as a weapon for intimidating speech.”⁵¹⁵

In 1957, *Confidential* became the first national publication in history to be put on trial for conspiracy to commit criminal libel. Attorney General Brown told the press that California was reviving criminal libel, “pioneering new fields in the prosecution of criminal libel.”⁵¹⁶

C. May 1957

The twenty-five witnesses subpoenaed before the grand jury⁵¹⁷ in May 1957 included journalists and detectives who worked for *Confidential*, informants and tipsters, the manager of the trucking company that shipped the magazines, and a postal inspector from Washington.⁵¹⁸ Maureen O’Hara and Liberace appeared before the grand jury as volunteer witnesses and labeled the *Confidential* stories about them “outright lies.”⁵¹⁹ The state’s star witness was former editor Howard Rushmore, who had recently left *Confidential* after disputes with Harrison over editorial policies.⁵²⁰ Harrison agreed to assume any liability Rushmore faced for libel and paid him \$2,000

⁵¹² Kelly, *supra* note 503, at 320.

⁵¹³ Robert Leflar, *Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 985–86 (1956).

Commonest among the political cases were those in which prosecutions were filed against an unsuccessful political candidate or his supporters for statements made during a campaign, now ended, concerning his now successful opponent. . . . One may suspect that in such cases the law was being used by the successful personage or his friends as a means of punishing their less potent enemies.

Id.

⁵¹⁴ Press Release, ACLU (Feb. 14, 1955) (on file with author). “Conviction of a Pennsylvania newspaper editor last year for criminal libel ‘endangers press freedom throughout the nation,’” announced an ACLU press release in 1955. *Id.*

⁵¹⁵ Kelly, *supra* note 503, at 320.

⁵¹⁶ *Brown Outlines Steps to Halt Crime Rise*, *supra* note 484, at B9 (internal quotation marks omitted).

⁵¹⁷ *Confidential Magazine Faces Grand Jury Quiz*, L.A. TIMES, May 13, 1957, at 5.

⁵¹⁸ *Maureen O’Hara, Liberace Hit “Lies,”* L.A. TIMES, May 15, 1957, at 1.

⁵¹⁹ *Id.* at 1 (internal quotation marks omitted).

⁵²⁰ *Id.*

to settle his contract.⁵²¹ Rushmore took the money and flew to California, where he offered himself as a witness against *Confidential*.⁵²² Rushmore testified how the magazine got its information from “call girls, private eyes, [and] bed partners,” and said that the elimination of *Confidential* would be a “service to American journalism.”⁵²³

The grand jury indicted *Confidential* on all the charges.⁵²⁴ Bail was set at \$25,000 for Robert Harrison and \$10,000 each for the other defendants.⁵²⁵ Harrison and his staff were booked in New York as “fugitives from justice”⁵²⁶ but were able to resist extradition through court actions.⁵²⁷ In Illinois, Assistant Attorney General Clarence Linn unsuccessfully requested the extradition of two executives of *Confidential*’s printer, the Kable Corporation.⁵²⁸ Kable’s attorneys argued that the case “look[ed] like harassment of the press;”⁵²⁹ “Don’t wrap yourselves and that magazine in the freedom of the press,” Linn retorted.⁵³⁰ “[D]irt and smut have nothing to do with freedom of the press.”⁵³¹ Fred and Marjorie Meade were in New York City; they went back to Los Angeles with defense attorney Arthur Crowley, apparently to avoid a trial *in absentia*.⁵³² Crowley, who would represent Hollywood Research, Inc. at the trial, was a well-known Hollywood divorce lawyer described as the “most famous trial lawyer in Los Angeles.”⁵³³

⁵²¹ SCOTT, *supra* note 3, at 134.

⁵²² *Id.* at 134, 163.

⁵²³ *Scandal on Scandal Mag: Ex-Editor Relates “Bedroom Sources,”* INDEPENDENT (Cal.), May 15, 1957, at 1 (internal quotation marks omitted).

⁵²⁴ *Indictments Name 11 in Confidential Quiz, supra* note 454, at 1.

⁵²⁵ *Id.*

⁵²⁶ “*Confidential*” Staffers Surrender in New York, BEND BULL., June 11, 1957, at 5 (internal quotation marks omitted).

⁵²⁷ SCOTT, *supra* note 3, at 170; *see also Confidential’s Head Fights Extradition*, WILMINGTON MORNING NEWS, July 24, 1957, at 8. Milton Pollack, Harrison’s attorney, argued to the Governor’s chief legal advisor that permitting extradition would “‘open the floodgates to wholesale reprisal’ against the magazine in other states.” *Hearing On Publisher: Harrison of Confidential Fights Extradition on Libel*, N.Y. TIMES, July 24, 1957, at 51.

⁵²⁸ *California Seeks 2 of Illinois Firm*, EDWARDSVILLE INTELLIGENCER (Ill.), July 18, 1957, at 6.

⁵²⁹ *Id.* (internal quotation marks omitted).

⁵³⁰ *Id.* (internal quotation marks omitted).

⁵³¹ *Id.* (internal quotation marks omitted).

⁵³² “*Confidential*” Couple Fly Back to L.A.: Meade and Wife Surrender on Conspiracy Count, L.A. TIMES, May 21, 1957, at 2. “We’ve come back voluntarily at our own expense. We’ve committed no crime whatsoever,” Fred Meade told the press. *Id.* Marjorie Meade, wearing “a fur scarf and a five-karat diamond ring,” told reporters, “[d]on’t you think this whole thing has a little to do with destruction of freedom of the press?” *Id.* (internal quotation marks omitted).

⁵³³ Daniel Miller, *The Remarkable Life and Quiet Death of Hollywood’s Forgotten Superlawyer*, HOLLYWOOD REP., <http://www.hollywoodreporter.com/news/remarkable-life>

Meanwhile, the state threatened *Confidential's* California dealers with criminal liability if it continued to carry and sell the magazine.⁵³⁴ Distributors promised to ship 100,000 copies of *Whisper*, another magazine Harrison pushed that was similar to *Confidential*, back to Harrison in New York.⁵³⁵ “I don’t think [*Confidential*] will ever be on sale in this State again,” Linn said.⁵³⁶ “Ultimately, it won’t go any place. Other States will see that we’ve been able to run it out and they will do the same.”⁵³⁷ Harrison’s lawyers then filed suit against Brown and Linn, seeking damages of \$3 million.⁵³⁸ “Your unlawful suppression of the distribution [of the magazine] . . . constitutes precensorship of the most arbitrary nature and a flagrant violation of the freedom of the press guaranteed by the California and U.S. Constitutions,” they told Brown in a telegram.⁵³⁹ U.S. District Judge Harry Westover dismissed the claim, concluding that Brown and Linn were within their authority in warning distributors that they could be prosecuted for selling the magazines.⁵⁴⁰ *Confidential* appealed to the Ninth Circuit,⁵⁴¹ and the ACLU of Southern California filed an amicus brief, protesting unlawful “precensorship.”⁵⁴² The Ninth Circuit dismissed the appeal.⁵⁴³

Panicked, Harrison and his attorneys proposed a deal in which the magazine would cut all “sex and scandal” from its California edition if the charges were dropped.⁵⁴⁴ Harrison threatened Brown that the trial, which would involve airing facts about celebrities’ private lives, would be the dirtiest in history.⁵⁴⁵ “[O]ne defense

-quiet-death-hollywood-171274 [https://perma.cc/CB5F-8SU3] (internal quotation marks omitted).

