

Prizefighting and the Birth of Movie Censorship

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Censorship scholars unanimously, but mistakenly, treat a 1907 ordinance of the City of Chicago as the first act of censorship in the United States. This Article finds, however, that movie censorship was born in March 1897 with prohibitions against a now-extinct genre: prizefight films that depicted real and staged boxing fights. At the time, boxing was generally illegal, yet the sport was enormously popular and boxers enjoyed privileged social status. In fact, shortly after Thomas Edison commercialized moving picture technologies in 1894, he accommodated the production of prizefight films at his studio in New Jersey, where prizefighting was prohibited.

The Article documents the reasons for Edison's decision to veto of the use of his equipment for prizefight films, only a few months after the production of prizefight films at his studio. Because of Edison's position in the industry, this decision effectively constituted the first form of content self-regulation in the motion-picture industry, approximately thirteen years before the presently-believed-to-be first form of content self-regulation in the industry.

This Article, therefore, begins to close a neglected gap in the literature on movie censorship. Its findings require a reexamination of content regulation in the motion picture industry, whose presumed twentieth century origins hide legislatures and industries already experienced with

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ensorship campaigns and laws. Despite this Article's historical reach, it provides important insights into modern-day social regulation. The failures of the nineteenth-century regulators to curtail popular activities like prizefighting can inform and shape current regulatory efforts, such as the design of anti-smoking policies.

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PROLOGUE

Censorship scholars unanimously, but mistakenly, treat a 1907 ordinance of the City of Chicago as the first censorship law that

exclusively targeted motion pictures.¹ The 1907 ordinance prohibited public exhibition of motion pictures without a permit from the Chief of Police² and required the Chief of Police to deny permits for “immoral or obscene” films.³ Historians who studied this early wave of censorship concluded that it originated in concerns about the corrupting influence of sexual innuendos and crime scenes.⁴ While the factual descriptions of movie censorship initiatives between 1907 and 1909 are generally correct,⁵ the belief that movie censorship was born in 1907 is erroneous. Equally erroneous is the perception that movie censorship originated from objections to sexuality and crime.

1. See, e.g., KEVIN BROWNLOW, *BEHIND THE MASK OF INNOCENCE: SEX, VIOLENCE, PREJUDICE, CRIME: FILMS OF SOCIAL CONSCIENCE IN THE SILENT ERA* 4-8 (1990); LEE GRIEVESON, *POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY-TWENTIETH CENTURY AMERICA* 76-78 (2004); RICHARD S. RANDALL, *CENSORSHIP OF THE MOVIES* 11 (1968); PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 295-96 (2004); LAURA WITTERN-KELLER, *FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915-1981*, 22 (2008) (“The City of Chicago enacted the first moving picture ordinance in the United States in 1907.”); John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 166 (1993) (“Late in 1907, the City of Chicago became the nation’s first jurisdiction to pass . . . a censorship law aimed exclusively at motion pictures.”).

2. An Ordinance to Prohibit the Exhibition of Obscene and Immoral Pictures and Regulating the Exhibition of Pictures of the Classes and Kinds Commonly Shown in Mutoscopes, Kinetoscopes, Cinematographs, and Penny Arcades (Chicago, November 4, 1907) § 1.

3. *Id.* § 3. The Supreme Court of Illinois upheld the constitutionality of the ordinance in *Block v. City of Chicago*, 239 Ill. 251 (1909). For the events that led to the adoption of the ordinance and the first years of enforcement, see Kathleen D. McCarthy, *Nickel Vice and Virtue: Movie Censorship in Chicago, 1907-1915*, 5 J. POPULAR FILM 37 (1976).

4. See, e.g., BROWNLOW, *supra* note 1, at 4-8; GRIEVESON, *supra* note 1, at 37-120; McCarthy, *supra* note 3. Some studies emphasize the important role of indirect censorship in the forms of costly licensing requirements and strict prohibitions against movie exhibition. See, e.g., GRIEVESON, *supra*, at 37-120; Daniel Czitrom, *The Politics of Performance: From Theater Licensing to Movie Censorship in Turn-of-the-Century New York*, 44 AM Q. 525 (1992). This regulatory trend started in 1908. Some licensure schemes clearly attempted to prevent or restrict movie exhibition. See, e.g., *United States v. Nuzum*, 5 Alaska 198 (D. Alaska Terr. 1914) (upholding an annual license fee of \$100); *Delaware v. Morris*, 76 A. 479 (Del. 1910) (upholding the position of the State of Delaware that moving picture exhibition constituted exhibition of a circus and as such required a license from the state); *William Fox Amusement Co. v. McClellan*, 114 N.Y.S. 594 (N.Y. Gen. Term 1909) (enjoining the revocation of the licenses of all exhibitors in New York City); *State v. Loden*, 83 A. 564 (Md. 1912) (upholding the conviction of an unlicensed Baltimore exhibitor); *Higgins v. Lacroix*, 137 N.W. 417, 419 (Minn. 1912) (holding that a annual license fee of two hundred dollars for an exhibitor in a village of one thousand inhabitants is not “a prohibition under the guise of license and regulation”). Other licensure schemes focused on safety issues but seemed to excessively burden exhibitors. See, e.g., *Examination and Licensing of Operators of Moving-Picture Machines*, 1910 Md. Acts, ch. 693 (instituting licensing requirements for exhibitors in Baltimore, focusing on safety inspection); *Examination and Licensing of Operators of Moving-Picture Machines* 1910 N.Y. Acts, ch. 654 (instituting licensing requirements for exhibitors in New York City).

5. Descriptions of events related to movie censorship between 1907 and 1909 are correct, yet partial. They neglect the censorship of boxing films that this Article discusses, as well as two additional restrictions that threatened critical revenue sources: Sunday exhibitions and the attendance of children. For restrictions on Sunday exhibitions see, for example, *Warrants Served on Moving Picture Men*, HARTFORD COURANT, Dec. 2, 1907, at 1; *Picture Shows to Test Blue Law*, N.Y. TIMES, Dec. 7, 1907, at 1; *New York Is Over “Blues”*: *Interpretation of New Sunday Law Left to the Police*, WASH. POST, Dec. 22, 1907, at 3. For restrictions on child attendance, see, for example, 1909 N. Y. Acts, ch. 88 § 484 (prohibiting admission of children under age sixteen to amusement establishments, including movie theaters).

Movie censorship in the United States was born in March 1897 with prohibitions against exhibitions of a now-extinct genre: prizefight films that showed real and staged boxing matches. Boxing was illegal in every state and territory at the time—except Nevada—and the first censorship laws were intended to bar the exhibition of fight films from Nevada.

While film historians acknowledge the significance of prizefight films in the development of early American Cinema,⁶ the censorship of prizefight films has never been systematically studied.⁷ However, legal periodicals of the early twenty century occasionally described developments in the status of prizefight films, mostly in case notes authored by law students.⁸ This Article uncovers the forgotten origins of movie censorship in the United States and explains how the fledgling motion picture industry boosted the commercialization of boxing that led states to tighten their anti-boxing laws and ultimately to the enactment of the first movie censorship laws.

Furthermore, the Article shows that content self-regulation in the motion-picture industry began with Edison's 1894 veto of the use of his equipment for prizefight films. The existing literature regards the 1909 formation of the National Board of Censorship as the beginning of content self-regulation in the industry, neglecting thirteen years of self-regulation attempts to suppress prizefight films.

This Article's findings require a reexamination of content regulation in the motion picture industry, the presumed twentieth-century origins of which ignore legislatures and industries already experienced in censorship campaigns and laws. Rather, a true study of movie censorship must begin with an examination of the legal wars against boxing in the nineteenth century. Although the inquiry in this Article is far from exhaustive,⁹ it is

6. See, e.g., GORDON HENDRICKS, *THE KINETOSCOPE: AMERICA'S FIRST COMMERCIAL SUCCESSFUL MOTION PICTURE EXHIBITOR* 70-109 (1966); CHARLES MUSSER, *THE EMERGENCE OF CINEMA: THE AMERICAN SCREEN TO 1907*, 82-85, 94-99, 194-208 (1990); TERRY RAMSAY, *A MILLION AND ONE NIGHTS: A HISTORY OF THE MOTION PICTURE INDUSTRY THROUGH 1925*, 106-37, 176-91, 210-17, 281-89, 408-13, 693-98 (1926) (Ramsay's book contains many factual errors, yet it is probably the most influential and cited book on the history of the motion picture industry.). The most significant study thus far is DAN STREIBLE, *FIGHT PICTURES: A HISTORY OF BOXING AND EARLY CINEMA* (2008). The origins of Streible's book are a 1989 article he published as a graduate student and his Ph.D. dissertation. Dan Streible, *A History of the Boxing Film, 1894-1915: Social Control and Social Reform in the Progressive Era*, 3 *FILM HIST.* 235 (1989); Dan Streible, *History of the Prizefight Film, 1894-1915* (unpublished Ph.D. dissertation, University of Texas Austin, August 1994) (on file with author).

7. Dan Streible's study of prizefight films describes several aspects of their censorship, but does not focus on this topic. STREIBLE, *FIGHT PICTURES*, *supra* note 6. Lee Grieveson examined the censorship of prizefight films between 1910 and 1912. GRIEVESON, *supra* note 1, at 121-150.

8. See, e.g., *Motion Pictures of Prize Fights*, 31 *LAW NOTES* 144 (1927); Ralf O. Willguss, *Pictorial Presentations of Prize Fights*, 6 *N.Y.U. L. REV.* 8 (1928); *Equity—Injunction—Seizure of Fight Films*, 37 *YALE L.J.* 992 (1928); *Searches and Seizures. Seizure of Prize Fight Films Transported in Interstate Commerce*, 29 *COLUM. L. REV.* 677 (1929).

9. A comprehensive study will be available in BARAK Y. ORBACH, *AMERICAN FISTIANA: LEGAL WARS AGAINST BOXING AND BOXING FILMS, 1800-1940* (forthcoming, 2012). See also Elmer M. Million, *The Enforceability of Prize Fight Statutes*, 27 *KY. L.J.* 152, 152 (1938).

the first of its kind and provides valuable insights into the design and enforcement of social regulations that seek to suppress popular activities.

In the nineteenth century, social regulators attempted to suppress boxing through broad prohibitions against the sport, its commercialization, and its public screening. They failed. The sport was enormously popular and boxers enjoyed privileged social status, despite the fact that the public was aware of the sport's illegality. The gap between the law and popular social norms suggests that moviegoers at the turn of the nineteenth century probably did not feel they were watching filmed "crimes." Today, social regulators tend to be more sophisticated. For example, they fight smoking through educational campaigns, gradually expanding bans on smoking in public places, restrictions on cigarette advertising, and proposed amendments to the movie rating system that assign more restrictive ratings to movies that depict smoking.¹⁰

The differences between the nineteenth century and modern regulatory strategies reflect the understanding that broad prohibitions against popular activities are likely to fail, while refined strategies that target social preferences are more likely to succeed. While this understanding may seem intuitive, many contemporary social policies still do not implement it.¹¹ Thus, as a study of regulatory failure, this Article supplements the literature on regulation of social preferences by exploring the characteristics of century-long, unsuccessful social experimentation.¹²

Part I describes the first days of the prizefight-film genre and explains the legal and social status of boxing in the nineteenth century. Part II introduces two celebrated boxers whose 1897 fight for the heavyweight championship of the world led to the birth of movie censorship—James J. Corbett and Robert Fitzsimmons. Part III explains how boxing motivated the development of early moving-picture technologies and presents the first form of content self-regulation of movies. Part IV investigates how the anticipated fight of the century between Corbett and Fitzsimmons shaped laws across the country and led to the birth of movie censorship. The Epilogue concludes and summarizes the insights that this Article offers for the design and study of social regulation.

10. Many anti-smoking advocates propose that movies that show smoking should be rated "R," unless "presentation of tobacco clearly and unambiguously reflects the dangers and consequences of tobacco use or is necessary to represent the smoking of a real historical figure." Smoke Free Movies: The Solution, <http://smokefreemovies.ucsf.edu/solution/index.html> (last visited July 25, 2009).

11. See, e.g., Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSP. 175 (1995).

12. See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000); Kenneth G. Dau-Schmidt, *An Economic Analysis of Criminal Law as Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990); Oren Bar-Gill and Chaim Fershtman, *Law and Preferences*, 20 J. L. ECON. & ORG. 331 (2004); Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

I. PRIZEFIGHTING ARRIVES IN AMERICA AND ON THE SCREEN

A. *Breaking the Law at the Black Maria*

In the late 1880s, Thomas Alva Edison promised the public a machine that would “record and reproduce motion as the phonograph recorded and reproduced sound.”¹³ In 1891, at a Convention of the Women’s Clubs of America, Edison revealed a model of a machine he named the “kinetograph” that could supposedly record and reproduce motion and sound.¹⁴ It took Edison another three years to perfect machines that could film and exhibit very short silent moving pictures.¹⁵ In 1894, Edison sold ten “kinetoscopes,” (peepshow slot-machines), to the Holland Brothers. The Hollands installed the machines in a converted shoe store in New York, and opened their kinetoscope arcade to the public on April 14, 1894. This date marks the birth of commercial film exhibition in the United States.¹⁶

In 1835, almost sixty years before the Holland Brothers opened their movie arcade, New Jersey amended its penal code to outlaw prizefighting. The amended code provided:

[E]very person who shall be engaged in any fight or combat, with fists, commonly denominated prizefighting, whether such fight or combat be for money or any other valuable thing, or merely to test the skill or bodily powers of the pugilists or combatants, and every person who shall be aiding, assisting, or abetting, in any such fight or combat, shall be deemed guilty of a high misdemeanor, and on conviction thereof, shall be punished by imprisonment at hard labor, not exceeding two years, or by fine, not exceeding one thousand dollars, or both.¹⁷

The 1835 amendments to the New Jersey penal code also criminalized transportation of boxers and their entourages,¹⁸ as well as attendance at prizefights.¹⁹

The New Jersey prohibition against prizefighting remained in effect until 1924. Nevertheless, in the summer of 1894, the Kinetoscope

13. *Edison’s Latest Marvel: The Kinetograph*, ENGLISH MECHANIC AND WORLD OF SCIENCE, Jun. 19, 1891, at 358. In 1888, Edison discussed with Eadweard Muybridge the possibility of combining Muybridge’s “simultaneous photography” technology with Edison’s phonograph to build a technology that recorded and reproduced sound and motion. *Edison’s Talking Baby*, THE WORLD, Jun. 3, 1888, at 16.

14. *The Kinetograph*, SUN, May 28, 1891, at 1.

15. For information on the development process, see W.K.L. DICKSON & ANTONIA DICKSON, HISTORY OF THE KINETOGRAPH, KINETOSCOPE, AND KINETOPHONOGRAPH (New York, Albert Bunn 1895).

16. See HENDRICKS, *supra* note 6, at 56-60.

17. N.J. REV. STAT. 257 § 88 (1847).

18. *Id.*

19. *Id.*

Exhibiting Company filmed two fights at Thomas Edison's studio, the Black Maria, in Orange County, New Jersey.²⁰ The first film, *The Leonard-Cushing Fight*, was a staged six-round fight between two second-rate light-weight boxers, Michael Leonard and Jack Cushing.²¹ The second film, *Corbett and Courtney Before the Kinetograph*, featured the world's heavyweight champion James J. Corbett and an inferior opponent, Peter Courtney. Corbett played with Courtney for five rounds and knocked him out in the sixth, giving the Kinetoscope Exhibiting Company enough time to shoot a film.²²

The New Jersey legislature could not have anticipated prizefight films in 1835, when photography technologies were largely experimental.²³ Nonetheless, the filming of the fights at the Black Maria clearly violated the 1835 prizefighting statute because the production teams witnessed, aided and abetted the bouts. Indeed, *The Sun's* report of the filming of *The Leonard-Cushing Fight* highlighted the potential illegality of the events at the Black Maria:

Notwithstanding the fact that Justice Depue of New Jersey is holding [a] Grand Jury to investigate a reported prize fight, something which was certainly meant to appear to be a fight to a finish took place in the grounds of Edison laboratory. . . . Whether it was a contest of the character prohibited by the law or not, the patrons of the Wizard Edison's Kinetoscope will probably be able to judge in a few days. Perhaps the kinetoscope may be subpoenaed before the Grand Jury.²⁴

There is no record of a grand jury investigation of the Leonard-Cushing fight. However, extensive press coverage of the Corbett-Courtney fight prompted Justice David Depue of the New Jersey Supreme Court to order

20. The Kinetoscope Exhibiting Company was a commissionaire of the Edison Manufacturing Company that distributed exhibition equipment (kinetoscopes) and specialized in the production of prizefight films. HENDRICKS, *supra* note 6, at 90-91; RAMSAYE, *supra* note 6, at 104-08, 407. As described *infra* Part III, the organization that produced these films in the summer of 1894 was still nameless. It received the name "The Kinetoscope Exhibiting Company" sometime later.

21. *Jack Cushing's Waterloo*, N.Y. WORLD, June 16, 1895, at 1; *Kinetographing a Fight*, SUN, June 16, 1894, at 7. For a detailed description of the production and exhibition of *The Leonard-Cushing Fight*, see HENDRICKS, *supra* note 6, at 75, 90-100. Terry Ramsaye argues that there were "about ten . . . snappy short rounds, of which the Kinetograph recorded six." RAMSAYE, *supra* note 6, at 109. There is no direct historical support for this argument. However, Ramsaye had access to more sources and individuals than any other film historian, so the possibility of ten rounds cannot be ruled out. For a detailed description of the production, see PAUL SPEHR, *THE MAN WHO MADE MOVIES: W.K.L. DICKSON 337-39* (2008).

22. HENDRICKS, *supra* note 6, at 94-95, 108-09; *Knocked Out By Corbett*, SUN, Sep. 8, 1894, at 1. Terry Ramsaye argues that the Leonard-Cushing fight was "genuine," but the Corbett-Courtney fight was "pre-arranged." RAMSAYE, *supra* note 6, at 109. For a detailed description of the production, see SPEHR, *supra* note 21, at 337-39.

23. On the early days of photography, see BRIAN COE, *THE BIRTH OF PHOTOGRAPHY: THE STORY OF THE FORMATIVE YEARS, 1800-1900* (1976); and BEAUMONT NEWHALL, *THE HISTORY OF PHOTOGRAPHY* (The Museum of Modern Art, 1982).

