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# Seeing It, Knowing It

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## SEEING IT, KNOWING IT

Elizabeth M. Glazer\*

### I. INTRODUCTION

In *When Obscenity Discriminates*,<sup>1</sup> I argued that the First Amendment's obscenity doctrine<sup>2</sup> has generated discriminatory collateral effects against gays and lesbians, and that those collateral effects generate a need to refine the obscenity doctrine in light of the Supreme Court's decision in *Lawrence v. Texas*.<sup>3</sup> In his response, *If Obscenity Were to Discriminate*, Professor Barry McDonald agrees with my essay's "core insight—that the *Miller* obscenity test should be applied in a manner that is neutral as to the sexual orientation of the pertinent actors,"<sup>4</sup> and notes that this insight "appears to have substantial support in basic principles of the Court's equal protection and First Amendment jurisprudence."<sup>5</sup> McDonald builds from that "core insight" by "tak[ing] the liberty of recasting these arguments as more modest claims that the obscenity doctrine needs to be modified in light of *Lawrence* in order to achieve a principled and coherent constitutional jurisprudence as it relates to the Court's treatment of gay sex."<sup>6</sup> However, the "more modest claim[]" that McDonald purports to make is, in fact, the claim made in my essay, namely, to "refin[e]—but not overturn[]—the obscenity test set forth in *Miller*"<sup>7</sup> so that it distinguishes between sex and sexual orientation.

Thus, despite Professor McDonald's perception to the contrary, he and I are in closer agreement about the doctrine's needed changes. On some

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\* Associate Professor, Hofstra University School of Law. Many thanks to Paul Abramson, James Gimmelmann, Mackenzi Farquer, Victoria Glazer, Zak Kramer, and Steve Vladeck for helpful discussions on the ideas presented in this Reply. Particular thanks are due to Professor Mary Anne Case for engaging with me in conversations that forced me to think deeply about the arguments presented in this Reply and in my original essay, and to Bryan Arbeit for truly excellent research assistance.

<sup>1</sup> Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379 (2008) (link).

<sup>2</sup> See *Miller v. California*, 413 U.S. 15, 23–26 (1973) (setting forth the current test to determine whether expression or conduct qualifies as obscenity, and thus whether the expression or conduct should, on that basis, be excluded from the First Amendment's protective reach) (link).

<sup>3</sup> 539 U.S. 558 (2003).

<sup>4</sup> Barry P. McDonald, *If Obscenity Were to Discriminate*, 103 NW. U. L. REV. COLLOQUY 72, 86–87 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/31/LRColl2008n31McDonald.pdf> (link).

<sup>5</sup> *Id.* at 87.

<sup>6</sup> *Id.* at 80.

<sup>7</sup> Glazer, *supra* note 1, at 1432 (citing *Miller*, 413 U.S. 15).

points, however, we do divide, and our division derives from two sources. First, and most fundamentally, we disagree about how to measure doctrinal effect. Although McDonald and I agree that the obscenity doctrine should not be applied in a way that is biased toward homosexual content, he and I part ways on the issue of determining when to measure the effects of a biased obscenity test. For McDonald, unless and until the obscenity test is applied in a court of law in a biased manner—that is, unless and until a work which would not constitute obscenity but for its homosexual content is held to be unprotected—the obscenity test has not generated any discriminatory effect.<sup>8</sup> This source of disagreement is fundamental because it divides McDonald and me on the question of implementation and, ultimately, on whether the obscenity doctrine merits refinement. To McDonald, the obscenity doctrine is fine as is unless and until it is misapplied in court; I believe, on the other hand, that the doctrine’s discriminatory effects are inherent to the test used and thus the doctrine merits refinement even absent “misapplication” in court. Part II of this Reply responds to McDonald’s objections that derive from our disagreement on measuring doctrinal effect.

The second source of our disagreement derives from McDonald’s and my differing views on the impact *Lawrence* should have on the obscenity doctrine. McDonald objects to the application of *Lawrence* to the obscenity doctrine and also takes issue with my argument that the obscenity doctrine, in a post-*Lawrence* world, violates the First Amendment because the doctrine may constitute viewpoint discrimination. Part III of this Reply responds to those objections.