⁵³⁴ Jack Smith, *Confidential Case Defense Set Back*, L.A. TIMES, Aug. 20, 1957, at 1. Linn alleged that if *Confidential* were placed on sale in California he would seek grand jury indictments against the distributors. *\$2,047,125 Suit Filed by Confidential Here*, L.A. TIMES, June 14, 1957, at 20.

⁵³⁵ *Publisher of Confidential Threatens to Sue Brown: Plans Action Over Ban on Whisper Sales*, L.A. TIMES, June 4, 1957, at 2.

⁵³⁶ *New Confidential Issue Won’t Be Sold in State: Publisher Shelves Plan to Distribute Forthcoming Issue Here, Linn Reveals*, L.A. TIMES, July 2, 1957, at B1 (internal quotation marks omitted).

⁵³⁷ *Id.* (internal quotation marks omitted).

⁵³⁸ *\$2,047,125 Suit Filed by Confidential Here*, *supra* note 534, at 20 (stating that *Confidential* sued Brown and Linn for \$2,047,125 while *Whisper* asked for \$1,008,120).

⁵³⁹ *Publisher of Confidential Threatens to Sue Brown*, *supra* note 535, at 2.

⁵⁴⁰ *Confidential Loses Two More Rounds of Battle*, L.A. TIMES, July 9, 1957, at 17.

⁵⁴¹ *Id.*

⁵⁴² *Brief Hits Brown Order on Scandal Magazines*, L.A. TIMES, Aug. 8, 1957, at 29; *Liberties Union to Help Magazines*, MEDFORD MAIL TRIBUNE (Or.), Oct. 20, 1957, at 9 (“The ACLU emphasized its interest in the case [was] consistent with past efforts supporting the right to sue government officials for damages.”).

⁵⁴³ *Confidential Case Plea Dismissed: U.S. Court Upholds Rules in Damage Suit Naming Brown*, L.A. TIMES, Dec. 3, 1957, at 7.

⁵⁴⁴ *Brown Rejects Confidential’s Deal to Eliminate Sex, Scandal*, SAN BERNARDINO DAILY SUN, May 14, 1957, at 1.

⁵⁴⁵ *Id.*

against criminal libel is the truth, [and] therefore [we] intend to call top name witnesses to show that [we] have been printing the truth,” the defense said.⁵⁴⁶ Brown rejected the offer.⁵⁴⁷

That summer, Harrison’s lawyers, through Fred Otash, subpoenaed more than 100 stars to testify at the trial.⁵⁴⁸ “Many actors successfully avoided Otash, including [Frank] Sinatra and Gregory Peck, who headed for Las Vegas.⁵⁴⁹ Half of Hollywood was said to have “hurried to vacation in Mexico.”⁵⁵⁰ “It looked like the Exodus from Egypt,” Crowley recalled.⁵⁵¹ An executive at a major studio was said to be working full-time to keep stars from being called to testify.⁵⁵² Hollywood was “working full steam behind the scenes” to keep the trial from turning into a scandal.⁵⁵³

Though his public face was one of hubris and bravado, Harrison was deeply troubled by the attack on *Confidential*. According to a journalist for the *New York Post* who interviewed Harrison in 1957, “[i]n the offices of his attorney, last week, the smell of success around Harrison was noticeably sour. There was no trace of swagger as he paced continually from wall to wall of the room.”⁵⁵⁴ Harrison believed that he was being unfairly attacked; several magazines, including respected publications such as *Look* and the *Saturday Evening Post*, published scandalous gossip about celebrities, he noted.⁵⁵⁵ “Why do they pick on me?” he asked.⁵⁵⁶ “What about *Look*? What about the [articles] they did on Sinatra and Gleason?”⁵⁵⁷

Confidential was in peril. It was not from diminished readership; the newsstand bans were most likely offset by increased circulation and interest in the magazine generated by the censorship campaigns and celebrity lawsuits. Instead, Harrison was being crushed by attorneys’ fees.⁵⁵⁸

⁵⁴⁶ Drew Pearson, *What Did Coy Confidential Breathe into the DA’s Ear*, ALTOONA TRIBUNE (Pa.), May 13, 1957, at 3.

⁵⁴⁷ *Brown Rejects Confidential’s Deal to Eliminate Sex, Scandal*, *supra* note 544, at 1.

⁵⁴⁸ Lee Belser, “*Confidential*” Gets Subpoenas for Stars. But Who Wants Them?, DAILY DEFENDER (Chi.), Aug. 13, 1957, at 18.

⁵⁴⁹ Miller, *supra* note 533.

⁵⁵⁰ HOLLEY, *supra* note 108, at 35 (“The eight-week period of the *Confidential* trial was one of the quietest times on record in Hollywood. Many stars had skipped town or even the country to avoid being subpoenaed.”); Miller, *supra* note 533.

⁵⁵¹ Gabler, *supra* note 35 (internal quotation marks omitted).

⁵⁵² *Film Leaders are Working to Keep Down Scandal*, UKIAH DAILY J. (Cal.), Aug. 6, 1957, at 3.

⁵⁵³ *Id.*

⁵⁵⁴ David Gelman & Edward Katcher, *The Man Behind Confidential*, N.Y. POST, Sept. 6, 1957, at M2.

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ SCOTT, *supra* note 3, at 187; SLIDE, *supra* note 3, at 180.

V. THE TRIAL OF *CONFIDENTIAL* MAGAZINE

On August 2, 1957, 135 Hollywood personalities jammed the courtroom of Judge Herbert Walker of the Los Angeles Superior Court, followed by a throng of curious onlookers.⁵⁵⁹ A necktie salesman peddled his goods in the courtroom, selling them from a suitcase.⁵⁶⁰ Witnesses went outside the court and freely voiced their opinions in front of TV cameras.⁵⁶¹ In the summer of 1957, the trial of *Confidential* magazine was “the most publicized single news item in most of the newspapers today.”⁵⁶²

A. Arguments

Represented by Clarence Linn and Assistant Los Angeles District Attorney William Ritz, the prosecution promised to illustrate that *Confidential* intentionally published matter that was obscene, false and defamatory, without good motives and justifiable ends.⁵⁶³ *Confidential* “maliciously dredged up from forgotten gutters a slip from the straight and narrow path by a prominent individual and depicted it as the individual’s way of life,” Linn told the jury.⁵⁶⁴ Stars were haunted by “forgotten sins, dredged from long-ago gutters and blown up into fanciful tales.”⁵⁶⁵

The prosecution focused on *Confidential*’s newsgathering methods, which it claimed would demonstrate Harrison’s intent to injure and defame.⁵⁶⁶ *Confidential* hired “women of the night life” to entice prominent people in Hollywood, then report the incidents to the magazine, Linn said.⁵⁶⁷ A Hollywood prostitute, one of *Confidential*’s informants, testified that Harrison “told me that he wanted stories primarily dealing with the sexual activities of celebrities . . . the more lewd and lascivious the story, the more colorful for the magazine.”⁵⁶⁸ Editor Howard Rushmore recalled Harrison’s zeal to dig up incriminating scandal—to get “hot, inside stories from Hollywood that

⁵⁵⁹ *Jury is Being Chosen to Try Confidential*, N.Y. TIMES, Aug. 3, 1957, at 22; Stars Crowd Start of Trial of Magazine, WASH. POST & TIMES HERALD, Aug. 3, 1957, at B10.

