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Does Obscenity Cause Moral Harm?

Andrew Koppelman*

*Northwestern University School of Law, akoppelman@law.northwestern.edu

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Abstract

This essay will reconsider the fundamentals of obscenity law: the harm that the law addresses and the means by which the law tries to prevent that harm. Strangely, even though an enormous amount of scholarship examines this doctrine, these fundamentals have not been adequately addressed. The harm that the doctrine seeks to prevent is not offense to unwilling viewers. It is not incitement to violence against women. It is not promotion of sexism. Rather, it is moral harm - a concept that modern scholarship finds hard to grasp. Liberals have not even understood the concept of moral harm, and so their arguments have often missed the point of the laws they were criticizing. Conservatives have understood the concept quite well, but have thought that it straightway entailed censorship. This essay is, to my knowledge, the first presentation of the liberal argument that does justice to the conservative case for censorship. I will argue that the concept is a coherent one and that obscenity law tries to prevent a genuine evil. But I will conclude that the law is too crude a tool for the task. A sound understanding of obscenity law's ambitions reveals that the doctrine is unworkable and should be abandoned.

ESSAY

DOES OBSCENITY CAUSE MORAL HARM?

Andrew Koppelman*

The classic justification for obscenity law is to prevent readers from being depraved and corrupted by sexually oriented publications. Moral harm is not an unfamiliar idea. It is what most parents have in mind when they censor what their children are allowed to see. Yet liberal critics of the doctrine have not understood it, and so have often missed the point of the laws they were criticizing. Texts shape our view of the world. Just as good literature invites us to perceive the world subtly and empathetically, it is possible—indeed, it is common—for novels, films, or television shows to view the world crudely and insensitively, and to spin out self-aggrandizing fantasies that invite self-centeredness and cruelty. Texts that do this can indeed cause moral harm. Discerning the moral content of texts is, however, too complex a task for the law to undertake. Some pornography is morally bad because it encourages the reader to regard other people as mere objects of sexual interest, whose feelings and desires do not matter. But this cannot be the basis for a workable legal test for obscenity, because it is too vague and its application too contestable to be a rule of law. Moral harm is not identical with, and only fortuitously overlaps with, what any legal test focuses on: the dissemination of particular types of images or subject matter. Obscenity law is thus an unsuitable solution to the problem it seeks to address, and should be abandoned.

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INTRODUCTION

This Essay will reconsider the fundamentals of obscenity law: the harm that the law addresses and the means by which the law tries to prevent that harm. Strangely, even though an enormous amount of scholarship examines this doctrine, these fundamentals have not been adequately addressed. The harm that the doctrine seeks to prevent is not offense to unwilling viewers. It is not incitement to violence against women. It is not promotion of sexism. Rather, it is *moral* harm—a concept that modern liberalism finds hard to grasp.

Because liberals have not even understood the concept of moral harm, their arguments have often missed the point of the laws they were criticizing. Conservatives have understood the concept quite well, but have thought that it straightway entailed censorship. This Essay is, to my knowledge, the first presentation of the liberal argument that does justice to the conservative case for censorship.

This Essay argues that the concept is a coherent one and that obscenity law tries to prevent a genuine evil, but that the law is too crude a tool for the task. A sound understanding of obscenity law's ambitions reveals that the doctrine is unworkable and should be abandoned.

I. THE PUZZLE OF OBSCENITY DOCTRINE

The Supreme Court has declared that, under the First Amendment of the U.S. Constitution,¹ “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”² The reasons are familiar. The people cannot control the government if the government gets to control what the people think.³ Discussion con-

1. U.S. Const. amend. I, provides in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”

2. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

3. See Alexander Meiklejohn, *Political Freedom* (1960); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993); Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 Sup. Ct. Rev. 191.



trolled by the state is less likely to discover truth than a free market in ideas.⁴ Human dignity depends on the freedom of the mind.⁵

The Court's formulation is, however, an obvious overstatement. The Court has laid down a number of categories of unprotected speech that are defined by their content. The First Amendment does not protect, for example, defamation with actual malice,⁶ false or misleading commercial advertising,⁷ fraudulent solicitation,⁸ incitement to lawbreaking,⁹ or threats of violence.¹⁰

All but one of these exceptions rest on fraud or harm to third parties, rather than on the intrinsic evil of the prohibited message. That one is obscenity.¹¹ Material can be obscene even if it has no likelihood of inciting anyone to unlawful conduct, and even if no unwilling viewer is ever likely to see and thereby be offended by it. Obscenity law aims at preventing the formation of certain thoughts—typically, erotic ones—in the minds of willing viewers.¹²

4. See John Stuart Mill, *On Liberty* (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

5. See Martin H. Redish, *Freedom of Expression: A Critical Analysis* (1984); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334 (1991).

6. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283–88 (1964).

7. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 & n.24 (1976); see also *In re R.M.J.*, 455 U.S. 191, 203 (1982).

8. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 624 (2003).

9. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

10. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

11. Obscenity is to be distinguished sharply from child pornography, which is prohibited because children are harmed in its production and the harm cannot be effectively prevented so long as there is a profitable market for its products. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *New York v. Ferber*, 458 U.S. 747, 759 (1982) (“[T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”). This Essay's claims are nonetheless relevant to the child pornography question, because the harm that children suffer when they participate in production is hard to describe without recourse to the broad conception of well-being advocated here.

12. This was noted long ago by Louis Henkin, who, however, was entirely baffled by the notion of harm that concerned the Court. See Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391, 407 (1963) (“Private ‘morals’ and their ‘corruption’ and what ‘corrupts’ them . . . are not in the realm of reason and cannot be judged by standards of reasonableness; they ought not, perhaps, to be in the domain of government.”). The present test for determining whether a publication is obscene, laid down in *Miller v. California*, is:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.



The Warren Court, which was the first to consider whether restrictions on sexually explicit literature might violate the First Amendment, dismantled much of the apparatus of suppression that existed at that time, but ensured the survival of the rest by devising the category of unprotected obscenity. The judges were not merely bowing to political resistance when they preserved the censorship of sexual speech. One law student, interviewing for a clerkship in Chief Justice Earl Warren's chambers in 1967, was asked whether he agreed with Warren's view that obscenity is unprotected, and was advised before answering that an affirmative response (to this and no other question) was a requirement for the job.¹³ William Brennan, one of the Court's great civil libertarians, was so offended by a publisher who advertised nonobscene materials in a way that appealed to buyers' prurient interests that he tossed aside traditional notions of legal notice and created a brand new crime of pandering, for which he sent the publisher to jail without pausing for a trial.¹⁴

Modern First Amendment theory typically either ignores or misunderstands the state interests that underlie obscenity law. Neither offense¹⁵ nor incitement to violence against women¹⁶ are the doctrine's core concerns, and so the doctrine is not effectively attacked by showing that obscenity does not cause these evils.¹⁷ The Court is persuaded that something very bad happens when citizens contemplate obscene materials. A responsive critique should find out what that is and why it is supposed to be so bad.

This Essay attempts to state, in its strongest form, the state interest that justifies the suppression of obscenity. It draws on scholarship in liter-

413 U.S. 15, 24 (1973) (citations omitted).

13. Telephone Interview with Lucas A. Powe, Professor of Law, University of Texas (Dec. 9, 2003). Powe, the applicant, answered the question truthfully and thereby disqualified himself. (He later clerked for Justice Douglas.) "If anyone showed that book to my daughters," Warren told a clerk when discussing one appeal, "I'd have strangled him with my own hands." Ed Cray, *Chief Justice: A Biography of Earl Warren* 326-27 (1997).

14. See *Ginzburg v. United States*, 383 U.S. 463, 475-76 (1966). The injustice of *Ginzburg* has been noted by many commentators. See, e.g., Harry Kalven, Jr., *A Worthy Tradition* 43-44 (1988); Lucas A. Powe, Jr., *The Warren Court and American Politics* 344-49 (2000). Brennan later conceded that the decision was "the worst mistake" he ever made. Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* 503 (1992).

Another revealing episode occurred in the Court's 1956 Term, when Felix Frankfurter's law clerk argued that the book being prosecuted in one case seemed fairly innocuous. The clerk later told an interviewer that, when he told Frankfurter that his wife agreed, the Justice "was apoplectic about the fact that an innocent young woman like my wife should see this." *Id.* at 292.

15. See *infra* Part III.D.

16. See *infra* Part III.G.

17. Still less effective is a general claim that government should never legislate on the basis of moral judgments. See Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 Mich. L. Rev. 1564 (1988). This claim has not, of course, gone unchallenged by defenders of pornography regulation. See, e.g., Harry M. Clor, *Mill and Millians on Liberty and Morality*, 47 Rev. Pol. 3 (1985).



ary theory that explores how texts promote certain dispositions in the reader. This Essay concludes that moral harm is a meaningful concept, and that some literature can produce it. When the state suppresses obscenity, it does something like what I do as a parent when I try to control what my children see. Of course, I don't want my children to assault anyone, but that improbable danger is not what motivates me. My hopes for them are less crude, and less modest.

But this Essay intends to bury obscenity doctrine, not to praise it. Once the case for preventing moral harm is understood, it becomes clear that this is an end that censorship is ill suited to promote. Outside of sexual literature, the First Amendment presumes that adults can be trusted to see even violent and malign entertainment. Sex is not different enough to warrant different treatment. The inevitable clumsiness of the law in this area is highlighted by the remarkably poor fit between obscenity law's scope and the evil that it seeks to prevent. It matters what we think and feel. But it does not follow that the law should police what we think and feel.

II. UNDERSTANDING THE IDEA OF MORAL HARM

A. *The Official Rationale*

The earliest and most influential definition of obscenity is the English case *Regina v. Hicklin*, which holds that a publication is obscene if it has a "tendency . . . to deprave and corrupt those whose minds are open to such immoral influences."¹⁸ The modern United States Supreme Court follows this approach, with modifications.¹⁹ The First Amendment does not protect "material which deals with sex in a manner appealing to prurient interest," which means, "material having a tendency to excite lustful thoughts."²⁰

18. L.R.-Q.B. 360, 371 (1868).

19. The debt of modern obscenity law to *Hicklin* is shown in Joel Feinberg, *Offense to Others* 171-78 (1985). Feinberg observes that the modern test "is not really a 'substitute' for *Hicklin* so much as a mere modification of *Hicklin*: 'average person' is substituted for unusually susceptible persons, 'contemporary community standards' for eternally fixed Victorian standards, 'the material as a whole' for isolated passages." *Id.* at 176. For useful treatments of the history of obscenity law, see generally de Grazia, *supra* note 14; Helen Lefkowitz Horowitz, *Rereading Sex: Battles over Sexual Knowledge and Suppression in Nineteenth-Century America* (2002); Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* (1987); P.R. MacMillan, *Censorship and Public Morality* (1983); Geoffrey Robertson, *Obscenity: An Account of Censorship Laws and Their Enforcement in England and Wales* (1979).

20. *Roth v. United States*, 354 U.S. 476, 487 & n.20 (1957). Not all such material is legally obscene. Pornography, in order to be obscene, must fall within the complex definition the Court articulated in *Miller*. See *supra* note 12. Appeal to prurient interest remains part of the definition, however. I will hereafter use "pornography" to refer to material calculated to appeal to the prurient interest, whether or not it satisfies the *Miller* test. Thus, for example, *Playboy* is pornographic but not obscene. This use is not etymologically sound, see Richards, *supra* note 5, at 47-51, but it corresponds with present American usage. Some feminist writers have proposed to redefine pornography as

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Just what interest is threatened by lustful thoughts? The anti-pornography crusaders of the nineteenth century thought that if sexual material came into the possession of teenage boys, it would induce them to masturbate, and this in turn would lead to lassitude, weakness, crime, insanity, and early death.²¹ No one believes this today. But there is still considerable support for regulating pornography, and prosecutions continue to take place.²² Why? What is the best case that can be made for the idea that at least some pornography can cause moral harm?

The most articulate defense of the constitutional nonprotection of obscenity that appears in any Supreme Court opinion is Chief Justice Burger's opinion for the Court in *Paris Adult Theatre I v. Slaton*,²³ decided on the same day that the present test for obscenity was laid down in *Miller v. California*.²⁴ No earlier opinion of the Court had even attempted to articulate the state's interests.²⁵ The key passage is the following:

If we accept the unprovable assumption that a complete education requires the reading of certain books, and the well nigh universal belief that good books, plays, and art lift the spirit, im-

necessarily involving the subordination of women—and thus to be contrasted with “erotica,” which is not subordinating—but this usage is idiosyncratic.

21. See Horowitz, *supra* note 19, at 92–93, 97–107, 394–403; Kendrick, *supra* note 19, at 138–43. The best general history of the masturbation panic, which began in the early 1700s and survives in attenuated form today, is Thomas W. Laqueur, *Solitary Sex: A Cultural History of Masturbation* (2003).

22. For an account of the federal government's vigorous efforts in the late 1980s and early 1990s to put the largest mail order merchants out of business, see generally Philip D. Harvey, *The Government vs. Erotica* (2001). On more recent federal prosecutions, see Eric Lichtblau, *Justice Dept. Fights Ruling on Obscenity*, N.Y. Times, Feb. 17, 2005, at A25 (reporting thirty-eight convictions since 2001); G. Beato, *Xtreme Measures: Washington's New Crackdown on Pornography*, Reasononline, May 2004, available at <http://www.reason.com/0405/fe.gb.xtreme.shtml> (on file with the *Columbia Law Review*) (describing details of two prosecutions). The Department of Justice has exaggerated the number of convictions it has secured. A December 2003 memo released to Concerned Women for America claimed twenty-one convictions, but if one excludes cases of child pornography and distribution of obscenity to minors, the number shrinks to five. The list appears in Jan LaRue, DOJ Releases List of ‘Obscenity Prosecutions During This Administration,’ Dec. 18, 2003, at <http://www.cwfa.org/articledisplay.asp?id=5022&department=LEGAL&categoryid=pornography> (on file with the *Columbia Law Review*).

23. 413 U.S. 49 (1973).

24. 413 U.S. 15, 24 (1973); see *supra* note 12.

25. Earlier decisions, following Justice Brennan's opinion in *Roth*, had simply proclaimed obscenity unprotected, therefore rendering unnecessary any consideration of the state's interests. Lucas Powe explains what is unsatisfactory about this strategy:

[I]f one doesn't know why obscenity is evil, it is difficult to know what limits to place on its regulation. The definition of the prohibited materials is inextricably linked to the rationale for regulation, but Brennan severed the link, never finding the reasons relevant. As a consequence he was never able to define successfully what he was certain the government could proscribe.