I am grateful to Professor McDonald for providing an opportunity for me to clarify these points of disagreement between us and, more generally, for answering my invitation to engage in a conversation about connections between the obscenity doctrine and the rights of gays and lesbians<sup>9</sup> that were previously designated “analytically irrelevant.”<sup>10</sup>

## II. MEASURING OBSCENITY’S EFFECT

The usual arenas in which advocates have fought for gay and lesbian civil rights, such as marriage,<sup>11</sup> employment discrimination,<sup>12</sup> and the now

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<sup>8</sup> See McDonald, *supra* note 4, at 72. This view is evidenced even in McDonald’s title: *If Obscenity Were to Discriminate*.

<sup>9</sup> Cf. Glazer, *supra* note 1, at 1433 (“Because those versed in either doctrine’s [obscenity or gay rights] vocabulary have not, until now, been able to communicate effectively, this essay aims to introduce them, and to help start their conversation.”).

<sup>10</sup> *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 159 n.12 (3d Cir. 2005) (link).

<sup>11</sup> For an extremely useful primer on the debate about same-sex marriage and approaches toward its legalization, see M.V. LEE BADGETT, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* (2009).

<sup>12</sup> See Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205 (2009) (link); Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651 (2009).

unconstitutional existence of consensual same-sex sodomy laws,<sup>13</sup> involve uphill battles that are worth the celebrations that their victories have generated.<sup>14</sup> While overcoming bias against gays and lesbians in these arenas should not be downplayed, the exclusion of gays and lesbians in these doctrinal settings is transparent—for instance, same-sex sodomy laws before *Lawrence* explicitly prohibited consensual sex between adult members of the same sex; marriage in most states is still defined as the union of one man and one woman; and federal anti-discrimination statutes, as well as those in some states, omit the identity category of sexual orientation. In other doctrinal settings, such as the obscenity doctrine, the exclusion of gays and lesbians is less obvious.

The obscenity test, which derives from the Supreme Court's decision in *Miller v. California*,<sup>15</sup> aims to provide a principled way to determine whether expression qualifies, under the First Amendment, as protected speech or unprotected obscenity.<sup>16</sup> The Court constructed the test in order to refine the standard courts use when drawing the line between protected speech and unprotected obscenity. Before *Miller*, such a determination was left, essentially, to intuition. Justice Potter Stewart ended his opinion in *Jacobellis v. Ohio* with a memorable sentence that captures pre-*Miller* obscenity jurisprudence: "But I know it when I see [obscenity], and the motion picture involved in this case is not that."<sup>17</sup>

While the *Miller* test aims to substitute standards for intuition, the test leaves to intuition the distinction between content that offends its observer because it depicts gay sex and content that does so because it is otherwise sexually explicit. Because at times equally suggestive content is filtered differently if it depicts gay sex as opposed to straight sex, I argued in my essay that *Miller* tests offensiveness on a level that, in light of the Court's decision in *Lawrence*, violates both equal protection and First Amendment

<sup>13</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003) (link).

<sup>14</sup> See, e.g., James Kirchick, *Are Gay Activists Too Wedded to the Cause?*, WASHINGTONPOST.COM, Apr. 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/10/AR2009041001983.html> ("Just in time for spring wedding season, gay marriage activists are celebrating a triumphant few weeks. Last Tuesday, the Vermont legislature effectively legalized same-sex unions in that state. Days earlier, the Iowa Supreme Court had ruled that a statute barring gay marriage was unconstitutional. And here in the nation's capital, the D.C. Council voted unanimously to recognize same-sex marriages performed elsewhere.") (link).

<sup>15</sup> 413 U.S. 15 (1973). In *Miller*, the Court offered a three-pronged test to determine whether content qualifies as obscenity:

- (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 the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24 (citations omitted) (internal quotation marks omitted).

<sup>16</sup> Obscenity is a category of low-value speech that falls outside of the First Amendment's protective reach. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (link).