⁵⁶⁰ Victor Davis, *The Father of Scandal*, 13 BRIT. JOURNALISM REV. 74, 78 (2002).

⁵⁶¹ *Id.* at 78–79.

⁵⁶² Editorial, *Publicity and Stars*, FAIRMOUNT NEWS (Ind.), Sept. 5, 1957, at 2.

⁵⁶³ CAL. PENAL CODE § 251, *invalidated by Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976); see *Stars Lured Into Traps, Confidential Trial Told: Enticement of Hollywood Personalities by ‘Women of the Night’ Cited by Prosecution*, L.A. TIMES, Aug. 8, 1957, at 1 [hereinafter *Stars Lured*].

⁵⁶⁴ Gladwin Hill, *Magazine Draws Scorn and Praise: Confidential on Trial, Called Hirer of Prostitutes and Servant of Public*, N.Y. TIMES, Aug. 8, 1957, at 16.

⁵⁶⁵ *Stars Lured*, *supra* note 563, at 1.

⁵⁶⁶ See *id.* at 1; *Magazine Linked to Coast Agency: Defense Admits Hollywood Office Got \$150,000 from Confidential Data*, N.Y. TIMES, Aug. 24, 1957, at 34.

⁵⁶⁷ Hill, *supra* note 564, at 16.

⁵⁶⁸ 4 Transcript of Record (Aug. 13, 1957), *supra* note 27, at 376.

would make our readers whistle when they read them.”⁵⁶⁹ Rushmore testified that while he was editor he *wanted* to hurt the celebrities he wrote about in *Confidential*. “Did you have,” Crowley asked, “the specific intention yourself to injure someone?” Rushmore replied: “I certainly did.”⁵⁷⁰

Crowley contended that *Confidential*’s articles were true and that “there [was] no malice concerned.”⁵⁷¹ He cited *Confidential* articles on subjects such as “social security, cancer cures, a mink coat racket, [and] telephone blackmailers” to illustrate that several articles in each issue were “public service” articles.⁵⁷² The celebrity articles also had a public purpose: “the American public has a right to know when the stars of the motion picture, radio, and tv do not live moral lives,” Crowley argued.⁵⁷³ “[P]rivate detectives have been hired to verify these stories. They are backed up by sworn affidavits,” Crowley said.⁵⁷⁴ *Confidential* hired “the best law firm it could find and paid them a large sum of money to keep from violating the law.”⁵⁷⁵

DeStefano described the magazine’s extensive “verification” process, and his conversations with Harrison about libel and obscenity:

I pointed out to Mr. Harrison that a publication like [*Confidential*] could never be guilty of criminal libel because in order to have criminal libel you must have enmity, you must hate an individual . . . and that I knew of no case in the history of this country where a nationwide publication had ever been accused of criminal libel.⁵⁷⁶

On the issue of whether *Confidential* intended to publish obscenity, Crowley introduced as evidence two large bundles of bestselling novels, including *Peyton Place*, *From Here to Eternity*, *The Naked and the Dead*, and *East of Eden*, as well as the men’s magazines *Tomcat*, *Dazzle*, *Nugget*, and *Escapade’s Choicest*.⁵⁷⁷ *Confidential* was far less racy than those popular publications, he argued.⁵⁷⁸ Crowley asked Ross what he had told Harrison about the legal definition of obscenity.⁵⁷⁹ Ross referred to

⁵⁶⁹ 2 Transcript of Record, *supra* note 27, at 130.

⁵⁷⁰ *Id.* at 202.

⁵⁷¹ *Magazine Libel Trial Is Started*, WASH. POST & TIMES HERALD, Aug. 8, 1957, at A3.

⁵⁷² “*Confidential*” Investigator Testifies Stories Are True, SAN MATEO TIMES, Aug. 22, 1957, at 14.

⁵⁷³ Pearson, *supra* note 478, at 1.

⁵⁷⁴ Lee Besler, *Tab Hunter Balks at Testifying in Libel Trial of “Confidential,”* KINGSPORT TIMES (Tenn.), Aug. 8, 1957, at 14 (internal quotation marks omitted).

⁵⁷⁵ *Confidential Defense Ends Arguments*, L.A. TIMES, Sept. 14, 1957, at B1 (internal quotation marks omitted).

⁵⁷⁶ 13 Transcript of Record (Aug. 28, 1957), *supra* note 27, at 1615.

⁵⁷⁷ Index to 8 Transcript of Record (Aug. 20, 1957), *supra* note 27 (providing a list of exhibits introduced by the defense).

⁵⁷⁸ 8 Transcript of Record, *supra* note 27, at 1021–22.

⁵⁷⁹ *Id.* at 932.

the Supreme Court's recent decision in *Roth v. United States*,⁵⁸⁰ issued just one week before the *Confidential* trial.⁵⁸¹ In *Roth*, the first case in which the Court addressed obscenity, Justice Brennan said that the First Amendment protects the communication of all ideas having "the slightest redeeming social importance," but "implicit in the history of the First Amendment [was] the rejection of obscenity as utterly without redeeming social importance."⁵⁸² *Roth* set out a constitutional criterion for obscenity: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."⁵⁸³ *Roth* was a victory for both social reformers and free speech advocates; the decision narrowed the definition of obscenity yet at the same time reaffirmed obscenity as categorically without constitutional protection.⁵⁸⁴

"[O]bscenity is determined according to the standards and the practices and the mores of the community," Ross told the court.⁵⁸⁵ Ross continued: "[a]n obscene matter is one which arouses a prurient reaction—a sexually itchy reaction, an uncontrolled desire to commit depraved acts."⁵⁸⁶ Creatively interpreting the *Roth* holding, Ross explained that he informed Harrison that under a U.S. Supreme Court ruling, if the result was to make a person "chuckle" he could not have lascivious thoughts at the same time, and the article was not obscene.⁵⁸⁷ "[The articles] were humorous, therefore not libelous nor obscene," Albert DeStefano was reported as saying.⁵⁸⁸

Harrison's threat to call hundreds of film stars to testify hung ominously over the proceedings. About two weeks into the trial, the prosecution moved to deny Crowley the right to call the stars he'd subpoenaed, contending that only the stars mentioned in the articles listed as the basis for the indictments could be called as witnesses.⁵⁸⁹ Walker agreed to limit testimony to the articles introduced by the prosecution.⁵⁹⁰ Hollywood issued a sigh of relief. Walker told Ritzki to read the allegedly obscene and libelous articles aloud to the jury, which took over two days.⁵⁹¹ Reported the *New York Daily News*, "[s]pectators drank in the testimony avidly—it was the first time

⁵⁸⁰ 354 U.S. 476 (1957).