Powe, *supra* note 14, at 117. For a similar analysis from a different political perspective, see Harry M. Clor, *Obscenity and Public Morality: Censorship in a Liberal Society* 40–43 (1969) [hereinafter Clor, *Obscenity and Public Morality*]. The Court's decisions after *Paris Adult Theatre* have been even less articulate.



prove the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.²⁶

Burger's concern has three elements: harm of a kind analogous to whatever benefit is imparted by good books, a crass affect toward sex, and consequent debasement and distortion of sex. What sense can be made of these claims?

B. *The Idea of Moral Harm*

Harry Clor is the most articulate philosophical defender of legal regulation of obscenity.²⁷ He argues that Burger is correct that sexuality is both important and vulnerable. The erotic often "is an arena in which primitive or powerfully self-centered urges and elevated aspirations are in competition for predominance."²⁸ Thus sex "can be the inspiration for a sustained intimacy and affection with another person—and it can be the occasion for possessiveness, hostilities, and humiliation."²⁹

Could one possibly harm a person by inflaming his sexual passions? Clor notes that "notions of what is harmful to human beings are ultimately linked to ideas of what is good for us."³⁰ Unless it can be shown

26. *Paris Adult Theatre*, 413 U.S. at 63 (citations omitted). Burger here argues in passing that obscene material also might lead to antisocial behavior, see also *id.* at 60–61, but this is makeweight. As Professor Redish observes, "the harmful effect alleged is so speculative that in no area of protected speech would such a showing justify regulation." Redish, *supra* note 5, at 71; see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–50 (2002) (rejecting this justification for suppressing computer-generated imitations of child pornography). The causal claim also is parasitic on Burger's claim about moral harm; it is precisely obscenity's corrupting and debasing impact that allegedly leads to antisocial behavior.

27. Other thoughtful defenses include Robert P. George, *Making Children Moral: Pornography, Parents, and the Public Interest*, in *In Defense of Natural Law* 184 (1999); Walter Berns, *Beyond the (Garbage) Pale or Democracy, Censorship and the Arts*, in *Freedom of Expression: Essays on Obscenity and the Law* 49 (Harry Clor ed., 1971); Irving Kristol, *Pornography, Obscenity, and the Case for Censorship*, *N.Y. Times*, Mar. 28, 1971 (Magazine), at 24. It is, of course, true that much opposition to pornography rests on less respectable sources, such as primitive pollution fears and a prudish antipathy to sex. But a fair criticism of the present regime should respond to the strongest claims that can be made on its behalf, and that is what I try to do here.

28. Harry M. Clor, *Public Morality and Liberal Society: Essays on Decency, Law and Pornography* 64 (1996) [hereinafter Clor, *Public Morality and Liberal Society*].

29. *Id.*

30. *Id.* at 115.



that good moral character is not a necessary element of well-being, it may be possible for us to suffer moral harm.³¹

The concept of moral harm is a strange one from the perspective of much contemporary moral philosophy. Joel Feinberg, for example, objects that “[m]orally corrupting a person, that is, causing him to be a worse person than he would otherwise be, can *harm* him . . . only if he has an antecedent interest in being good.”³² Clor responds that if Feinberg is right, then all effort by educators of children to promote children’s moral development should be understood to be a raw exercise of power, not even justifiable on paternalistic grounds. “On this view of what moral education means, ‘it’s for your own good’ could only be a falsehood or a kind of myth, the truthful translation of which would be ‘because that’s how we want it.’”³³

Feinberg’s understanding of well-being as the satisfaction of subjective desire, with no external standard against which to judge that desire, is of a piece with the idea that obscenity is of concern only to the extent that it is likely to produce antisocial conduct. Both manifest the tendency of many modern moral philosophers, noted by Charles Taylor, “to focus on what it is right to do rather than on what it is good to be, on defining the content of obligation rather than the nature of the good life.”³⁴ What this tendency obscures from view is a central element of ordinary moral reasoning, which Taylor calls “strong evaluation.” Such evaluation involves “discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged.”³⁵ A person who did not make any such discriminations, a “simple weigher of alternatives,”³⁶ would be a very strange

31. For now, this Essay will defer the question of whether, even if moral harm exists, it can be caused by sexually arousing publications.

32. Joel Feinberg, *Harm to Others* 70 (1984).

33. Clor, *Public Morality and Liberal Society*, *supra* note 28, at 113. This is not, of course, a refutation of Feinberg’s claim. Such a refutation would require a conclusive answer to the ancient question, posed but not resolved in Book I of Plato’s *Republic*, of whether a person is better off if he has a good character. That question continues to be debated by philosophers. On the other hand, it is answered on an existential level by parents every day when they try to develop their children’s moral character on the assumption that to neglect this task would wrong the children. On the norms implicit in parenting practice, see Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (1989). The objection to Feinberg is that actual human practice is inconsistent with Feinberg’s degree of agnosticism about human interests. It is unlikely that Feinberg was so noncommittal when he raised his own children. Thanks to John Deigh for pressing me on this issue.

34. Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 3 (1989) [hereinafter *Taylor, Sources*].

35. *Id.* at 4.

36. 1 Charles Taylor, *What is Human Agency?*, in *Philosophical Papers: Human Agency and Language* 15, 23 (1985).



sort of person; it is not clear whether there could be a person so lacking in depth.³⁷

Another way of putting the point is to say that some of our desires and feelings are “import-attributing”: They hold that “some goals, desires, allegiances are central to what we are, while others are not or are less so.”³⁸ Because these attributions are claims about value, they are capable of being mistaken. But this means that a person could be mistaken about his fundamental purposes.³⁹ If A were to induce B to make such a mistake, this would harm B even if B did not complain about it. It would impair B’s ability to discern the morally better from the morally worse. This is a kind of moral harm. B has an interest in having good moral capacities whether he knows it or not.

C. *When Reading Is Bad for You*

Even if moral harm exists, how could a photograph or a movie cause such harm? Justice Burger thinks that the harm caused by obscene books is somehow analogous to the benefit caused by good books. But what good are good books?

1. *Nonce Beliefs and Fixed Norms.* — Any work of literature promotes certain desires and projects in the reader. Wayne Booth observes that narratives, when we are paying attention to them, tend to reshape us. As we read “a large part of our thought-stream is *taken over*, for at least the duration of the telling, by the story we are taking in.”⁴⁰ Any text will imply an author, possibly different from the real historical author, whose presence can be felt by the reader.⁴¹ As I read, my thinking becomes that of the implied author: “I begin to see as he or she sees, to feel as she feels, to love what he loves, or to mock what she mocks.”⁴² The best narratives are morally useful precisely because they “introduce us to the prac-

37. *Id.* at 28; Taylor, Sources, *supra* note 34, at 27. Even utilitarians who are officially committed to such simple weighing tend to be animated by motives of a loftier sort; they cannot account for their own existence. See *id.* at 76–86, 322–40.

38. 2 Charles Taylor, What’s Wrong with Negative Liberty, in *Philosophical Papers: Philosophy and the Human Sciences* 211, 224 (1985).

39. Taylor offers two illustrations of persons who are thus fundamentally mistaken: multiple murderer Charles Manson and terrorist Andreas Baader. *Id.* at 227. “And once we recognize such extreme cases, how avoid admitting that the rest of mankind can suffer to a lesser degree from the same disabilities?” *Id.* But these examples, both violent criminals, provide us with no guidance as to how we can extend the analysis to less extreme cases. Still, once the principle is established, it opens the possibility of a response to Feinberg.

40. Wayne C. Booth, *The Company We Keep: An Ethics of Fiction* 141 (1988) [hereinafter Booth, *The Company We Keep*]; see also Wayne C. Booth, “Of the Standard of Moral Taste”: Literary Criticism as Moral Inquiry, in *In Face of the Facts: Moral Inquiry in American Scholarship* 149, 167–77 (Richard Wightman Fox & Robert B. Westbrook eds., 1998).

41. On the idea of the implied author, see Wayne C. Booth, *A Rhetoric of Fiction* 67–77 (2d. ed. 1983) [hereinafter Booth, *Rhetoric of Fiction*].

42. Booth, *The Company We Keep*, *supra* note 40, at 256.

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tice of subtle, sensitive moral inference, the kind that most moral choices in daily life require of us.”⁴³ Morally bad literature is literature that promulgates morally bad fixed norms.

The “facts” that we take in when we read a narrative are of two kinds, Booth argues. One is “nonce beliefs,” which the reader embraces only for the duration of the story: “Once upon a time there was a farmer who had the good fortune to possess a goose that laid a golden egg every day” But any story will also depend for its effect on “fixed norms,” which are “beliefs on which the narrative depends for its effect but which also are by implication applicable in the ‘real’ world.”⁴⁴ When Aesop concludes the goose story with the claim that “overweening greed loses all,” the reader is meant to keep thinking that once the story is over. And the point applies to all fictions, whether or not they have overt morals as Aesop’s do. These fixed norms may be good or malign. *King Lear*, *Oliver Twist*, and *Midnight Cowboy* “depend upon and reinforce, among other fixed norms, the enormous value of simple kindness and the awfulness of gratuitous cruelty.”⁴⁵ *Don Giovanni*, *A Farewell to Arms*, and *Gargantua* “depend upon and reinforce (in different degrees, to be sure, and among many other fixed norms) the conviction of the male world that women are artistically expendable, at most a kind of attractive backdrop against which the comedy or tragedy of men’s fate can play itself out.”⁴⁶

2. *It Is Not About Consequences*. — The inappropriateness of focusing only on the consequences of narrative, rather than on the moral dimensions of narrative itself, is made clearer in a little parable by Iris Murdoch in her 1971 book, *The Sovereignty of Good*.⁴⁷ Murdoch was trying to refute a school of moral philosophy that concerned itself only with the appropriateness of conduct, and which was entirely indifferent to people’s internal mental states. But her tale can also show how a narrative can be good or bad without having good or bad behavioral effects.

A woman, M, feels hostile toward her daughter-in-law, D. M thinks that her son has married beneath him, and finds D unrefined, brusque, and rude. However, M always behaves beautifully toward D, and keeps her real opinion well concealed. Then suppose that the young couple emigrates, or D dies, so that whatever happens after that happens only in M’s mind. M, moved only by love for her son and a desire to be just, now reflects on D. She concludes that D has many good qualities that M had failed to appreciate: She is not undignified but spontaneous, not vulgar but refreshingly simple, and so on. In the course of these reflections, Murdoch insists, M has been “active, she has been *doing* something, something which we approve of, something which is somehow worth doing in

43. Id. at 287.

44. Id. at 142–43.

45. Id. at 152.

46. Id.

47. Iris Murdoch, *The Sovereignty of Good* 19 (1971).



itself.”⁴⁸ M’s activity of trying to see D accurately is a moral activity, and perhaps the necessary substrate of any further moral activity.⁴⁹

Morality, Murdoch claims, is inseparable from accurate perception. “The more the separateness and differentness of other people is realized, and the fact seen that another man has needs and wishes as demanding as one’s own, the harder it becomes to treat a person as a thing.”⁵⁰ On the other hand, Murdoch writes that the chief enemy of morality is “personal fantasy: the tissue of self-aggrandizing and consoling wishes and dreams which prevents one from seeing what is there outside one.”⁵¹ Moral harm may be understood, following Murdoch, precisely as succumbing to that kind of fantasy—which is *not* the same thing as entertaining, as a nonce belief, any particular type of fantasy. The best art, Murdoch argues, is that which “shows us the world, our world and not another one, with a clarity which startles and delights us simply because we are not used to looking at the real world at all.”⁵²

Another instance of moral harm is revealed in Ted Cohen’s analysis of jokes.⁵³ All jokes, Cohen argues, are conditional on some preexisting knowledge that is shared by teller and audience. Here is one of his illustrations, which is perceived as funny only if the audience knows a little about drama:

A panhandler approached a man on the street outside a theater. The man declined to give anything, saying, “Neither a borrower nor a lender be.”—William Shakespeare.

*The panhandler replied, “Fuck you!”—David Mamet.*⁵⁴

Any joke depends on and calls attention to what the audience already knows and feels. Cohen claims that “a deep satisfaction in successful joke transactions is the sense held mutually by teller and hearer that they are joined in feeling.”⁵⁵ When you tell me a joke and hope that I find it funny, “what you want is to *reach* me, and therein to verify that you understand me, at least a little, which is to exhibit that we are, at least a little, alike. This is the establishment of a felt intimacy between us.”⁵⁶ When a joke works it creates a community of persons who are united both by knowledge and by feeling.

Cohen ends his book with a consideration of the morality of joking, with special attention to the problem of racist jokes. The following is one that Cohen finds especially disturbing:

48. Id.

49. Murdoch’s conception of morality as dependent on accurate perception is persuasively elaborated in Christopher Cordner, *Ethical Encounter: The Depth of Moral Meaning* (2002). Thanks to Nancy Koppelman for directing my attention to this book.

50. Murdoch, *supra* note 47, at 66.

51. Id. at 59.

52. Id. at 65.

53. Ted Cohen, *Jokes: Philosophical Thoughts on Joking Matters* (1999).

54. Id. at 15.

55. Id. at 25.

56. Id. at 29.



How did a passerby stop a group of black men from committing a gang rape?

*He threw them a basketball.*⁵⁷

It is possible, but unprovable, that such jokes cause racist beliefs and behaviors. But the jokes would still be troubling even if they had no such causal effects. And Cohen is not sure why this is so. He has been amused by the joke, and yet he is disturbed by it. Booth's analysis can solve Cohen's puzzle. The basketball joke presupposes that neither teller nor listener is black, that both understand black men to be interested in little beside basketball and sex, and that those who know this are better and smarter than the black men.⁵⁸ The joke's funniness is just what makes it so disturbing. When I laugh, I succumb to the joke, and in that moment the joke's racist fixed norms become my norms. I am constituted, in the moment of laughter, as a member of a racist community. And that is not a good thing to be.⁵⁹

3. *Posner's Objection.* — A prominent critic of obscenity law, Judge Richard Posner, denies Burger's premise that good literature can improve us, and so questions whether bad literature can make us worse. "[I]mmersion in literature does not make us better citizens or better people."⁶⁰ Professors of literature are not morally superior to other people, and Nazi Germany was more cultured than the United States was in the 1940s.

Posner does not, however, deny that literature has effects on its readers.

[L]iterature continues to be an important component of high-school and college education because of its effects in stretching the student's imagination, multiplying his cultural perspectives, broadening his intellectual and emotional horizons, offering him a range of vicarious experiences, and assisting him to read

57. *Id.* at 77.

58. However, sometimes the teller or listener or both will be black, in which case a different analysis would apply. Thanks to Richard Posner for pointing this out.