<sup>17</sup> 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (link).

principles. As a result, the obscenity test folds content related to gays' and lesbians' very identity into a category of speech that the government can regulate without violating the Constitution. And in a world where those who discriminate against gays and lesbians tend to find their coupling—and especially the explicit details of their copulation—offensive,<sup>18</sup> leaving to intuition the determination of whether content strikes one as obscene because it contains gay sex seems particularly unrefined. In order to remedy the doctrine's discriminatory collateral effects, my essay proposed “refining—but not overturning—the obscenity test set forth in *Miller*” so that it distinguishes between sex and sexual orientation. And while McDonald agrees that the doctrine should be refined, he argues that this solution should be implemented only “if the discriminatory application of the obscenity doctrine against gay sex portrayals were to become an issue.”<sup>19</sup>

But the obscenity doctrine's discriminatory application has already become an issue. Obscenity trials are, after all, jury trials. A prosecutor who brings an obscenity case wants to win. It is thus unsurprising that obscenity cases often involve depictions of sex likely to make the average juror squirm, ultimately causing him to conclude that the material he watched was so disgusting that it should be classified as obscene, and that the government's regulation of it should not be limited by the protection of the First Amendment. And it is unsurprising that material that tends to have this effect on a juror often involves sex between members of the same sex, sex among multiple partners, and even interracial sex. Dr. Paul Abramson, a professor of psychology at UCLA who has served on multiple occasions as an expert witness in criminal and civil litigations involving sex, recounts his experience serving as an expert witness for Knight-Time Entertainment, one of the country's largest adult video companies, against which the Justice Department brought suit in 1991. The United States District Court of Northern California issued a search warrant against Knight-Time that contained “a request for every ‘interracial and all black’ video.”<sup>20</sup> Knight-Time successfully argued on Fourteenth Amendment grounds that the government had impermissibly used race as a prosecution strategy, and the videos confiscated in connection with its search warrant were dropped from the case. But the government's strategy was discernible, as it was when the prosecution showed in court *My Ass Runneth Over*, a gay Knight-Time film starring three male actors that ended with a scene involving double penetration. This film and fifteen others were “broadcast on a huge screen, at full

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<sup>18</sup> Cf. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1643 (1993) (“[C]oupling’ as in ‘forming a pair bond’ and ‘coupling’ as in ‘copulating’ are exactly what gay men and lesbians may want to do and what troubles society when they try to do it.”).

<sup>19</sup> McDonald, *supra* note 4, at 73.

<sup>20</sup> See PAUL R. ABRAMSON, ON THE PRECIPICE OF PORN: THE TRIALS AND TRIBULATIONS OF AN EXPERT WITNESS 40 (forthcoming 2010) (manuscript on file with author).

volume, in a United States Federal Courtroom to a jury that looked aghast and disgusted, particularly by the gay male films.”<sup>21</sup>

Thus, even where its application is clear, the obscenity doctrine’s issue is the doctrine itself. A potential claimant wishing to argue in court that his work was classified as obscene on the basis of its homosexual content would be told—and told correctly—that because the obscenity doctrine does not distinguish between sex and sexual orientation, his work *can* be classified obscene on that basis. The potential claimant might even be told, moreover, that his work could be classified as obscene *because of* its portrayal of sexual orientation. As a result, cases addressing specifically whether an obscenity determination hinged on a work’s homosexual nature do not exist. In addition, because there is no real fear of overstepping First Amendment bounds, major media filters such as Google and the Motion Picture Association of America (“MPAA”) can filter content of a homosexual nature more strictly than equally explicit heterosexual content.

Even while the source of the obscenity doctrine’s discrimination against gays and lesbians may be less transparent than, say, a statute that bans same-sex sodomy, the discrimination that results from the doctrine is clear. For example, while it is now clear that the law cannot discriminate between same-sex and opposite-sex couples with respect to private copulation, the current obscenity doctrine still discriminates between media portrayals of these respective acts. Despite this discrimination, McDonald takes the view that refining the obscenity doctrine should occur only in the subjunctive. My view is that the obscenity doctrine is harmful before a court decides on which basis a work was classified—because of sexual content or because of homosexual content. Because McDonald’s view of the obscenity doctrine’s impact depends upon its traditional enforcement in a court of law, he objects to my essay’s focus on the actions of Google and the MPAA—neither is a state actor. I address this objection in Part II.A, below. His view on how to measure doctrinal effect also grounds his criticism of my essay’s empirical evidence—evidence which the essay openly concedes to be nothing more than “the requisite first steps toward the collection of [statistical] . . . data,”<sup>22</sup> and which my essay disclaims is not dispositive evidence of the obscenity doctrine’s discriminatory collateral effects.<sup>23</sup> I address these objections in Part II.B.