⁵⁸¹ 8 Transcript of Record, *supra* note 27, at 1014.

⁵⁸² *Roth*, 354 U.S. at 484.

⁵⁸³ *Id.* at 489.

⁵⁸⁴ *See id.*

⁵⁸⁵ 8 Transcript of Record, *supra* note 27, at 932.

⁵⁸⁶ Jack Jones, *Witness Tells of Party at Actor's Pool*, L.A. TIMES, Aug. 21, 1957, at 1 (internal quotation marks omitted).

⁵⁸⁷ 13 Transcript of Record, *supra* note 27, at 1710.

⁵⁸⁸ Seymour Korman, *Jury to Visit Confidential's Theater Scene*, CHI. DAILY TRIBUNE, Aug. 31, 1957, at 8 (internal quotation marks omitted).

⁵⁸⁹ *Confidential Loses Bid to Drop Charges*, WASH. POST & TIMES HERALD, Aug. 16, 1957, at A16.

⁵⁹⁰ 4 Transcript of Record, *supra* note 27, at 377–81; *Judge Limits Testimony in Scandal Trial: Rule Curbs Stars*, CHI. DAILY TRIBUNE, Aug. 20, 1957, at 43.

⁵⁹¹ 5 Transcript of Record (filed Aug. 14, 1957), *supra* note 27, at 550–51; *Confidential Jury Hears Star Gossip Stories: Magazines Read by Prosecutor*, L.A. TIMES, Aug. 15, 1957, at 1.

many of them had heard *Confidential's* scandals, for the publication [was] banned in California."⁵⁹² The articles and accusations were made part of the public record, and the press gladly reprinted them, detail for sensational detail.⁵⁹³

Ultimately, the defense never called any celebrities as witnesses.⁵⁹⁴ The only stars who testified were Maureen O'Hara and Dorothy Dandridge, called as prosecution rebuttal witnesses.⁵⁹⁵ O'Hara claimed that she never had romantic activity in Grauman's Chinese Theater, and that she hadn't even been in the United States at the time.⁵⁹⁶ Dandridge denied the story about her alleged tryst with a white bandleader.⁵⁹⁷ There was too much racial prejudice in 1950 for her to have openly had an affair with a white man, she said.⁵⁹⁸ African-American newspapers across the country celebrated Dandridge's forthright testimony.⁵⁹⁹ Wrote the Baltimore *Afro American*: "The tiny star's blast at American standards . . . visibly impressed the jury, the judge, the prosecution, and took the wind out of the defense's sails."⁶⁰⁰

In his closing argument, Crowley finally brought up the free press issue, likening California's actions against *Confidential* "to the book burnings and witch hunts of

⁵⁹² SCOTT, *supra* note 3, at 174 (internal quotation marks omitted).

⁵⁹³ Newspaper editors claimed that covering the trial presented them with an ethical dilemma: how to fulfill their responsibility of reporting the news without rehashing *Confidential's* salacious gossip. *Clean—And Otherwise*, NEWSWEEK, Aug. 26, 1957, at 60, 60. A few newspapers downplayed the details of the trial, or ran the story on their inside pages—the *New York Times* gave instructions to its West Coast reporter to "write this one for your Aunt Minnie." *Id.* at 61. But most did their best to sell papers with the story. The *New York Daily News* featured articles with outrageous, outsized headlines such as "14 Stars Shine in Hollywood Bedtime Story." *Id.* "[P]ractically every newspaper and magazine attacked *Confidential* editorially," observed Howard Rushmore, but they "didn't hesitate to devote their news columns to reporting the lurid . . . details of the trial . . . us[ing] blaring headlines, sexy photographs and thousands of words reprinting what *Confidential* had said months before . . ." Rushmore, *supra* note 40, at 33.

⁵⁹⁴ If he were to call the stars to testify, he would be bound by their answers, even if they were subsequently found perjurious. Bob Thomas, "*Confidential* Closes Defense; More Fireworks Possible," SAN BERNARDINO DAILY SUN, Aug. 31, 1957, at 1. If the state called them, Crowley could attack their stories on cross-examination. *Id.*

⁵⁹⁵ Gladwin Hill, *2 Film Actresses Testify on Coast: Maureen O'Hara, Dorothy Dandridge Deny Stories Carried in Confidential*, N.Y. TIMES, Sept. 4, 1957, at 40.

⁵⁹⁶ *Id.* Judge Walker permitted the jurors to be taken to the theater, by bus, to view the site of the alleged episode. Jack Smith, *Confidential Trial to Move Over to Grauman's Theater: Jury to See Alleged Love Scene Site*, L.A. TIMES, Aug. 31, 1957, at B1. Both the prosecution and members of the jury wanted to know if it would be physically possible for O'Hara to have been in the position described by the theater usher. *See id.*

⁵⁹⁷ Hill, *supra* note 595, at 40.

⁵⁹⁸ 15 Transcript of Record (Sept. 3, 1957), *supra* note 27, at 1907.

⁵⁹⁹ *See, e.g.*, Charles Denton, *Dandridge on Witness Stand: Dandridge on Stand, Rips "Birds and Bees" Story*, DAILY DEFENDER (Chi.), Sept. 4, 1957, at 1; *No Walk in Woods—Dottie*, AFRO-AM. (Balt.), Sept. 14, 1957, at 1.

⁶⁰⁰ *No Walk in Woods—Dottie*, *supra* note 599, at 1.

history.”⁶⁰¹ The trial was “one of the worst cases of suppression of freedom of the press that I have ever seen.”⁶⁰²

⁶⁰¹ *Confidential Case Defense Pleads Freedom of Press: Trial Nearing End, Likened to Witch Hunts*, L.A. TIMES, Sept. 12, 1957, at B1. Harrison introduced the “free press” issue in the September 1957 *Confidential*, in a two-page article titled *Hollywood v. Confidential*:

That this magazine is under assault in the California courts is, we assume, a fact known to most of our nine million readers. . . .

A California Assistant Attorney General has stated to the press: “In my opinion, CONFIDENTIAL is finished.”

This is a determined effort, initiated by a segment of the motion picture industry, to “get” this magazine.

We hold no secrets from our readers. In our first issue, nearly five years ago, we promised to “publish the facts” and “name the names.” We have kept that promise; and our readers have made us successful. We have *the world’s largest newsstand sale*. . . .

Our success is due to their appreciation of our efforts to establish the truth and to maintain *the right for them to have the truth*. . . .

WE ARE *NOT GUILTY* OF “CONSPIRACY TO PUBLISH CRIMINAL LIBEL.”