59. The critique of pornography developed by Catharine MacKinnon and Andrea Dworkin also claims constitutive harm, but of a different kind: They claim that pornography constitutes sexuality, of a particularly malign kind. While MacKinnon and Dworkin often enlist consequentialist arguments, such arguments are not their main claims. See Henry Louis Gates, Jr., To "Deprave and Corrupt," 38 N.Y.L. Sch. L. Rev. 401, 433-37 (1993) (book review). The analogous claim about racist jokes would be that such jokes constitute what it is to be a black person in American society. In both cases, one must beware of exaggerating the cultural power of any particular set of representations; but representations taken as a whole do constitute the world we inhabit. The type of moral criticism of texts that MacKinnon and Dworkin (and, in a different way, Clor) advocate is important, even if they are mistaken in trying to enlist the law to enforce their judgments.

60. Richard A. Posner, *Law and Literature: A Misunderstood Relation* 306 (1998) [hereinafter Posner, *Law and Literature*]. The prohibition of pornography, of course, makes no sense at all to Posner. See *id.* at 333-38; Richard A. Posner, *Sex and Reason* 351-82 (1992).



difficult texts, express complex thoughts, and write and speak persuasively.⁶¹

The coexistence of these passages in Posner's work leads Booth to conclude that there are two Posners, one who rules out all ethical questions from aesthetic judgment and another who repeatedly engages in ethical criticism.⁶² Posner responds that "Booth defines 'ethical' so broadly that it largely overlaps what I consider 'aesthetic.'"⁶³ But it appears that Posner's understanding of the ethical is confined in just the way that Murdoch is attacking. If the educational process that Posner describes did not make the student a better person, then why require the student to endure it? Posner appears to have a richer and more complex conception of well-being than his stated position will allow, and that conception entails the possibility of subtler forms of moral corruption than those he considers.

III. RECOGNIZING MORAL HARM

Even if moral harm is a coherent concept that describes a real evil, it does not follow that law can or should do anything about it. The large difficulty—one that, this Essay shall eventually argue, is fatal—is using this concept to define a workable legal standard. What is the pertinent characteristic of literature that entitles the law to conclude that it is morally harmful and therefore should be denominated obscene?

This Part shall examine several characteristics that might be thought to make literature morally harmful: the reduction of human beings to objects, the tendency of sexual arousal to distort people's discernment and judgment, damage to children's moral development, offensiveness, the alleged worthlessness of sexual fantasy, the association of sex with violence, and the factors singled out by the Supreme Court in the *Miller* test. None of them, I conclude, provides a legal standard that enables the courts to recognize moral harm.

A. Objectification

A common theme in arguments about the debasing effect of obscenity is that it reduces people to the level of objects. Thus, Clor argues that pornography "dehumanizes in an area of great human importance and some sensitivity."⁶⁴ It "obliterates the distinction between human and subhuman sexuality."⁶⁵ "The purpose—to arouse an elemental passion for other people's bodies independently of any affection or regard for a particular person—virtually guarantees that human beings will be repre-

61. Posner, *Law and Literature*, supra note 60, at 335.

62. Wayne C. Booth, *Why Banning Ethical Criticism Is a Serious Mistake*, 22 *Phil. & Literature* 366, 366–67 (1998).

63. Richard A. Posner, *Against Ethical Criticism: Part Two*, 22 *Phil. & Literature* 394, 395 (1998).

64. Clor, *Public Morality and Liberal Society*, supra note 28, at 192.

65. *Id.* at 187.

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sented as instruments.”⁶⁶ Citizens cannot respect one another while viewing each other “pornographically, or as mere objects and opportunities for self-gratification.”⁶⁷ If this is what is wrong with pornography, then it is a mistake, Clor argues, for some feminists to try to salvage certain erotic materials that supposedly do not degrade women. “They condemn ‘objectification’ while apparently validating representations of a sort that inevitably objectify.”⁶⁸ To appropriate Booth’s terms, Clor’s claim is that pornography inevitably incorporates fixed norms that are morally bad, that regard people as mere objects.⁶⁹

This focus on sexual objectification as the core wrong of pornography is common ground among pornography’s critics on the right (such as Clor) and the left (such as Catharine MacKinnon and Andrea Dworkin). These writers’ case, however, has been weakened by their imprecise use of the term “objectification.” Just what is it and why is it bad?

Martha Nussbaum has offered the most careful analysis of the concept of objectification.⁷⁰ She concludes that it refers to a number of distinct ways of treating a person like a thing: as an instrument, as lacking in autonomy, as lacking in agency, as interchangeable with other objects, as lacking in boundary integrity, as something that can be owned, or as something whose experience and feelings (if any) need not be taken into account.⁷¹ Not all of these are morally objectionable per se. Sound evaluation of each is heavily dependent on the context in which it takes place. What *is* always morally wrong is the instrumental treatment of human beings as mere tools for the purposes of another “if it does not take place in a larger context of regard for humanity.”⁷²

Although Nussbaum’s argument is the most specific indictment of pornography,⁷³ it needs further specification. Briefly, the malign sexual objectification she describes has two characteristic forms. With one of them, the morally malign character is a contingent danger. With the other, it is intrinsic.

66. *Id.* at 191–92.

67. *Id.* at 68.

68. *Id.* at 196.

69. The similarity between Booth’s approach and Clor’s is particularly evident in Clor, *Obscenity and Public Morality*, *supra* note 25, at 242–45, where it is apparent that Clor’s core concern is the fixed norms reflected in obscenity.

70. Martha C. Nussbaum, *Objectification*, in *Sex and Social Justice* 213 (1999) [hereinafter *Nussbaum, Objectification*].

71. *Id.* at 213, 238.

72. *Id.*

73. It is not, however, offered as a justification for obscenity law. The law’s inevitable clumsiness leads her, in her study of objectification, to conclude that there should be no legal restrictions on such work, because “it would be ill administered in practice and would jeopardize expressive interests that it is important to protect.” *Id.* at 234. In more recent work, Nussbaum has further criticized obscenity law for relying on disgust toward the female body, but she has also become less firm in her rejection of censorship. Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* 134–47 (2004) [hereinafter *Nussbaum, Hiding from Humanity*].



The first sort of objectification will here be called “self-centeredness.” It occurs when one is so focused on one’s own gratification that all interest in the subjectivities of others is lost. Kant, who is the most profound ancestor of both the authors of pornography laws and their libertarian critics, worried that sex is always self-centered in this way. Sensations of sexual pleasure focus attention on one’s own bodily states and drive out of one’s mind all considerations of the experience of the partner, at least until the act is concluded.⁷⁴ Kant thought the problem is solved by the institution of marriage,⁷⁵ in which each partner pledges a permanent tie to the other, but this does not solve his core difficulty. Perhaps mutual commitment guarantees a certain kind of respect, but it is hard to see how this respect could eliminate the objectifying character of the sexual act itself. The part of sex that Kant worried about cannot be expunged. Nussbaum recognizes this, but worries that, when “[u]sed as a masturbatory aid,” pornography “encourages the idea that an easy satisfaction can be had in this uncomplicated way, without the difficulties attendant on recognizing women’s subjectivity and autonomy in a more full-blooded way.”⁷⁶

The second sort of objectification, which will be called “cruelty,” has a different flavor altogether. What Nussbaum finds described in the novels of Hankinson and James is not merely instrumentalization and denial of subjectivity. The desire Hankinson describes “would not have been satisfied by intercourse with a corpse, or even an animal.”⁷⁷ The sexy thing is “the act of turning a creature whom in one dim corner of one’s mind one knows to be human into a thing, a something rather than a someone.”⁷⁸ This form of objectification is not well captured in Kantian terms. We need instead to look to the master-slave dialectic of

74. Immanuel Kant, *Lectures on Ethics* 162–68 (Louis Infield trans., 1930); Barbara Herman, *Could It Be Worth Thinking About Kant on Sex and Marriage?*, in *A Mind of One’s Own: Feminist Essays on Reason and Objectivity* 53, 59–65 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002); Nussbaum, *Objectification*, supra note 70, at 224.

75. Kant, supra note 74, at 167–68.

76. Nussbaum, *Objectification*, supra note 70, at 235. Here Nussbaum cites with approval Alison Assiter, *Autonomy and Pornography*, in *Feminist Perspectives in Philosophy* 58 (Morwenna Griffiths & Margaret Whitford eds., 1988). Nussbaum claims that “of course, none of these arguments entails moral criticism of masturbation.” Nussbaum, *Objectification*, supra note 70, at 428 n.56. Elsewhere she insists on the importance and omnipresence of sexual fantasy. Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* 696–97 (2001). Assiter, however, thinks that pornographic fantasies, precisely because they involve fantasized objects that are not autonomous, reinforce men’s desires for women who are not autonomous. Assiter, supra, at 67–68. If an object’s lack of autonomy constitutes bad sexuality, then it is hard to see how any sexual fantasy can escape condemnation. No object of sexual fantasy can be autonomous.

77. Nussbaum, *Objectification*, supra note 70, at 233.

78. *Id.*



Hegel's *Phenomenology*,⁷⁹ or the war of consciousness detailed by Sartre.⁸⁰

Eroticization of cruelty may lead to cruel behavior.⁸¹ In laboratory experiments, portrayals of violent sex induce some viewers to be more accepting of such behavior.⁸² Perhaps these viewers are thereby made more likely to engage in sexual assault; nobody knows for sure. That is, however, not the only harm at issue. A Hegelian master is simply not a good thing to be.

The same point can be made about the very common hybrid case, partaking of both self-centeredness and cruelty, in which men treat women as "a prize possession, an object whose presence in their lives, and whose sexual interest in them, enhances their status in the world of men."⁸³ This kind of script is not necessarily sadistic. It can even be friendly. But it has a distinctively Hegelian dimension.

Sometimes, however, pornography's readers are merely self-centered. Self-centeredness is not always evil; it depends on whether someone else's valid claims are being neglected by the self-centered activity. A woman is not a thing, but a photograph of a woman is. Kurt Vonnegut writes that what pornography has in common with some science fiction is "fantasies of an impossibly hospitable world."⁸⁴ What is hospitable about the fantasized world is precisely the ease of satisfaction, to which other subjectivities always constitute something of an obstacle. Self-centeredness can produce malign behavior, in the same way that one's rational

79. G.W.F. Hegel, *Phenomenology of Spirit* (A.V. Miller trans., 1977) [hereinafter Hegel, *Phenomenology*].

80. Jean-Paul Sartre, *Being and Nothingness: A Phenomenological Essay on Ontology* (Hazel E. Barnes trans., 1956). Put very briefly, Hegel thought that persons desire to be recognized and respected, and that the most primitive manifestation of this desire is the effort to subjugate and enslave the other. See Hegel, *Phenomenology*, supra note 79, at 111–16; G.W.F. Hegel, *Philosophy of Mind* 170–74 (William Wallace trans., 1971) [hereinafter Hegel, *Philosophy*]. But this strategy is self-defeating, because recognition is worthless unless it comes from another free being. One cannot get recognition from a thing. Hegel thus thought that true recognition was only possible in conditions of equality. See Hegel, *Phenomenology*, supra note 79, at 116–19; Hegel, *Philosophy*, supra, at 174–78. Sartre was more pessimistic, concluding that the gulf between self and other is unbridgeable, and that relationships therefore are characterized by an unavoidable hostility, which even the enslavement of the other cannot assuage. See Sartre, supra, at 358, 478–82; see also Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 *Yale J.L. & Human.* 399, 416–17, 427–28 (1992) (book review). The comparison with Hegel and Sartre is mine and not Nussbaum's.

81. The emphasis here is on "may." Sadomasochists in fact tend to follow careful protocols for ensuring safety and verifying consent, which the mainstream community would do well to emulate. See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 254–57, 259–63 (1999).

82. See infra notes 145–146 and accompanying text.

83. Nussbaum, *Objectification*, supra note 70, at 235.

84. Kurt Vonnegut, Jr., *God Bless You, Mr. Rosewater or Pearls before Swine* 20 (Dell 1970) (1965).

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desire to maximize one's wealth can lead one to steal. But it does not follow that the desire for wealth is per se bad. Similarly, the objectification in pornography is not per se bad. Everything depends on the context within which the fantasy is taking place.⁸⁵

Clor would doubtless respond that Nussbaum has misapprehended the harm from pornography. Pornography treats human beings as if they were animals with animal appetites, induces its viewers to think of themselves that way, and so brutalizes and debases them. The problem is not ameliorated by treating the debased person as one whose desires matter. Even if you are kind to an animal, you are not treating it as human. But people *are* animals. Sexual need is part of what makes us human.

Lust depersonalizes, but it also personalizes. When I am the object of lust, this sometimes means that I am appreciated in the full embodied particularity of my self, as I am not if you only love me for my mind.⁸⁶ A person is dehumanized in a distinctive way if she is never the object of anyone's lust.⁸⁷

The precise letting go, in sex, of one's sober self-control that Kant feared is what D.H. Lawrence thought particularly valuable about sex, and Nussbaum takes Lawrence's part in the argument.⁸⁸ This is the largest disagreement between Nussbaum and Clor. The huge question that Clor leaves unanswered is whether sexuality is redeemable on his terms, or whether his view, like Kant's, logically must condemn sex as such.

85. One possible kind of moral harm happens when a reader becomes so transfixed by pornography as to lose all interest in relationships with actual people, and there is anecdotal evidence that this sometimes happens. See M. Douglas Reed, Pornography Addiction and Compulsive Sexual Behavior, *in* Media, Children, and the Family: Social Scientific, Psychodynamic, and Clinical Perspectives 249 (Dolf Zillmann et al. eds., 1994). Thomas Laqueur argues that the fear of such social withdrawal is what really animated the masturbation scare that lasted from the early eighteenth century to the present. See Laqueur, *supra* note 21, at 249, 267–68. That same fear has now changed its object, and focuses on illegal drugs, such as marijuana. See Andrew Koppelman, Drug Policy and the Liberal Self, 100 Nw. U. L. Rev. (forthcoming 2005). This kind of solitary obsessiveness is not unique to pornography. It occurs with many activities that are usually harmless. The concept of “pornography addiction” is a dubious one that has not survived scientific scrutiny. See Martin P. Levine & Richard R. Troiden, The Myth of Sexual Compulsivity, 26 J. Sex Res. 347 (1988).

86. See Roger Scruton, Sexual Desire: A Moral Philosophy of the Erotic 68–76 (1986).

87. The point is nicely made in Tony Kushner's depiction, in his play *Angels in America*, of the disintegration of Harper as she becomes aware that her husband Joe (who, there is no doubt, really loves her) is gay and has never felt any sexual desire for her. See Tony Kushner, *Angels in America: A Gay Fantasia on National Themes* (1995).