24. *Kinetographing a Fight*, *supra* note 21.

a grand jury investigation of the second fight at the Black Maria.²⁵ The New York Times reported that “[p]rize fighting of all kinds, even glove contests and stage exhibitions, are tabooed in [Orange County], and the law has been very clearly defined by Judge Depue . . . on previous occasions, and always resulted in the finding of indictments.”²⁶

The grand jury subpoenaed Corbett, Courtney, Edison and other individuals who attended the fight.²⁷ Edison immediately released a statement to the press, saying:

[i]t was simply a boxing match for a show for which these men were paid and nothing more. The people who are making a fuss about it have not been correctly informed as to the facts. I don’t see how they can prove it to be anything more than a boxing match. I should certainly not permit any fight to a finish in my place.²⁸

Edison’s statement reflected his self-righteousness and confidence, but legal minds should have regarded it as a plain confession. New Jersey prohibited fights, as well as tests of “skills or bodily powers of . . . pugilists.”²⁹ No person, however, was tried for the events at the Black Maria.

Not only did the filming of fights at the Black Maria violate New Jersey law, it was also illegal in many states to distribute and exhibit the films. In 1894, at least twenty-seven states proscribed prizefighting.³⁰ Most also criminalized facilitation and promotion of prizefights, and some imposed

25. See, e.g., *Pugilist Corbett May Be Indicted*, N.Y. TIMES, Sep. 9, 1894, at 1; *Corbett’s Fight Before Edison*, L.A. TIMES, Sep. 12, 1894, at 2; *Sporting News and Comment*, WASH. POST, Sep. 13, 1894, at 6; *Inventor Edison and the Grand Jury*, N.Y. TIMES, Sep. 14, 1894, at 9. [EE: reorder after AU query] David A. Depue was one of the most prominent New Jersey judges in the late nineteenth century. He retired from the bench in 1901 as the Chief Justice of the New Jersey Supreme Court. *Chief Justice Depue Resigns*, N.Y. TIMES, Jan. 26, 1901, at 3; *Justice Depue Retires*, N.Y. TIMES, Nov. 16, 1901, at 9.

26. *Pugilist Corbett May Be Indicted*, *supra* note 25.

27. See *May Indict Corbett*, PHIL. INQ., Sep. 13, 1894, at 3; *Inventor Edison and the Grand Jury*, *supra* note 25.

28. *To Inquire into the Corbett-Courtney Fight*, OSWEGO DAILY TIMES, Sep. 12, 1894, at 1. It is unclear whether Edison attended any of the fights. See *Kinetographing a Fight*, *supra* note 21. (“Mr. Edison, it was said, did not see [the Leonard-Cushing fight], as he was up in the mountains at Ogdensburg”); *Corbett in a Fight*, CHICAGO DAILY TRIBUNE, Sep. 8, 1894, at 7 (noting that Edison was not present at Corbett-Courtney fight). By contrast, Gordon Hendricks was convinced that Edison attended at least the Corbett-Courtney fight. See HENDRICKS, *supra* note 6, at 90-110.

29. N.J. REV. STAT. § 88 (1847).

30. ARK. PENAL CODE § 1983 (1891), § 1984 (1893); CAL. PENAL CODE §§ 412-414 (1872); COLO. GEN. LAWS §§ 830-831 (1882); CONN. REV. STAT. §§ 1507-1508 (1888); 546 DEL. LAWS 12 (1893); IDAHO REV. STAT. § 6957 (1887); ILL. REV. STAT. §§ 231-236 (1893); IND. GEN. LAWS § 2062 (1894); Iowa Acts, ch. 97 § 1 (1894); 1869 Ky. Acts, ch. 24; Me. Acts, ch. 123 §§ 4-5 (1884); MASS. GEN. STAT. 150 § 14, 160 §§ 15-16 (1883); MINN. GEN. STAT. §§ 6652-6658 (1894); MO. REV. STAT. §§ 3757-3759 (1889); NEB. GEN. LAWS §§ 6656-6657 (1895); NEV. GEN. LAWS § 2345 (1877); N.J. REV. STAT. 257 §§ 88-90 (1847); N.Y. PENAL CODE § 485-491 (1865); OHIO REV. STAT. §§ 6888-6889 (1884); OR. REV. STAT. § 1869 (1892); Penn. Act No. 22 (1867); R.I. Acts, ch. 228 §§ 13-15 (1872); S.D. GEN. LAWS §§ 6686-6689 (1887); Tenn. Acts, ch. 14 §§ 1-2 (1891); TEX GEN. LAWS, ch. 50 §§ 1-4 (1891); VT. REV. STAT. §§ 4901-4904 (1894); VA. CODE §§ 3693-3694 (1894). In 1894, the District of Alaska was subject to the Oregon law that prohibited prizefighting.

liability for attendance at prizefights.³¹ A plain interpretation of these statutes could be that the distribution and exhibition of fight films constituted facilitation of prizefighting because their proceeds covered the costs of fights. No state, however, took this path.

The *Leonard-Cushing Fight* and *Corbett and Courtney Before the Kinetograph* were among the most successful films in the nineteenth century. At the time, *The Corbett-Courtney Fight* was “the most conspicuous motion picture [ever produced] and it exceeded in notoriety all others for some time.”³² It was the top-grossing film in the early days of the motion picture industry and generated more than twenty thousand dollars in royalties to Corbett.³³ The influential film historian Terry Ramsaye described this “pre-arranged prize fight” as “the first glimmering of creative motion picture effort [and] the first step toward having things happen for the camera rather than merely photographing events ordained by other forces.”³⁴ As such, he argued, *The Corbett-Courtney Fight* was “the ancestor of dramatic construction for the motion picture[s].”³⁵

The production, distribution, and exhibition of the films at the Black Maria illustrated the ineffectiveness of the late nineteenth century anti-prizefight laws. Justice Depue and the press indirectly raised two important questions related to the nature of film censorship: (1) Is cinematic presentation of unlawful activity illegal in itself?; and, (2) Is the cinematic presentation of a staged activity that looks like an unlawful activity illegal in itself? These questions were not answered in connection with the first fight films and would hang over the motion picture industry for more than a century.

Some modern statutes still raise the foregoing questions in very specific contexts. For example, the Child Pornography Prevention Act of 1996 prohibited “any visual depiction [that] conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”³⁶ In *Ashcroft v. Free Speech Coalition*,³⁷ the Supreme Court struck down the statute’s ban on “virtual child pornography” that depicts minors by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. In response, Congress enacted the PROTECT Act of 2003 to prohibit computer-generated child pornography, “when such visual depiction [is] virtually indistinguishable from that of a minor engaging in sexually

31. See *infra* notes 99-101 [EE: verify internal cross-reference] and accompanying text.

32. See HENDRICKS, *supra* note 6, at 100.

33. Corbett received \$150 per week (later reduced to \$50) for each set of films on exhibition. By the end of August 1896, he had received \$13,307 and was eventually paid over twenty thousand dollars. MUSSER, *supra* note 6, at 84.

34. RAMSAYE, *supra* note 6, at 110.

35. *Id.*

36. Pub. L. No. 104-208, § 2(4), 110 Stat. 3009-26 (1996).

37. 535 U.S. 234 (2002).

explicit conduct.”³⁸ Notwithstanding, five years later in *United States v. Williams*,³⁹ the Supreme Court reviewed the PROTECT Act of 2003 and held that “an offer to provide or request to receive virtual child pornography is not prohibited by the statute.”⁴⁰ This exchange between Congress and the Supreme Court illustrates the still unsettled nature of questions that the first prizefight films raised.

The analogy between prizefight films and child pornography can serve as more than a stress on unanswered questions about the relationship between censorship and filmed crimes. This juxtaposition suggests that the social acceptance of censorship is likely to vary with common attitudes toward the crime filmed. Prizefight films and child pornography represent opposite ends of the spectrum of acceptance. Prizefighting was generally illegal during the nineteenth century,⁴¹ but the sport was a very popular form of entertainment and the public was hungry for news about bouts and fighters, as well as for views from the ring. Censorship of prizefight films, therefore, received little support and was doomed to fail. By contrast, sexual activities that involve children are widely condemned and censorship of child pornography enjoys wide public support. Furthermore, because censorship is a cost for content producers, it disproportionately burdens stigmatized content whose markets are relatively thin, such as the markets for child pornography. In other words, bans on production, distribution, or exhibition of content may not undermine the incentives to operate in markets for popular content because of the financial prospects in these markets. By contrast, in markets for stigmatized content, there may not be enough demand to compensate for the expected sanctions. Between prizefighting and child pornography there are many other categories of crimes and illegal activities that the public’s tolerance toward cinematic presentation may change over time. Examples of such categories include murder, rape, sodomy, and blasphemy.

To understand why movie censorship began with a genre whose illegal roots are forgotten today—and may even appear counterintuitive—it is necessary to take a few steps back in time to the formation of prizefighting as a sport in the United States.

B. The Emergence of Prizefighting in America

Prizefighting, or “boxing,” came to the United States along with British and Irish immigrants in the eighteenth century. When the French historian

38. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 502(a), 117 Stat. 650, *amended by* 18 U.S.C. 2256(8)(B).

39. 128 S. Ct. 1830 (2008).

40. *Id.* at 1844.

41. See *infra* Sections I.C., IV.C.

and lawyer, Médéric Louis Élie Moreau de Saint-Méry, explored the United States between 1793 and 1798, prizefighting was already an established sport that had its own “rules and regulations.”⁴²

The rules, as described by Moreau de Saint-Méry, were quite loose and barely resembled those of modern boxing:

The two athletes settle on a site for the fight. They strip to their shirts, and roll up their sleeves to the elbows. Then at a given signal they run at each other and swing on chest, head, face and bellies, blows whose noise can only be realized by those who have been present at such spectacles.

At each new clash, they draw back, and start again from the mark. If one of the two has fallen in one of these attacks, his adversary cannot touch him as long as he is on the ground; but if he makes the slightest movement to get up, the other has the right to hit him again and force him to remain on the ground. Nobody interferes to separate the combatants: a ring is made around them, and the spectators urge on their favorites.

At the end of the fight the boxers are bruised, disfigured, and covered with blood, which they spit out, vomit out, or drip from the nose. Teeth are broken, eyes are swollen and shut, and sometimes sight is completely obliterated.⁴³

Boxing in the United States remained unorganized entertainment for sailors in the backrooms of taverns during the eighteenth and much of the nineteenth centuries.⁴⁴ Prominent American fighters developed their careers in the more established fighting circuits of England.⁴⁵

The first memorable American ring fight was held in 1816 in New York between Jacob Hyer and Tom Beasley.⁴⁶ It was an athletic fistfight and not a “prize fight” because no prize was at stake. Nevertheless, the pugilists fought hard and hurt each other badly. Hyer broke his arm and continued fighting. Beasley incurred several serious injuries himself. The men ignored their injuries and continued fighting until mutual friends intervened and declared the bout a draw.

In the years that followed the Hyer-Beasley fight, the popularity of prizefighting gradually rose among lower-class men. Popular newspapers,

42. MÉDÉRIC LOUIS ÉLIE MOREAU DE SAINT-MÉRY, MOREAU DE ST. MERY'S AMERICAN JOURNEY, 1793-1798, 328 (Kenneth Roberts & Anna M. Roberts eds. and trans., 1947).

43. *Id.* at 328-29.

44. NAT FLEISCHER & SAM ANDRE, A PICTORIAL HISTORY OF BOXING, 38-41 (1959).

45. *Id.* at 26-30; ELLIOTT J. GORN, THE MANLY ART: BARE-KNUCKLE PRIZE FIGHTING IN AMERICA, 19-21, 34-36 (1986). *See also* Paul Magriel, *Tom Molineaux*, 12 *PHYLON* 339 (1951) (studying the life of Tom Molineaux, a black, American fighter who went to England in 1809 with the express purpose of fighting for the championship).

46. FLEISCHER AND ANDRE, *supra* note 44, at 38-41; GORN, *supra* note 45, at 38.

like the New York Herald,⁴⁷ started to cover bouts.⁴⁸ William Newnham Blane—a self-described “English Gentleman,” who traveled in the United States and Canada twenty some years after Moreau de Saint-Méry—observed that prizefights were also well attended by “noblemen and gentlemen who were on the most friendly terms with all the gamblers, blacklegs, and rascals that frequent these disgusting exhibitions.”⁴⁹ Newspapers and magazines of the time covered matches to satisfy the public demand, but often also criticized the sport for its brutality and the surrounding gambling.⁵⁰

C. Early Legal Wars Against Prizefighting

Prizefighting’s rising popularity created opposition to the sport. States and municipalities sought to eliminate prizefighting by prosecuting fighters and those who aided and abetted fights.⁵¹ The common law did not recognize prizefighting as a distinctive offense,⁵² but authorities in the nineteenth century often used general common-law offenses, such as breach of the peace, affray, rout, riot, assault, and battery to convict prizefighters and accessories.⁵³ These strategies were not particularly successful.

47. Other newspapers included *The National Police Gazette*, *The New York Clipper*, *Public Ledger*, and *Spirit of the Time*.

48. GORN, *supra* note 45, at 39-47; John Rickards Betts, *Sporting Journalism in Nineteenth-Century America*, 5 AM. Q. 39 (1953).

49. WILLIAM NEWNHAM BLANE, AN EXCURSION THROUGH THE UNITED STATES AND CANADA DURING THE YEARS 1822-23, 508 (London, Baldwin, Cradock, and Joy 1824).

50. See, e.g., *Complaints*, N.Y. MIRROR, Feb. 19, 1825, at 235 (describing the pressures that the magazine editors faced in choosing content: “One will tell you ‘your paper is insupportably dull, and [I] can’t read it unless it contains an account of all the prize fights, and other occurrences in the sporting world;’ another declares that if you pollute our columns with such trash, he will cease to take your journal.”); *On Pugilism*, 5 LITERARY MAG. & AM. REG. 468, 469 (1806) (“Pugilism on a public stage is . . . a prostitution of a manly and useful art. . . . [W]hen considered in the light of a public spectacle, or of furnishing an opportunity for gambling speculation, it is then viewed in all of its naked deformity.”).

51. See *infra* Section I.D.

52. See, e.g., *Sullivan v. Mississippi*, 7 So. 275 (Miss. 1890); *Coliseum Athletic Ass’n v. Dillon*, 223 S.S. 995 (Mo. App. 1920); *Fitzsimmons v. New York State Athletic Comm’n*, 146 N.Y.S. 117 (1914). Some courts perceived prizefighting as assault and battery. See, e.g., *Adams v. Waggoner*, 33 Ind. 531 (1870) (prizefighting with knives); *State v. Burnham*, 56 Vt. 445 (1884) (holding that prizefighting was not a statutory crime, but could constitute a breach of the peace).

53. See generally 7 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 222 (Boston, Cummings, Hilliard & Co. 1824); FRANCIS WHARTON & WILLIAM DRAPER LEWIS, A TREATISE ON CRIMINAL LAW §§ 142, 215, 227, 371-72, 636 (Philadelphia, Kay & Brother, 10th ed. 1896). See also *Pennsylvania v. Taylor*, 5 Binn. 277 (Pa. 1812) (defining breach to the common peace as “[a]cts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable”); *Champer v. State*, 14 Ohio St. 437 (1863); *Adams*, 33 Ind. 350 (holding that both fistfight participants are guilty of assault despite their mutual consent and lack of anger); *Castle v. Houston* 19 Kan. 417, 419 (1877) (noting in dictum that “[when] two men who agree to engage together in fisticuffs[,] the law for the protection of the peace of society, and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the other personal damages.”); *State v. Burnham*, 56 Vt. 445 (1884) (holding that consent to engage in a boxing match is not a defense to an indictment for a breach of the peace).

1. *The First High-Profile Trials*

In the modern arena, fights often end with both boxers on their feet and the judges announcing a winner based on point scoring. Knockouts are quite rare. In the nineteenth century, however, boxers entered the ring bare-knuckled. Fights ended when one boxer knocked out his opponent, a boxer's backer threw a towel into the ring, or when the parties agreed to stop the fight. Resistant boxers fought long hours, with the record set by Condel "Con" Orem and Hugh O'Neil who fought for 185 rounds in January 1865.⁵⁴ Many other fights lasted dozens of rounds. The brutality of the fights resulted in frequent serious injuries and casualties.

The most famous early boxing casualty was Thomas McCoy who died during a fight with Christopher Lilly on September 13, 1842, in Hastings, New York.⁵⁵ McCoy "fought [120 rounds] for two hours and forty-three minutes, receiving eighty-one heavy falls."⁵⁶ He died shortly after Lilly knocked him out. Subsequently, eighteen individuals – backers, seconds, ringkeepers, bottleholders, and the attending physician – were indicted for manslaughter. Eleven of these individuals were also indicted for "riot and affray."⁵⁷ The prosecution relied on common law doctrines because New York did not have an anti-prizefighting statute until 1859.⁵⁸

The trials were held in November 1842, and the jury returned guilty verdicts after three hours of deliberation. The defendants' sentences varied from fines to imprisonment, with a maximum punishment of two years hard labor for James "Yankee" Sullivan, one of the bottleholders and a boxer himself.⁵⁹ Justice Charles R. Ruggles delivered the court's instructions to the jury. His instructions can teach us something about sentiments against prizefighting:

A prizefight brings together a vast concourse of people; and I believe it is not speaking improperly of such assemblages, to say that the gamblers, and the bullies, and the swearers, and the blacklegs, and the pickpockets and the thieves, and the burglars are there. It brings together a large assemblage of the idle, disorderly, vicious, dissolute people-people who live by violence-people who live by crime-their

54. See WARREN J. BRIER, *THE FRIGHTFUL PUNISHMENT: CON OREM AND MONTANA'S GREAT GLOVE FIGHTS OF THE 1860S* (1969).

55. Some commentators crowned this fight "the first prize fight in America involving a fatality." See, e.g., GORN, *supra* note 45, at 76; ALEXANDER JOHNSTON, *TEN-AND OUT!* 26 (1927). Newspaper reports, however, describe many earlier casualties. See, e.g., *Dueling and Pugilistic Gambling*, FRIEND OF PEACE, Jan. 4, 1827, at 122.

56. *The Ring: Fatal Prize Fight Between Lilly and McCoy for \$200 a Side*, SPIRIT OF THE TIMES, Sep. 17, 1842, at 339 (providing a detailed description of the 120-round fight). *The New York Times* described the fight more than a decade later. *Fatal Prize Fights*, N.Y. TIMES, Sep. 9, 1856, at 1. See also PATRICK TIMONY, *THE AMERICAN FISTIANA* 17-21 (New York, H. Johnson 1849); Thomas M. McDade, *Death in the Afternoon*, 46 WESTCHESTER HISTORIAN 2 (1970).