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<sup>21</sup> *Id.* at 42.

<sup>22</sup> Glazer, *supra* note 1, at 1402.

<sup>23</sup> *Id.* at 1409.

### A. State Actors and Collateral Effects

Nicole Wong is not a state actor. Wong is the deputy general counsel of Google.<sup>24</sup> Google, of course, is “the most powerful and protean” of the Internet’s search engines, reported to dominate the online search market.<sup>25</sup> Internet search engines are the Internet’s “librarians, . . . [its] messengers, . . . [its] inventors, . . . [and its] spies.”<sup>26</sup> Increasingly, users rely on search engines to find information on the Internet.<sup>27</sup> And the Internet is where a large and growing number of people find much of their information.<sup>28</sup>

Accordingly, despite the fact that Nicole Wong does not act on behalf of the state as a formal matter, because of a combination of Google’s ubiquity and its role in determining, while making sure to comply with the First Amendment’s categories of protected and unprotected expression, the content that a typical end-user will be able to access, in effect, she does. She and her colleagues at Google have been said to have “near-sovereign discretion” over, for example, the thirteen hours of content uploaded each minute to YouTube,<sup>29</sup> a Google-owned website through which users can watch and share original videos online. Wong, whose colleagues call her “the Decider,” has been tasked with determining what controversial material appears (or does not appear) in search results generated by Google, as well as whether the user-generated content uploaded to Google’s various websites stays or goes.<sup>30</sup> For example, when the Turkish government blocked access to YouTube in Turkey because the website hosted videos that the government “claimed insulted [Mustafa Kemal Atatürk, founder of modern Turkey] or ‘Turkishness,’” Wong was the one who ultimately decided to which videos YouTube would block access in Turkey.<sup>31</sup> Among the videos blocked was a parody newscast reporting on the homosexuality of Atatürk. Wong was the one who negotiated, ultimately unsuccessfully, with Turkish authorities about whether to block worldwide access to anti-Turkish content. Upon her refusal to accede to the Turkish government’s request, the

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<sup>24</sup> Jeffrey Rosen, *Google’s Gatekeepers*, NYTIMES.COM, Nov. 28, 2008, [http://www.nytimes.com/2008/11/30/magazine/30google-t.html?\\_r=1&scp=1&sq=“google’s%20gatekeepers”&st=cse](http://www.nytimes.com/2008/11/30/magazine/30google-t.html?_r=1&scp=1&sq=“google’s%20gatekeepers”&st=cse) (link).

<sup>25</sup> *Id.*

<sup>26</sup> James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007).

<sup>27</sup> See, e.g., Matt Warman, *How Facebook Toppled the BBC*, TELEGRAPH.CO.UK, Nov. 8, 2008, <http://www.telegraph.co.uk/technology/3394840/How-Facebook-toppled-the-BBC.html> (link).

<sup>28</sup> A recent study found that 40% of Americans (and nearly 60% of Americans under 30) reported getting most of their news from the Internet. The Pew Research Center for People & the Press, *Internet Overtakes Newspapers As News Outlet*, Dec. 23, 2008, <http://people-press.org/report/479/internet-overtakes-newspapers-as-news-source> (link).

<sup>29</sup> See Rosen, *supra* note 24 (quoting Professor Tim Wu).

<sup>30</sup> Rosen, *supra* note 24.

<sup>31</sup> *Id.*

Turkish government blocked access to YouTube in Turkey, a block still in effect.<sup>32</sup>

As a result of their decisionmaking power, “Wong and her colleagues arguably have more influence over the contours of online expression than anyone else on the planet.”<sup>33</sup> A bipartisan bill has been introduced in the House of Representatives that would require Internet companies to disclose to an office within the State Department “all material filtered in response to demands by foreign governments.”<sup>34</sup> The Global Online Freedom Act (the “Bill”)<sup>35</sup> has not yet been enacted, and Google, among others, has sought modifications to the Bill, arguing that it would not allow Internet companies the flexibility to negotiate with repressive foreign governments. Seeking an alternative to government regulation, these companies have been working with other Internet companies and human rights and civil-liberties advocacy groups to create voluntary standards that would address international censorship requests.<sup>36</sup> These efforts, and the existence of groups like the Global Network Initiative,<sup>37</sup> “a multi-stakeholder group of companies, civil society organizations . . . , investors and academics [working together] to protect and advance freedom of expression and privacy in the [Information & Communications Technology] sector,”<sup>38</sup> suggest that private actors like Wong are likely to continue to have control over online content for some time to come.