88. See Nussbaum, Objectification, *supra* note 70, at 228–31.

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B. *The Power of Sex*

The wrongs of cruelty and indifference have no direct connection to *sexual* representations, but sex is a necessary element of unprotected obscenity.⁸⁹ Why should that be so?

It is a commonplace idea among opponents of obscenity that sexuality has a powerful tendency to distort our powers of perception and judgment. Clor's concerns have already been noted. Catharine MacKinnon argues that "because pornography is sexual, it is not like the literatures of other inequalities. It is a specific and compelling behavioral stimulus, conditioner, and reinforcer."⁹⁰ If the claim is taken to be that pornography incites crime, we have already noted the difficulty: There is little evidence that this is true. The problem is rather that obscenity induces its consumers to entertain morally bad fixed norms. This much is common ground between conservatives such as Clor and feminists such as MacKinnon, though they have different fixed norms in mind: Clor worries about lust separated from affection, while MacKinnon worries about lust connected with cruelty toward women. The problem is similar to that of racist jokes. To the extent that the reader succumbs to the narrative, he becomes complicit in the narrative's fixed norms. Sexual arousal is an especially profound way to succumb.

This, however, is only to say that the rhetorical appeal of a text that promotes bad fixed norms may be greater if the text is sexually arousing. An arousing text that does not promote bad fixed norms will be harmless, perhaps even valuable. Sex itself is not the problem.

C. *Protecting Children*

The idea of a distinctly sexual type of moral harm may make sense of another puzzle in the Court's obscenity jurisprudence: the rule that states may prohibit sales of nonobscene sexual materials to minors. Concern about harm to minors has always been central to obscenity law, though the conception of harm has shifted over time.⁹¹ Here, again, the Supreme Court has explained itself only once, in the 1968 decision *Gins-*

89. The Court has said that depiction of "excretory functions" can also be obscene, but it is not clear that it has in mind any nonsexual depictions. At any rate, there is no market for depictions of excretion except for a specialized audience that finds such depictions sexually arousing.

90. Catharine A. MacKinnon, *Feminism Unmodified* 200 (1987) [hereinafter MacKinnon, *Feminism Unmodified*]; accord Cass R. Sunstein, *Pornography and the First Amendment*, 1986 *Duke L.J.* 589, 606–08.

91. See generally Kendrick, *supra* note 19. This concern is now most manifest in the burgeoning law of child pornography, which is so determined to maintain a wedge between children and sexuality that it now sweeps within its net any image of a child that some pedophile might find arousing. See *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999), cert. denied, 529 U.S. 1029 (2000); *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), cert. denied, 513 U.S. 1109 (1995). See generally Amy Adler, *Inverting the First Amendment*, 149 *U. Pa. L. Rev.* 921 (2001); Amy Adler, *The Perverse Law of Child Pornography*, 101 *Colum. L. Rev.* 209 (2001).



berg v. New York.⁹² The Court observed that most parents did not want their children to see these publications, and the legislature could appropriately wish to help those parents. (Parents who felt differently could purchase the magazines for their children.) But the Court also cited the state's "independent interest in the well-being of its youth."⁹³ It did not specify just what harm the state was preventing, and the most articulate source it quoted emphasized

a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.⁹⁴

Here the Court nearly admitted that these laws are ineffectual and that children will get their hands on pornography anyway.⁹⁵ But it also indicated that this would not be so bad so long as the materials were nominally prohibited.

The harm pornography does to its young readers evidently is not caused by the materials themselves, but rather by the materials in a certain context. The context, the Court thinks, should be one in which the readers do not take away the wrong fixed norms. What matters is the child's "identification processes."⁹⁶ The law prohibits the sale of porno-

92. 390 U.S. 629 (1968).

93. *Id.* at 640.

94. *Id.* at 642 n.10 (quoting Willard M. Gaylin, *The Prickly Problems of Pornography*, 77 *Yale L.J.* 579, 594 (1968) (book review)).

95. Two years after *Ginsberg*, the President's Commission on Obscenity and Pornography found that "[r]oughly 80% of boys and 70% of girls have seen visual depictions or read textual descriptions of sexual intercourse by the time they reach age 18" and that "[m]ore than half of boys have had some exposure to explicit sexual materials by age 15." Report of the Commission on Obscenity and Pornography 25 (1970); see also 6 Technical Report of the Commission on Obscenity and Pornography 8 (1970) (reporting age breakdowns from ages 12–21 for both males and females).

No additional data was collected by the Attorney General's Commission on Pornography. The commission's report states, vaguely, that "from an early age American children are bombarded by very stimulating sexual messages," Attorney Gen.'s Comm'n on Pornography, Final Report 209 (1986), and that "too many young people get too much of their sex education from pornographic magazines and films," *id.* at 210, but it later acknowledged that no comparable age-of-first-exposure question was asked in any of the research it relied on, and fell back on the 1970 data, see *id.* at 912–16.

A 1989 study found that 92% of males and 84% of females had seen *Playboy* or *Playgirl* magazines by age 15. Dan Brown & Jennings Bryant, *Uses of Pornography, in Pornography: Research Advances and Policy Considerations* 45 (Dolf Zillmann & Jennings Bryant eds., 1989). All of these numbers are somewhat out of date, but it is hard to imagine that they could have recently gone anywhere but up.

96. *Ginsberg*, 390 U.S. at 642 n.10.



graphy to children, not in the expectation that it will keep the stuff out of their hands, but in order to express its moral stance.⁹⁷ The concern is not inducement of bad conduct, but moral harm. And if some pornographic material—that denominated “obscene”—is prohibited for adults as well, can we not infer that this is because adults may be harmed in just the same way?

D. *The Relevance of Offensiveness*

Thus far this Essay has neglected an important element of obscenity doctrine. The *Miller* test requires that the material be “patently offensive,”⁹⁸ and it looks to community standards to determine what is offensive. Does this not show that the doctrine is concerned, not with moral harm, but with offense?

Offense can be understood two ways. One of these treats offense as a primitive emotion, not reducible to any more basic elements. The other understanding of offense is parasitic on an idea of moral harm.

If one understands the harm of pornography as raw offense, then the law is making exorbitant demands on pornography’s consumers. This is an idea of offense that is not satisfied by merely shielding the unwilling from unwanted sights, since obscenity doctrine permits the suppression of even publications mailed in plain envelopes whose contents are unknown to anyone but the recipient. Even if I am distressed by “what is commonly read and seen and heard and done”⁹⁹ by my neighbors behind closed doors, it hardly follows that my distress caused by that mere knowledge, without more, should trump their interest in their private lives.¹⁰⁰ Offense may justify laws against mailing unsolicited sexual material, or zoning restrictions on sexually oriented bookstores and theaters, but obscenity law outruns this justification.

The other way of understanding offense is as a reflection of a view about morality. On this account, public decency laws, for example, give the majority’s preferences force, not only because of their intensity, but also because they are thought to represent a correct moral view.¹⁰¹ A similar perspective appears to inform obscenity law. When the law interdicts what can be mailed in unmarked envelopes, it is paternalizing con-

97. The expression of a message is a legitimate reason for a law (or, in some contexts, for objecting to a law). See Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 Md. L. Rev. 713, 717–36 (2001); Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 Md. L. Rev. 777 (2001).

98. *Miller v. California*, 413 U.S. 15, 24 (1973).

99. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973) (quoting Alexander Bickel, *On Pornography: Dissenting and Concurring Opinions*, Pub. Int., Winter 1971, at 25, 26).

100. See Joel Feinberg, *Harmless Wrongdoing* 55–64 (1988).

101. For discussion of this understanding of offense, see Clor, *Public Morality and Liberal Society*, *supra* note 28, at 103–10; Larry Alexander, *Harm, Offense, and Morality*, 7 Can. J.L. & Jurisprudence 199, 201 (1994); Larry Alexander, *The Legal Enforcement of Morality*, in *A Companion to Applied Ethics* 128, 136–40 (R.G. Frey & Christopher Heath Wellman eds., 2003).



sumers, and then one may reasonably ask what interest of the consumer is being served by the paternalism. We are back to the idea of moral harm.

Offense matters, then, as an indicator of the moral views of the pertinent community. *Miller* can be understood, in part, as a response to cultural heterogeneity. Different communities have different moral views, and “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”¹⁰² *Miller* permits each community to try to prevent what it understands to be moral harm.

This solution is consistent with the idea of federalism as one response to deep moral disagreement: Different regions can hold different moral views, and no one of these views can be forced upon the nation as a whole. But, of course, there is another possible response to moral disagreement: the idea of the sovereign individual, who cannot be bullied out of his views even by an entire community. The Court, somewhat incoherently, tossed a small bit of consolation to the individual who lives in a conservative community. In *Stanley v. Georgia*, it held that “the mere private possession of obscene matter cannot constitutionally be made a crime.”¹⁰³ The Court offered a sweeping declaration of the freedom of the mind:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.¹⁰⁴

Two years later, in *United States v. Reidel*, the Court made clear that *Stanley* did not call into question the validity of laws prohibiting distribution of obscenity.¹⁰⁵ *Stanley*, it held, focused “on freedom of mind and thought and on the privacy of one’s home,”¹⁰⁶ and these interests were not implicated in commercial distribution. The result is strange: The individual has a right to view obscenity in his home, but the law can punish virtually every means of obtaining the material.¹⁰⁷ *Stanley* is best understood as a

102. *Miller*, 413 U.S. at 32.

103. 394 U.S. 557, 559 (1969).

104. *Id.* at 565.

105. 402 U.S. 351 (1971).

106. *Id.*

107. This conclusion has recently been challenged by a federal district court, which held that privacy claims under substantive due process have been strengthened by *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a statute that criminalized homosexual sodomy), and that obscenity laws are now unconstitutional when deployed to prevent private consumption at home. *United States v. Extreme Assoc., Inc.* 352 F. Supp. 2d 578 (W.D. Pa. 2005). It remains to be seen whether this unusual holding survives on appeal. For a different reading of *Lawrence*, see Andrew Koppelman, *Lawrence’s Penumbra*, 88 Minn. L. Rev. 1171 (2004). If the decision is sustained on appeal, then of course we would be in a completely different world: Obscenity would still be officially unprotected by the First Amendment, but prosecutions for obscenity would become effectively impossible



very limited concession to the individualistic philosophy that obscenity law as a whole rejects.¹⁰⁸

E. *The Chumsy Miller Standard*

The Court's analogy to good literature, its concern with crass affect, and its notion that sex is somehow uniquely vulnerable are all now clear. If one wanted a litmus test for morally bad pornography, it would be this: *The text's fixed norms regard people as mere objects of sexual interest, whose feelings and desires do not matter.* Such fixed norms might be what Burger had in mind when he denounced "crass commercial exploitation of sex."¹⁰⁹ But this concern is not identical to, and only fortuitously overlaps with, concern about the dissemination of any particular image or subject matter.

The *Miller* test addresses longstanding problems of vagueness by declaring that any obscenity statute must specifically define the conduct that may not be depicted, and offers as an example "[p]atently offensive representations or descriptions" of "ultimate sexual acts, normal or perverted, actual or simulated," and "masturbation, excretory functions, and lewd exhibition of the genitals."¹¹⁰ Justice Brennan reportedly relied on what his clerks called the "limp dick" standard, according to which a work was obscene if, and only if, it showed an erect penis.¹¹¹ But some pretty nasty materials would pass any of these tests, and some much more innocuous stuff would flunk them.¹¹²

The most widely available pornographic materials are those that easily satisfy the *Miller* standard, preeminently *Playboy* magazine.¹¹³ The lack

for any defendant who exercised reasonable care to shield children and unconsenting adults from the merchandise.

108. One could also understand this line of cases as an illustration of path dependency: The later courts, composed of less liberal justices, disagreed with *Stanley* and would not have decided it the same way, so they confined it to its specific holding. But this does not explain why *Stanley* has not been overruled.

109. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 63 (1973). This may also explain why the Court was willing to criminalize the "pandering" of otherwise nonobscene material, through advertising permeated by "the leer of the sensualist," in *Ginzburg v. United States*, 383 U.S. 463, 467–68 (1966). Justice Scalia has relied entirely on *Ginzburg* when claiming that states may entirely ban sexually oriented bookstores, even if the material they sell is not obscene. See *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 124 S. Ct. 2219, 2228 (2004) (Scalia, J., concurring in the judgment); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 250–64 (1990) (Scalia, J., concurring in part and dissenting in part).

110. *Miller v. California*, 413 U.S. 15, 25 (1973).

111. Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 194 (1979).

112. Clor understands the intensely contextual judgments involved in the determination that a work of literature is obscene, but leaps without much argument to the conclusion that these can be shoehorned into a brief legal definition. See Clor, *Obscenity and Public Morality*, *supra* note 25, at 210–45.

113. According to Ulrich's Periodicals Directory, in the United States *Playboy* has a current circulation of 3,150,000; among its principal competitors, *Hustler's* circulation is 1,000,000, and that of *Penthouse*, 980,106. Ulrich's Periodical Directory: *Playboy*, at http://www.ulrichsweb.com/ulrichsweb/Search/fullCitation.asp?navPage=1&tab=1&serial_uid=

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of fit between the *Miller* standard and the concern about objectification is nicely epitomized in one of *Playboy's* publications, on newsstands in mid-2003, titled *Playboy's Exotic Beauties*. The magazine (subtitled "Hot Girls With a Spicy Kick!") is, like most of *Playboy's* material, the softest of soft core porn. It consists entirely of naked women posing for the camera. There is no sadism, no feces or urine, no sex act of any kind. On the other hand, what makes the women "exotic"? You guessed it: None of them are white. The narrative that constructs women of color as a sort of sexual forest primeval, a distant erotic vacation Disneyland from which a man can shortly return to civilization, is one of the most malign and destructive sexual scripts that we have inherited.¹¹⁴ There is room for argument about whether that is what is going on here; obviously not only racists are attracted to women of color. Resolving this question would require a close reading of the magazine, which is beyond the scope of this Essay. But even if the magazine were flagrantly racist, that still wouldn't make it obscene.

Booth observes that our understanding of any text develops and changes in conversation with others.¹¹⁵ I was moved to tears by that film, but you've convinced me that it is corny and manipulative; you initially thought that poem pretentious and unintelligible, but I have persuaded you that it is quite powerful. Yet when judges and juries make determinations of obscenity, they may not converse with anyone. The dangers of parochialism are obvious. Attorneys for Joyce's *Ulysses* addressed the problem by taking a copy of the book and pasting in it every review that seemed useful (because anything in the book could be used as evidence) and then provoking U.S. Customs into seizing that particular copy, which then became the object of litigation.¹¹⁶ Texts draw their meaning from their contexts. Because no reader can completely know the context of any text, no reader can have the last word about the meaning of any text.