57. *The Prize Fight Trials*, SUN, Sep. 24, 1842, at 2.

58. An Act to Prevent and Punish Prize Fighting, N.Y. Laws, ch. 37 (Mar. 7, 1859).

59. *Sentence of the Prize Fighters*, N.Y. HERALD, Dec. 2, 1842, at 2.

tastes run that way, and though some respectable people probably were there . . . you can readily perceive the influence which such assemblages are likely to exercise on the public peace, and morals, and taste; and you can therefore estimate correctly the propriety and necessity of that law which forbids their existence. Upon that spot, then, no one can hesitate to say – even had no fatal result ensued – there were collected a body ferocious and demoralized. The assemblage was in itself indictable as an unlawful one.⁶⁰

The New York Governor, William C. Bouck, apparently did not share this strong aversion to boxing. On September 1, 1843, he pardoned Yankee Sullivan “on condition that [Yankee Sullivan would] keep the peace . . . and [would] not engage in any prize fight . . . during his natural life.”⁶¹ To avoid any confusion about the nature of the condition, Governor Bouck specifically ordered that “in the event [that Sullivan fails to] comply with the said conditions . . . then this pardon shall cease and . . . Sullivan shall be arrested and imprisoned according to his sentence.”⁶² Yankee Sullivan, however, never stopped fighting in the ring.⁶³

2. *The Great Prizefight Between Hyer and Sullivan*

On May 4, 1848, the self-crowned heavyweight champion of America, Tom Hyer (the son of Jacob Hyer),⁶⁴ Yankee Sullivan, and their entourages met at the Sherwood’s Saloon on Broadway in New York.⁶⁵ The conversation quickly converged to the topic of the “muscular scientific power” of Hyer and Sullivan.⁶⁶ Sullivan “asserted his ability to whip any man in New York” and the two pugilists agreed “to test the matter in a friendly way.”⁶⁷ Despite this gentlemanly agreement, they exchanged blows until “Hyer’s strong arm brought the great pugilist [Sullivan] to the floor.”⁶⁸

On June 1, 1848, Yankee Sullivan published an advertisement in *The*

60. *Trials of Sullivan, McCleester, and Kensett*, N.Y. HERALD, Nov. 27, 1842, at 2.

61. *The Pardon of Yankee Sullivan*, WKLY. HERALD, Feb. 17, 1849, at 53.

62. *Id.*

63. See LIFE AND BATTLES OF YANKEE SULLIVAN (Philadelphia, n.p. 1854).

64. On September 9, 1841, twenty-five years after the historic fight between Jacob Hyer and Tom Beasley, Hyer’s son, Thomas, fought for 101 rounds against George McChester (“Country McCloskey”) and won. Upon victory, Thomas “Tom” Hyer declared himself the first heavyweight champion of America. He held the title for several years without fighting on the title. See RICHARD K. FOX, PRIZE RING HEROES 6-18 (1889); TIMONY, *supra* note 56, at 8-10. Richard Fox, one of the first boxing writers in the United States, noted that “[t]he Hyer and McCloskey fight was not fought by any rules. . . . [B]ut, nevertheless, the battle was fought without either [boxer] trying to win by a foul advantage.” *Id.*, at 16.

65. *Pugilism in a Broadway Saloon – Yankee Sullivan and Hyer*, N.Y. HERALD, May 5, 1848, at 2.

66. *Id.*

67. *Id.*

68. *Id.* An account of this encounter is also available in TIMONY, *supra* note 56, at 2.

New York Herald, arguing that he “was assailed in a most cowardly manner by . . . Hyer.”⁶⁹ Sullivan further blamed Hyer and his friends for false reports of the incident in “a number of newspapers” and challenged Hyer to fight against him.⁷⁰ Hyer replied immediately, stating that Sullivan assaulted him and promised that “Mr. Sullivan will find me always much readier to meet him anywhere than in the newspapers. Anywhere . . . I am his master.”⁷¹

On August 7, 1848, Hyer and Sullivan signed articles of agreement that set the purse at five thousand dollars with an option to increase or decrease it by mutual consent.⁷² The agreement also included a “provision against interference,” which provided that “[i]n case of magisterial interference or other interruption . . . the referee . . . shall name the time and place for the next meeting of the parties . . . or terminate the fight.”⁷³

Ultimately, the parties raised the side bet to ten thousand dollars⁷⁴ and agreed to fight in Maryland. In spite of the governor’s objections and threats, the two escaped state troops⁷⁵ to meet in Still Pond Creek, Maryland, on February 7, 1849. Hyer knocked out Sullivan in the sixteenth round and kept his title as the heavyweight champion of America.⁷⁶

There were no doubts about the illegality of the fight and the Maryland authorities’ stance on the fight. A report from the day before the fight describes the authorities’ efforts to prevent it from happening:

State authorities are making great efforts to prevent the great prize fight from coming off . . . and the probability is that they will be successful. Judge Brice yesterday issued bench warrants for the arrest of both Sullivan and Hyer, but up to this time the police have not been able to lay hands on either of them. . . . There is also some talk of indicting the owners of the steamboats [that brought the fighters, their crews and spectators] as aiders and abettors to the fight.⁷⁷

According to another report, Maryland Governor Philip Francis Thomas sent one hundred state troops to intercept Hyer and Sullivan and to prevent

69. Reprinted in TIMONY, *supra* note 56, at 3.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Pugilism: Tom Hyer’s Benefit*, N.Y. HERALD, January 13, 1849, at 13.

75. For descriptions of the events, see TIMONY, *supra* note 56, at 23; Paul Margiel, *A Famous Maryland Prize Fight*, 46 M.D. HIST. MAG. 290 (1951); and *The Great Prize Fight Between Tom Hyer and Yankee Sullivan*, SPIRIT OF THE TIMES, Feb. 17, 1849, at 618.

76. See FOX, PRIZE RING HEROES, *supra* note 64, at 18-25; TIMONY, *supra* note 56, at 25-28. Tom Hyer was superior to Yankee Sullivan in size and weight: Hyer was 6’2.5” and weighed 185 pounds, while Sullivan was 5’10.5” and weighed 155 pounds. FOX, *supra*, at 19; TIMONY, *supra*, at 25.

77. *The Prize Fighters: Bench Warrants Issued*, N.Y. HERALD, Feb. 8, 1849, at 2 (publishing the report a day after the fight).

the fight.⁷⁸ The authorities stopped the steamboats that the parties had hired for transport from Baltimore to the fight location and arrested their captains.⁷⁹

Immediately after the fight, Hyer and Sullivan fled Maryland. Hyer stopped in Philadelphia to celebrate his victory, where he was arrested and transferred to Maryland.⁸⁰ Sullivan returned to New York City and hid.⁸¹ *The Baltimore Clipper* followed these events, emphasized the illegality of the prizefighting, and demanded that justice be served: “For the deliberate violation of the laws of Maryland, Hyer and Sullivan and those aiding them should be punished in the most exemplary manner, for if the supremacy of the laws be not maintained these brutal exhibitions may be of frequent occurrences.”⁸²

On March 26, 1846, Hyer was convicted and the Maryland court ordered him to pay one thousand dollars, which he paid immediately, although many local friends allegedly volunteered to pay his fine.⁸³ Sullivan was never tried for his participation in the fight or arrested for violating the conditions of his 1843 pardon.⁸⁴ The authorities’ efforts to stop the fight only increased the public interest. *The New York Herald* sent to Still Pond Creek a crew that, for the first time in sport history, used telegraph to report on an ongoing sport event.⁸⁵

The Herald covered prizefighting long before and long after the Hyer-Sullivan fight. It broke the news about the 1848 bar fight between Hyer and Sullivan, and published Sullivan’s challenge and Hyer’s reply. *The Herald’s* founder and editor, James Gordon Bennett, saw a financial opportunity in the public interest in the fight and seized on it.⁸⁶ The newspaper dedicated the entire front page of the February 9th issue to a detailed, graphic description of the fight. *The Herald*, however, attempted to further dramatize the events by criticizing prizefighting. For example, on the morning of the Hyer-Sullivan fight, *The Herald* published a long article that concluded:⁸⁷

Unless the disgraceful and blackguard exhibition is prevented by some legal process, it will take place to-day. . . . From all we can

78. *The Preliminaries of the Great Fight*, N.Y. HERALD, Feb. 7, 1849, at 3.

79. *Id.*

80. *Arrest of Tom Hyer in Philadelphia*, WKLY. HERALD, Feb. 9, 1849, at 44; *Delivery of Hyer to the Authorities of Maryland*, N.Y. HERALD, Feb. 15, 1849, at 4.

81. *Arrest of Tom Hyer in Philadelphia*, *supra* note 80.

82. Printed in *The Prize Fighters*, N.Y. HERALD, Feb. 13, 1849, at 4.

83. *Trial of Thomas Hyer*, N.Y. HERALD, Mar. 28, 1849, at 1. According to *The American Law Journal*, Hyer was convicted for not complying with the Governor’s warrant. *Thomas Hyer’s Case*, 8 AM. L.J. 430 (1849).

84. Some argue that the pardon only restrained Sullivan from participating in prizefights within New York. See, e.g., *The Case of James Sullivan*, 8 AM. L.J. 430 (1849).

85. See Mike Sowell, *The Birth of National Sports Coverage*, 3 J. SPORTS MEDIA 51 (2008).

86. See *Id.*

87. *The Great Prize Fight: Interesting Particulars*, N.Y. HERALD, Feb. 7, 1849, at 2.

learn on the subject . . . there is a probability of its resulting in . . . a scene of great bloodshed and murder. . . . If this fight do[es] take place, it is to be hoped that it will be the last exhibition of the kind that our country will be disgraced by. Such scenes are demoralizing and brutal in their consequences, and ought to be put down by law. If every State Legislature would follow the example of . . . New York, it would be the last to a certainty; for the act recently passed by the Assembly, and now before the Senate, makes it a crime to train for a prize fight, to engage in one[,] or to leave the State within intent to participate in one.⁸⁸

The Herald's criticism of boxing and calls for anti-prizefighting legislation were nothing more than tongue-in-cheek. The newspaper was a leading source of reliable, up-to-date information about boxers and boxing. The newspaper was also an active participant in the first commercialized match in the United States—the “Great Prize Fight” between Hyer and Sullivan—and in many other fights thereafter.

Like the Lilly-McCoy fight, the Hyer-Sullivan fight illustrates the discrepancy between social policies and cultural norms. If anything, the illegality of prizefighting contributed to the interest in fights because of the added drama to which law enforcement forces contributed. To a large extent, the rise of popular journalism in the nineteenth century increased the discrepancy between social policies and cultural norms. Illegal Prizefights under risk of arrests and prosecution were news stories for which the public was willing to pay and accordingly newspapers produced generously. The general lesson from this observation is that, under some circumstances, attempts to eliminate markets through law, say by imposing bans on prizefighting, could actually have the reverse effect because activities in the market may become more dramatic and gain news value. Although this effect does not always occur, it should be acknowledged.

3. *Anti-Prizefight Legislation*

Common-law doctrines, as we saw, had limited effectiveness in the war against prizefighting. In a society where duels were still commonplace,⁸⁹ social norms did not condemn consensual fist fights as disturbances of the public order. States therefore began to enact specific prizefighting laws. Some statutes used broad language without the term “prizefight.” For

88. The article refers to a bill entitled: “An act for the prevention and punishment of prize or concerted fighting” that the Assembly of the State of New York endorsed on February 1, 1849. See JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK AT THEIR SEVENTY-SECOND SESSION 263-64, 273-74, 298-305, 391-95 (1849). This legislative process, however, was completed only in March 1859 with the enactment of an act to prevent and punish prize fighting, N.Y. Laws, ch. 37 (Mar. 7, 1859).

89. See generally Warren F. Schwartz, Keith Baxter, & David Ryan, *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321 (1984).

example, the 1834 Ohio statute provided that “any person or persons [who] challenges another to fight at fisticuffs . . . shall on conviction . . . pay for every offence a sum not exceeding ten dollars.”⁹⁰ Similarly, in Illinois, the legislature redefined the common-law offense of “affray” and changed it from unpremeditated breach of the peace to a fight by agreement between two persons or more in a public place.⁹¹ In Florida, the legislature simply outlawed “fighting.”⁹² Other statutes, such as the 1835 New Jersey statute, specifically targeted “prize fighting.”⁹³

The number of states that adopted anti-prizefight laws continuously grew throughout the nineteenth century. For Senator Henry Wilson of Massachusetts,⁹⁴ however, the pace was not fast enough and the variations among state laws were problematic. He therefore introduced a federal anti-prizefighting bill in February 1870.⁹⁵ The bill proposed to impose heavy penalties on fighters and certain third parties in events of interstate travel for fights. The bill was introduced in the house a month later.⁹⁶ However, the Senate voted to postpone the bill indefinitely in April 1870.⁹⁷

Senator Wilson’s idea to impose liability on third parties was not innovative. This concept existed under common law and quite a few statutes. The trials that followed the McCoy-Lilly fight essentially focused on third-party liability.⁹⁸ All state legislatures adopted this approach and extended the liability to third parties that aided, assisted, and abetted in fights and often even in preparation for fights. Three formats of third-party definitions emerged: (1) a legalistic description that captured any person who aided, assisted, or abetted a fight;⁹⁹ (2) an industry-specific description that captured players from the boxing scene, such as backers, promoters, referees, trainers, aids, and reporters;¹⁰⁰ and (3)

90. Ohio Laws, ch. 636 § 3 (1834). Thirty-four years later, Ohio enacted “An Act to Punish and Suppress Prize Fighting” that imposed a penalty of up to ten years of imprisonment with hard labor for any person convicted of engaging in “any premeditated fight . . . commonly called a prize fight.” An Act to Punish and Suppress Prize Fighting § 1 (March 10, 1868).

91. ILL. CRIM. CODE § 114 (“If two or more persons shall, by agreement, fight in a public place to the terror of the citizens in this state, the person so offending, shall be deemed guilty of affray.”). See also *Dougherty v. People*, 4 Scam. 179 (Ill. 1843) (distinguishing the statutory offense of affray from the common-law offense).

92. See *infra* I.C.1.

93. A Further Supplement to the Act entitled ‘An Act for the Punishment of Crimes,’ NJ (Feb. 26, 1835).

94. Henry Wilson is known today mostly for his anti-slavery activities and for serving as Vice President under President Ulysses Grant.

95. A Bill to Prevent Prize Fighting, S. 590, 41st Cong., 2d. Sess. (1870).

96. H.R. 1496, 41st Cong. (1870).

97. 5 Journal of the Senate of the United States of America, 1869-1871, at 505 (Washington, Gales & Seaton 1871).

98. See *infra* Section I.C.1.

99. See, e.g., CONN. REV. STAT. §§ 1507-1508 (1888); 546 DEL. LAWS 12 (1893); N.J. REV. STAT. 257 §§ 88-90 (1847).

100. See, e.g., ILL. REV. STAT. §§ 231-236 (1893); IND. GEN. LAWS § 2062 (1894); MASS. GEN.

combinations of the legalistic and industry-specific formats.¹⁰¹ Quite a few states also extended the third-party liability to spectators.¹⁰²

The availability of third-party liability provisions, especially in the legalistic format and spectator liability, presumably could have allowed states to prosecute distributors and exhibitors of prizefight films and save legislative efforts required to pass laws that censor the genre. Nevertheless, no state pursued this option.

An interesting contemporary question is what was the “evil” that motivated the enactment of anti-prizefight laws? An examination of state laws shows that a mixture of perceived evils stood behind the legislation and that the factors motivating such laws varied across states. Some laws defined the “prize” as a necessary element of the crime,¹⁰³ thereby focusing on the gambling involved. Some statutes codified the prohibitions against prizefighting together with offenses against public peace, such as dueling, affrays, riots, and breach of the peace.¹⁰⁴ These laws highlighted the disturbance that fights caused the public. Other statutes focused on the pugilists themselves and codified the prizefight bans together with other ‘offences against the person,’ such as murder, manslaughter, assault, and poisoning.¹⁰⁵ Yet, some laws codified the bans together with crimes against morality and decency, alongside with adultery, polygamy, sodomy, fornication, and obscenity.¹⁰⁶

Thus, the location of prizefight bans in penal codes, as well as public rhetoric, as reflected in newspapers of the time, suggest that four values induced prizefight legislation: 1) anti-gambling sentiments; 2) concerns about fighters’ well-being; 3) the view that fights could lead to disturbing events for neighboring communities; and 4) the perception that boxing is simply an immoral and degrading activity. In the context of censorship, generally only the latter value was relevant because the exhibition was distanced from the fight itself.¹⁰⁷ Prizefight films showed past events that

STAT. 150 § 14, 160 §§ 15-16 (1883); N.Y. PENAL CODE § 485-491 (1865); OHIO REV. STAT. §§ 6888-6889 (1884).

101. See, e.g., CAL. PENAL CODE §§ 412-414 (1872); COLO. GEN LAWS §§ 830-831 (1882).

102. See, e.g., CAL. PENAL CODE §§ 412-414 (1872); COLO. GEN LAWS §§ 830-831 (1882); CONN. REV. STAT. §§ 1507-1508 (1888); ILL. REV. STAT. §§ 231-236 (1893); IND. GEN. LAWS § 2062 (1894); 1869 Ky. Acts, ch. 24; OHIO REV. STAT. §§ 6888-6889 (1884). See also *Spectators at Prize Fight*, 3 OH. L.J. 98 (1883).

103. See, e.g., 546 DEL. LAWS 12 (1893); 1869 Ky. Acts, ch. 24 (“If any person shall engage in a prize-fight . . . for a bet, wager, or stakes, by whatever name it may be called, he shall be fined. . . . If any person shall bet . . . on any . . . fight . . . he shall be fined.”); N.J. REV. STAT. 257 §§ 88-90 (1847).

104. See, e.g., CAL. STAT. § 216 (1851); CONN. GEN. LAWS, ch. VI (1866); OHIO LAWS, ch. 636 § 3 (1834) (describing fisticuffs as a breach of the peace); ME. REV. STAT., ch. 123 §§ 4-5 (1884); OHIO REV. STAT. §§ 6888-6889 (1884) (codifying prizefight bans together with other offenses against public peace).