A precious and historic American principle is this: truth may be distasteful, but truth can *never* be libelous. . . .

. . . .
We believe that the truths we have published . . . have been in the public interest and in the best traditions of American journalism. . . .

. . . .
“Hollywood” is in the business of lying. Falsehood is a stock in trade. They use vast press-agent organizations and advertising expenditures to “build up” their “stars.” They “glamorize” and distribute detailed—and often deliberately false—information about private lives.

Because of advertising money, in these “build-ups” they have the cooperation of large segments of the daily press, many magazines, columnists, radio and TV. They have the cooperation of practically every medium *except* CONFIDENTIAL . . . They can’t “influence” us. So they want to “get” us. . . .

We do not underestimate this effort to “get” us. We concede that those who want to “finish” us are powerful and resourceful. They have some tricky arguments; they are artists in the old three-shell game.

But we expect to survive. For we believe that even those Americans who may not like what we say will, nevertheless, defend our right to say it.

We doubt that the time has arrived when Americans can be “gotten” for the crime of telling the truth.

Robert Harrison, *Hollywood v. Confidential: A Publisher’s Statement: California has Accused us of a Crime—The Crime of Telling the Truth!*, CONFIDENTIAL, Sept. 1957, at 22, 22–23.

⁶⁰² *Acquittal Is Asked in Libel Trial*, HARTFORD COURANT, Sept. 12, 1957, at 10 (internal quotation marks omitted). *Confidential*’s “free press” arguments were mocked in the press. “In the final arguments in the [*Confidential*] case in Los Angeles the defense attorney made

“The prosecution wants to indulge in censorship . . . to do your thinking for you,” Crowley said, “to satisfy a certain political segment.”⁶⁰³ “They’re trying to put the largest newsstand-selling magazine in the world out of business. Who is the prosecutor and who is the Attorney General . . . to tell you what you can and can’t read?”⁶⁰⁴

“Who are these people to impose a censorship, to stifle thought and reading habits, to encroach on freedom of the press? Would they burn books like Hitler did, would they engage in witch hunts?”

When you let the state tell you what to read, you are letting such individuals take away one of the most precious bit sof [sic] freedom you have.”⁶⁰⁵

a fiery speech, purportedly in defense of freedom of the press. But freedom of the press was not involved in this case,” wrote one editor. Editorial, *A Phony Plea*, OXNARD PRESS-COURIER (Cal.), Sept. 14, 1957, at 16. “Publications have not only the right of freedom to print; they also have the obligation and responsibility not to print certain material which would be against public morals and decency.” *Id.* “The principle of freedom of the press has no slight involvement in the right of such magazines to peddle their wares.” Editorial, *Two Smut Magazines*, MASON CITY GLOBE-GAZETTE (Iowa), Aug. 13, 1957, at 4.

⁶⁰³ *Confidential Case Defense Pleads Freedom of Press*, *supra* note 601, at B1 (internal quotation marks omitted). Turning to prosecutor William Ritzi, he asked:

“Does Mr. Ritzi think it is a public service to sacrifice freedom of the press on the altar of expediency to cover up people in this town who walk around like they wear the purple of ancient Rome?”

....

“There is only one industry where homosexuality is not only condoned but protected.”

Confidential Defense Sums Up Arguments, INDEP. J. (San Rafael), Sept. 12, 1957, at 8. Crowley said that it would be better if the \$350,000 “war chest” which he had claimed the movie industry had raised to destroy *Confidential* were used to “clean out the homosexuals, nymphomaniacs, and dope addicts from their ranks.” *Id.*

⁶⁰⁴ *Confidential Case Defense Pleads Freedom of Press*, *supra* note 601, at B1 (internal quotation marks omitted).

⁶⁰⁵ Seymour Korman, *Confidential Calls Trial “Witch Hunt”: Charges State Effort of Censorship*, CHI. DAILY TRIB., Sept. 12, 1957, at 10. Ritzi accused *Confidential* of “hid[ing] under freedom-of-press laws while showing a lack of responsibility.” *Jury Gets Confidential Case; Deliberations to Start Today: Prosecution in Scorching Last Attack*, L.A. TIMES, Sept. 17, 1957, at B1 (internal quotation marks omitted). Pointing to Fred and Marjorie Meade, he charged: “People who are most concerned with freedom of the press are those who see it in a vastly different light than these people. People who are really concerned see a free press as honest, responsible and truthful. . . . Libel and obscenity are not protected by our Constitution,” he protested vehemently. *Id.* (internal quotation marks omitted). “The real problem here is not ‘a free press,’ but a ‘responsible press versus libel and obscenity.’” *Id.* (internal quotation marks omitted).

B. Proper Procedures

Unlike other efforts against *Confidential*, California's case generated virtually no public criticism.⁶⁰⁶ Despite California's vague criminal libel and obscenity laws, the pressures of the film industry, and the obvious political motivations behind Brown's actions, the ACLU said nothing. Apparently relieved that more overt suppression had been avoided, the organization remained silent during the trial.

"Naturally there have been efforts to censor and suppress 'Confidential.' Such efforts we deplore. Now in Los Angeles the proper method of action is being pursued," wrote the *Oxnard Press Courier*.⁶⁰⁷ "[E]xisting laws against obscenity and gratuitous libel are fairly rigorous, and the current case . . . is the way to compel compliance—not to set up some board of censors who in an [excess] of zeal might make any reading not suitable for 12-year-olds, impossible to obtain."⁶⁰⁸ "Censorship tends to spread like cancer[.] . . . [But] there are laws against libel and slander on the books of all states," opined another editor.⁶⁰⁹ "The public is also entitled to legal protection against obscenity in its grosser and more obvious forms"⁶¹⁰

"What is most important about the Confidential case is that it is being prosecuted under long-established legal procedures," wrote the *Decatur Herald* in an article titled *Legal Procedures, Not Censorship, A Proper Approach*.⁶¹¹

Many of the persons who have found the scandal magazines an affront to good taste have urged special legislation to prohibit the periodicals from being published. . . .

However . . . such measures endanger the whole concept of freedom of the press, for who is to say what should be banned? If these magazines are not publishing the truth, the remedy is

⁶⁰⁶ The only critic, ironically, was Howard Rushmore. See Rushmore, *supra* note 40, at 38: I have said publicly that I considered the recent legislative investigation of *Confidential* in California unwise and, in its broad aspects, a threat to a free press. Although I was, under force of subpoena, a witness for the State of California in the criminal trial of *Confidential*'s owners and researchers, I felt misgivings about certain aspects of the prosecution's case. I do not believe that courts should be used to suppress a publication; persons damaged by publication of false or defamatory material can always sue in the civil courts.

⁶⁰⁷ Editorial, *The Attack Upon Confidential*, OXNARD PRESS-COURIER (Cal.), May 16, 1957, at 28.

⁶⁰⁸ Editorial, *Through the Courts*, MEDFORD MAIL-TRIBUNE (Or.), Aug. 30, 1957, at 4.