Of course, much of the pornography that is available today is obscene under *Miller*. There was an enormous boom in pornography in the 1990s, fueled by the growth of the internet and cable TV. Large corporations such as AT&T and Marriott have joined in its distribution. The explosion was abetted by a distinct lack of interest among federal prosecutors, since the Clinton Administration had other priorities. Clinton's Attorney General, Janet Reno, thought that child pornography was the

51793&issn=00321478 (last visited Mar. 24, 2005) (on file with the *Columbia Law Review*) (paid); id. tit. Hustler, at http://www.ulrichsweb.com/ulrichsweb/Search/fullCitation.asp?navPage=1&tab=1&serial_uid=51793&issn=00321478 (last visited Mar. 24, 2005) (on file with the *Columbia Law Review*) (paid); id. tit. Penthouse, at http://www.ulrichsweb.com/ulrichsweb/Search/fullCitation.asp?navPage=1&tab=1&serial_uid=183183&issn=00902020 (last visited Mar. 24, 2005) (on file with the *Columbia Law Review*) (unspecified).

114. On the history of racist sexual scripts, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 220-34 (1994).

115. Booth, *The Company We Keep*, supra note 40, at 70-77.

116. De Grazia, supra note 14, at 223-24.



only kind of pornography worth prosecuting. John Ashcroft came with a different agenda, but the distraction of the September 11th attack has meant that federal prosecutions of pornography have resumed only very recently.¹¹⁷ Material that would certainly have been suppressed a few decades ago, and that would offend nearly every community, is now available in vast quantities. A cursory internet search quickly yields graphic sexual fantasies involving rape, torture, bestiality, excrement, vomit, cannibalism, and necrophilia.¹¹⁸

But much of even this material is not clearly malign in its overall intention. One of the strangest examples is a website consisting of sexual fantasies, visual and written, of boiling naked women alive and eating them.¹¹⁹ It is, however, prominently accompanied by the following musing:

If you have read this far, you may be wondering what kind of person puts together a publication like this. I think you might be surprised at how plain I am in real life. No, I don't hate women and I don't like violence. . . . Frankly, I am at a loss to explain why I find such fantasies erotic. I don't find the real thing erotic at all. I get angry when I read of real life violence. Confronted with real situations similar to my fantasies, I don't think I would find them erotic (and I don't plan to ever find out).¹²⁰

This self-serving disclaimer is hardly conclusive, and here it is only possible to report my conclusion that the fixed norms that emerge from the "Boiled Alive!" website are vastly superior to those implied by *Playboy's Exotic Beauties*. The more general point is that malign fantasies, whether racist or cannibalistic, can be harmless so long as the person who entertains them recognizes that he is handling fire. The website's insistence on "a healthy separation of fantasy and reality"¹²¹ is entirely absent from *Playboy*.

117. For overviews of the recent history of the industry, see generally Frederick S. Lane III, *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age* (2000); Frontline: American Porn (Feb. 2002), at <http://www.pbs.org/wgbh/pages/frontline/shows/porn> (on file with the *Columbia Law Review*).

118. Examples are collected at <http://www.sickestites.com> (last visited May 9, 2005).

119. This material is probably obscene. It appeals to the prurient interest of members of a deviant group, see, e.g., *Mishkin v. New York*, 383 U.S. 502, 508–09 (1966) (holding that such appeal can render a work obscene), and is patently offensive to the average person.

120. Boiled Alive!, at <http://daha.best.vwh.net/boiled/comments.html> (last visited Feb. 2, 2005) (on file with the *Columbia Law Review*). The website collects correspondence from other fetishists that is similarly decent and reflective. Some even offer feminist analyses of the fetish. See *id.* But feminist analysis is unlikely to be what brought them to the website.

121. Boiled Alive!, at <http://daha.best.vwh.net/boiled/main.shtml> (last visited Feb. 2, 2005) (on file with the *Columbia Law Review*). Close readings of many pornographic films, some of them well-known, may be found in Linda Williams, *Hard Core: Power, Pleasure, and the "Frenzy of the Visible"* (rev. ed. 1999). Williams concludes that many pornographic films offer morally dubious perspectives on sexuality and on women. *Id.* at



Perhaps the best defense that can be offered for legal standards as crude as *Miller* would be that there is value in drawing the line somewhere. One rule, never formally codified but widely understood and enforced before *Miller*, held that under no circumstances could a photograph show pubic hair.¹²² The idea that a picture of the forbidden kind would be morally harmful is risible. The efforts pornographers were forced to make to avoid the forbidden zone meant, however, that pornography always conveyed, in addition to other fixed norms, an idea of moral limits. And one might say the same thing about the vaguer limitations of *Miller*.¹²³

Of course, the message that is conveyed by this type of ritualistic prohibition is not merely that there are limits. It is also that the limits are *here*. And that is a false message with moral consequences that are not innocuous. The same culture that made pubic hair taboo was largely oblivious to the moral wrongs of domestic violence, date rape, racial segregation, sex discrimination, and the ferocious repression of gay people.¹²⁴ If the aim is to create a morally discerning citizenry, then it is counter-productive to teach them such nonsense.

A definition that gets at the problem with somewhat more precision is that adopted by the Supreme Court of Canada in *Regina v. Butler*.¹²⁵ The Court held that material would probably be obscene if it depicted explicit sex with violence, and that it would certainly be obscene if it showed “explicit sex without violence, but which subjects participants to treatment that is degrading and dehumanizing if the material creates a substantial risk of harm.”¹²⁶ By focusing on what is “degrading and dehumanizing,” the Court did get at the problem of moral harm, more accurately than the U.S. Supreme Court had in *Miller*. But the clarity ended there. It is possible to depict degrading and dehumanizing treatment for morally impeccable reasons; the Court presumably did not mean to ban the depiction of Nazi atrocities in *Schindler’s List*.¹²⁷ And the confusion is exacerbated by the requirement that the trier decide (which will mean in practice, guess)¹²⁸ whether “the material creates a substantial risk of harm.” It is unsurprising that this vague test has in practice been used to

275–77. But as her book dramatically illustrates, the reasoning that leads to this ultimate moral evaluation enlists a degree of literary sophistication that judges and juries would be hard put to duplicate.

122. The informal barrier lasted until 1971, when *Penthouse* broke the barrier, shortly followed by *Playboy*. See de Grazia, *supra* note 14, at 578–79.

123. This objection was raised by Lino Graglia.

124. Peter Berger similarly observes that, in the early- and mid-twentieth century, the ethical system of Southern Protestant fundamentalism, which confined “sin” to private wrongdoings such as fornication, gambling, and drunkenness, functioned to distract attention from the more severe ethical difficulties posed by segregation. Peter L. Berger, *Invitation to Sociology: A Humanistic Perspective* 113–14 (1963).

125. [1991] 1 S.C.R. 452.

126. *Id.* at 484.

127. *Schindler’s List* (Universal Studios 1993).

128. See *infra* text accompanying notes 141–184.

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target and harass gay and lesbian bookstores.¹²⁹ The idea of moral harm appears not to be susceptible to codification in a legal definition.

F. *The Varieties of Pornographic Experience*

But what good is fantasy, anyway? Is there any reason to think that anything of substantial value would be lost if we suppressed the “Boiled Alive!” website? More generally, what good are the most offensive types of pornography—those involving violence and degradation? If this stuff is worthless, then even if the law is somewhat imprecise in this area, perhaps we should not be troubled.

My core assumption here is that sexual pleasure is good. If pleasure is good, then fantasy is good if it is an avenue to pleasure. It is in the nature of sexual fantasy that it is an avenue to pleasure. It follows that sexual fantasy is per se good. It may be that there are other aspects of fantasy, such as the provocation of destructive acting out, that outweigh its goodness. But this does not mean that the fantasies themselves are per se bad.

The point may be clarified by exploring the psychological functions of fantasy. Even the strangest fantasies may be therapeutic for the person who is having them. Sexual fantasies, Michael Bader argues, should be understood as manifestations of the mind attempting creatively to construct a scenario in which pleasure can be pursued safely.¹³⁰ Thus, for example, Bader, who is a psychotherapist, describes a patient (he calls her Jan) who could not have an orgasm with her husband unless she fantasized that a large, strange man was holding her down and forcing sex on her. Jan, who was an outspoken feminist, was bewildered and embarrassed by her fantasy, which involved just the kind of man that she loathed in real life. The fantasy was eventually explained in this way. Jan unconsciously believed that men were fragile and unable to stand up for themselves. She feared that, if she fully expressed her own sexuality, most men would feel threatened and overwhelmed. And she felt guilty about hurting them. The fantasy resolved this difficulty by creating a man so strong he could not be hurt, who needed no help from her in taking his pleasure. This created a safe environment in which she could take her

129. See Janine Fuller & Stuart Blackley, *Restricted Entry: Censorship on Trial* (1995). The Court conceded that these abuses had taken place in *Little Sisters Book & Art Emporium v. Canada*, [2000] 2 S.C.R. 1120, but declined to place substantial limits on the state's ability to regulate obscenity. Instead, it merely admonished the government to reform its own procedures. The consequence has been that the gay bookstores have continued to be harassed by Canadian Customs, which may ultimately prevail by wearing down the bookstores' financial ability to continue to litigate. See *Little Sisters Book & Art Emporium v. Canada*, No. CA32104, 2005 B.C.C. Lexis 299 (Feb. 18, 2005) (reversing award of costs to bookstore).

130. Michael J. Bader, *Arousal: The Secret Logic of Sexual Fantasies* 51–55 (2002). A similar analysis can explain many other fantasies, including those involving urination and defecation, exhibitionism and voyeurism, cross-dressing, incest, and multiple partners. See *id.* at 115–41.



own pleasure. Once she understood this, her relationship with her husband improved. Bader thinks that many domination fantasies take this form; they often circumvent guilt and thus enable desire.¹³¹

Quite a lot of fantasy takes the form that Bader describes. Consider nonsexual violent fantasy, which he does not consider but which is a staple of popular culture. The typical scenario is one in which it is first established that there are some truly terrible people, for whom no punishment would be sufficiently severe. Then the hero, after considerable difficulty, proceeds to do in these nasties, one by one. The audience cheers, because they have been given a permissible outlet for their own inclinations to violence. As with pornography, the fantasy has created a context in which it is safe to pursue a dangerous kind of pleasure—more dangerous here than in the sexual case, because it is clear that the bad guys are not consenting to what is happening to them. Unlike the pornographic fantasies, the evildoers' pain and fear is a necessary element of the fantasy. Which fantasy is more malign? We put up with violent entertainment, because we know that most viewers can handle it. It makes them happy, and it is good for people to be happy.

One might easily imagine an adolescent Jan exploring pornographic fantasies of rape, even ones that include the vicious idea that women secretly want to be raped and benefit from it.¹³² That idea is unlikely ever to be more than a nonce belief for her. For reasons she will probably not fully understand, these will be the fantasies that arouse her. If pleasure is good, then for her, this pornography is good. Moreover, the experience of gay adolescents with gay pornography shows that the experience of communicating fantasy, and of exploring the fantasies of others, can be a powerful antidote to sexual shame.¹³³ It will do Jan good to know that she is not the only woman in the world who is aroused by rape fantasies.

The unconscious mind has its own logic. But this is not an animal process. Animals do not have fetishes, or cross-dress, or need to act out sexual scripts.¹³⁴ These are distinctively human activities. They reveal

131. *Id.* at 51–55.

132. Identifying this idea as a fixed norm in any particular text is tricky business. Linda Williams's survey of various types of sadomasochistic pornography finds that in all the films she surveyed, "violence invariably arises out of an agreement between dominator and dominated." Williams, *supra* note 121, at 212.

133. See Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 *Stan. L. Rev.* 661, 687–89 (1995) (emphasizing value of gay male pornography). But see Christopher N. Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (2004). Kendall condemns gay male "pornography," but uses that word to refer only to erotic expression that "valorizes male dominance" and that indicates "that those who choose not to adopt this identity have no value, no power." *Id.* at 129. The benefits of pornography for many readers are examined at length in Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* 141–78 (1995), although Strossen overstates her case by refusing to acknowledge any countervailing harms.

134. Nussbaum observes that if the desire for sex were a purely physical appetite, it would be hard to understand how there could be pornography at all. The desire for food



the creative potential of the human mind. For that reason, they have a dignity of their own. If people are entitled to respect, then their sexual desires are entitled to respect. People live better lives if they have some space in which those desires are not judged, but respected and made to count for something. The last thing Jan needs is to be told that her fantasies are so awful that she must not even imagine them.¹³⁵ It is as presumptuous for an outsider to interfere here as elsewhere.¹³⁶

What is bad for one reader is not necessarily bad for another. Booth quotes with approval William James's defense of the proliferation of religious creeds:

No two of us have identical difficulties, nor should we be expected to work out identical solutions. Each, from his peculiar angle of observation, takes in a certain sphere of fact and trouble, which each must deal with in a unique manner. One of us must soften himself, another must harden himself; one must

cannot be assuaged by food-pornography. Nussbaum, *Hiding from Humanity*, supra note 73, at 30.

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135. The idea of rape is distasteful. I find it surprising that anyone would be aroused by it. But one of Freud's key insights is that the overt and latent content of fantasies (sexual or otherwise) are likely to be very different from each other. Sexual fantasies operate at a quasi-infantile level of consciousness, where the superego cannot operate and where moral judgment is misplaced. Jan's fantasy, for example, isn't really about rape at all: Rape is a placeholder for the relief of other needs. Shirley MacLaine's observation that "sex is hardly ever about sex" applies with special force here. Bader, supra note 130, at 17 (quoting Shirley MacLaine). Bader found an explanation for Jan's fantasy, but other analysts with rape fantasies will doubtless call for other explanations. The disproportionate importance of latent content in pornographic texts enormously complicates the effort to discern the fixed norms in those texts.

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If Jan were really turned on by anything resembling real rape, one would expect her to be sexually involved with a partner who despises her and treats her badly. Many people are. But in fact Jan's biggest problem was her inappropriate feelings of guilt about her fantasy, which were damaging her relationship with her husband. It will sometimes happen that guilt is one of the principal obstacles to someone's capacity to achieve love. If Jan despises her own sexuality, then we shouldn't be surprised if she doesn't feel all that charitable toward her husband's. The projection of one's unconscious guilt feelings onto others is a familiar and fertile source of cruelty.

Love is a complicated psychological achievement, balancing a formidable array of conscious and unconscious forces; it is impressive that so many people manage to accomplish it successfully. See generally Martin Bergmann, *The Anatomy of Loving: The Story of Man's Quest to Know What Love Is* 277-78 (1987) (Freudian account of the psychic dynamics of ideal sexual love). If Jan's only problem is that her fantasy life is distasteful to third parties like me and (perhaps!) you, she is in pretty good shape. Thanks to Harry Clor for demanding better articulation of this point.