Because the obscenity test set forth in *Miller* has fallen into desuetude<sup>39</sup> and the reach of the First Amendment’s protection cannot be understood fully by analyzing court decisions,<sup>40</sup> my essay did not analyze judicial decisions invoking the obscenity doctrine, but instead examined other decisions that determined what content should be filtered on account of its obscenity. In addition to analyzing Google’s tendency to filter out of its search results

<sup>32</sup> *See id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. (2006) (link); Global Online Freedom Act of 2007, H.R. 275, 110th Cong. § 101 (2007) (link). For a summary of the Act’s provisions, see Marc D. Nawyn, Note, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, 2007 COLUM. BUS. L. REV. 505, 544–47 (link).

<sup>36</sup> World Press Freedom Committee, *World Press Freedom Committee Joins International Alliance to Launch Global Network Initiative*, Oct. 30, 2008, <http://www.wpfc.org/index.php?q=node/182> (link). The Network includes companies like Google, Microsoft, and Yahoo!. Global Network Initiative, Participants, <http://www.globalnetworkinitiative.org/participants/index.php> (last visited Nov. 1, 2009) (link).

<sup>37</sup> Global Network Initiative, <http://www.globalnetworkinitiative.org/index.php> (last visited Dec. 6, 2009) (link).

<sup>38</sup> *Id.*

<sup>39</sup> *See* Glazer, *supra* note 1, at 1382–83.

<sup>40</sup> *Cf. id.* at 1384 (explaining that, in light of the innovations that social norms theory has brought to legal scholarship, some of the most profound examples of law’s effects derive from its “‘expressive function,’ its ability to influence individual behavior by an existence decoupled from its enforcement” (citations omitted)). *See infra* Part III.



images of homosexual content that contain as much nudity as images of heterosexual content, the essay analyzed the MPAA's tendency to rate homosexual content in films more harshly than equally suggestive heterosexual content.<sup>41</sup> After all, Google is not the only private actor whose actions seem more like those of the state than those of a private individual. Because the MPAA plays a "dominant and preemptive role" in the film industry,<sup>42</sup> a New York trial court admonished the MPAA to "strongly consider some changes in its methods of operations to properly perform its stated mission."<sup>43</sup> Otherwise, the court warned, "the MPAA may find its rating system subject to viable legal challenge by those groups adversely affected," namely filmmakers whose films are given a rating of "X," a rating that the court referred to as "stigmatizing."<sup>44</sup>

Neither Google nor the MPAA is a state actor. My essay engaged with the obscenity doctrine's discriminatory *collateral* effects and proposed refining the obscenity doctrine on that basis. For this reason, I argued, "with respect to an assessment of the obscenity doctrine's collateral effects, it is unnecessary to determine the status of the MPAA [or Google]."<sup>45</sup> However, even though as a technical matter it is unnecessary to determine whether collateral discriminatory effects occurred at the hands of a state actor, it should be noted that the actions of either Google or the MPAA might fall within the state action requirement's recognized exceptions. Pursuant to the state action requirement, "the Constitution's protections of individual liberties and its requirement for equal protection apply only to the government."<sup>46</sup> The two recognized exceptions to the state action requirement—the public function exception and the entanglement exception—may each apply to Google or the MPAA.

The public function exception applies "in the exercise by a private entity of powers traditionally exclusively reserved to the State,"<sup>47</sup> and the power to determine whether expression or conduct is obscene is a power traditionally reserved to courts<sup>48</sup> and government agencies. In fact, the process in

<sup>41</sup> See *id.* at 1404–11.

<sup>42</sup> *Miramax Films Corp. v. Motion Picture Ass'n of Am., Inc.*, 560 N.Y.S.2d 730, 735–36 (N.Y. Sup. Ct. 1990).

<sup>43</sup> *Id.* at 736.

<sup>44</sup> *Id.*

<sup>45</sup> Glazer, *supra* note 1, at 1405.

<sup>46</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 6.4, at 507 (3d ed. 2006).