⁶⁰⁹ Editorial, *Curbing Printed Smut*, NORTH ADAMS TRANSCRIPT, Dec. 20, 1957, at 6.

⁶¹⁰ *Id.*

⁶¹¹ Editorial, *Legal Procedures, Not Censorship, a Proper Approach*, DECATUR HERALD (Ill.), Aug. 15, 1957, at 6.

through such actions as the libel and conspiracy trial being conducted in Los Angeles.⁶¹²

Make no mistake about it—we think this type of slush magazine is a blot on the fair face of America.

But the way to get rid of them is not to limit the right to write and print freely . . . but to hold them (and all men) responsible for what they write and print. The way to do this is in the time-tested and proven way of democracy—through the courts.

It takes longer, this way, and (like other democratic processes) is “inefficient.” But any other way is risking the totalitarian method of telling everyone just what they can and can’t do. That way, freedom dies.⁶¹³

C. *The End of Confidential*

After a record fourteen days of jury deliberation—the longest in California history—the *Confidential* trial came to a close.⁶¹⁴ The jury split seven-to-five on the criminal libel part of the conspiracy charge, and voted eight-to-four on the obscenity part of the charge.⁶¹⁵ One outspoken juror said that the “freedom of the press” issue introduced into the case by the defense was an important factor in his stand for acquittal.⁶¹⁶ Because the jury could not reach a unanimous verdict on whether *Confidential* committed a conspiracy, a mistrial was declared.⁶¹⁷

“*Confidential* trial lays egg,” read one newspaper headline.⁶¹⁸ “No verdict, no nothing. . . . Nobody goes to jail *Confidential* magazine is still in business.”⁶¹⁹ “*Confidential* magazine won . . . means a green light for the garbage business.”⁶²⁰ Harrison claimed to be overjoyed.⁶²¹ “The fact that reasonable people of good-will

⁶¹² *Id.*

⁶¹³ *Through the Courts*, *supra* note 608, at 4.

⁶¹⁴ *The ‘Exhausting’ Juror*, NEWSWEEK, Oct. 14, 1957, at 74, 74.

⁶¹⁵ *Id.*; Jack Lefler, ‘Mag’ Jurors Discharged After 2-Week Deadlock, BRIDGEPORT POST, Oct. 2, 1957, at 48.

⁶¹⁶ SCOTT, *supra* note 3, at 187.

⁶¹⁷ *Confidential Trial Jury Dismissed in Deadlock: Case Ends in Mistrial as Panel Members Fail to Reach Verdict After Two Weeks*, L.A. TIMES, Oct. 2, 1957, at 1.

⁶¹⁸ *Confidential Trial Lays Egg*, DAILY NOTES (Canonsburg, Pa.), Oct. 2, 1957, at 8.

⁶¹⁹ Bob Thomas, *Confidential Trial Ends as Expected*, FLORENCE TIMES (Ala.), Oct. 7, 1957, at 11.

⁶²⁰ Editorial, *Views on the Day’s News*, PITTSBURGH PRESS, Oct. 4, 1957, at 26.

⁶²¹ *Publisher Pleased at Libel Trial End*, WASH. POST & TIMES HERALD, Oct. 3, 1957, at A3 (“Publisher Robert Harrison said today the failure of a California jury to reach a verdict in the criminal libel trial of *Confidential* magazine was a victory for free speech and a free press.”).

could differ so strongly . . . is proof that there was no basis for a criminal prosecution . . .,” he told the press.⁶²² The trial’s result “constitutes a vindication and reaffirmation . . . of our basic constitutional guarantees of freedom of speech and freedom of the press—not only the freedom of a publisher to publish, but equally, if not more important, the freedom of the public to read”⁶²³

The State planned to try the case again.⁶²⁴ The prospect hit Harrison hard, since he had paid around \$500,000 to his attorneys for the trial.⁶²⁵ Harrison also faced large settlements in the Liberace, Dorothy Dandridge, and Maureen O’Hara libel suits.⁶²⁶ Sensing that Harrison was in financial trouble, Brown offered Harrison a deal, which he accepted over the objections of his lawyers, who wanted to go back to court and run up his bill.⁶²⁷ Under the agreement, *Confidential* would run no more exposés about the private lives of celebrities, and Harrison would publicize the magazine’s ‘change of heart’ in newspaper advertising.⁶²⁸ The state’s original charges would be reduced to a token charge of conspiring to publish obscenity.⁶²⁹

In December 1957, a judge found *Confidential* guilty of conspiracy to publish obscenity and fined Harrison \$5,000.⁶³⁰ In early 1958, *Confidential* published advertisements in San Francisco and Los Angeles newspapers claiming that it would “eliminate exposé stories on the private lives of celebrities.”⁶³¹ The announcement, signed by Harrison, added: “While we have never felt that such stories violated any laws, in a spirit of cooperation with Edmund G. Brown . . . we have agreed . . . to so change our format. We are confident that our millions of readers will find the new format interesting and exciting.”⁶³²

⁶²² *Confidential Case Retrial To Be Asked, Brown Says*, L.A. TIMES, Oct. 3, 1957, at B1.

⁶²³ *Id.* (internal quotation marks omitted).

⁶²⁴ *Confidential Retrial: Coast Prosecutor Rules out Compromise in Libel Case*, N.Y. TIMES, Oct. 4, 1957, at 45.

⁶²⁵ SCOTT, *supra* note 3, at 187 (“[The trial] had cost [Harrison] an estimated \$500,000, a sum equivalent to \$3.5 million today.”); *Retrial in Doubt for Confidential: A Court Hearing This Week May Reveal Decision on Prosecuting Magazine*, N.Y. TIMES, Oct. 6, 1957, at 60 (“The trial was estimated by state officials to have cost, on the prosecution side, about a million dollars The defense probably cost a better part of \$500,000.”); *see also* TAB HUNTER WITH EDDIE MULLER, *TAB HUNTER CONFIDENTIAL: THE MAKING OF A MOVIE STAR* 185 (2005).

⁶²⁶ HUNTER WITH MULLER, *supra* note 625, at 185.

⁶²⁷ *Id.*

⁶²⁸ *Id.*

⁶²⁹ Gladwin Hill, *Accord Approved for Confidential Magazine: Magazine Agrees It Will Run No More Exposés and State Drops Major Charges*, N.Y. TIMES, Nov. 13, 1957, at 42.

⁶³⁰ *Confidential, Whisper Convicted, Fined \$5,000*, L.A. TIMES, Dec. 19, 1957, at 5.

⁶³¹ *Confidential Clean Up?*, NEWSWEEK, Nov. 25, 1957, at 81, 81.

⁶³² *Announcement by Confidential & Whisper Magazines*, L.A. TIMES, Nov. 12, 1957, at A11. Editor Al Govoni “knew immediately that the magazine was history, but Harrison refused to believe it. Then he found out how tough it was to serve up [that] kind of journalism under the watchful eye of the lawyers. ‘The settlement was so binding,’” Govoni wrote to a friend, “that it became impossible to put out a book with any guts.” Govoni, *supra* note 58, at 33.