136. This is one reason why it is a mistake to withdraw First Amendment protection from pornography on the ground that it appeals to the passions and not to reason. See John M. Finnis, "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222, 222-27 (1967). Finnis's argument depends on a dubious aesthetic, in which artistic value depends on a degree of detachment from the narrative to which few readers aspire. See *id.* at 239. Most art appeals to the passions.



yield a point, another must stand firm—in order the better to defend the position assigned him.¹³⁷

Clor observes that the most prominent defenses of pornography are inconsistent with one another.¹³⁸ Perhaps pornography has no effect at all on readers' attitudes and inclinations; perhaps it does affect readers' sexual behaviors, but only in positive ways, by freeing them of stultifying inhibitions; perhaps, as Susan Sontag famously observed, it promotes self-knowledge, by affording a window into "the demonic forces in human consciousness . . . which range from the impulse to commit sudden arbitrary violence upon another person to the voluptuous yearning for the extinction of one's consciousness, for death itself."¹³⁹ Clor evidently thinks that one cannot coherently make all these claims at once. But it seems likely each of them describes different pornographies and their effects on different readers.

Different people are aroused by different things. Some of the things that arouse some people are disturbing to other people. Fantasies are very hard, perhaps impossible, to change.¹⁴⁰ And why bother to try, if they do not manifest themselves in harmful activity?

G. *What About Sexual Violence?*¹⁴¹

But of course, sometimes harmful activity does ensue. The thought is sometimes prelude to the deed. The population that is aroused by rape fantasies includes some real rapists.¹⁴² Could it be the case that censorship will prevent acts of violence? If so, then the benefits of suppression might be so great that they would outweigh any harm to the consumers of pornography.

At this point, of course, we are no longer talking about moral harm. The claim that pornography tends to cause sexual violence is not concerned with morality, and it does not need the idea of moral harm in

137. Booth, *The Company We Keep*, supra note 40, at 57 (quoting William James, *The Varieties of Religious Experience* 384 (Frederick H. Burkhardt et al. eds., 1985)).

138. Clor, *Public Morality and Liberal Society*, supra note 28, at 200–09.

139. Susan Sontag, *The Pornographic Imagination*, in *Perspectives on Pornography* 131, 154 (Douglas A. Hughes ed., 1970).

140. See Bader, supra note 130, at 210–17; Sandra Lee Bartky, *Feminine Masochism and the Politics of Personal Transformation*, in *Femininity and Domination: Studies in the Phenomenology of Oppression* 45, 55–58 (1990).

141. This subpart is heavily indebted to the assistance of Prof. Neil Malamuth of UCLA, whose generosity with his time should not be taken to signify agreement with what is said here. Thanks also to Shari Diamond and John Heinz for helpful conversations.

142. Bader observes that male fantasies about raping women can take two forms. In one, the man appears to be hurting the woman but really is not: This fantasy is a way of mastering feelings of guilt about hurting others. In the other, the woman is in real pain. In the second set of cases, Bader thinks, the man has probably experienced himself as a helpless victim of a powerful attacker, typically a parent. He masters this experience by turning the tables, so that he is now the victimizer. This may be the fantasy that usually accompanies actual rape. Bader, supra note 130, at 126–27. Depictions of rape probably appeal to both sorts of men.

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order to make its case.¹⁴³ Nonetheless, the claim is relevant, because sexual violence may be a powerful tangible indicator of moral harm, which is necessarily hard to detect. There may, of course, be forms of moral harm that do not manifest themselves in bad behavior. But as a general matter, it is reasonable to surmise that bad deeds are done by bad people. So if we have good evidence that pornography causes men to abuse or even rape women, this will give us reason to think that the men are being morally harmed.

This subpart reviews the empirical evidence and concludes that it is reasonable to infer that pornography is causally connected with some sexual violence, though the effect is relatively small. This is consistent with the general claim of this Essay, that pornography does cause some moral harm. But, I will argue, this effect is too small, its relation to any particular text too uncertain, and the benefits of censorship too speculative to justify legal intervention.

There are two types of studies that have plausibly linked pornography with violence. The first type conducts controlled experiments in laboratory settings, exposing men to various kinds of pornography and observing their attitudes and behaviors afterward. The other uses questionnaires, administered to large representative samples of men, that measure pornography consumption, self-reported aggressive behavior, and other variables. Both types of study have inevitable limitations. In the laboratory, one can manipulate the relevant variables in the test and control groups in order to confidently establish causation, but one cannot be sure that the findings will apply outside the lab. In natural settings, one can show correlations, but typically one cannot identify the causal basis. All one can hope to do with correlations is establish associations between variables that are consistent with the causation that has been shown in the lab. These limitations could only be overcome by what is impossible as a practical matter: A long term study that exposed different groups to different kinds and amounts of pornography (reliably keeping control over what each group's members ever get to see!) and then observed, over a period of years, their behavior toward girlfriends and spouses, their reactions to the sexual aggression of others, their behavior on juries in rape trials, and so forth. So the lab and survey data, for all their limitations, are the best we are likely ever to have.¹⁴⁴

143. See Catharine A. MacKinnon, *Not a Moral Issue*, in MacKinnon, *Feminism Unmodified*, *supra* note 90, at 146, 146.

144. Other sources of evidence include longitudinal studies of the experience of states and countries that have changed their practices with respect to pornography, accounts by rape victims, and rapists' own explanations for their actions. For reasons explored elsewhere, these are weak sources of evidence of causation. See Andrew Koppelman, *Antidiscrimination Law and Social Equality* 238–40 (1996) [hereinafter Koppelman, *Antidiscrimination*]. They may, however, tend to refute causal claims if there is a negative correlation. See, e.g., *infra* note 151.

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The strongest reading of the lab studies finds that exposure to certain violent pornography, in particular that which depicts rape as “pleasurable, sexually arousing, and beneficial to the female victim,”¹⁴⁵

increases normal men’s willingness to aggress against women under laboratory conditions; makes both women and men substantially less able to perceive accounts of rape as accounts of rape; makes normal men more closely resemble convicted rapists psychologically; increases all the attitudinal measures that are known to correlate with rape, such as hostility toward women, propensity to rape, condoning rape, and predicting that one would rape or force sex on a woman if one knew one would not get caught; and produces other attitude changes in men like increasing the extent of their trivialization, dehumanization, and objectification of women.¹⁴⁶

These effects, without more, would not be a sufficient justification for censorship. As already noted, laboratory studies cannot establish what happens outside the lab. Short-term attitudinal and behavioral changes are all that laboratory studies, by their nature, could possibly show. Moreover, the laboratory studies also found that the effect of even this kind of pornography was not inevitably malign. When men who had been exposed to these misogynistic materials were later given debriefing sessions that included materials dispelling rape myths and detailing the harms women suffer as a consequence of rape, the net effect was striking. After these men were exposed *both* to violent pornography *and* to pro-feminist material, they had more positive, less discriminatory, and less stereotyped attitudes toward women than they did before the experiment. Moreover, negative attitudes toward women were more effectively reduced by exposure to both violent pornography and feminist materials than by exposure only to the latter.¹⁴⁷ Nadine Strossen observes that these findings are “completely consistent with a central tenet of U.S. free speech jurisprudence: that the appropriate antidote to speech with which we disagree, or which offends us, is more speech.”¹⁴⁸

Moreover, even the negative attitudinal effects associated with violent pornography have less to do with their sexual content than with their violence. Nonviolent sexual materials do not produce any increase in negative attitudes toward women, much less aggressive behavior.¹⁴⁹ Some studies have even found that “exposure to nonviolent sexually explicit expression actually *reduces* aggression in laboratory settings.”¹⁵⁰ Ex-

145. Edward Donnerstein et al., *The Question of Pornography: Research Findings and Policy Implications* 4 (1987).

146. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 304 n.6 (1989) [hereinafter MacKinnon, *Feminist Theory of the State*].

147. See Donnerstein et al., *supra* note 145, at 180–85.

148. Nadine Strossen, *A Feminist Critique of “the” Feminist Critique of Pornography*, 79 Va. L. Rev. 1099, 1168 (1993) [hereinafter Strossen, *A Feminist Critique*].

149. See Donnerstein et al., *supra* note 145, at 72.

150. Strossen, *A Feminist Critique*, *supra* note 148, at 1182.

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posure to violent but nonsexual films, particularly those that show violence against women, produce attitudinal and behavioral responses in experimental subjects similar to those that exposure to violent pornography produces.¹⁵¹

The other source of data is surveys of representative samples of men that seek to correlate pornography consumption with self-reported sexual aggression, such as obtaining unwanted sexual contact or sexual intercourse by threatening or using physical force such as arm-twisting, by continual arguments and pressure, or by using alcohol or drugs.¹⁵² These studies could not control the content of the pornography involved in the way that the lab studies could, and instead asked about subjects' rate of consumption of familiar sex magazines such as *Playboy* and *Penthouse*. The most thorough recent study of this kind found that

for the majority of American men, pornography exposure (even at the highest levels assessed here) is not associated with high levels of sexual aggression But among those at the highest "predisposing" risk level for sexual aggression (a little above 7% of the entire sample), those who are very frequent pornography users (about 12% of this high risk group) have sexual aggression levels approximately four times higher than their counterparts who do not use pornography.¹⁵³

The predisposing risk factors included such characteristics as sexual promiscuity, hostility toward women, attitudes accepting of violence against women, narcissistic personality characteristics, and growing up in

151. See Donnerstein et al., *supra* note 145, at 110–12; Edward I. Donnerstein & Daniel G. Linz, *The Question of Pornography: It Is Not Sex, but Violence, that Is an Obscenity in Our Society*, *Psychol. Today*, Dec. 1986, at 56, 56–59. It remains uncertain, however, whether depictions of violence, sexual or otherwise, causes an aggregate increase in violent behavior. An interesting natural experiment was recently conducted in Japan, where, after 1990, stringent legal restrictions on pornography suddenly evaporated. Thereafter, sexually oriented material proliferated, and it was typically much more aggressive and violent than that found in the United States. Over the same period, the incidence of sexual assault decreased dramatically. See Milton Diamond & Ayako Uchiyama, *Pornography, Rape, and Sex Crimes in Japan*, 22 *Int'l J.L. & Psychiatry* 1 (1999). Sexual assault is massively underreported in Japan, see Charles A. Radin, *Rape in Japan: The Crime that Has No Name*, *Boston Globe*, Mar. 8, 1996, at 1, but there is no reason to think that this problem has become any worse in recent years. It would be reckless to credit the pornography for the drop in sex crimes, but this evidence confounds any claim that violent pornography is likely to cause an increase in such crimes.

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152. The text of the questionnaire relied on appears in Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 *J. Consulting & Clinical Psychol.* 162, 167 (1987). The use of the questionnaire in the pornography study is noted in Neil M. Malamuth et al., *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?*, *Ann. Rev. Sex Res.*, 2000, at 26, 63–64.

153. Malamuth et al. *supra* note 152, at 85. This article is a rejoinder to the much more skeptical review of the data in William A. Fisher & Guy Grenier, *Violent Pornography, Antiwoman Thoughts, and Antiwoman Acts: In Search of Reliable Effects*, 31 *J. Sex Res.* 23 (1994).

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a home with parental violence or child abuse.¹⁵⁴ Consumption of large amounts of pornography was strongly associated with aggression in 12% of this 7%, or 0.84% of the population as a whole. There was a weaker, but still statistically significant, correlation in other groups of men.¹⁵⁵ Since correlation does not indicate the direction of causation, it is impossible to tell from this data whether, even within the high-risk group, pornography causes aggression against women or whether rather aggressiveness is a cause of the subjects' interest in pornography. The latter could be the case because these men enjoy thinking about women as available and vulnerable, or because these men have difficulty finding actual sexual partners because of their poor social skills and strong desire to control others.¹⁵⁶

It is a reasonable inference from the two types of study, taken together, that relatively high sexually aggressive tendencies in some men, resulting from other developmental factors, leads a small percentage of them to use a large amount of pornography, and such heavy pornography exposure may correspondingly reinforce and therefore increase their aggressive tendencies. But it is a long way from that inference to a justification for censorship.

To begin with, there is a very poor fit between the problem that these studies find and the solution that obscenity law offers. Modern American obscenity doctrine, we have already seen, does not require that material be violent in order to be deemed obscene,¹⁵⁷ and no amount of violence will make a publication obscene absent some sexual element.¹⁵⁸ Censoring all depictions of violence against women that make such violence seem attractive would, of course, require a much larger censorial apparatus than almost any critic of pornography contemplates.¹⁵⁹ And in the age of the internet, it is hard to imagine how that apparatus could possibly succeed.¹⁶⁰

Next, note how isolated is the correlation shown in the survey data. The effects appear to be relatively weak with respect to more than 99% of

154. Malamuth et al., *supra* note 152, at 64-65, 73; Neil Malamuth & Mark Huppert, *Pornography and Teenagers: The Importance of Individual Differences*, in *Adolescent Medicine: State of the Art Reviews* (forthcoming 2005) (manuscript at 9, 13-14, on file with the *Columbia Law Review*).

155. Malamuth et al., *supra* note 152, at 76-78.

156. *Id.* at 58-59, 79.

157. See *supra* note 12.

158. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (invalidating restriction on minors' access to violent video games).

159. Clor, *clear-eyed here as elsewhere*, understands that the logic of his argument entails the censorship of some violent entertainment, such as the novels of Mickey Spillane. Clor, *Obscenity and Public Morality*, *supra* note 25, at 235-36, 245; Clor, *Public Morality and Liberal Society*, *supra* note 28, at 224-25.

160. The impossibility of restricting pornography consumption in the age of the internet is briefly and elegantly explained in Eugene Volokh, *Obscenity Crackdown—What Will the Next Step Be?*, *TechKnowledge*, Apr. 12, 2004, at <http://www.cato.org/tech/tk/040412-tk.html> (on file with the *Columbia Law Review*).

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male readers of pornography.¹⁶¹ And pornography appears to be a relatively minor cause of the sexual violence that actually occurs, since far more than .84% of American men have engaged in sexual coercion.¹⁶²

One might reasonably respond that any reduction in sexual violence, however small, is worth achieving. But the data do not show that even with respect to high-risk men, suppression of pornography would bring about any reduction in aggression. Those men appear to be inflamed, not only by violent pornography, but also by milder fare such as *Playboy*. If one suppressed that, too, they still might arouse themselves in the same way, and with the same result, with the *Sports Illustrated* swimsuit issue. What arouses men depends (among many other things!) on cultural norms of bodily concealment. In Iran, women have been regarded as indecently exposed when strands of hair have been visible from underneath their veils.¹⁶³ It is also not remotely possible to estimate the numbers on other side of the ledger: cases in which pornography served as a "safety valve" that induced a potentially violent person to stay harmlessly in his room.