<sup>47</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–52 (1974) (indicating that if there exists a sufficiently clear nexus between the State and the challenged action of a private entity, the action of the latter may be treated as that of the State itself, but holding that the actions of a private utility company did not constitute state action) (link).

<sup>48</sup> The Supreme Court has held that "action[s] of . . . courts and judicial officers in their official capacities [are] to be regarded as action[s] of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (link).

which both Google and the MPAA engage—watching hours of content to determine whether that content is sufficiently offensive to merit censorship—is strikingly similar to the practice the Court adopted in deciding *Redrup v. New York*<sup>49</sup>—namely, reversing, per curiam, convictions for the dissemination of materials that at least five members of the Court deemed to be inoffensive.<sup>50</sup> As the Court itself later stated, the *Redrup* Court acted as an “unreviewable board of censorship for the 50 states, subjectively judging each piece of material brought before [it].”<sup>51</sup> This likewise seems an apt description of the offices where Nicole Wong and her colleagues review content uploaded to YouTube, or the screening rooms where members of the MPAA’s ratings board determine who will see a film and who will not.<sup>52</sup> Thus, if private actors conduct business previously reserved to the Court, a state actor, the public function exception could apply, transforming the otherwise private conduct into state action.<sup>53</sup>

The second exception to the state action requirement, the entanglement exception, applies to actions “authorize[d], encourage[d], or facilitate[d]” by the government, but carried out by a private actor.<sup>54</sup> One might argue that the existence of the obscenity doctrine, which excludes from First Amendment protection material classified as obscene, indicates that the government authorizes, encourages, and facilitates private actors to refrain from disseminating obscene material. However, the Court has “never held that the mere availability of a remedy for wrongful conduct . . . so significantly encourages the private activity as to make the State responsible for it.”<sup>55</sup> It would therefore seem equally implausible that the Court would find

<sup>49</sup> 386 U.S. 767 (1967) (link).

<sup>50</sup> See Glazer, *supra* note 1, at 1397–98.

<sup>51</sup> *Miller v. California*, 413 U.S. 15, 22 n.3 (1973).

<sup>52</sup> See THIS FILM IS NOT YET RATED (Independent Film Channel 2006) (explaining the procedure used by the MPAA’s ratings board when rating films and how a rating of “NC-17” means that a film will not be released widely).

<sup>53</sup> I should reemphasize at this point that I mean to argue only that the public function exception to the state action requirement *could* apply to the actions of Google or the MPAA because of the parallels that might be drawn between either of these actors’ filtering procedures and the particular filtering procedures that the Court employed when deciding the early obscenity cases. I recognize that courts have not been ready to hold that private actions fall within this exception to the state action requirement, but again, accepting this argument is not a necessary component of accepting the argument presented in my essay. That said, it is undeniable that in media contexts, private filtering bodies wield enormous power that the state does not. As I argued in my essay, “it is unnecessary that an obscenity case be decided in court in order for [my essay’s] goal to be met.” Glazer, *supra* note 1, at 1432. The fact that both Google and the MPAA have near unanimous power to filter expressive content in media through which so much expressive content is filtered might not motivate a court to hold that their actions constitute those of the state, but should at least motivate a court to refine the obscenity doctrine to prevent those who filter expressive content from doing so on discriminatory bases. Refining the doctrine to incorporate the distinction between sex and sexual orientation would cause private filtering bodies to internalize the distinction—as they internalize other aspects of First Amendment doctrine—so as to avoid future liability.

<sup>54</sup> CHEMERINSKY, *supra* note 46, § 6.4.4.3, at 527.

<sup>55</sup> *Am. Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) (link).

the absence of a remedy—for example, one flowing from First Amendment protection of material improperly classified as obscene—so discourages private activity as to make the State responsible for private actions. Still, one unifying theme of those decisions that do create exceptions to the state action requirement is the Court’s determination that the state action “is inextricably linked to the Court’s view as to whether[,] [in a particular case,] there is a violation of equal protection.”<sup>56</sup> It is this binding feature—the prevention of private discrimination—that makes some sense of the confusing and inconsistent set of cases involving exceptions to the state action requirement.<sup>57</sup> And this feature most certainly appears in the private conduct upon which my essay elaborates.<sup>58</sup>

The line dividing state action from private action is anything but bright.<sup>59</sup> Cases elaborating exceptions to the state action requirement are inconsistent and suggest that any action could be cast as state action if a court believes it should be.<sup>60</sup> Moreover, the line between public and private action has been widely criticized in a number of different contexts,<sup>61</sup> but has been particularly criticized when applied to the Internet domain.<sup>62</sup> This criticism results in part from the increasing popularity of the Internet as a forum for speech:

As more and more speech migrates online, to blogs and social-networking sites and the like, the ultimate power to decide who has an opportunity to be heard, and what we may say, lies increasingly with Internet service providers, search

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<sup>56</sup> CHEMERINSKY, *supra* note 46, § 6.4.4.3, at 538.