In February 1958, Harrison began to put out a toned-down *Confidential*, which featured such “safe” stories as *What’s Wrong with the Oil Burner in the White House Basement?* and *Penicillin Can Save Your Life!*⁶³³ “If *Confidential* seems changed . . . if you’ve noticed a new complexion, it’s because we’ve broadened our outlook,” the magazine announced.⁶³⁴ “We’re quitting the area of private affairs for the arena of public affairs. . . . Where we pried and peeked, now we’ll probe, and occasionally we’ll take a poke. . . . If wiseacres say that we’ve retreated from the bedroom, we’ll say yes, that’s true”⁶³⁵ Newsstand sales of *Confidential*, once nearly four million, went down to around one million in May 1958.⁶³⁶

In the spring of 1958, Harrison announced he was getting out of the publishing business.⁶³⁷ He could no longer withstand the financial burden of defending his magazines: there were “too many lawsuits,” in his words.⁶³⁸ Harrison sold the rights to *Confidential* to entrepreneur Hy Steirman for \$25,000.⁶³⁹ Steirman mandated non-Hollywood stories,⁶⁴⁰ issues focused on such noncontroversial subjects as bankruptcy, weight loss remedies, rabies, phone jewelry, and bad dentists.⁶⁴¹ Sales nosedived.⁶⁴²

It was then that the real results of the trial became apparent. “Perhaps it is just as well that the two-month *Confidential* trial ended in a hung jury . . . [F]or the litigation seems already to have served its primary purpose of toning down the lurid scandal publications,” noted one critic.⁶⁴³

The magazines still may not be fit for most living rooms, but it is generally agreed that they are not quite so bad as they were before The heavy expenses of the trial appear to have made the publishers and editors of *Confidential* and her scandalous sisters more conscious of their responsibilities in putting out magazines under the protection of the First . . . Amendment to the Constitution.⁶⁴⁴

⁶³³ Roger Price, *Doodles*, PITTSBURGH PRESS, Feb. 8, 1958, at 15.

⁶³⁴ Robert Harrison, *Confidential’s New Policy*, CONFIDENTIAL, Apr. 1958, reprinted in SCOTT, *supra* note 3, at 186.

⁶³⁵ *Id.*

⁶³⁶ *High Price of Virtue*, TIME, May 26, 1958, at 56.

⁶³⁷ *Id.*

⁶³⁸ Jack Jones, *Gable Denies Romance with Miss De Scaffa: Scandal Jury Told of Story*, L.A. TIMES, Aug. 13, 1957, at 1 (“There have been too many lawsuits and the expose field magazine—except for *Confidential*—is dead.”) (internal quotation marks omitted).

⁶³⁹ BERNSTEIN, *supra* note 3, at 266.

⁶⁴⁰ *Id.* at 267.

⁶⁴¹ *Id.*

⁶⁴² SCOTT, *supra* note 3, at 188 (“[C]irculation plunged to roughly 200,000 before it closed in the early 1960s.”).

⁶⁴³ Editorial, *Another Trial for Confidential?*, DECATUR HERALD (Ill.), Oct. 12, 1957, at 4.

⁶⁴⁴ *Id.*

[M]en who hope to make a fat living by publishing scandal are put on notice that they may be subject to costly law suits. It is true that Mr. Harrison was not put in jail but it is also true that the profit from his venture was much reduced. This is handwriting on the wall for others to read.⁶⁴⁵

In the end, *Confidential* had been censored, but not in the way its opponents had planned or expected. The elimination of *Confidential* from the nation's newsstands was accomplished not through official bans, postal restrictions, anti-scandal legislation, or criminal sanctions, but rather through the exhaustion and financial depletion of publisher Robert Harrison. Forced to defend himself on multiple fronts for over two years, Harrison could no longer afford to pay his attorneys. This kind of "censorship" was entirely within the purview of the First Amendment.

CONCLUSION

The year 1958 saw the effective end of *Confidential*, and the end of an era. Laws governing publishing content, and public attitudes towards government involvement in the press, soon changed, as did popular views on celebrities, sex scandals, and the coverage of public figures in the media.

Within a few years of the *Confidential* trial, the entire apparatus of official censorship was crumbling.⁶⁴⁶ The use of "lists" by policemen and prosecutors to threaten newsdealers and booksellers diminished between the mid-1950s and the early 1960s.⁶⁴⁷ Following public criticism by the ACLU in 1958, the influence and prestige of the National Organization for Decent Literature waned.⁶⁴⁸ Several government review boards were dismantled after court decisions.⁶⁴⁹ Detroit's notorious censorship system ended in 1957 when a court enjoined officials from making threats of prosecution to booksellers and newsdealers.⁶⁵⁰

Obscenity law was liberalized in the 1960s by several decisions of the U.S. Supreme Court.⁶⁵¹ A leading publishers' attorney called the era the "end of obscenity"

⁶⁴⁵ Editorial, *Confidential Not Acquitted*, REDLANDS DAILY FACTS (Cal.), Oct. 3, 1957, at 10.

⁶⁴⁶ See WALKER, *supra* note 294, at 235.

⁶⁴⁷ William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 7 (1960).

⁶⁴⁸ *Id.*

⁶⁴⁹ See, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69–72 (1963) (invalidating unconstitutional restraints by Rhode Island's Commission to Encourage Morality in Youth); *Holding v. Nesbitt*, 259 F. Supp. 694, 698–99 (W.D. Okla. 1966), *aff'd in part sub nom. Blankenship v. Holding*, 387 U.S. 95 (1967), *rev'd in part on other grounds*, 387 U.S. 94 (1967) (invalidating action of Oklahoma Literature Commission).

⁶⁵⁰ Lockhart & McClure, *supra* note 647, at 7–8.

⁶⁵¹ See *infra* notes 655–59 and accompanying text.

and of “censorship.”⁶⁵² The ACLU at last took a firm stand on obscenity, concluding that “the constitutional guarantees of free speech and press apply to all expression and there is no special category of obscenity or pornography to which different constitutional tests apply.”⁶⁵³ The ACLU also advanced a near-absolutist position on libel, announcing its “opposition to virtually all libel actions as restrictions on free speech, except in cases of reckless disregard for the truth.”⁶⁵⁴

In 1964, the Supreme Court’s decision in *New York Times v. Sullivan*⁶⁵⁵ imposed constitutional restrictions on the libel tort.⁶⁵⁶ Criminal libel was all-but-eliminated. In 1961, the drafters of the Model Penal Code refused to include a criminal libel section: “[u]sually we reserve the criminal law for harmful behavior which exceptionally disturbs the community’s sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., [and] that it is therefore inappropriate for penal control.”⁶⁵⁷ Three years later, the Supreme Court in *Garrison v. Louisiana*⁶⁵⁸ recognized the diminishing need for criminal libel statutes:

Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that “. . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of the peace requires a criminal prosecution for private defamation.”⁶⁵⁹

Several states, including California, declared their criminal libel laws unconstitutional and repealed them.⁶⁶⁰

⁶⁵² WALKER, *supra* note 294, at 236. The California legislature drafted a new obscenity statute in 1961 in which it adopted a new definition of obscenity, consistent with the *Roth* decision:

“Obscene” means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

Act effective Sept. 15, 1961, ch. 2147, § 5, 1961 Cal. Stat. 4427, 4427 (codified as amended at CAL. PENAL CODE § 311(a) (West 2016)).