105. See, e.g., MASS. REV. STAT., ch. 160 §§ 15-17 (1873).

106. See, e.g., OR. LAWS (special session) §§ 1-2 (1885).

107. A primary exception to this observation is the 1910 fight between Jack Johnson and James Jeffries that led to interracial riots.

no longer had any gambling value because their outcomes were known. To the extent that they substituted real boxing exhibitions, potentially they reduced risks to pugilists. Similarly, because the films' outcomes were known they probably generated less excitement than actual fights. Thus, the value that prizefight films could have protected was the perception that boxing was an immoral and degrading activity.¹⁰⁸

Evidence shows that, when the Kinetoscope Exhibiting Company filmed *The Leonard-Cushing Fight* and *Corbett and Courtney Before the Kinetograph* at the Black Maria in 1894, all involved parties were aware of the illegality of their actions. The boxers' livelihood often required them to ignore the law and it is likely that no person at the Black Maria perceived his actions as "wrongs."

II. JAMES J. CORBETT AND ROBERT FITZSIMMONS

James J. Corbett, a.k.a. "Gentleman Jim," was the heavyweight champion who participated in one of the two fight films shot at the Black Maria in 1894. His archrival was Robert Fitzsimmons, who was mostly known as "Fitz," "Ruby Robert," or the "Freckled Wonder." The two met for a historic fight in 1897 that led to the birth of movie censorship. Like their peers, Corbett and Fitzsimmons had many encounters with the legal system. This Part introduces these iconic boxers through the specific legal incidents that contributed to the campaigns against the Corbett-Fitzsimmons fight and its subsequent exhibition.

A. *Jim Corbett Ignores Prizefight Laws*

On September 7, 1892, the Olympic Club of New Orleans hosted the world heavyweight championship between Jim Corbett and John L. Sullivan, the "Great John L," in front of ten thousand fans. Both boxers were celebrities and the fight was widely covered by the press.¹⁰⁹ It was a twenty-one round fight that ended with a knockout to Sullivan.¹¹⁰

The historic fight between "Gentleman Jim" and "John L" marked the end of the bare-knuckle era in the United States. It was the first heavyweight championship to be held under the Marquess of Queensberry Rules that required fighters to wear gloves.

108. A typical justification for censorship is that the depiction of illegal or otherwise 'undesirable' activity, such as smoking and blasphemy, may popularize the activity, especially among the youth. Note, however, that this justification applies to censorship and not to the underlying activity.

109. See, e.g., *Corbett Wins!*, CHI. DAILY TRIB., Sep. 8, 1892, at 1; *The Battle by Rounds*, L.A. TIMES, Sep. 8, 1892, at 1; *Corbett and Sullivan: Both Are Well and Fit and Ready for the Big Contest*, N.Y. TIMES, Sep. 7, 1892, at 3; *Vanquished at Last*, WASH. POST, Sep. 8, 1892, at 1; *Sullivan Knocked Out*, WASH. POST, Sep. 8, 1892, at 2.

110. For more on the Sullivan-Corbett fight and its importance to the evolution of boxing in the United States, see GORN, *supra* note 45, at 237-47.



James J. Corbett, circa 1890.

A year later, when Corbett and the English middleweight champion Charles Mitchell¹¹¹ signed a contract with the Duvall Athletic Club in Jacksonville, Florida, Governor Henry Mitchell was determined to prevent the fight from happening.¹¹² Governor Mitchell relied on the 1868 amendment to the Florida penal code that outlawed “dueling” and “fighting.”¹¹³ The 1868 act prohibited “dueling” and criminalized “fighting by previous appointment.”¹¹⁴, but did not define the term “fight.” The fact that fighting was distinguished from dueling and that the statute imposed liability also on aiders and abettors, including promoters,

111. In 1881, Mitchell won England’s welterweight and lightweight championships. He then gained some weight and, in 1882, won England’s middleweight championship, along with several fights against prominent heavyweight fighters. Mitchell became famous among American prizefight fans for his success in fights against Sullivan. On March 10, 1888, they fought a 39-round rematch until both agreed to call the fight a draw. On May 14, 1893, Mitchell dropped Sullivan in the first round and they continued to fight until the New York police halted the contest in the third round. *Charley Mitchell Is Dead: Former English Middleweight Boxing Champion Passes Away*, N.Y. TIMES, Apr. 14, 1918, at 14. For Mitchell’s arrival in the United States, see *Mitchell the Pugilist: Arrested and Released; Corbett Deposits \$10,000 to Fight Him*, L.A. TIMES, Feb. 17, 1893, at 2.

112. See *Ordered to Prevent Prize Fight*, CHI. DAILY TRIB., Nov. 17, 1893, at 7. See also GEORGE B. CHURCH, *THE LIFE OF HENRY LAURENS MITCHELL, FLORIDA’S 16TH GOVERNOR* (1978).

113. Fla. Act No. 25, ch. 1637, Sub-Ch. 3 (Aug. 6, 1868).

114. *Id.* §§ 25-29 (addressing dueling), §§ 30-32 (addressing fighting).

suggests that the legislature intended to proscribe prizefighting.¹¹⁵ The word “fighting” was probably intentionally chosen to include both prizefighting and other forms of physical fighting that were commonly used to settle disputes.

The Duvall Athletic Club took the position that the law did not prohibit prizefighting.¹¹⁶ Per the governor’s request, Attorney General William Lamar prepared an official interpretation of the statute that was released to the press on November 22, 1893:

Prize fighting is unlawful in this State and fighters may be punished either under the Florida [1868 statute] or under the common law. While prize fighting is not a distinctive offense at common law, yet the combatants could be indicted and punished for assault, affray, or riot, according to circumstances, and the spectators who . . . attend and aid, cheer on, and encourage the prize fight can, in this State, be indicted and punished also. There is no weakness in our statute, and if the proposed Mitchell-Corbett fight should occur in Florida[,] the parties should be arrested. . . . Our statute is the stronger because it does not denounce prize fighting.

The Florida statute denounces a fight by previous appointment. This would secure the punishment of all taking part in a so-called sparring match, which, in this case, would be but a thin disguise for a brutal prize fight. It may be that the parties engaging in a prize fight may also be punished under our statutes against gaming. If so, then Corbett and Mitchell, instead of residing in one of our county jails for six months, may secure a ‘local habitation’ in the Florida State Prison for a term of years.¹¹⁷

In response to the Governor’s position, in December 1893, the City Council of Jacksonville passed an ordinance that permitted glove contests of an unlimited number of rounds and secured enough votes to overcome the mayor’s veto.¹¹⁸ Governor Mitchell did not remain silent and threatened to send state troops to stop the fight.¹¹⁹ Corbett and Mitchell ignored all arrest threats, arrived in Florida in late December,¹²⁰ got

115. *Id.* § 31.

116. See *Florida’s Law: The Sports there Insist That Prize Fighting Is Not Prohibited*, ATLANTA CONST., Nov. 18, 1893, at 1; *Florida Law and Pugilism: The Statutes Seem to Have Neglected the Fighters – A Strong Case in Point*, CHI. DAILY TRIB., Nov. 18, 1893, at 7.

117. See *No Prize Fight in Florida: Attorney-General Lamar Expounds the Law in Clean, Terse Style*, CHI. DAILY TRIB., Nov. 23, 1893, p. 7.

118. *The City Says No: Jacksonville Municipal Authorities Veto the Corbett*, CHARLOTTE OBSERVER, Nov. 12, 1893 at 1; *Gov. Mitchell Silent: Opposition in Florida to the Prize Fight Has Almost Disappeared*, WASH. POST, Dec. 20, 1893, at 6.

119. *Will Stop the Fight: Florida’s Governor Says He Will Have Troops on Hand*, HARTFORD COURANT, Dec. 26, 1893, at 2.

120. See *Corbett May be Arrested: As Soon as He Arrive, with His Party, at Jacksonville*, DAILY CHARLOTTE OBSERVER, Dec. 13, 1893, at 1.; *Jacksonville Sports Excited: A Scheme to Arrest Corbett on His Arrival*, COLUMBUS DAILY ENQUIRER-SUN, Dec. 13, 1893, at 1.; *Mitchell and Corbett Really*

arrested, and were released on bail.¹²¹ A day after their release, Governor Mitchell announced that he would declare martial law in Duval County, so that he could use state troops to protect the peace in the county.¹²² To test his sincerity, the Duvall Club quickly arranged a fight between Florida's black middleweight champion, Perry Watkins, and Tennessee's black middleweight champion, Green Harris.¹²³ The police and state troops did not interfere in this fight and the Club proceeded with its plan to hold the Corbett-Mitchell fight.¹²⁴ The Club petitioned a local court and received an injunction to restrain the state from intervening in the fight.¹²⁵ On January 25, 1894, Corbett and Mitchell met in the ring. Corbett easily defeated Mitchell in the third round.¹²⁶ Corbett and Mitchell were immediately arrested. On March 1, Corbett was tried and acquitted by a jury after sixteen minutes of deliberation.¹²⁷ The next day, Attorney General Lamar dropped the charges against Mitchell.¹²⁸

B. Bob Fitzsimmons' Tragic Sparring Accident

Bob Fitzsimmons came to the United States in 1890 as the Australian middleweight champion. In January 1891, he easily won the world middleweight championship in New Orleans. His next goal was to win the world heavyweight championship, but he had to wait another six years until he had his opportunity to fight for the heavyweight title.

In the meantime, Fitzsimmons earned his living by fighting less lucrative contests and conducting boxing exhibitions with his sparring partner, Cornelius "Con" Riordan. On November 16, 1894, Fitzsimmons and Riordan held a sparring exhibition at the Grand Opera House in Syracuse, New York. After a few exchanges, Fitzsimmons struck a blow to Riordan's face that caused him to drop to the floor.¹²⁹ Riordan never

Likely to Come Together, WASH. POST, Dec. 19, 1893, at 10 (noting that Corbett arrived on December 18); *Mitchell Reaches Florida*, DAILY CHARLOTTE OBSERVER, Dec. 28, 1893, at ___ (noting that Mitchell arrived on December 27).

121. *Mitchell and Corbett Arrested for Contemplating a Meeting*, STATE, Dec. 29 1893, at 2.; *Both Pugilists Arrested*, DAILY CHARLOTTE OBSERVER, Dec. 29, 1893, at 1; *Big Men Go to Court: Corbett and Mitchell Placed Under Bonds in Florida*, CHI. DAILY TRIB., Dec. 29, 1893, at 11.

122. *Florida's Governor Has a Trump Card: He Will Stop the Fight by Declaring Martial Law*, PHILA. INQUIRER, Dec. 31, 1893, at 3.

123. *The Governor Defied: The Duval Club Will Fight to a Finish*, STATE, Jan. 10, 1894, at ___.

124. *See It Was a Dummy: The Negro Pugilists Had Their Fight Unmolested*, COLUMBUS DAILY ENQUIRER-SUN, Jan. 16, 1894, at 2.

125. *Duval Club's Last Card: The Court is Asked to Restrain Interference from the Sheriff*, PHILA. INQUIRER, Jan. 23, 1894, at 3; *The Duval Club's Victory: A Decision of the Court in Their Favor*, COLUMBUS DAILY ENQUIRER-SUN, Jan 25, 1894, at 1.

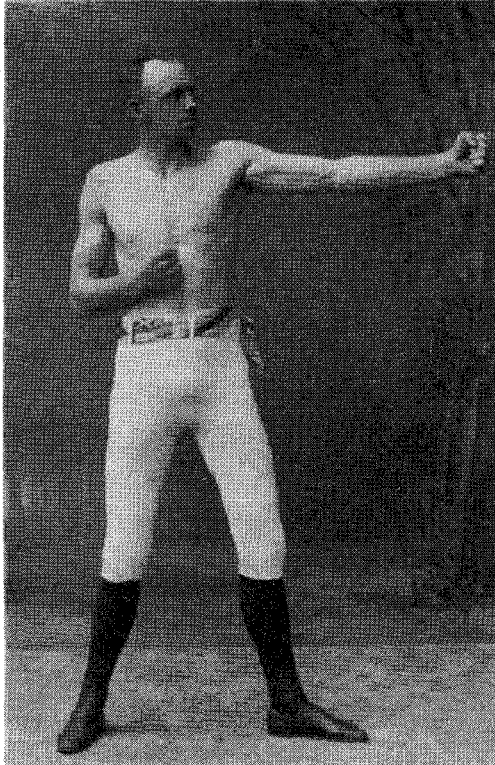
126. *Corbett in a Rush*, NAT'L POLICE GAZETTE, Feb. 10, 1894, at 2.

127. *In Sixteen Minutes*, DALLAS MORNING NEWS, Mar. 2, 1894, at 3; *Corbett Scores Another Victory: The Champion Cleared of the Charges of Prize-Fighting by a Jacksonville Court*, PHILA. INQUIRER, Mar. 2, 1894, at 3.

128. *Mitchell Goes Free: Attorney-General Lamar Drops the Cases Against the Pugilists*, PHILA. INQUIRER, Mar. 3 1894, at 3.

129. *Con Riordan's Last Bout: Death Followed a Light Blow from Fitzsimmons's Fist*, NY

recovered consciousness and died five hours later.¹³⁰ The autopsy revealed several blood clots in Riordan's brain, which according to the autopsy, were a result of a blow to his head.¹³¹ Fitzsimmons' counsel argued that Riordan died of apoplexy, which was "occasioned by the degenerated condition of the arteries of the brain," aggravated by a few additional preexisting conditions.¹³²



Bob Fitzsimmons, circa 1890.

TIMES, Nov. 18, 1894, at 9.

130. *People v. Fitzsimmons*, 34 N.Y.S. 1102, 1102 (1895). Fitzsimmons was quoted saying to a reporter immediately after the bout:

Do you suppose I would strike my sparring partner with any force? Yesterday I knew he had drinking hard, but did not know he was in such a condition. Invariably when I sparred with him he turned blue around the mouth, and it was a sign for me to let up. I never struck him hard. Last night I noticed after the first exchange of blows that he was not right. The blow I delivered . . . was as light as I could make it, merely slapping him with the back of the hand. He fell down. . . . I thought he was faking and was thoroughly disgusted, because somebody in the house, thinking it was a fake, hissed me. I was never hissed before.

Con Riordan's Last Bout, *supra* note 129. At trial, the District Attorney hinted that Fitzsimmons intended to punish Riordan for his drunkenness. *Fitzsimmons's Trial Under Way*, N.Y. TIMES, Jun. 29, 1895, at 1.

131. *Cause of "Con" Riordan's Death*, N.Y. TIMES, June 30, 1895, at 10.; *Effect of an Upper Cut: On That Hinges the Result in the Fitzsimmons Case*, July 2, 1895, at 13.

132. *People v. Fitzsimmons*, 34 N.Y.S. 1102, 1102 (1895); *Fitzsimmons's Defense*, N.Y. TIMES, July 3, 1895, at 5.

A grand jury, however, indicted Fitzsimmons in January 1895 and his trial was held in the summer of that year.¹³³ During the jury selection, Fitzsimmons' attorney sought to strike out any juror who was prejudiced against prizefighting and prizefighters. The District Attorney objected, arguing that "every good citizen who obeyed the laws must be against prize fighting." His objection was overruled by the judge.¹³⁴

After hearing arguments from both sides, Judge Lewis Ross instructed the jury that they must convict Fitzsimmons of manslaughter if they found that the sparring exhibition was an unlawful encounter under the New York prizefighting statute.¹³⁵ The statute's language was plain: "[a] person who . . . engages in, instigates, aids, encourages, or does any act to further a contention or fight, without weapons, between two or more persons, or a fight commonly called a ring or prize fight . . . is guilty of a misdemeanor."¹³⁶ The jury, however, rendered a verdict of not guilty, because Fitzsimmons' counsel convinced them that the exhibition was merely a "trial of athletic skill, lawful in itself"¹³⁷ that tragically resulted in an excusable homicide.¹³⁸

The outcome of Fitzsimmons' trial is yet another illustration of the ineffectiveness of prizefight laws in 1894,¹³⁹ the same year that Edison commercialized motion-picture technologies and several fledgling production companies started producing fight films.

III. DEVELOPING A TECHNOLOGY TO FILM GENUINE FIGHTS

A. *Moving Pictures and Prizefighting*

1. *Edison's Visions*

Thomas Edison regularly used the press to unveil new inventions or to describe, with some exaggeration, uncompleted inventions. In April 1893, Edison held the first public demonstration of his kinetograph at the World Fair in Paris. It was still a prototype with very limited capabilities. Nevertheless, when Edison returned to the United States, he argued that he had intended to "kinetograph[] the Corbett-Sullivan prize fight and

133. *See Indictment Against Fitzsimmons*, CHI. DAILY TRIBUNE, Jan. 20, 1895, at 5.

134. *Seeking a Jury to Try Fitzsimmons*, N.Y. TIMES, June 25, 1895, at 6.

135. *Fitzsimmons*, 34 N.Y.S. at 1103-14.

136. N.Y. PENAL LAW § 458 (1865).

137. *Fitzsimmons*, 34 N.Y.S. at 1107.

138. *Id.*, at 1102. Under the New York penal code of the time, "excusable homicide" was "homicide . . . committed by accident and misfortune, in doing a N.Y. lawful act, by lawful means, with ordinary caution and without any unlawful intent." *Id.* at 1105. *See also Fitzsimmons, Pugilist, Acquitted: Declared Not Responsible for the Death of "Con" Riordan*, N.Y. TIMES, July 4, 1895, at 1.

139. *See, e.g., Fitzsimmons' Knock-Out Blow*, WASH. POST, Nov. 20, 1894, at 4 (an editorial expressing the view that Fitzsimmons should not be held liable for Riordan's death).

reproduce it in New York and Chicago, but the arrangement was not consummated.”¹⁴⁰ Edison also noted that he “ha[d] his eye on the coming mill between Corbett and Mitchell and it [was] probable that in the fall [of 1893] some hall in Chicago [would] be packed with a crowd gazing upon a kinetographic prize fight and listening to a phonograph giving the audible accessories to the international affair.”¹⁴¹

None of these events ever happened simply because at the time Edison did not have the technology to record a real fight. Edison’s suggestion that some negotiation failures prevented the filming of the Corbett-Sullivan fight was baseless.

In the first week of January 1894, almost a year after Edison’s public announcement of a probable screening of the Corbett-Mitchell fight, Edison used a press conference to introduce “[a] new instrument [that] ha[d] no commercial value, but [was believed to have unlimited] possibilities as a means of furnishing amusement.”¹⁴² This invention was a nickel-in-the-slot peepshow machine that could play moving pictures of such quality that viewers could see “every motion of a dancer’s foot” or “a performing athlete.”¹⁴³ That week, Jim Corbett and Charley Mitchell were still in Jacksonville, Florida, waiting for the resolution of the legal battle between the Duvall Athletic Club and Florida Governor Henry Mitchell.