<sup>57</sup> *See id.* § 6.4.2, at 511.

<sup>58</sup> *See* Glazer, *supra* note 1, at 1404–11, 1419–32.

<sup>59</sup> And, in fact, as the U.S. government contemplates taking equity stakes in banks (pursuant to the financial bailout bill), the line seems to be getting blurrier every day. *See* H.R. 1424, 110th Cong. (2008) (link).

<sup>60</sup> *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 463–64, n.2 (2007); Robert J. Glennon Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221; Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451 (2007).

<sup>61</sup> Many scholars have argued that the state action requirement should be eliminated. For some canonical works, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688–1719 (2d ed. 1988); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991); Harold W. Horowitz, *The Misleading Search for State Action Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

<sup>62</sup> *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 217 (1999) (“If [in the Internet context] code functions as law, then we are creating the most significant new jurisdiction since the Louisiana Purchase, yet we are building it just outside the Constitution’s review. Indeed, we are building it just so the Constitution will not govern—as if we want to be free of the constraints of value embedded by that tradition.”).

engines and other Internet companies like Google, Yahoo, AOL, Facebook, and even eBay.<sup>63</sup>

In a world increasingly reliant on bottom-up rather than top-down ordering where media distributors and Internet service providers control the flow of expressive content, it has been private actors that have, for some time, made the determination of whether content falls into the unprotected category of obscenity.<sup>64</sup>

### B. *Requisite First Steps*

Because the obscenity doctrine has largely fallen into disuse, the examples I engaged with in my essay did not derive from judicial opinions.<sup>65</sup> Taking a cue from scholars like Ryan Goodman, I sought to “examine not only the instrumental, or direct, impact of laws . . . but also the indirect or collateral effects . . . laws have . . . .”<sup>66</sup> The examination of law’s collateral effects is an outgrowth of the “explosion of scholarly interest in norms,”<sup>67</sup> which examines law’s “ability to influence individual behavior by an existence decoupled from its enforcement.”<sup>68</sup> Because the obscenity doctrine has not been enforced in recent years, I examined the indirect effects the doctrine might have. And while scholarly interest in norms extends beyond the First Amendment, a scholarly examination of norms in that context is particularly worthwhile for at least two reasons.

First, as I argued in my essay, examining the collateral effects of the First Amendment’s boundaries helps to illuminate both patent and latent silencing effects that result from a lack of protection for certain expression.<sup>69</sup>

<sup>63</sup> Rosen, *supra* note 24.

<sup>64</sup> I do not mean to suggest that the nature of the Internet and film media contexts—each intermediated by filtering bodies like search engines and a ratings board that exercises discretion in filtering content to end-users—itself violates First Amendment principles. I mean to argue instead that because the obscenity doctrine has failed to disaggregate sex from sexual orientation, these filtering intermediaries have acted reasonably when filtering homosexual content more readily than equally suggestive heterosexual content. As a result, my argument addresses principally not the intermediaries themselves but courts with the ability to refine the doctrine with which these intermediaries reasonably aim to comply. Cf. Christopher S. Yoo, *Free Speech and the Myth of the Internet As an Unintermediated Experience*, (Inst. for Law & Econ. Univ. Pa. Law Sch. Research Paper No. 09-33, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1475382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475382) (arguing that intermediaries’ exercise of editorial discretion can promote rather than inhibit free speech values) (link).

<sup>65</sup> It should be noted that even if one argues that the obscenity doctrine has not fallen into disuse, an examination of the ways in which major media filters have internalized constitutional norms by censoring content perceived to be obscene can still be useful because these private filtering entities have very powerful control over content that is publicly disseminated.

<sup>66</sup> Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 645 (2001).

<sup>67</sup> Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 542 (1998).