⁶⁵³ WALKER, *supra* note 294, at 234.

⁶⁵⁴ *Id.* at 230.

⁶⁵⁵ 376 U.S. 254 (1964).

⁶⁵⁶ *Id.* at 283–84.

⁶⁵⁷ MODEL PENAL CODE § 250.7 cmt. 2 (AM. LAW INST., Preliminary Draft 1961), *reprinted in* BRUCE W. SANFORD, LIBEL AND PRIVACY § 4.14 at 4-76–4-76.1 (2d ed. 2007 & 2015 Supp.).

⁶⁵⁸ 479 U.S. 64 (1964).

⁶⁵⁹ *Id.* at 69 (quoting Emerson, *supra* note 275, at 924).

⁶⁶⁰ The California criminal libel statute was held unconstitutional in 1976 and repealed in 1986. CAL. PENAL CODE §§ 248–57 (1957), *partially invalidated by* *Eberle v. Mun. Court*

These transformations in the law were driven by changing public attitudes—a shift in the prevailing moral climate that was spurred, in part, by publications like *Confidential*. By the end of the 1950s, there were significant changes in public opinion regarding censorship.⁶⁶¹ The 1960s saw far less opposition to sexually suggestive material than the previous decade; sexual imagery abounded in the culture, and “sex became an integral part of the public domain,” observe historians John D’Emilio and Estelle Freedman.⁶⁶² With their daring exposés of public figures’ sexual affairs, *Confidential* and the scandal magazines altered popular sensibilities around the public discussion of sexual matters. *Confidential* contributed to a more open cultural milieu that encouraged freedom of expression and freedom of the press.

Confidential’s legacy lives on in America’s tabloid culture. Robert Harrison has been described, rightly, as the godfather of tabloid journalism, and his style and tactics spawned scores of imitators, from *The National Enquirer*, which debuted in 1965, to *People* (1974) to TMZ (2005).⁶⁶³ *Confidential* transformed the nation’s media more broadly. By 1960, elements of the “scandal magazine” style had become a part of mainstream journalism.⁶⁶⁴ “[M]any high class . . . magazines” were starting to print “eye-raisers and ‘inside stuff’ that tabloid lawyers delete,” gossip columnist Walter Winchell wrote in 1957.⁶⁶⁵ Weekly magazines were publishing sensational material that “would have been censored by the attorneys of even *Confidential*,” and family magazines were digging up scandalous matter “in much the same manner that *Confidential* would have done.”⁶⁶⁶

Confidential ended the “hero-worshipping era” of Hollywood.⁶⁶⁷ After *Confidential*, “the public no longer expect[ed] its screen heroes to be [idols] who regularly pay off the mortgage, teach Sunday School, and retire by 10 each night,” Jerry Giesler told the

127 Cal. Rptr. 594 (Cal. Ct. App. 1976), *repealed by* Act of June 9, 1957 ch. 141, 1986 Cal. Stat. 311.

⁶⁶¹ WALKER, *supra* note 294, at 232.

⁶⁶² D’EMILIO & FREEDMAN, *supra* note 63, at 300.

⁶⁶³ In 1965, *Newsweek* wrote with alarm about the rising circulation of the tabloid *The National Enquirer*. “The editorial policy behind these profits is unabashedly simple. . . . If a story is good, no matter how vile,” it would run it. *No Matter How Vile*, NEWSWEEK, Jan. 18, 1965, at 48 (internal quotation marks omitted). The *Enquirer* was based on “tips” from newspaper reporters, “for stories too ghastly to appear in regular dailies.” *Id.*

⁶⁶⁴ *Id.*; see also HUNTER WITH MULLER, *supra* note 625, at 185.

⁶⁶⁵ Walter Winchell, *Broadway & Elsewhere: The Broadway Orbit*, LOGANSPORT PHAROS-TRIBUNE (Ind.), Dec. 17, 1957, at 4.

⁶⁶⁶ Rushmore, *supra* note 40, at 34, 37 (“Even the sedate movie fan magazines that for years had been publishing details of the stars’ eating habits and preferences in such things as clothes, homes and perfumes, now began to use semi-sensational materials with suggestive titles over every story.”); see also GOODMAN, *supra* note 100, at 53. “The one contribution the expose type [magazine made] to the field of journalism was to emphasize that people are interested in other people,” noted one commentator in 1961. Hy Gardner, *Hy Gardner Calling*, OGDEN STANDARD EXAMINER (Utah), Apr. 2, 1961, at 6. “This led to more national magazines publishing more candid personal stories than ever in history, many in the first person.” *Id.*

⁶⁶⁷ Crosby, *supra* note 96, at 4 (“When I was a boy . . . fan magazines were entirely filled

press near the end of the trial.⁶⁶⁸ Rather than shun the scandal magazine treatment, stars learned to embrace it, turning salacious revelations into part of their public personas.⁶⁶⁹ In early 1958, one critic noted that “[i]t was only a few weeks ago that movie stars were taking to the hills to escape questioning as witnesses in a Hollywood libel trial against a scandal magazine. Now they are literally tumbling over each other to tell it all in slick-paper magazines.”⁶⁷⁰

For years, Robert Harrison remained bitter about what happened to *Confidential*. In 1964, Harrison was interviewed by journalist Tom Wolfe for *Esquire* magazine.⁶⁷¹ Harrison said he was working on creating a tabloid called “*Inside News*” (“This is going to be bigger than *Confidential*,” he promised), and also thinking of writing his own memoir: *Now It Can Be Told*.⁶⁷² None of these ever came to fruition.

“You couldn’t put out a magazine like *Confidential* again,” Harrison told Wolfe.⁶⁷³ “You know why? Because movie stars have started writing books about *themselves*! . . . They tell all! No magazine can compete with that.”⁶⁷⁴

with chocolate marshmallow sauce. . . . Then ‘Confidential’ magazine came along. Overnight the character of our movie goddesses changed”); Shearer, *supra* note 454, at 22.

⁶⁶⁸ Shearer, *supra* note 454, at 22.

⁶⁶⁹ Editorial, *Tarnished Glitter*, SALEM NEWS (Bos.), Jan. 16, 1958, at 4.

⁶⁷⁰ *Id.* As Walter Winchell wrote in late 1957, “[i]t’s getting rougher for [gossip] columnists when celebs peddle the lowdown on themselves that they threaten to sue about.” Walter Winchell, *On Broadway*, DAILY RECORD (Scot.), Dec. 16, 1957, at 4.

⁶⁷¹ *See* Wolfe, *supra* note 16.

⁶⁷² *Id.* at 89.

⁶⁷³ *Id.* at 157.

⁶⁷⁴ *Id.*