The Albany Telegram reported that at the press conference “[i]t was claimed that by the use of th[e] machine all the rounds of a boxing contest, every blow in a prize-fight or other contest, [could] be reproduced.”¹⁴⁴ *The Albany Telegram* went on and explained that “[b]y this means the hundreds of thousands who wish to see the meeting between Corbett and Mitchell [could] witness the encounter, counterfeited by the kinetograph, on every street and corner within a week after the gladiators meet.”¹⁴⁵ Although the promising financial prospects of this insight should have been rather straightforward, it seems that at the time they were not that obvious, at least not to Edison.

2. *The Kinetoscope Exhibiting Company*

As he did more than once in his long career, Edison predicted some of the functional uses of a new invention but failed to realize its commercial value. Edison did not believe that moving-picture technologies would be profitable. The brothers Otway and Grey Latham, Samuel Tilden, and Enoch Rector understood the promise behind the new technology and the

140. *Edison’s Latest Marvel*, DALLAS MORNING NEWS, May 6, 1893, at 4.

141. *Id.*

142. *See Some of Edison’s Latest: New Inventions by the Great Electrician*, ALBANY TELEGRAM, Jan. 7, 1894, at 1.

143. *Id.*

144. *Id.*

145. *Id.*

great financial prospects of prizefight films. In April 1894, the four men were in New York City and saw the kinetoscopes at the first moving-picture house, which had opened to the public on April 14.¹⁴⁶ According to film historian Terry Ramsaye, who interviewed many of the industry's pioneers, Grey Latham had the idea of commercializing fight films. Ramsaye quotes him saying to Enoch Rector: "everybody's crazy about prize fights, and all we have to do is to get Edison to photograph a fight for this machine and we can take it out and make a fortune on it."¹⁴⁷

Shortly thereafter, the men formed the Kinetoscope Exhibiting Company to produce fight films.¹⁴⁸ Enoch Rector, one of its four founders, worked at Edison's laboratory in Orange County to triple the kinetograph capacity from 20-second films to one-minute films. In his seminal book, Terry Ramsaye writes that this technological progress "made the prize ring and pugilism the major influence in the technical evolution of the motion picture for the entire first decade of the art."¹⁴⁹

In June 1894, the Kinetoscope Exhibiting Company filmed *The Leonard-Cushing Fight*, a film that opened at their parlor in August 1894 and drew enough interested patrons that the police came to keep order.¹⁵⁰ "[L]ooking for box office value," the Latham brothers realized that they needed "a bigger and better" prizefight.¹⁵¹ They used their acquaintance with Corbett to sign him on a contract for a fight against Courtney. In the contract, Corbett also committed to participate only in films of the Kinetoscope Exhibiting Company. This commitment was the first exclusive star contract in the history of the motion picture industry.¹⁵²

In September 1894, the Company produced *The Corbett-Courtney Fight*. The commercial success of *The Corbett-Courtney Fight* proved the potential profitability of fight films.¹⁵³ It showed that there could be a strong demand for cinematic exhibition of prizefights and that the boxing industry could expand its revenue basis and profit from royalties, rather than relying only on ticket sales to spectators. The film was a successful test of the hypothesis of *The Albany Telegram* and Grey Latham.

146. See RAMSAYE, *supra* note 20, at 104-08. The first "moving-picture house" was the Holland Brothers' arcade at 1155 Broadway, on the corner of 27th Street, in New York City.

147. *Id.* at 107. It is unclear whether Ramsey quotes a conversation mentioned in an interview he conducted many years later for his book or that he "imagined" the existence of such a conversation.

148. *Id.*

149. *Id.* at 108.

150. *Id.* at 109.

151. *Id.* at 110.

152. *Id.*

153. According to film historian Charles Musser, *The Corbett-Courtney Fight* "generated the most income of a N.Y. motion picture subject made during the kinetoscope era." CHARLES MUSSER, *EDISON MOTION PICTURES, 1890-1900: AN ANNOTATED FILMOGRAPHY* 36 (1997). It is noteworthy that movie viewers had to pay to watch the fights on six machines; each played one round. For the vast majority of other kinetoscope films, viewers only had to buy a ticket for one machine.

3. Edison Denounces Fight Films

Edison was a boxing fan.¹⁵⁴ He envisioned that film technologies would show matches, gave the Kinetoscope Exhibiting Company exclusive rights to use his equipment for the production of fight films, and profitably distributed the fight films that were shot at the Black Maria.

In the second half of December 1894, however, newspapers started reporting that “Edison has put his foot down on the scheme of the Kinetoscope Exhibiting Company to [film a fight between] Corbett and Fitzsimmons.”¹⁵⁵ Edison, so the reports argued, had opposed the use of his equipment for fight films since Corbett and Courtney fought at the Black Maria.¹⁵⁶

The *Chicago Daily Tribune* reported that Fitzsimmons was “vexed and astonished” to hear about Edison’s veto of “the kinetoscope project” for his fight with Corbett.¹⁵⁷ Fitzsimmons told the Tribune’s reporter that after the Corbett-Courtney fight, Edison kept sending him invitations to come and punch a punching bag before the kinetograph and “seemed confident that the [Corbett-Fitzsimmons] fight would be taken by the new invention.”¹⁵⁸ Furthermore, Fitzsimmons noted that Edison promised him to improve the kinetograph to allow the filming of a real fight according to the Marquess of Queensberry Rules.¹⁵⁹

There is no evidence to support the proposition that Edison had a change of heart after the Corbett-Courtney fight. The reports about Edison’s public denouncement of fight films started appearing only shortly after the highly-publicized death of Andy Bowen as a result of injuries he suffered in a fight with George “Kid” Lavigne.¹⁶⁰ Many newspapers argued that Bowen’s death would spell the end of boxing.¹⁶¹ The heavyweight champion, Corbett, told reporters that the fight would hurt pugilism and made him “more eager than ever to get out of the business.”¹⁶² Fitzsimmons refused to talk about the fight, perhaps because many journalists emphasized the similarities between Bowen and

154. See SPEHR, *supra* note 21, at 338 (internal citations omitted).

155. *Edison Issues an Injunction*, SIOUX CITY J., Dec. 20, 1894, at 2.

156. *Id.*; see also SPEHR, *supra* note 21, at 365.

157. *Fitzsimmons Talks of the Game*, CHI. DAILY TRIB., Dec. 24, 1894, at 11.

158. *Id.*

159. *Id.*

160. The Bowen-Lavigne fight was held at the Olympic Club of New Orleans on December 14, 1894. Bowen died the next day. See *Andy Bowen May Die*, CHI. DAILY TRIB., Dec. 15, 1894, at 2; *Blow Ends His Life*, CHI. DAILY TRIB., Dec. 16, 1894, at 5; *He Went to Sleep*, L.A. TIMES, Dec. 15, 1894, at 2; *Put to Sleep for All Time*, N.Y. TIMES, Dec. 16, 1894, at 16; *The Fight Was to a Finish*, DAILY PICAYUNE, Dec. 16, 1894, at 1.

161. See, e.g., *Will Kill Pugilism*, SUNDAY INTER OCEAN, Dec. 16, 1896, at 2; *No More Glove Contests*, KANSAS CITY STAR, Dec. 17, 1894, at 3; *Pugilism’s End*, ST. LOUIS REPUBLIC, Dec. 16, 1894, at 12.

162. *Champion Corbett’s Opinion*, SUNDAY WORLD-HERALD, Dec. 16, 1894, at 2. See also *Lavigne’s Fatal Blow*, PHILA. INQUIRER, Dec. 17, 1894, at 4.

Riordan.¹⁶³ Edison, therefore, probably denounced fight films to distance himself from public controversies. Indeed, some newspapers linked Edison's new constraints on the use of the kinetograph to the death of Bowen.¹⁶⁴

Edison's "veto" of fight films was short-lived. He continued collecting revenues from exhibitions of Corbett and Courtney Before the Kinetograph and gave his blessing to the filming of the Corbett-Fitzsimmons fight.¹⁶⁵

The actual reasons for Edison's 1894 public denouncement of fight films may say something about his personality and, as such, are interesting in a very limited way. His decision itself, however, is an important one: Edison's short-lived veto of prizefight films was the first form of content self-regulation in the motion picture industry. Edison, who led the industry until the early 1910s, sensed already a few months after the first commercial exhibitions of films that content self-regulation was a necessary measure to avoid—or at least mitigate—state and municipal censorship. He revived his objections to prizefight films in 1896.

The existing consensus in the literature is that content self-regulation in the motion-picture industry began only in 1909 with the formation of the National Board of Censorship.¹⁶⁶ The early forms of content self-regulation have evolved and softened over the years into the modern rating system. Thus far, scholars have neglected Edison's 1894 act of content regulation and subsequent industry choices to avoid fight films. This neglect of the first phase of content self-regulation undermines the understanding of subsequent phases. The experience with 'self-censorship' that the motion-picture industry acquired when Edison attempted to ban prizefight films offered lessons to the industry players when they designed the National Board of Censorship. Specifically, to film entrepreneurs to comply with the industry's content standards, the established organized players blocked access to raw materials (Kodak films) from non-complying filmmakers.¹⁶⁷

B. Screening Fight Films

The Latham brothers realized that "money would come faster" if they screened films on a wall to a room full of patrons, rather than playing

163. *Fitzsimmons Is Mum*, SUNDAY WORLD-HERALD, Dec. 16, 1894, at 2; *Fitzsimmons on Bowen's Death*, PHILA. INQUIRER, Dec. 17, 1894, at 4.

164. See, e.g., *The Corbett-Fitz 'Go,'* KAN. CITY STAR, Dec. 25, 1894, at 3.

165. See *infra* Part IV.D.1.

166. See CHARLES MATTHEW FELDMAN, THE NATIONAL BOARD OF CENSORSHIP (REVIEW) OF MOTION-PICTURES, 1909-1922 (1977).

167. See Ralph Cassady, Jr., *Monopoly in Motion Picture Production and Distribution: 1908-1915*, 32 S. CAL. L. REV. 325, 333-35 (1959).

films in peephole machines.¹⁶⁸ They persuaded their father, Woodville, to join their endeavors.¹⁶⁹ Primitive screening technologies already existed and were used by the early industry pioneers, Eadweard Muybridge and Étienne-Jules Marey.¹⁷⁰ Inspired by Muybridge, Edison also experimented with screening technologies but chose not to commercialize projectors.¹⁷¹ Thus, Edison left the lucrative field of projection to other entrepreneurs, such as the Lathams in the United States and the Lumière brothers in France.

The Kinetoscope Company, a rival of the Kinetoscope Exhibiting Company, held the franchise for distributing Edison's kinetoscopes. It understood the market demand for projectors and tried to convince Edison to enter the market for "screening kinetoscopes." Edison, however, refused to consider the possibility of developing a projector, noting that

[I]f we make this screen machine that you are asking for, it will spoil everything. We are making these peep show machines and selling a lot of them at a good profit. If we put out a screen machine there will be a use for maybe about ten of them in the whole United States. With that many screen machines you could show the pictures to everybody in the country – and then it would be done. Let's not kill the goose that lays the golden egg.¹⁷²

The Lathams did not remain idle. In December 1894, they incorporated the Lambda Company for the purpose of developing a projector and a wide-format camera that could shoot films for screening. Lambda's most important invention was a mechanism that liberated the camera from strict capacity constraints. This mechanism, which became known as "the Latham Loop," stabilized the film in the camera and permitted use of long films.¹⁷³ The Latham Loop patent was the single most important patent during the first two decades of the motion picture industry.¹⁷⁴ Lambda's "projecting kinetoscope," originally named pantopticon and shortly thereafter renamed eidoloscope, was the first device that was capable of exhibiting long films.

168. RAMSAYE, *supra* note 20, at 110-11.

169. Woodville Latham was a professor of chemistry at the University of West Virginia and later at the University of Mississippi. HENDRICKS, *supra* note 20, at 147-53.

170. See BARAK Y. ORBACH, REEL LAW: A LEGAL HISTORY OF THE AMERICAN MOTION PICTURE INDUSTRY (forthcoming 2011).

171. RAMSAYE, *supra* note 20, at 111.

172. *Id.* at 119. Subsequently, Edison was willing to raise his estimate of the potential market for projectors to "perhaps fifty for the whole world." *Id.* at 120.

173. *Id.* at 121-25.

174. U.S. Patent No. 707,934 (filed June 1, 1896) (issued August 26, 1902). The validity of the Latham Loop Patent was subject to extensive litigation. See, e.g., Motion Picture Patents Co. v. Independent Moving Pictures Co. of America, 200 F. 411, (2d Cir. 1912); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917); Motion Picture Patents Co. v. Cahuff Supply Co., 251 F. 598 (3d Cir. 1918). For the significance of the Latham Loop Patent, see ORBACH, *supra* note 170, ch 2.

On April 21, 1895, Woodville Latham demonstrated his projector to reporters.¹⁷⁵ This exhibition triggered a strong reaction from Edison, who told *The Sun*:

[The Lathams' "invention"] is the kinetoscope. . . . The throwing of the pictures on a screen was the very first thing I did with the kinetoscope. I didn't think much of that, because . . . there seemed to me to be no commercial value in that feature of the machine.

In two or three months, however, we will have the kinetoscope perfected, and then we will show you screen pictures. . . . If [the Lathams call their machine a kinetoscope], that's all right. I'll be glad of whatever improvements Mr. Latham may make.

If they carry the machine around the country, calling it by some other name, that's a fraud, and I shall prosecute whoever does it. I've applied for patents long ago.¹⁷⁶

The next day, *The Sun* published a letter from Woodville Latham who denied all infringement allegations and suggested that Edison did not have any screening technologies.¹⁷⁷

Two weeks after the screening demonstration for the press, on May 4, 1895, the Lathams tested their equipment. Young Griffo, a popular featherweight boxing star, fought with Charley "Battling" Barnett at Madison Square Garden. Griffo knocked out Barnett in the fourth round and shortly thereafter the boxers reenacted the fight on the roof of Madison Square Garden in front of the Lathams' camera.¹⁷⁸ On May 20, 1895, The Griffo-Barnett Fight was shown to the public in New York City and (mistakenly) was credited as the first film ever to be screened publicly.¹⁷⁹

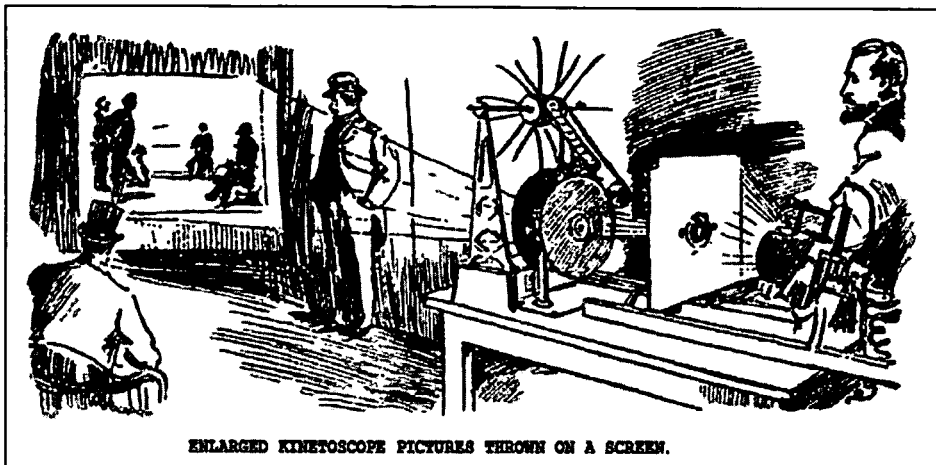
175. The Lathams held a public demonstration of their projecting projector on April 21, 1895 in New York City. *Magic-Lantern Kinetoscope: Edison Says Latham's Device is Old and Promises to Beat It*, *SUN* (New York), Apr. 22, 1895, at 2 [hereinafter *Magic-Lantern Kinetoscope*]; *Pantopticon Rivals the Kinetoscope*, *N.Y. TIMES*, Apr. 22, 1895, at 2. A month earlier, the Lumiere brothers demonstrated their camera-projector system, *Cinematographe*, in Paris. MUSSER, *THE EMERGENCE OF CINEMA*, *supra* note 6, at 135.

176. *Magic-Lantern Kinetoscope*, *supra* note 175. The complete article is printed in RAMSAYE, *supra* note 20, at 129-30.

177. *Latham Pantopticon: The Inventor of It Denies that IT Infringes Upon the Kinetoscope*, *SUN* (New York), Apr. 22, p. 5. The letter is reprinted in RAMSAYE, *supra* note 20, at 131-32.

178. See RAMSAYE, *supra* note 6, at 134; STREIBLE, *FIGHT PICTURES*, *supra* note 6, at 45. According to some reports, the Kinetoscope Exhibiting Company produced *The Leonard-Cushing Fight*, only after Young Griffo and George "Kid" Lavinge backed out of their initial willingness to fight in front of the kinetograph. See, e.g., *Kinetographing a Fight*, *supra* note 21.

179. In February 1895, Charles Francis Jenkins screened an Edison film with a projector he built, but this event received little publicity. Edison, who was against projectors until 1896, argued that the recognition given to Jenkins was a "gross injustice." He fought against Jenkins in court until the late 1920s. See ORBACH, *supra* note 170, ch. 3.



ENLARGED KINETOSCOPE PICTURES THROWN ON A SCREEN.

The New York Sun, April 22, 1895. The man on the left is Woodville Latham.