Compare the evidence that smoking causes lung cancer, or that drunk driving causes accidents. MacKinnon has pressed the analogy with the evidence in these other cases in order to argue that the opponents of pornography have been held to an unreasonably strict standard of causation.¹⁶⁴ Laboratory studies consistently show that exposure to tobacco smoke causes cancer in laboratory animals,¹⁶⁵ and that ingestion of alco-

161. Aside from actual sexual violence, there may also be effects on other less extreme behaviors, such as domineeringness in conversation or the way a person votes as a member of a jury in a rape trial. Although these latter types of changes may not necessarily be considered serious antisocial acts in and of themselves, they may affect the cultural climate that indirectly affects the likelihood of various antisocial acts such as sexual aggression.

Malamuth & Huppert, *supra* note 154, at 4. These effects are not necessarily confined to the high-risk population. Here, of course, we are no longer talking about violence, but rather have shifted back to more general types of moral harm.

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162. One very large national survey (using the same questionnaire that was used in the pornography survey just discussed) found that 19% of college-age men admitted having obtained sexual contact through the use of physical force, 10% had brought about unwanted sexual intercourse through continual arguments and pressure, 4% had brought about unwanted sexual intercourse through the use of alcohol or drugs, and 1% admitted to using physical force to obtain sexual intercourse. Each of these figures appears to underreport the aggression that takes place, because a simultaneous survey of college women found that 54% of women reported sexual victimization, compared with only 25% of men who admitted any degree of sexually aggressive behavior. Koss et al., *supra* note 152, at 167-69.

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163. See Azar Nafisi, *Reading Lolita in Tehran* 26-27, 70, 275 (2003).

164. See MacKinnon, *Feminist Theory of the State*, *supra* note 146, at 207. For a similar argument that makes the same analogies, see generally Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 *Am. B. Found. Res. J.* 737.

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165. See *Smoking and Health: A Report of the Surgeon General* ch. 5, 29-31 (1979) [hereinafter *Smoking and Health*].



hol diminishes reaction time and coordination.¹⁶⁶ Correlational studies show that people who smoke are ten times more likely to develop lung cancer than those who do not.¹⁶⁷ Half of all fatal car accidents involve, and at least half of those are caused by, drunk drivers.¹⁶⁸ There is no line-drawing problem, because there are no noncarcinogenic cigarettes or nonimpairing alcoholic drinks. There exists no subset of the population that can safely smoke, or that can competently drive after several drinks. No one's lungs are improved by tobacco smoke. No one's driving is improved by alcohol. If the population's consumption of tobacco and (among drivers) alcohol is reduced, there is little doubt that a reduction in cancer and traffic accident deaths will follow.

But there is a deeper problem with the pornography studies. When we study alcohol or tobacco, we are fairly confident about which active ingredient is producing the effect. It is unlikely that the water in the vodka is producing the diminished reaction time, or that the paper in the cigarettes is causing the cancer. Even with chemicals, it is hard to be sure that we have isolated the active ingredient; that is why generic drugs sometimes do not work as well as the brand names.¹⁶⁹

The basic problem for pornography researchers is that books, magazines, and movies do not have any inert ingredients. A film may depict rape as "pleasurable, sexually arousing, and beneficial to the female victim."¹⁷⁰ It will also have characters in it that provoke the viewer to certain reactions; it will be edited in a way that pleases, bores, or overstimulates the viewer; the actors may be appealing or repulsive, and they may be talented or wooden; the film stock may be beautifully clear or irritatingly grainy, and so on.¹⁷¹ And we have not even started talking about the story.

The laboratory studies of pornography presume that we know the active ingredient in the films we are showing to the research subjects. Censorship that relies on the lab studies further presumes that we can tell which other films, not used in the studies, have that same active ingredient, and that we can extrapolate from the test conditions to other conditions in the world and predict with confidence when similar results will occur. If the active ingredient is not isolated, then not only do the laboratory studies lack external validity; we do not even know what happened in the lab.

166. See 1 Henrik Wallgren & Herbert Barry, III, *Actions of Alcohol: Biochemical, Physiological and Psychological Aspects* 295-317 (1970).

167. See *Smoking and Health*, *supra* note 165, ch. 5, 11.

168. H. Laurence Ross, *Confronting Drunk Driving: Social Policy for Saving Lives* 36-37 (1992).

169. See Peter Meredith, *Bioequivalence and Other Unresolved Issues in Generic Drug Substitution*, 25 *Clinical Therapeutics* 2875, 2877-78 (2003). This point was emphasized in conversation by Ronald Allen, to whom this entire discussion is indebted.

170. Donnerstein et al., *supra* note 145, at 4.

171. See Williams, *supra* note 121, at 194.

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Laboratory researchers have addressed this problem intelligently, by having subjects and controls look at carefully edited variants of the same pornographic story or film, manipulating relevant variables such as consent versus no consent, pain versus no pain, sexually aroused woman versus disgusted woman, etc.¹⁷² The basic purpose (though none of the researchers have formulated it in these terms) is to construct texts with clear fixed norms that are either favorable or unfavorable to sexual coercion. It is impossible to say, without examining the specific texts with care, whether the researchers succeeded in this task. Given the inevitable complexity of texts, the difficulties are obvious.

Even if the researchers have succeeded in constructing stories with determinate fixed norms, the problems that arise when one tries to generalize from those stories to any other depiction that anyone proposes to censor are huge. The tendency to generalize from the lab to some large undifferentiated mass of “pornography,” Laura Kipnis observes, relies on the unexamined assumption that low cultural forms are devoid of complexity, and that its consumers are stupid and easily brainwashed. The dangerous fantasy that is at work here is a “projection of upper-class fears about lower-class men: brutish, animal-like, sexually voracious.”¹⁷³ A film is not like a drug. It is infinitely more complex, and its effects are similarly complex.

Once more, the real problem with the violent pornography that concerns the researchers here is the fixed norms that are portrayed in the texts. If one were to be concerned merely about *portrayals* of sexual violence, then one would be required, absurdly, to ban feminist films such as *Boys Don't Cry*.¹⁷⁴

Even with portrayals of sexual violence that make the violence appear attractive, matters are complicated. One of the most vivid literary treatments of sexual cruelty is Vladimir Nabokov's novel, *Lolita*, which is told from the point of view of the eloquent and witty pedophile Humbert Humbert.¹⁷⁵ For half a century critics have debated whether Nabokov went too far in letting Humbert's voice dominate the novel. Not all readers will notice how Nabokov subtly subverts his narrator's ingenious apol-

172. See Fisher & Grenier, *supra* note 153, at 28; Neil M. Malamuth & James V.P. Check, Sexual Arousal to Rape and Consenting Depictions: The Importance of the Woman's Arousal, 89 J. Abnormal Psychol. 763 (1980).

173. Laura Kipnis, Bound and Gagged: Pornography and the Politics of Fantasy in America 175 (1999).

174. *Boys Don't Cry* (Twentieth Century Fox 1999). On the intractable difficulties of devising a definition of unprotected pornography that is not massively overinclusive, see generally James Lindgren, Defining Pornography, 141 U. Pa. L. Rev. 1153 (1993). The present Essay is in part an attempt to explain theoretically Lindgren's finding that no definition produces reliable results.

175. Vladimir Nabokov, *Lolita* (1955). The book's subject matter, rather than its mode of presenting that subject matter, was what prevented its publication in the United States for years after it was written. See de Grazia, *supra* note 14, at 243–72.

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ogetics.¹⁷⁶ The same problem is present in any narrative that makes the appeal of evil actions intelligible, such as that of Milton's heroically defiant Satan in the early pages of *Paradise Lost*.¹⁷⁷ Such portrayals are risky, but morally valuable, precisely because they help to dispel the notion that evil is wholly other. That comfortable notion tends to beget the thought that what *we* are doing cannot possibly be evil, since we are the ones who are doing it. It is more than coincidental that the same Department of Justice that has lately revived obscenity prosecutions has also found itself claiming unreviewable power to lock up anyone indefinitely,¹⁷⁸ and defending the extraction of forced confessions from alleged terrorists who turned out to be innocent.¹⁷⁹

A strong link between pornography consumption and sexual aggression has been found in less than one percent of men. These men—often raised in abusive homes, hostile toward women, self-centered and with poor social skills¹⁸⁰—are particularly at risk of moral harm. They are morally fragile just as children are morally fragile, and they might benefit from benevolent censorship in the same way that children do. But you cannot limit their reading without controlling everyone's. The Supreme Court once invalidated a law barring the sale of any material that might have a deleterious effect on youth, explaining that the state may not "reduce the adult population of Michigan to reading only what is fit for children."¹⁸¹ It is similarly inappropriate to reduce the entire population to reading only what is fit for persons with unusual sociopathic tendencies. If the threshold for censorship is bad behavior in less than one percent of the population, then much beside pornography will be censored.

Sometimes the worst will happen. Representations, pornographic or otherwise, will trigger destructive acting out by the viewer. But texts and viewers are so various that it is impossible to say when this will happen or what will set it off. The 1972 film *Deep Throat* reportedly inspired numerous men to brutalize women in novel ways,¹⁸² but no one could have anticipated that a hastily thrown together, low budget film could have such an effect. The early film career of Jodie Foster triggered John

176. See Booth, *Rhetoric of Fiction*, supra note 41, at 390–91. On the other hand, some readers will see the subversion very clearly, and will be grateful for this window into the mind of a certain familiar type of solipsistic wielder of power. See Nafisi, supra note 163, at 35–37, 40–44, 48–50.

177. John Milton, *Paradise Lost* (John Leonard ed., Penguin Books 2003) (2d ed. 1674).

178. See, e.g., *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Padilla v. Hanft*, No. CIV.A. 2:04-2221-26A, 2005 WL 465691 (D.S.C. Feb. 28, 2005).

179. See Jane Mayer, *Outsourcing Torture*, *New Yorker*, Feb. 14, 2005, at 106.

180. See supra text accompanying note 154.

181. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

182. *Deep Throat* (P.D. Inc. & Vanguard Films Production 1972). See In *Harm's Way: The Pornography Civil Rights Hearings* 68, 116, 215, 409–10 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997).

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Hinckley's attempt to assassinate President Reagan.¹⁸³ Leo Tolstoy's story *The Kreutzer Sonata* tells how a man is inflamed to murder his wife by listening to Beethoven.¹⁸⁴

It is impossible for the law to predict the consequences of the dissemination of any text, picture, or film. What *is* possible is to read a text and decide whether the fixed norms it contains are good or bad ones. But if the problem is that the texts and films promote bad fixed norms, then, once more, the complexity of texts and films makes it impossible to fashion a workable legal standard.

IV. PREVENTING MORAL HARM

So moral harm exists. It might appear that the argument so far has left the state impotent to prevent it. There are, however, two common methods that already are used to prevent such harm. This Part will argue that, while outright censorship is not an appropriate method for preventing moral harm, these other methods are not vulnerable to the same objections. Both of these methods are even cruder than *Miller*, restricting broad categories of sexually oriented speech without much attention to whether any particular item is harmful, or even whether it is legally obscene. But this crudeness is tolerable because neither of these measures prevents adults from viewing anything at all. Nor do they require merchants to make fine distinctions of literary judgment in order to avoid criminal prosecution.

One such measure restricts what may be shown or sold to juveniles. The law can bar the sale of sexually oriented material to minors even if it is not obscene.¹⁸⁵ The legal criteria for what children may or may not purchase are remarkably broad: Even simple representations of nudity are typically forbidden.¹⁸⁶ The rule for merchants therefore is simple: Do not display or sell to minors sexually oriented material—a category whose boundaries are, for the most part, fairly clear.

This rule makes sense if it is understood that sexual explicitness is not constitutive of moral harm, but merely an indicator that it is a danger. Child sexuality is malleable; it can be directed in morally bad ways. Censorship is thus a routine part of what parents do. Parents' task is facilitated if material objectionable to many of them cannot be given to their children without their permission.

183. See Lincoln Caplan, *The Insanity Defense and the Trial of John W. Hinckley, Jr.* (1984).

184. Leo Tolstoy, *The Kreutzer Sonata* (Isai Kamen trans., 1957).

185. See *supra* Part III.C.

186. See, e.g., Ark. Code Ann. §§ 5-68-501 to -503 (Michie Supp. 2003); Fla. Stat. Ann. §§ 847.001-.0134 (West 2002); N.Y. Penal Law §§ 235.20-.22 (McKinney 2000); Tex. Penal Code Ann. § 43.24 (Vernon 1994); Va. Code Ann. §§ 18.2-390 to -391 (Michie 1996).



Moreover, in the United States, many parents want to prevent their children from seeing *any* sexual material.¹⁸⁷ Parents' desire to shape the formation of their children is itself an important aspect of human liberty that deserves respect.¹⁸⁸

The second of the crude restrictions that the Supreme Court has permitted is what has been called "erogenous zoning."¹⁸⁹ The Court has upheld the use of zoning laws to confine sexually related expression to certain localities.¹⁹⁰ Here, too, it is crucial that this type of restriction does not mean that "the viewing public is unable to satisfy its appetite for sexually explicit fare" or that "the market for this commodity is essentially unrestrained."¹⁹¹ The Court has, however, found it difficult to explain what it was doing when it allowed this ordinance, and at one point it went so far as to deny that such laws restricted speech on the basis of its content.¹⁹² It held that the purpose of the challenged ordinance was "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views."¹⁹³ As Daniel Farber observes, the Court's profession of content neutrality cannot be taken seriously. "Would the Court really uphold special zoning for computer book stores? What about zoning of religious book stores, if those were shown to have undesirable effects on the neighborhood?"¹⁹⁴ In its most recent decision on the question, there was no longer a majority for this dubious understanding of content neutrality, and Justice Kennedy, concurring in the judgment supporting a zoning ordinance and providing the necessary fifth vote for that judgment, conceded that the claim of content neutrality was "something of a fiction."¹⁹⁵ He nonetheless upheld the ordinance

187. This desire becomes increasingly forlorn as the children approach adulthood. See *supra* note 95. But it can be enforced very effectively in the earlier years of childhood.

188. See William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* 93–109 (2002).

189. See Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 1130 (15th ed. 2004).

190. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–55 (1986); *Young v. Am. Mini Theatres, Inc.* 427 U.S. 50, 71–73 (1976).

191. *Young*, 427 U.S. at 62.

192. It has long been settled that content-based restrictions on speech are presumptively unconstitutional. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 902–09 (2d ed. 2002).

193. *Renton*, 475 U.S. at 48 (alterations in original) (citation omitted).