IV. THE CORBETT-FITZSIMMONS FIGHT

A. Forcing Corbett to Fight

1. The Ultimatum

By 1894, only two people seriously threatened Corbett's heavyweight title: Peter Jackson and the middleweight champion Bob Fitzsimmons. Jackson was a black fighter, with whom Corbett fought a sixty-one round bout that ended with a draw in May 1891. Standing against Jackson for sixty-one rounds gave Corbett the credentials he needed to secure a fight with John L. Sullivan, from whom he took the title in 1892. Sullivan drew the color line and would not fight against Jackson or any other black contenders.¹⁸⁰

After winning the heavyweight title, Corbett did everything possible to avoid fighting with Jackson and Fitzsimmons. The public pressure on the champion grew and major newspapers regularly mocked his excuses. On October 1, 1894, the board of the Olympic Club of New Orleans that crowned Corbett as the world heavyweight champion passed a unanimous resolution that threatened to unbelt Corbett. In a letter to Corbett that was published in many daily newspapers, the Club's president explained the resolution:

It was in the Olympic Club that both you and Fitzsimmons won your

180. For information on Peter Jackson and the racial barriers that prevented him from fighting for the title, see A.G. HALES, *BLACK PRINCE PETER: THE ROMANTIC CAREER OF PETER JACKSON* (1931).

greatest honors and it is now within the province and duty of the Olympic Club to declare Bob Fitzsimmons the champion heavyweight of the world should you persist in refusing to accept his challenge. . . . In the event you do not accept the challenge of Fitzsimmons by Thursday, October 4, we will declare Robert Fitzsimmons the champion heavyweight of the world.¹⁸¹

2. *An Illegal Meeting at The New York Herald's Offices*

The Olympic Club's ultimatum forced Corbett to agree to fight Fitzsimmons. On October 11, they met at the offices of *The New York Herald* and agreed to fight at the Florida Athletic Club in Jacksonville, Florida, after July 1, 1895.¹⁸² They also agreed that "[i]n case the Florida Athletic Club fails in any way in bringing th[e] contest to a successful conclusion [they would] contest before the club offering the largest purse."¹⁸³ The parties drafted the contract at the offices of *The Herald*, but did not sign it. They believed that "it [was] against the law to make a written agreement to fight in [New York]" and did not want "to antagonize the authorities."¹⁸⁴

The caution of the pugilists and *The Herald* is instructive. In 1894, it was illegal in New York for a person to challenge another to engage in any prizefight or to accept such a challenge.¹⁸⁵ The term "challenge" was defined as "[a]ny words spoken or written, or any signs uttered or made to any person, expressing or implying, or intended to express or imply a desire, request or invitation or demand to engage in any [prize] fight."¹⁸⁶ Thus, the understanding reached at *The Herald's* offices was as illegal as the execution of a fight contract. Equally illegal was the New York newspapers' practice of publishing the challenges of Fitzsimmons and other fighters.¹⁸⁷ *The Herald* and its editor also took the risk of a conviction for instigating, encouraging, or promoting a prizefight.¹⁸⁸ Therefore, the parties' attempt to circumvent the New York prizefight

181. See, e.g., *An Ultimatum to Jim*, DALLAS MORNING NEWS, Oct. 2, 1894, at 8; *Corbett's Last Chance: Must Sign to Fight Fitzsimmons or Lose His Title*, PHILA. INQUIRER, Oct. 2, 1894, at 3; *Gentleman Jim Unbelted: The Olympic Club Declares Fitzsimmons Champion of the World*, CHARLOTTE OBSERVER, Oct. 4, 1894, at 2; *The Olympic Club's Ultimatum*, L.A. TIMES, Oct. 2, 1894, at 1.

182. *Fitz Corners Jim: They Meet in the Herald Office to Arrange for the Fight*, ATLANTA CONST., Oct. 12, 1894, at 1; *Fitz Has No Chance: Pugilistic Opinion Considers Red Bob Outclassed*, CHI. DAILY TRIB., Oct. 22, 1894, at 11 [hereinafter *Fitz Has No Chance*].

183. *Fitz Has No Chance*, *supra* note 182.

184. *Corbett and "Fitz" Matched: Plenty of Talk, Diamonds, and Bills at the Meeting of the Pugilists*, N.Y. TIMES, Oct. 12, 1894, at 6 [hereinafter *Corbett and "Fitz" Matched*]; *Fitz Has No Chance*, *supra* note 182.

185. N.Y. PENAL LAW § 486 (1865).

186. § 487.

187. § 486 ("every person who knowingly forwards, carries or delivers any such challenge . . . is guilty of misdemeanor.").

188. § 485.

statute mostly reflected a blunt misunderstanding of the local prizefight law.

The Herald's vague familiarity with the New York prizefight statute was not unique. *The New York Times* and other newspapers exhibited similar ignorance in their reports of the event at *The Herald* and in their practice of publishing challenges.¹⁸⁹

A day after the meeting at *The Herald*, Florida Governor Henry Mitchell published his opposition to the fight: "The Corbett and Fitzsimmons fight will not take place in Florida even if the Legislature has to be convened for the purpose of preventing it."¹⁹⁰ This threat had little impact; the Corbett-Fitzsimmons agreement was an option contract for the Florida Athletic Club that bound the boxers to fight, with no restrictions on the venue.

B. A Startling Proposition to Film the Fight

1. The Mexican Offer

Corbett and Fitzsimmons met at *The Herald's* offices less than a month after Corbett fought with Courtney in front of Edison's kinetograph, so at the very least, Corbett and his manager were aware of the financial prospects of fight films. Nevertheless, the agreement between Corbett and Fitzsimmons did not contemplate filming. One reason could have been that Corbett and Fitzsimmons used the Sullivan-Corbett fight contract as a template and thus did not discuss the option. Another reason could have been pure skepticism. Corbett and his manager had a first-hand experience with the limitations of film technologies from the production at the Black Maria in September 1894. They knew that the then-existing technologies did not have the capacity to film real fights.

Grey Latham, the vice president of the Kinetoscope Exhibiting Company, however, considered technological constraints as nothing more than a temporary hurdle. On October 26, 1894, two weeks after the meeting at *The Herald's* offices, he sent the fighters a letter that he also released to the press:

While we have no desire to interfere in any way with the plans of the Florida Athletic club, [with] which . . . you agreed to fight for a purse of \$41,000, we are advised that many obstacles may be placed in the way of holding the fight of such importance in the Peninsula state.

189. See Corbett and "Fitz" Matched, *supra* note 189.

190. Gov. Mitchell Will Oppose It: Says the Corbett-Fitzsimmons Fight Will not Be Allowed in Florida, CHI. DAILY TRIB., Oct. 13, 1894, at 5; see also Mitchell is Riled: Florida's Governor Says He Will Have the Legislature Make Prize Fighting Impossible, DALLAS MORNING NEWS, Oct. 13, 1894, at 4; The Sentiment at Jacksonville, L.A. TIMES, Oct. 13, 1894, at 2.

There is no definite information to this effect, but in case the Florida Club should conclude to withdraw its bid we propose to make you an offer which will certainly demand consideration.

This offer would have been made at the time the several other clubs were bidding for the championship contest, but for the fact that we were not then in a position to enter the competition [among other reasons because] the experiments at three minute subjects with the kinetograph had not proved entirely successful.

Now, however, we shall not only be able to take each three minute round of the fight, but also the action of the seconds and . . . the one minute rest[s] between rounds. . . . [O]ur Mexican agent [says that there] could be no interference in the fight [if held in Mexico], and he was assured by the authorities that everything will be done to protect those engaged in the contest as well as those who go to Mexico to see it.

Our offer is a plain one. The fight must be held in the morning, and in case the date selected should prove a cloudy day, we will ask for a postponement until a clear day comes around. However, we will be able to name a date during the dry season which will answer our purpose, for in this season the odds are 50 to 1 that any day will be suitable.

We want the fight before November 1, 1895, and will give \$50,000 for it. The entire amount will be deposited in any bank agreed upon by you two months before the date set for the contest, or earlier if necessary. . . .

We are enabled to offer this amount of money without depending upon the gate receipts, because, while a good many tickets will be sold, that is entirely after consideration with us.¹⁹¹

The fact that in October 1894 there was no wide-format camera in existence that could record long scenes did not bother the ambitious Lathams any more than the fact that their proposition was a misdemeanor.¹⁹² The Lathams were visionary film producers who saw the box-office prospects of fight films, although “[m]en connected with them assert[ed] that it [was] utterly impossible to [film] a long fight of three minutes to a round.”¹⁹³ They ignored technological constraints, the law, and even Edison’s unequivocal public announcement that the Kinetoscope Exhibiting Company could not use his equipment for fight films and,

191. *Before the Kinetoscope: An Offer of \$50,000 for the Corbett-Fitzsimmons Contest*, KANSAS CITY STAR, Oct. 27, 1894; see also *The Championship Match*, N.Y. CLIPPER, Nov. 4, 1894, at 562.

192. According to Terry Ramsaye, the Lathams tested a crude prototype of a wide-format camera only on February 26, 1895. RAMSAYE, *supra* note 20, at 122-24.

193. *Edison Issues an Injunction*, SIOUX CITY J., Dec. 20, 1894, at 2.

specifically the Corbett-Fitzsimmons fight.¹⁹⁴

The Lathams' vision, however, seemed promising to many. *The Kansas City Star*, for example, marketed the "Mexican offer" to its readers: "a set of pictures of the Corbett-Fitzsimmons fight showing the bloods in action would sell like hot tamales in a crowd of hungry men."¹⁹⁵

2. Corbett and Fitzsimmons Disagree Over the Kinetoscope

Fitzsimmons and his manager watched *The Corbett-Courtney Fight* at least twice after the meeting at *The Herald*.¹⁹⁶ *The Philadelphia Inquirer* quoted Fitzsimmons as saying that the film was "a most wonderful thing" and that he was "ready to sign with the kinetoscope company to fight Corbett under their direction." At that point in time, Fitzsimmons felt that the "fight [would] never come off in Jacksonville," although he was willing to meet Corbett at any place.¹⁹⁷

Some reporters asked Fitzsimmons whether watching *The Corbett-Courtney Fight* was beneficial for him. He replied that the film had no value for professional boxers because it was staged. "Courtney is a stiff," he said, and added, "either Corbett or I could dispose him in a punch or two. I understand that Corbett had to go the distance with Courtney in order to earn his money."¹⁹⁸

The Lathams' proposition created a new disagreement between Fitzsimmons and Corbett. Fitzsimmons was eager to fight for the offered purse, while Corbett preferred not to fight in front of the kinetograph.¹⁹⁹ In a press conference, Corbett told reporters:

It's all wind. It is impossible to fight before the kinetoscope. I fought before it once and it is all bosh to say that a battle according to the Marquis of Queensbury rules can be fought before it. Do you know that a round can only last one minute and that there is a rest between rounds of about ten minutes before the instrument can . . . reproduce the actions of the contestants in a mill? . . . Fitzsimmons is making a big bluff when he says he wants to fight before the kinetoscope. The truth . . . is that he wants a little newspaper notoriety and thinks the

194. *Id.*

195. *Before the Kinetoscope*, *supra* note 191.

196. *Fitzsimmons' Way of Fighting*, PHILA. INQUIRER, Nov. 25, 1894, at 24.

197. *Id.*

198. *Id.*

199. See, e.g., *Fitzsimmons Is Willing to Pick Up His Share of the Kinetoscope Money*, ATLANTA CONST., DEC. 19, 1894, at 1; *Fitzsimmons Talks: Willing to Fight Corbett Before the Kinetoscope*, HARTFORD COURANT, Dec. 26, 1894, at 1 [hereinafter *Fitzsimmons Talks*]; *Lanky Bob Objects: He Does Not Understand Mr. Corbett*, L.A. TIMES, Dec. 27, 1894, at 2 [hereinafter *Lanky Bob Objects*]; *Offer for the Championship Fight*, IDAHO DAILY STATESMAN, Oct. 28, 1894, at 3; *The Corbett-Fitz "Go:" Both Pugilists Discussing the Kinetoscope Proposition*, KANSAS CITY STAR, December 25, 1894, at 3 [hereinafter *The Corbett-Fitz "Go"*]; *The Wizard's Glass: Why Corbett Dislikes to Fight Before It*, L.A. TIMES, Dec. 29, 1894, at 2.

discussion about the kinoscope is an excellent way to get it.²⁰⁰

Fitzsimmons, however, believed that Corbett was just trying to avoid the fight. He reminded reporters that “[t]he Edison people . . . assured us that they could take the contest on the kinoscope, . . . that they could take three-minute rounds, and would want only one minute between rounds.”²⁰¹ Fitz further ridiculed Corbett’s experience with the kinoscope, saying “Corbett might find [a kinoscope contest] more than he imagines if he were before [a kinoscope in] a genuine contest instead of a mere ‘fake.’”²⁰²

C. First Legal Hurdles and the Emergence of Dan Stuart

1. Florida and Louisiana Prohibit Prizefighting

Three weeks after Grey Latham made the “Mexican offer,” Fitzsimmons unintentionally killed his sparring partner, “Con” Riordan.²⁰³ This accident gave additional ammunition to religious groups and politicians who demanded enforcement of existing prizefight statutes and campaigned for stricter laws. The murder trial, however, had no direct effect on the arranged contest. It did not delay the fight that was agreed to be held after July 1, 1895,²⁰⁴ and it did not stop Fitzsimmons from engaging in boxing contests and sparring exhibitions. On July 3, 1895, a jury acquitted Fitzsimmons, but the boxers still had no agreed-upon time and place for the fight.

The preliminary agreement to hold the fight after July 1, 1895, gave Governor Mitchell of Florida enough time to tighten the state’s prizefight statute. On May 6, 1895, the Florida Legislature enacted an explicit and strict prohibition against prizefighting to avoid the legal uncertainty that allowed Corbett and Mitchell to fight in Florida.²⁰⁵ On the very same day, the Louisiana Supreme Court declared void the “glove exemption” in the state’s prizefight statute, thereby making all forms of prizefighting illegal

200. *The Corbett-Fitz “Go,” id.*

201. *Lanky Bob Objects, supra* note 199.

202. *Fitzsimmons Talks, supra* note 199.

203. *See supra* Part I.C.2. *See also Riordan’s Ailment: Bob Fitzsimmons Is Acquitted By a Jury, L.A. TIMES*, July 4, 1895, at 2.

204. *Fitz Has No Chance, supra* note 182.

205. An Act to Prohibit Prize Fighting, Pugilistic Exhibitions, and Kindred Offenses §§ 1-3, 1895 Fla. Laws 163. The act criminalized any pugilistic exhibition, fight or encounter, with or without gloves . . . for money or anything of value.” § 1. To avoid any dispute over the interpretation of the prohibition, the statute clarified that the phrase “any pugilistic exhibition, fight or encounter” meant “any voluntary fight or personal encounter, by blows, . . . for money, prize of any character, points, distinction or fame, or other thing[s] of value, or upon the result of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly.” § 3. Furthermore, the act imposed a duty on sheriffs and deputies “in any county where there is cause to believe that an illegal encounter or contest [was] about to occur, to enter any house or enclosure, or any other place, and arrest, without warrant, any . . . parties engaged or about to engage in such contest. § 2.

in Louisiana.²⁰⁶ Thus, despite all expectations, the Olympic Club of New Orleans did not reap the windfall of Florida's hostility toward prizefighting.

2. *Virginia and Texas Move to Prevent the Fight*

The legal setbacks in Florida and Louisiana drew offers from gambling entrepreneurs who tried to lure the boxers to other possible fight venues. The two most important offers were from the Alexander Race Track in Jackson City, Virginia,²⁰⁷ and Dan Stuart, a Texan gambler who was the president of the Florida Athletic Club. Stuart believed that he could hold the fight in Texas without any interference.²⁰⁸

a. *The Virginia Offer*

Stuart's position at the Florida Athletic Club and in the sporting world gave him a significant advantage that won him the contract. Yet, the Virginia offer deserves a few words. Jackson City was a promising location for a championship fight. At the turn of the century, it was a "resort for sports and gamblers" and the financial backers believed that its location, across the Potomac River from Washington, DC, "would surely make the meeting a financial success."²⁰⁹ The Chicago Daily Tribune reported that "[o]wing to the looseness of the laws in Virginia in regard to prize fights . . . , no difficulty ha[d] been experienced . . . in getting these affairs reeled off without interference on the part of the municipal or county authorities."²¹⁰ This account said more about enforcement of the local law than about the law itself. The Code of Virginia, as amended in 1887, clearly prohibited prizefighting and also imposed liability on aiders and abettors:

§ 3693 Prize-fighters, how punished

Every person who, by previous engagement or arrangement, meets another person and engages in a fight, commonly known as a prize-fight, shall, in the discretion of the jury, be punished by confinement in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or both.

206. *State v. Olympic Club*, 47 La. Ann. 1095 (1895). The 1890 Louisiana prize fighting law provided that "this act shall not apply to exhibitions and glove contests between human beings, which may take place within the rooms of regularly chartered athletic clubs." An Act Defining the Crime of Prize Fighting, and to Provide for the Punishment thereof in and out of the State of Louisiana, Act 25 1890, p. 19.

207. *Wants the Big Mill: Virginia is After the Corbett-Fitzsimmons Fight*, CHI. DAILY TRIB., May 11, 1895, at 6 [hereinafter *Wants the Big Mill*]. Jackson City later changed its name to Fort Jackson.

208. *Let Them Go to Texas: The Corbett-Fitzsimmons Fight May Go to Texas*, GRAND FORKS DAILY HERALD, May 10, 1895; *May Fight in Texas*, PHILA. INQUIRER, May 10, 1895, at 5.

209. *Wants the Big Mill*, *supra* note 207, at 6.

210. *Id.*

§ 3694 Their aiders and abettors, how punished

Whoever is present at such fight as an aid, second, or surgeon, or advises, encourages, or promotes such fight, shall, in the discretion of the jury, be punished by confinement in the penitentiary not exceeding three years, or by fine not exceeding five hundred dollars, or both.²¹¹

The Alexander Race Track, however, argued that it had “assurances” from Governor Charles O’Ferrall that “he consider[ed] it beneath his dignity to interfere” and that he would leave the matter to the local sheriff.²¹² These assurances, however, quickly proved to be fictitious. A few days after the Alexander Race Track extended its offer, Governor O’Ferrall declared that Corbett and Fitzsimmons would not meet in the ring in his state so long as he was governor.²¹³

Although the offer of the Alexander Race Track could not compete with Stuart’s offer, the mere idea that the fight could be held in Virginia kept Governor O’Ferrall alert. He successfully convinced the Virginia Legislature to do the same.²¹⁴ In November 1895, the Virginia Legislature revised the language of the prizefight prohibition, clarifying unambiguously that the title fight would be illegal in the state:

§ 3693 Prize fighters, pugilism . . . how punished

Any person who shall voluntarily engage in a pugilistic encounter between man and man . . . for money or other thing of value or for any championship, or upon the result of which any money or any thing of value is bet or wagered or to see which any admission fee is charged, either directly or indirectly, shall be deemed guilty of a felony, and upon conviction shall be punished by confinement in the penitentiary not less than one and no more than five years.²¹⁵

The revised statute also defined the term “pugilistic encounter” as:

[A]ny voluntary fight or personal encounter by blows by means of the fists or otherwise, whether with or without gloves, between two or more men for money or for a prize of any character or for any other thing of value or for any championship or upon the result of which any money or any thing of value is bet or wagered.²¹⁶

With this legislation, Virginia joined the list of states in which the fight of the century was barred. Many other states revised their statutes or enacted new prizefight statutes to prevent the fight from happening within

211. VA. CODE ANN. § 3693-94 (1887).

212. *Wants the Big Mill*, *supra* note 207, at 6.

213. *Untitled*, KANSAS CITY STAR, May 16, 1895, at 4.

214. *Gov. O’Ferrall Opposed to Glove Contests*, WASH. POST, Oct. 5, 1895, at 8.

215. VA. CODE ANN. § 3693 (1895).

216. *Gov. O’Ferrall Opposed to Glove Contests*, *supra* note 214, at 8.

their jurisdictions.

b. Dan Stuart's Journey in Texas

Like Virginia, Texas had on the books a prizefight statute by the spring of 1895;²¹⁷ however, this statute was not in effect because of a 'legislative accident.'

In 1889, Texas revised its tax code and imposed "for every fight between man and man . . . [an occupation tax of] five hundred dollars for each performance."²¹⁸ Two years later, the Texas Legislature passed a clear prohibition on pugilistic encounters and repealed all laws that were in conflict with the new prizefight statute.²¹⁹ To expedite the adoption of a prizefight ban, the Texas Legislature suspended the constitutional requirement to read bills on three different days because "there [was] no law prohibiting prize fighting in [Texas], and this offense [became] of common practice."²²⁰ Governor James Hogg saw no urgency and never signed the bill or returned it with objections to the Legislature. Thus, it became a law without his signature.²²¹

The Texas Legislature tried to avoid the common statutory ambiguity of prizefight laws and defined the term "pugilistic encounter" as "any voluntary fight . . . by blows by means of the fists, whether with or without gloves, . . . for money, prize of any character or other thing of value, or upon the result of which any money or other thing of value is bet or wagered."²²² The statute classified the act of prizefighting as a felony, but imposed only a penalty of misdemeanor on convicted prizefighters.²²³ This technical discrepancy was ignored until Dan Stuart sought to hold the fight in Dallas County.

Despite the stated importance of the Texas prizefight statute, its enforcement was lax at best. Thus, when John L. Sullivan fought without a license against Bob McGhee in Dallas, on January 12, 1893, the trial court convicted him and imposed the statutory fine. Sullivan appealed and the Court of Criminal Appeals reversed and dismissed charges, holding that the 1891 prizefight statute repealed the 1889 statute. In its decision, the court mentioned the general prohibition against prizefighting, but imposed no penalty on Sullivan.²²⁴

The Texas prizefight statute also did not deter the International-Great

217. For a review of the history of Texas anti-prizefight statutes, see Elmer M. Million, *History of the Texas Prize Fight Statute*, 17 TEX. L. REV. 152 (1938).

218. 1889 Tex. Gen. Laws 24.

219. 1891 Tex. Gen. Laws 54.

220. 1891 Tex. Gen. Laws 54-55.

221. *Id.* at 55.

222. *Id.*

223. *Id.* ("not less than \$500 nor more than \$1000, and by punishment in the county jail [of] not less than sixty days nor more than one year.").

224. *Sullivan v. State*, 32 Tex.Crim. 50 (1893).

Northern Railroad Company from making an effort to bring the Corbett-Fitzsimmons fight to San Antonio. The Railroad that served San Antonio was hoping to profit from spectators that would come to see the fight. It relied on “a prominent attorney” close to the governor who saw no legal objections that could be made.²²⁵ Corbett and Fitzsimmons apparently did not consider this offer seriously, but they surely gave full attention to Dan Stuart’s offer.

As the president of the Florida Athletic Club, Stuart already had a direct contact with Corbett, Fitzsimmons, and their managers. He believed that his unique position in Texas’ political and business communities would allow him to prevent any interference in the fight. His plan was to hold the fight for the title at the end of the Texas State Fair and Dallas Exposition in October 1895.

In April 1895 the Texas Legislature revised the state penal and civil codes. The vote on the penal code preceded the vote on the civil code by a week. The penal code included the 1891 prohibition and the civil code included the 1889 occupation tax provision. Governor Culberson failed to sign them and thus the penal code became effective several days prior to the civil code.²²⁶ The local legal community unanimously agreed that in this act of codification the 1889 occupation tax provision repealed the 1891 prizefight statute.²²⁷ Some lawyers also pointed out that the 1891 law was invalid because of its internal discrepancy between the classification of the crime and the punishment.²²⁸

This legal development was good news for Dan Stuart, who told reporters that “[t]here is absolutely no legal way to stop the contest. That matter was fully investigated before we went into it. . . . All Corbett and Fitzsimmons have to do is to pay an occupation tax.”²²⁹ The county attorney of Dallas, John P. Gillespie, was less confident and asked for the advice of the state attorney general. On July 14, Attorney General Crane issued an official opinion declaring prizefighting illegal in Texas:

The intention frequently controls express language in the construction of statutes. . . . It must be plain . . . that the intention of the Legislature was to prohibit prize-fighting. . . . [Thus, since] the Legislature affixed the punishment of a misdemeanor to the offense

225. *The Big Fight: A Proposition to Have the Corbett Fitzsimmons Mill in Texas*, PHILA. INQUIRER, Dec. 23, 1894, at 4.

226. See Million, *History of the Texas Prize Fight Statute*, *supra* note 8, at 154.

227. *A Legal View of It: Corbett and Fitzsimmons Cannot Fight*, L.A. TIMES, July 15, 1895, at 2; *Respect the Law: Is the Consensus of Opinion Among Lawyers*, DALLAS MORNING NEWS, Sep. 20, 1895, at 1; *Will the Fight Come Off*, DAILY OLYMPIAN, Sep. 19, 1895 at 2.

228. *Respect the Law*, *Id.*

229. *To Fight in Dallas: Stuart Sure of the Corbett-Fitzsimmons “Boxing Match” – Can Be No Interference*, DALLAS MORNING NEWS, June 17, 1895, at 7. See also *Word from Stuart: The Big Fight Is Coming Off and All Details Have Been Satisfactorily Arranged*, DALLAS MORNING NEWS, June 14, 1895, at 6.

of prize-fighting and . . . the word ‘felony’ was inserted by mistake, [the court is] at perfect liberty to disregard the word in the construction of the statute. . . .

[T]he validity of the act . . . is not affected by the [1895] revision of the code [because] all laws embodied in the revised statutes . . . were in existence at the time of [the] adoption [of the code and] should be considered to be a continuation, not as new enactments. . . . [I]t is the duty of the Sheriff of Dallas County to see that [the law] is enforced.
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On August 27, Attorney General Crane issued a second opinion concerning the anticipated Corbett-Fitzsimmons fight. In this opinion, he determined that the gathering for the fight would be in violation of the law and, thus, the Sheriff was bound to disperse the assemblage at any cost. He clarified that shooting into the crowd was an available option, because under the Texas penal code “homicide [was] justifiable when necessary to suppress a riot.”²³¹

Franklin Holland, the mayor of Dallas, preferred the view of “the leading lawyers of the State” to the opinion of the attorney general. The fight offered great economic opportunities to his town that, at the time, had a population of less than eight thousand people. With this in mind, Mayor Holland promised to take the case to court.²³² A test case coincidentally arose shortly thereafter when the police arrested two pugilists for participation in a prizefight. After two days of oral arguments, Chief Justice Hurt of the Court of Criminal Appeals rendered a decision in which he expressed support for the criminalization of prizefighting, but declared that “under the provisions of [the] statutes or the well-settled rule of construction” the 1891 prizefight prohibition was invalid.²³³

Governor Charles Allen Culberson, therefore called a special “prize-fight session” of the Texas Legislature “to denounce prize-fighting and kindred practices in clear and unambiguous terms and prohibit the same by appropriate pains and penalties.”²³⁴ In the Session, held on October 1, 1895, Governor Culberson pleaded to the Legislature:

The public interests require that [the Corbett-Fitzsimmons fight] should be suppressed. Discountenanced by Mexico and the

230. Op. Att’y Gen. 68 (1895-6).

231. *Dallas Sheriff May Shoot: Second Legal Opinion on the Coming Prize Fight*, WASH. POST, Aug. 28, 1895, at 1; *May Shoot if Necessary: Opinion of Attorney General of Texas as to Stopping of Prizefights*, N.Y. TIMES, Aug. 28, 1895, at 7.

232. *Texas Supreme Court Will Decide: What Mayor Holland of Dallas Has to Say About the Big Fight*, CHI. DAILY TRIB., Aug. 29, 1895, at 5.

233. *Here Is the Text: Judge Hurt’s Opinion in the Prize Fight Case*, DALLAS MORNING NEWS, Sep. 22, 1895, at 1.

234. JAMES WILLIAM MADDEN, CHARLES ALLEN CULBERSON: HIS LIFE, CHARACTER AND PUBLIC SERVICE 35 (1929).

Territories, outlawed and driven from every State, it is proposed to assemble a horde of ruffians and gamblers and offer hear this commanding insult to public decency. Against it the instincts and the pride of the people revolt, and your prompt and resolute action will spare them the ignominy and shame. It will do another thing. [It will save Dallas from] one of the most disgraceful orgies that ever promised to discredit and dishonor Texas.²³⁵

Cullberson's call persuaded the Senate and the House to pass a new prizefight statute, which he signed into law on October 3, 1895.²³⁶ This statute ended Dan Stuart's plan to hold his "fistic carnival" in Texas, but did not prohibited the exhibition of fight films in Texas. Governor Culberson, therefore, was quite shortsighted in his analysis of Stuart's plans.

D. Enoch Rector Prepares to Film the Fight

1. Edison Re-embraces Fight Films

Edison quickly forgot his strong public statements of December 1894 and was willing to consider the shooting of prizefight films. During the legal battle in Texas, Enoch Rector of the Kinetoscope Exhibiting Company parted ways with the Lathams in order to maintain his "diplomatic relations" with Edison.²³⁷ For his stake in the Lambda Company, he received the lucrative exclusivity film contract with Corbett. Rector then asked for and received from the Edison Manufacturing Company four new wide-format cameras that could record a fight.

235. *Id.* at 36.

236. TEX. PENAL CODE ANN. §§ 1005, 1005a, 1005b (1895). *See also No Prize Fighting in Texas: The Law Prohibiting It Passed Almost Unanimously by Both Houses of the Legislature*, N.Y. TIMES, Oct. 3, 1895, at 1; *To Stop the Fight: Gov. Culberson Convenes the Texas Legislature*, CHI. DAILY STAR, Sep. 27, 1895, at 1.

237. RAMSAYE, *supra* note 20, at 281.

SAM'L J. TILDEN, PRES'T.
 ENOCH J. RECTOR, VICE-PRES'T.
 J. H. COX, SEC'T AND TREAS.



SOLE OWNERS OF
 JAMES J. CORBETT'S
 KINETOSCOPIC EXHIBITIONS

The Kinetoscope Exhibiting Co.

NEW LEBANON, N. Y.

An 1896 letterhead of the Kinetoscope Exhibiting Company. The letterhead emphasizes the exclusivity with Corbett and does not list the Lathams as officers in the company.

There are no records that indicate when and how Rector departed from the Lathams and started to collaborate with Stuart. A September 12, 1895 letter from the Kinetoscope Company to Edison suggests that the financial prospects of filming the Corbett-Fitzsimmons fight were well understood.²³⁸ In the letter, the Kinetoscope Company, the distributor of Edison's kinetoscopes, begged Edison to rescind the exclusive rights that he had given the Kinetoscope Exhibiting Company. Specifically, the Kinetoscope Company asked Edison for permission to film the Corbett-Fitzsimmons fight. The letter accused the "Latham people" of being in the business of motion pictures "solely as exhibitors and only for their own profit and advantage, without any particular regard for [Edison's] interests."²³⁹ To emphasize the point, the Kinetoscope Company reminded Edison that the Lathams "did not hesitate to sacrifice [him] for their own ends . . . when they laid their plans to make machines of their own" and brought out "a so-called Screen Machine," which was no more than "an imitation Kinetoscope."²⁴⁰

During that time, Woodville Latham was still touring the country with his screening machine, the eidoloscope. On September 16, 1895, in a demonstration in Atlanta he worked to convince the crowd of his eidoloscope's superiority over Edison's kinetoscope:

One of the advantages our machine possesses is that it can take pictures all day if necessary. The kinetoscope [is limited to one] minute, and you are required while viewing [moving pictures in a kinetoscope] to remain in a cramped position. With this machine,

238. Reprinted in HENDRICKS, *supra* note 20, at 141-42. The letter was signed by the heads of the Company: Norman C. Raff and Frank R. Gammon.

239. *Id.*

240. *Id.*

however, you are comfortably seated in front of a screen, the pictures are presented in life-size and the machine will run as long as you desire it. . . . We propose to have one of our machines at the Corbett Fitzsimmons fight and will get the whole affair.²⁴¹

2. *The Fitzsimmons-Maher Fight*

In December 1894, Corbett announced that he would retire from boxing and focus on his acting career after his fight with Fitzsimmons.²⁴² In October 1895, however, after Governor Culberson signed into law a prizefight law in Texas, Corbett retired and announced that he would surrender the championship to the winner of the Pete Maher–Steve O’Donnell mill.²⁴³ On November 11, 1895, Maher knocked out O’Donnell in the first round and became the official heavyweight champion of the world.²⁴⁴ On the day of his victory, Maher published an open challenge to Fitzsimmons.²⁴⁵ Enoch Rector and Dan Stuart immediately started working to find a location for a fight between Fitzsimmons and Pete Maher.²⁴⁶ The fight was held in Juarez, Mexico, on February 21, 1896, after Texas authorities again tried to prevent spectators from crossing the Rio Grande river to attend the fight.²⁴⁷ The day of the fight was cloudy and dark, and it is unclear whether Rector succeeded to film the fight.²⁴⁸ If he did, it must have been a very short film—Fitz easily knocked out Maher in 95 seconds.²⁴⁹

After the fight, Rector offered Fitzsimmons and Maher a \$5,000 purse

241. *Knocks Edison Out: Work of the Latest Electric Invention, the Eidoloscope*, ATLANTA CONST. Sep. 16, 1895, at 10.

242. *Corbett’s Ambition*, PHILA. INQUIRER, Dec. 11, 1894, at 4; *Champion Jas. J. Corbett*, PHILA. INQUIRER, Dec. 14, 1894, at 9.

243. *Corbett Claims the Belt*, WASH. POST, Oct. 25, 1895, at 3; *Retired from the Ring*, PHILA. INQUIRER, Oct. 23, 1895, at 1. In an interview about his retirement and choice to give the belt to the winner of the Maher-O’Donnell fight, Corbett said: “I am disgusted with the entire business [of pugilism], and henceforth will confine my enterprises to the stage. No matter what the public may say. . . . I bestowed the championship upon Maher because he is an Irishman and because I prefer [him over] an Australian or an Englishman.” *True to the Irish*, PHILA. INQUIRER, Nov. 25, 1895, at 5.

244. *It Lasted One Round*, WASH. POST, Nov. 12, 1895, at 1; *Maher in One Round*, DAILY INTER OCEAN, Nov. 12, 1895, at 4; *O’Donnell No Match for Pete Maher*, PHILA. INQUIRER, Nov. 12, 1895, at 5.

245. *Maher Challenges*, L.A. TIMES, Nov. 14, 1895, at 2. Fitzsimmons knocked Maher out twice before 1895 and all newspapers agreed that he was superior to Maher. *See, e.g., A Fake Champion*, L.A. TIMES, Nov. 25, 1895, at 3.

246. *Fitzsimmons to Fight Maher*, N.Y. TIMES, Dec. 17, 1895 at 7.

247. *See* C. L. SONNICHSEN, ROY BEAN: LAW WEST OF THE PECOS, 174-89 (2005).

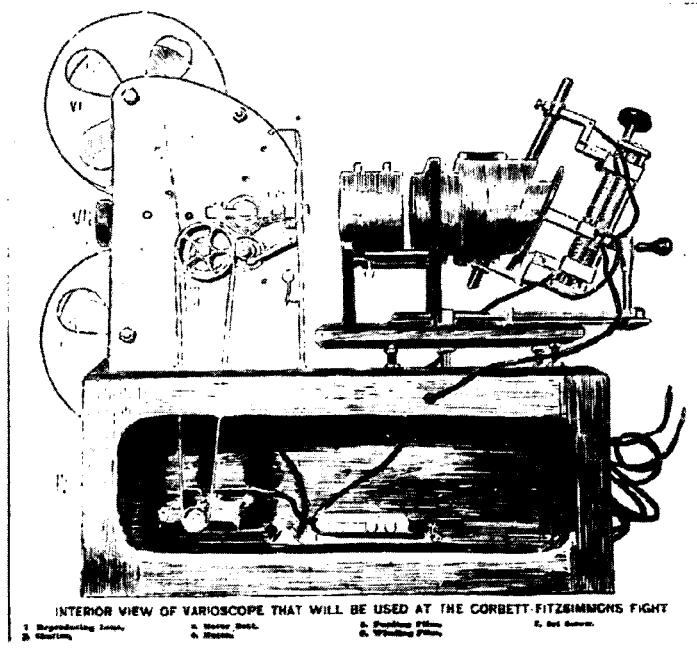
248. Ramsaye believes that the fight was never screened, but was available on Enoch Rector and Samuel Tilden’s peepshow machines. RAMSAYE, *supra* note 20, at 284. Several press accounts, however, reported that the weather conditions did not allow filming. *See, e.g., The Day Was Too Dark for the Kinetoscope*, AUSTIN STATESMAN, Feb. 22, 1896 at 5.

249. *Details of the Great Contest*, CHI. DAILY TRIB., Feb. 22, 1896, at 1; *Fitzsimmons Is Champion: He Defeated Maher in Just Ninety-Five Seconds*, N.Y. TIMES, Feb. 22, 1895, at 5. *How Maher Was Knocked Out*, ATLANTA CONST., Feb. 22, 1896, at 1. The *Chicago Daily Tribune* claimed that the fight lasted 103 seconds.

to fight a six round mill the next day.²⁵⁰ Fitzsimmons declined this offer. He agreed to fight against Maher only for “\$5,000 cash and 50 per cent of the receipts,” but Rector was unwilling to pay that much.²⁵¹

On the evening of Fitzsimmons’ victory, Corbett sent a telegram to the office of the Associated Press in Texas that covered the Fitzsimmons-Maher fight. The telegram announced the end of Corbett’s short retirement: “Tell Fitzsimmons to come to Chicago as soon as he possibly can and I will make a match with him for any amount to fight him in any place on earth.”²⁵²

Stuart and Rector were back in business. The Fitzsimmons-Maher fight, however, led to the termination of relations between Rector and Edison. Edison was unhappy with the bad publicity and Rector was annoyed by the limitations of Edison’s camera.²⁵³ Free from the constraints imposed by Edison, Rector built a small, light camera that could be used for the Corbett-Fitzsimmons fight. He and Tilden formed the Veriscope Company and signed an agreement with Corbett and his manager to pay them 25% of all the proceeds of the fight film with \$13,000 paid up front.²⁵⁴



The veriscope

Source: Philadelphia Inquirer, Feb. 11, 1897, at 8.