194. Daniel A. Farber, *The First Amendment* 140 (1998). The studies on which the Court relied also appear to be "junk science" of a kind that it has generally ruled inadmissible as expert evidence. See Mark Kernes, *The Myth of Secondary Effects*, at http://www.freepresscoalition.com/Myth_of_Secondary_Effects.htm (last visited Apr. 12, 2005) (on file with the *Columbia Law Review*).

195. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment). Justice Kennedy is the most consistent defender of free speech on the Court, voting for free speech claimants approximately seventy-five percent of the time. See Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*,



because it could operate “without substantially reducing speech.”¹⁹⁶ These decisions are better understood as an effort to restrict the geographic scope of a certain kind of moral harm—a harm that is directly related to the content of the speech in question.¹⁹⁷

However, one means of preventing moral harm that should be absolutely barred is the one at the core of obscenity law: criminal prosecution for selling forbidden materials to adults. It is likely that some obscene material causes harm to some adults. But there are four fatal objections to the use of the criminal law to prevent this kind of harm.

First, the litmus test for bad pornography that this Essay has suggested—the text’s fixed norms regard people as mere objects of sexual interest, whose feelings and desires do not matter—is too vague and contestable to be workable as a rule of law. It could not give a publisher fair notice of what is or is not prohibited. Any proxy for it that does give fair notice, such as the *Miller* test, will not fit the prohibition’s rationale.

Second, that rationale reaches far beyond pornography. Malign fixed norms are ubiquitous in literature, not least in mass market literature. Sex does have a powerful rhetorical appeal, but hardly a unique one. Violence also has its charms. Yet no amount of violence will render a text legally obscene. And, of course, there are morally pernicious works of literature that do not graphically depict either sex or violence. If gov-

48 UCLA L. Rev. 1191, 1193 (2001); for an updated version, see Eugene Volokh, How the Justices Voted in Free Speech Cases, 1994–2002, at <http://www1.law.ucla.edu/~volokh/howvoted.htm> (last visited Feb. 2, 2005) (on file with the *Columbia Law Review*). If Kennedy is willing to tolerate content-based restrictions on protected speech in this context, then he must think some powerful state interest is being served. He has never articulated his own reasons for withdrawing protection from certain categories of speech such as obscenity, saying only that these are “historic and traditional categories long familiar to the bar.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring). On the other hand, writing for the Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), he discarded nearly every rationale for the obscenity exception. *Ashcroft* invalidated a law that prohibited “virtual child pornography”: sexually explicit images that appear to depict minors, but were actually produced by computer imaging or by using adults that look like children. “As a general principle,” he noted, “the First Amendment bars the government from dictating what we see or read or speak or hear.” *Id.* at 245. There was no compelling interest that could justify such a broad prohibition. Any causal link between such images and actual child abuse was “contingent and indirect.” *Id.* at 250. Government had a legitimate interest in preventing children from seeing such images, but “speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.” *Id.* at 252. If the idea that children are appropriate sexual objects, presented in a sexually alluring way, is not obnoxious enough to justify suppression, then what could possibly be so much worse than it is beyond the pale?

196. *Alameda Books*, 535 U.S. at 450.

197. The problem with the law upheld by the Court is that it does this only for those persons fortunate enough not to have an apartment across the street from all the porn shops. It protects the middle classes while concentrating the costs of pornography on the poor. Frederick Schauer emphasized this point in conversation.



ernment generally is to be empowered to prevent the persuasive advocacy of evil ideas, then that is the end of free speech.

This leads us to the third objection. Banning even the worst obscenity might not prevent any harm at all. It depends on who would read the stuff. (And, of course, even morally admirable fictions are sometimes misconstrued.¹⁹⁸) Even if a work of literature promotes very bad fixed norms, those fixed norms must be accepted uncritically and internalized by a reader before any harm can occur. It is hard to find a single *demonstrable* instance of moral harm caused by obscenity.¹⁹⁹ This is unsurprising, since the harms we are most interested in take place on the same plane as M's contemplation of D in Murdoch's fable, and are not observable by any third party. And how should the positive value on the other side be weighed? Booth concedes that even the most malign material, such as the pornographic novels of the sociopath Marquis de Sade, can offer "the by-no-means contemptible gift of providing fodder for ethical discourse, including my own."²⁰⁰ Even if a fiction represents bad fixed norms, it does not follow that it will produce moral harm.

Finally, there is an intractable difficulty in defining moral harm with enough particularity to authoritatively determine whether any particular fiction does or does not convey bad fixed norms. There is uncertainty, not only about the fixed norms of any particular work, but also about the value or disvalue of many fixed norms, especially with respect to sex.

Thus far this Essay has considered "moral harm" at a very abstract level. The idea that moral harm exists and that some literature can promote it is widely shared. But this consensus breaks down when we try to specify the details of moral harm because Americans disagree so radically about the details of moral well-being. Is a person harmed if she is persuaded that premarital sex is morally permissible? Homosexual sex? Robert P. George argues that pornography depraves and corrupts by "arousing sexual desire that is utterly unintegrated with the procreative and unitive goods that give the sexual congress of men and women, as husbands and wives, its value, meaning, and significance."²⁰¹ But it is far from clear that such unintegrated sexual desire is always morally wrong, or that it is never present even in the heterosexual marriages that George most values and wishes to protect.²⁰²

198. See *supra* text accompanying notes 175–176.

199. The strongest anecdotal evidence that has been cited has involved self-serving claims of criminal defendants and stories of crime victims whose assailants used pornography as a kind of "how-to" manual. Even in the latter cases, it is impossible to know which, if any, of the rapes would not have occurred had the pornography not been available. See Koppelman, *Antidiscrimination*, *supra* note 144, at 239–40.

200. Booth, *The Company We Keep*, *supra* note 40, at 59.

201. George, *supra* note 27, at 187.

202. It is also doubtful that the experience of such desires "makes it difficult for people to understand, intend, and experience sexual relations as other than a kind of self-gratification involving, as part of its end, the 'using' and, in some sense, 'possessing' of another." *Id.* On the contrary, as argued *supra* Part III.A., desire of that kind is an

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So for legal purposes, moral harm should be understood at a very high level of abstraction—so high that the law should not try to decide whether it is present in any particular publication.²⁰³ Crude rules of law are the right ones here precisely because the law is incompetent to make finer distinctions.

The case is closely analogous to a familiar one in the jurisprudence of the religion clauses of the First Amendment.²⁰⁴ The Court has declared that “[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”²⁰⁵ But the Court has also acknowledged that “the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion.”²⁰⁶

It is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have therefore regarded the First Amendment as in tension with itself.

I have suggested elsewhere that this apparent tension can be resolved in the following way.²⁰⁷ Begin with an axiom: The Establishment Clause forbids the state from declaring religious truth. A principal rea-

ineradicable aspect of sexuality itself. For further critique of George’s conception of the good achievable by sexuality, see Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, U. St. Thomas L.J. (forthcoming 2005) (manuscript at 18–24, on file with the *Columbia Law Review*); see also Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* 80–93 (2002); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 Am. J. Jurisprudence 51, 95 (1997).

203. On the value of defining political ends at a high level of abstraction, see Andrew Koppelman, *The Fluidity of Neutrality*, 66 Rev. Pol. 633, 638–45 (2004) [hereinafter Koppelman, *Fluidity of Neutrality*].

204. U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

205. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

206. *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981); see also *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (“[I]n one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.”).

The privileged status of religion is somewhat diminished after *Employment Division v. Smith*, which held that there is no right to religious exemptions from laws of general applicability. 494 U.S. 872, 878–79 (1990). Even after *Smith*, however, religions retain some special protection that nonreligious beliefs do not share. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court struck down four ordinances that a city had enacted with the avowed purpose of preventing a Santeria church from practicing animal sacrifice. 508 U.S. 520 (1993). The laws, the Court held, violated the Free Exercise Clause of the First Amendment because their object was the suppression of a religious practice. *Id.* at 542, 547. The result would have been different if the law had targeted a club that did exactly what the Santeria did, not as part of a religious ritual, but because its members thought that killing animals was fun.

207. See Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 125–40 (2002). This account of the Establishment Clause is further developed in Andrew Koppelman, Akhil Amar and the Establishment Clause, 33 U. Rich. L. Rev. 393 (1999); Andrew



son why it is so forbidden is because it is incompetent to determine the nature of this truth. "The one only narrow way which leads to heaven is not better known to the magistrate than to private persons," Locke wrote, "and therefore I cannot safely take him for my guide who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am."²⁰⁸ Madison wrote that the idea "that the Civil Magistrate is a competent Judge of Religious truth" is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages."²⁰⁹

This incompetence forbids the state from favoring one religion over another. It also bars the state from taking a position on contested theological propositions, such as whether God exists. There is an exception for the "de facto establishment," confined to public rituals of long standing whose religious content is sufficiently bland, but in its nature it cannot permit any new instances.

It is, however, possible, without declaring religious truth, for the state to favor religion at a very abstract level. The Court noticed this in *Texas Monthly v. Bullock* when it invalidated a law that granted a tax exemption to theistic publications, but not atheistic or agnostic publications.²¹⁰ Justice Brennan's plurality opinion thought that a targeted exemption would be appropriate for publications that "sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life."²¹¹ Justice Blackmun thought it permissible for the state to favor human activity that is specially concerned with "such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong."²¹² What is impermissible is for the state to decide that one set of answers to these questions is the correct set.

But the state can abstain from endorsing any diagnosis of or prescription for the universal human problem while acknowledging that there *is* a problem, and that efforts to address it have a distinctive kind of value. Not all human activities attempt to respond to the fundamentally flawed character of human existence. Indeed, most human activities are to some extent an effort to distract oneself from the problem. The Establishment Clause permits the state to favor religion so long as "religion" is understood very broadly to encompass all efforts to address the fundamental human problem, while forbidding any discrimination or prefer-

Koppelman, No Expressly Religious Orthodoxy: A Response to Steven D. Smith, 78 Chi.-Kent L. Rev. 729 (2003).

208. John Locke, A Letter Concerning Toleration 32 (William Popple trans., Patrick Romanell ed., 1950) (1689).

209. James Madison, Memorial and Remonstrance Against Religious Assessments, in *The Mind of the Founder: Sources of the Political Thought of James Madison* 9 (Marvin Meyers ed., rev. ed. 1981).

210. 489 U.S. 1 (1989).

211. Id. at 16 (plurality opinion by Brennan, J., joined by Marshall & Stevens, JJ.).

212. Id. at 27-28 (Blackmun, J., joined by O'Connor, J., concurring in the judgment).



ence among them. The state is incompetent to determine the soundness of any diagnosis or the efficacy of any prescription.

The status of “moral harm” is somewhat analogous to the constitutional status of “religion.” The state can recognize it and try to take account of it—at a very high level of abstraction. What it cannot do is try to make fine distinctions among instances of it. That is beyond its competence. And the idea of state incompetence is as important in free speech doctrine as it is in religion clause doctrine. It has particular bite here. Just as government should not be able to decide for us the path to salvation, so it should not be able to decide for us what our sexual fantasies should be.

Finally, the inevitable clumsiness of any legal standard raises a fundamental human rights issue about arbitrary enforcement of the law. There is now a huge industry in pornography, much of which probably would be found obscene under the *Miller* test by some juries in some jurisdictions.²¹³ The very large number of citizens who are engaged in the pornography business, a business which is openly tolerated by the law, cannot tell when they might be subject to criminal prosecution. Prosecutors are typically unwilling to provide specific advance notice to dealers of sexually oriented merchandise, for fear of being perceived as collaborating with pornographers.²¹⁴ The consequence is that a growing number of citizens are vulnerable to being destroyed at the whim of the government. These include some substantial economic actors. Under *Alexander v. United States*, a business can lose all its assets under the civil forfeiture provisions of RICO²¹⁵ if it sells pornographic material.²¹⁶ Thus Ferris Alexander, who once presided over a large business empire, had thirteen theaters and bookstores and nine million dollars in inventory seized from him and died in poverty after he was convicted of selling four obscene magazines and three obscene videotapes.²¹⁷ This means that, as this is written, many large bookselling and hotel chains are potentially subject to wholesale seizure by the government if it can be shown that they have purveyed at least two obscene publications.²¹⁸ This is a potent power and has gone unused since *Alexander*, but it still sits handy, like a loaded weapon, in case it is in government’s interest to destroy someone. This Essay is not intended to be a source of legal advice, but here is some for

213. See *supra* text accompanying notes 117–118.

214. See Harvey, *supra* note 22, at 98–103.

215. The Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 943 (1970) (codified at 18 U.S.C. § 1964 (2000)).

216. 509 U.S. 544 (1993).

217. See Mike Mosedale, The Porn Warrior at Rest: Ferris Alexander’s Legacy, City Pages (Minneapolis), Mar. 12, 2003, available at <http://www.citypages.com/databank/24/1162/article11110.asp> (on file with the *Columbia Law Review*).

218. See Vartan Aznavoorian, Note, Using Racketeering Laws to Control Obscenity: *Alexander v. United States* and the Perversion of RICO, 36 B.C. L. Rev. 553 (1995); Kendall W. Harrison, Note, *Alexander v. United States*: RICO, Pornography, and the Obscenity Doctrine, 1994 Wis. L. Rev. 1549.



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anyone who plans to criticize incumbent politicians who wield the power to prosecute: Do not invest in hotels, bookstores, or cable TV companies.

This is not the rule of law.

CONCLUSION

The First Amendment is not an absolute. The protection of speech is shot through with exceptions that apply when countervailing social interests are felt to be sufficiently threatened. Is the moral condition of citizens a sufficiently important interest to overcome the interest in free speech? An affirmative answer would be inconsistent with the viewpoint-neutrality ordinarily associated with free speech,²¹⁹ but neutrality has its costs and they may not be worth it.²²⁰ The state's interest must be addressed.

This Essay argues that moral harm exists and that pornography can cause it, but these premises do not entail that there should be censorship. Moral harm requires more than a certain kind of text. It also requires a certain kind of reader. Children often lack the necessary critical resources to defend themselves from such harm, and this is why parents routinely exercise censorship.²²¹ Parents can appropriately decide that certain materials are worthless and harmful, and that children cannot be trusted to see them. But it is not a light thing to treat adult citizens as if they were children.

219. This is emphasized in Martin Redish's critique of obscenity law in *Freedom of Expression*. Redish, *supra* note 5, at 68–76.

220. Put another way, neutrality may be understood at many different levels of abstraction. See Koppelman, *Fluidity of Neutrality*, *supra* note 203, at 645–47.

221. On the other hand, children also must develop those critical resources, and how are they to do that without bad texts on which to practice? The most morally destructive texts that children routinely see are advertisements, which teach that happiness can and should be bought.

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