250. *Details of the Great Contest*, *supra* note 249, at 1.

251. *Id.*

252. *Corbett Challenges*, PHILA. INQUIRER, Feb. 22, 1896, at 5.

253. RAMSAYE, *supra* note 20, at 284.

254. *Id.* at 284-86.

E. Dan Stuart's Fistic Carnival in Carson City, Nevada

1. Federal Legislation

Stuart's defeat in Texas was costly, but it did not discourage him from looking for alternative venues for the fights. He made a trip to Mexico City and received assurances that he could hold the fight without interference in a location close to the border.²⁵⁵ Stuart also considered holding the fight in New Mexico, but Congress blocked him by passing a federal prohibition against prizefighting in the territories and District of Columbia. President Cleveland signed this prohibition into law on February 7, 1896.²⁵⁶

A few days later, Representative Fredrick Gillett of Massachusetts also introduced a bill that prohibited any interstate transmission and transportation of any "gambling bet, or report of such bet on any race or prize fight or other event."²⁵⁷ This bill could have affected the profitability of prizefights, but it never reached a vote.

The 1896 Gillett Bill reflected hostility toward gambling and commercialization of brutality. As discussed earlier, the anti-gambling sentiment appeared in several state statutes. The hostility toward commercialization of brutality roughly corresponded to the common legislative perception that boxing was immoral and degrading activity.²⁵⁸

The federal ban on prizefighting in the territories and the District of Columbia outlawed pugilistic encounters between men and fights between men and animals for money or any other value, including championship, or such encounters and fights in which admission was charged.²⁵⁹ The statute made it unequivocally clear that charging admission "to see" a pugilistic encounter was illegal, regardless of whether the fee was charged directly or indirectly.²⁶⁰ One possible interpretation of this prohibition could have been that it also included watching prizefight films in the territories and the District of Columbia. This interpretation was never implemented.

Unlike the state anti-prizefight laws and the 1870 federal bill,²⁶¹ the federal 1896 prizefight ban did not include any third-party liability

255. "Dan" Stuart Gets a Place in Mexico Where He Can Defy the Police, N.Y. TIMES, Nov. 19, 1896, at 2. The Mexican Government later outlawed prizefighting. *Mexicans Approve the Law*, WASH. POST, Feb. 8, 1896, at 8.

256. 29 Stat. 5, ch. 12 (1896).

257. H.R. 5921, 54th Congress (1896).

258. *See supra* Part I.C.3.

259. 29 Stat. 5, ch. 12, §1 (1896). § 1.

260. §§ 1-2.

261. *See supra* Part I.C.3.

provisions. Nevertheless, on February 11, 1896, ten days before the Fitzsimmons-Maher fight, reporters asked Representative David Henderson of Iowa, the chairman of the Judiciary Committee, about the legality of an alleged payment of \$10,000 from the Kinetoscope Exhibiting Company to the fighters. His answer was decisive: “[T]he Kinetoscope [Exhibiting] Company would undoubtedly be liable under the anti-prize fighting law as abettors . . . if the fight occurred within [a] territory covered by the law.”²⁶²

Ultimately the fight was not held on American soil and no court needed to examine the question of whether the 1896 ban imposed any third-party liability. However, as far as the legislative intent matters, Henderson’s statement possibly suggests that the 1896 prizefight law intended to impose some restrictions on prizefight films.

2. Nevada Amends Its Law to Have the Fight

In October 1894, when the Olympic Club forced Corbett to agree to fight Fitzsimmons, quite a few states still had no prizefight laws. The anticipation to the Corbett-Fitzsimmons fight led all remaining states to enact prizefight laws and many others to tighten their existing laws. By February 1896, Dan Stuart had no location in the United States where he could legally hold his fistic carnival. He therefore changed strategy and lobbied the Nevada Legislature to repeal its 1877 prizefight statute. He succeeded.

On January 29, 1897, Governor Reinhold Sadler signed into law “An Act to restrict and license glove contests, or exhibitions between man and man, and to repeal all other Acts in conflict therewith.”²⁶³ The 1897 statute allowed prizefighting with gloves and provided that “[t]he Sheriff of any county in which the exhibition . . . is to be held, shall issue a license for such exhibition or contest upon payment . . . of . . . one thousand . . . dollars.”²⁶⁴ The statute further provided that “[n]o town, city or municipal corporation . . . shall have the power to prohibit, suppress or regulate any such glove exhibition or contest, [provided that] no such exhibition or contest shall take place on Sunday.”²⁶⁵

On March 17, 1897, Corbett and Fitzsimmons finally met in Carson City, Nevada, and fought in front of Rector’s cameras. Fitzsimmons needed only fourteen rounds to knock out Corbett. This so-call “fight of the century” was the first genuine multi-round fight to be filmed and the longest film ever recorded at the time.

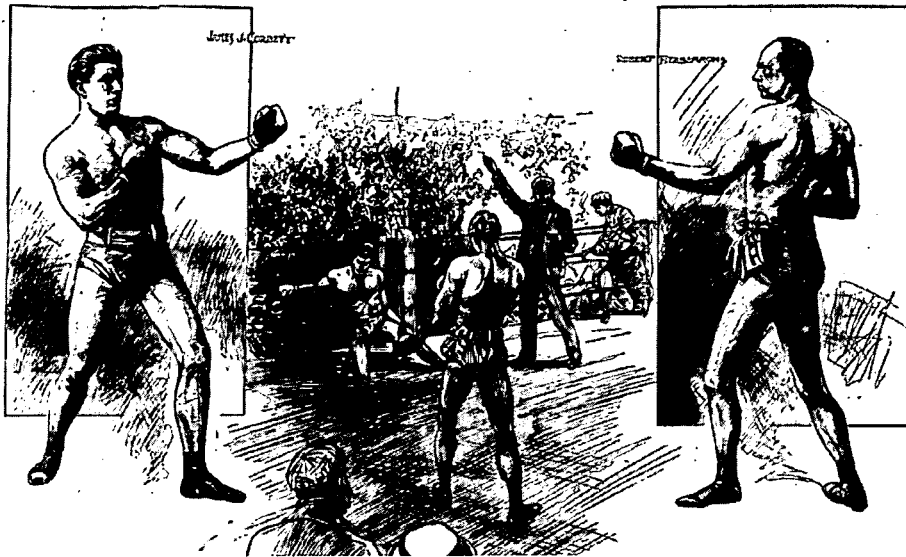
262. *The Kinetoscope People Could be Made Liable under the Law*, PHILA. INQUIRER, Feb. 12, 1896, at 5.

263. Laws of Nevada 11 (1897).

264. § 2.

265. § 6.

THE SCENE IN THE RING WHEN FITZSIMMONS KNOCKED CORBETT OUT.



Source: New York Herald, March 18, 1897, at 6.

The Corbett-Fitzsimmons fight caught states off guard again. With the exception of Nevada, all states had strict laws against prizefighting, but no law explicitly prohibited the exhibition of prizefight films. Two days after the fight, on March 19, 1897, Senator Nelson Aldrich and Representative Hepburn introduced a new federal anti-prize fight bill that sought “to forbid the transmission by mail or interstate commerce of any picture or description of any prize fight or any of its accessories.”²⁶⁶ The bill never reached a vote. On March 24, Senator George Hoar introduced yet another bill that prohibited the exhibition of prizefight pictures “by kinoscope or kindred devices” in the District of Columbia and the Territories.²⁶⁷ The Hoar bill was no more successful than the Aldrich-Hepburn bill.

On March 20, 1897, the Maine Legislature passed a single-provision statute that prohibited the exhibition of prizefight films in the state:

Any Person exhibiting publicly any photographic or other reproduction of prize fight shall be punished by a fine not exceeding five hundred dollars.²⁶⁸

The legislatures of other states were quick to introduce prizefighting censorship bills, but not as quick as Maine in completing the legislative process. Other states in which bills against prizefight films were introduced in the second half of March 1897 include Illinois, Minnesota,

266. Anti-Prize Fight Bill, H.R. 1598, 54th Cong. (introduced Mar. 19, 1897).

267. An Act to prohibit prize fighting, S. 1187, 54th Cong. (introduced Mar. 24, 1897).

268. 1897 Me. Laws 352.

Massachusetts, New Jersey, New York, and Pennsylvania.²⁶⁹

The Maine statute was the first direct legislative act of movie censorship in the United States. It was enacted more than ten years before the City of Chicago passed its censorship ordinance that mistakenly has been regarded as the parent of film censorship in the United States.

Maine has never been an important outlet for film exhibition and it was not an important exhibition outlet in 1897. But as far as history matters, its censorship laws long preceded the so-called ‘first act of movie censorship’ of the Chicago. We do not have a full account of state and municipal legislative activities to censor prizefight films in 1897, because there are no databases of bills, ordinances, and statutes. However, even at the municipal level, Chicago was not the first city to censor films. On July 26, 1897, Los Angeles passed an Ordinance that prohibited the “exhibition of photographic or kinetoscopic pictures or other representation of any prize fight or any fight of similar nature.”²⁷⁰

Therefore, by 1907, when Chicago adopted its Ordinance, states and municipalities had experience with movie censorship or at the very least have considered one form of censorship. The Chicago Ordinance possibly introduced an innovative censorship mechanism, but not a new concept.

The Corbett-Fitzsimmons Fight opened on May 22, 1897, at the Academy of Music, New York. A crowd of two thousand people came to see the film’s premiere.²⁷¹ Subsequently, copies of the film were exhibited in many other cities for more than two years. Some details of the events that surrounded the fight and its filming are available in film and boxing histories, but its legal story has not been told until now.

269. See, e.g., *Fights Shocks La Monte*, CHI. DAILY TRIB., Mar. 20, 1897, at 9 (discussing Illinois); *A Knock-Out Measure*, UTICA SEMI-WEEKLY HERALD, Mar. 23, 1897, at 4 (discussing Illinois, Massachusetts, and Minnesota); *Law Making in New Jersey*, N.Y. TIMES, Mar. 30, 1897, at 3; *No Prize Fight Pictures*, N.Y. HERALD, Mar. 24, 1897, at 12; *Taboos Fights by Kinetoscope*, WASH. POST, Mar. 26, 1897, at 3 (discussing New York); *To Cut off Exhibition of Prize Fight Pictures*, N.Y. TIMES, Mar. 21, 1897, at 3 (discussing Minnesota); *To Prohibit Prize-Fight Pictures*, CHI. DAILY TRIB., Mar. 20, 1897, at 6 (discussing Massachusetts); *Want No Pictures*, N.Y. HERALD, Mar. 20, 1897 (discussing Illinois, Massachusetts); *The Ring*, N.Y. CLIPPER, Mar. 26, 1897, at 64 (discussing Minnesota, Illinois, and Massachusetts). See also *No Prize Fight Pictures*, DALLAS MORNING NEWS, July 21, 1897, at 2 (discussing a Los Angeles ordinance that prohibited the exhibition of prizefight films).

270. Representations of Prizefights, Ordinance 4437, New Series (Los Angeles, July 26, 1897).

271. *Fight Pictures Shown: Opening Exhibition in New York Fairly Satisfactory*, CHI. DAILY TRIB., May 24, 1897, at 4; *The Veriscope Shows the Fight*, N.Y. TRIB., May 22, 1897, at 8.

ACADEMY OF MUSIC.

14th STREET AND IRVING PLACE.

E. G. GILMORE & FITZGERALD TOMPKINS..... Proprietors and Managers
E. F. VAN DUSEN..... Business Manager.

Week Commencing Monday, May 31st, 1897.

THE VERISCOPE

Pictures of the

CORBETT—FITZSIMMONS

SPARRING CONTEST.

Taken in Carson City, March 17th.

Produced by the VERISCOPE COMPANY,

DAN A. STUART, President.

PART I.

The preliminaries. The entrance of the Principals, Seconds and Officials into the ring. The beginning of the contest.

ROUND 1.

PART II.

ROUNDS 2, 3 and 4.

PART III.

ROUNDS 5, 6 and 7.

PART IV.

ROUNDS 8, 9 and 10.

PART V.

ROUNDS 11, 12 and 13.

PART VI.

LAST ROUND

and all the scene for five minutes after the contest ended

Afternoons at 2.30.

Evenings at 8.45.

EPILOGUE

This Article brings to light the forgotten origins of censorship and content self-regulation in the motion picture industry. The present understanding of content regulation in the motion picture industry builds on an erroneous belief that censorship began in 1907, ignoring ten years of legislative experience and thirteen years of soft forms of self-regulation. This omission has prevented scholars from incorporating into the analysis of content regulation experiences and insights that legislators and the industry have possessed. This Article explains the events that led to the birth of content regulation and, as such, it takes only the first step needed for a complete reexamination of the history and evolution of content regulation in the industry.

Contrary to scholarly consensus in the literature, movie censorship was not born of conservative concerns about pictorial depictions of sex and crime; rather, it arose from attempts to suppress boxing. This Article chronicles the events that led to the birth of movie censorship.

The Article explains why boxing motivated movie pioneers to improve film technologies, how movies commercialized the sport, and why this commercialization led states to increase pressures against the sport and to censor boxing films.

As a case study, this Article offers valuable insights into the design and study of social regulation. First, the Article demonstrates that when legislatures ban popular activities, entrepreneurs are likely to circumvent the law to satisfy demand. Nineteenth-century boxing promoters provided matches to prizefighting fans, just like the contemporary drug dealers who supply marijuana to casual and regular smokers. The nineteenth-century boxing fans read about the major fights in the newspapers and typically could watch low-profile fights in their towns fairly openly. Similarly, today's marijuana smokers know where to buy their "weed." The marijuana of today is as easily accessible and commonplace though technically illegal as prizefighting in the nineteenth century. One may argue that in itself these observations reflect an inevitable imperfect enforcement that cannot justify legalization of banned activities. The point, however, is that in a world of limited resources, bans may be proven a prohibitively costly policy tool to address popular activities. The reason is that the enforcement costs tend to go up with the popularity of the activity.

Second, and related to the first point, the Article offers an example of a potential inverse relationship between sudden legal changes and developments in public preferences. Under some circumstances, attempts to eliminate markets through law, say by imposing bans on prizefighting, could actually have a reverse effect because activities in the market would be dramatic and even have news value. The legal wars against boxing

started in the 1830s and peaked in 1897 when prizefighting was illegal in virtually all states and territories but Nevada. The public interest in boxing, however, gradually increased with the expansion of anti-prizefight laws. In the 1830s, boxing was mostly an entertainment for low-class men. The 1897 heavyweight championship between Corbett and Fitzsimmons was attended mostly by relatively wealthy individuals, including women and politicians, who could afford the travel and the admission tickets. One intuitive lesson that this inverse relationship offers is that strict bans on popular activities may backfire.

Third, the Article suggests that when information about banned activities is valuable in itself, banning only the activities is insufficient to accomplish the regulatory goal. Although most nineteenth-century boxing fans probably loved watching certain fights, they must have placed high value on learning about fights they could not afford to attend or in which they had relatively low interest. These boxing fans satisfied their interest in information by reading the local newspapers. For them, the local prizefight bans merely raised the costs associated with attending fights, but not other costs associated with the sport. Consistency should have required state legislatures to prohibit publishing information about prizefights in newspapers. If such state laws existed, they were not common and I could not locate one. Furthermore, when state legislatures tightened anti-prizefight laws in anticipation to the Corbett-Fitzsimmons fight, they should have also considered the legal status of the prospective cinematic exhibition of the fight. They did not do so and shortly thereafter they faced this question. Put simply, when information about banned activities is valuable in itself, the value of local bans diminishes.²⁷²

Fourth, the Article emphasizes possible advantages of federal laws, as opposed to state laws. Nineteenth-century boxing and gambling entrepreneurs successfully arranged high-profile fights because variations across state laws allowed them to locate loopholes in local laws. Dan Stuart is, of course, a prime example of such an entrepreneur. Moreover, variations among state laws and the availability of loopholes undermined in the public mind the value of complying with prizefight bans. The daily newspapers regularly reported about fights, and reports about encounters with the legal system become akin to exciting adventure stories. The nineteenth-century campaign against boxing could have been successful, had one standard—even an outright ban—governed the country. In fact, Senator Wilson's 1870 bill²⁷³ could have also spelled the end of the sport: It would have prevented fighters, sport professionals, and fans to travel

272. Effective censorship might have been possible in the nineteenth century when people relied on newspapers, but much less so today in the Internet era. Thus, I do not develop the possibility of using censorship to counterbalance the decrease in value of local bans.

273. See *supra* notes 94-97 and accompanying text.

across state lines for fights. Here, the importance of federal law as oppose to state laws derived again from the fact that boxing fans attributed value to the information about the banned activities, and, therefore, at any point in time one local loophole was enough to satisfy the public demand.

Fifth, the Article offers a glimpse into an industry's choices to endorse self-regulation to avoid bad publicity and state intervention. Edison's choices to distance himself from fight films and veto the use of his machines for such movies were all about regulating the industry he largely controlled in order to mitigate public consequences.

Sixth and last, this Article illustrates that values that at some point in time shape social regulation may change and even become forgotten before the regulation is repealed. The origins of movie censorship have been in the dark for many decades, among other reasons, because the boxing aversion of the nineteenth-century was forgotten. This censorship of boxing films began in 1897 and ended only in 1940,²⁷⁴ long after the passionate nineteenth century aversion to the sport dissolved. This example of changes in values that shape social regulation supports calls for extra-caution that social regulators must endorse before using values for restrictive regulations.

The foregoing points summarize the key regulatory insights that this Article offers. They can be easily applied to modern forms of regulation, such as strict bans on drugs, tobacco regulation, prohibitions on child pornography, federal funding of abstinence-only education programs, and many others.

274. An Act to divest prize-fight films of their character as subjects of interstate or foreign commerce, and for other purposes, Pub. L. 76-673, 54 Stat. 686 (June 29, 1940).