<sup>68</sup> Glazer, *supra* note 1, at 1384.

<sup>69</sup> *Id.* at 1403.

Second, examining the collateral effects of the obscenity doctrine, or of any First Amendment doctrine, is warranted and useful because Google, the MPAA, and other companies who filter and disseminate expressive content to ordinary end-users incorporate into their practices and policies the substance of First Amendment doctrine. For example, YouTube's Community Guidelines, incorporated by reference into YouTube's Terms of Service,<sup>70</sup> explain that while YouTube "encourage[s] free speech and defend[s] everyone's right to express unpopular points of view," it "is not for pornography or sexually explicit content," and doesn't "permit hate speech" (which, it should be noted, includes speech that "attacks or demeans a group based on" identity categories like race, religion, disability, and "sexual orientation/gender identity").<sup>71</sup> So that YouTube can ensure that it avoids liability for disseminating content that falls into the First Amendment's categories of unprotected speech, it allows users to upload the sort of speech that the First Amendment protects—speech that does not fall into delineated "low-value speech" categories and that expresses differing points of view—and does not allow users to upload speech that maps onto the surviving categories of unprotected, low-value speech—obscenity and hate speech.<sup>72</sup> Thus, an examination of the companies that determine which types of expression will be exposed to end-users seems a useful one when trying to determine law's collateral effects.

Professor McDonald criticizes the statistical data on the actions of Google and the MPAA that I offered in my essay. In the case of Google, this was based on the quantity of my data,<sup>73</sup> and in the case of the MPAA, on their alleged generality.<sup>74</sup> As a threshold matter, I should note that my essay disclaimed that the data would be able to "demonstrate the sorts of statistical disparities that a showing of disparate impact [against gays and lesbians] might require."<sup>75</sup> My purpose in offering data was to demonstrate only that major media filters *might* be biased against content involving gay

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<sup>70</sup> YouTube, YouTube Terms of Service § 1.A, <http://www.youtube.com/t/terms> (last visited Nov. 1, 2009) (link).

<sup>71</sup> YouTube, YouTube Community Guidelines, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Nov. 1, 2009) (link).

<sup>72</sup> As I argued in my essay, obscenity is arguably the only surviving category of low value speech of the categories listed by the *Chaplinsky* Court. Glazer, *supra* note 1, at 1388. Cf. Posting of Eugene Volokh to The Volokh Conspiracy, <http://www.volokh.com/posts/1212872018.shtml> (Jun. 7, 2008, 16:53 EST) ("'Hate speech' is not a legal term of art under U.S. law, nor an exception from First Amendment protection. Some of what some label as 'hate speech' may, depending on the circumstances, fall within the generally quite narrow exceptions for fighting words, threats, incitement, or certain kinds of false statements of fact.") (link).

<sup>73</sup> See McDonald, *supra* note 4, at 480–81.

<sup>74</sup> See *id.* at 480.

<sup>75</sup> Glazer, *supra* note 1, at 1403.

and lesbian sex. After all, discrimination is difficult to demonstrate conclusively and is often carefully disguised.<sup>76</sup>

Moreover, I collected the preliminary data that I analyzed in my essay with the purpose of determining what content end-users do and do not receive. The information collected and described in the essay came from two sources: (1) Searches generated through Google; and (2) Kirby Dick's documentary film *This Film is Not Yet Rated*, which exposed the MPAA for a number of questionable practices, including but not limited to its differing treatment of homosexual and heterosexual sex. The reason that I chose to study the filtering processes of Google and the MPAA was that these entities have nearly sovereign discretion over the content that ordinary individuals can access, and because these giant filtering entities perform the same kind of function that was once performed by courts when obscenity cases appeared on their dockets. In addition, in assessing the collateral effects of First Amendment doctrine, the end-user who does or does not receive content is the relevant individual about whom data should be collected—the First Amendment's concern is that speech be accessible to the individual.<sup>77</sup> As a result, when gathering preliminary data on Google and the MPAA, I endeavored to collect data that would have an impact on what content end-users would and would not receive.

McDonald criticizes the Google search results described in my essay for being too few. When collecting results from Google, I tried to act as the typical Google end-user, which is why I reported only on the first page of results. I performed Google searches for “having sex” under each of Google's “strict,” “moderate,” and no filtering options, and analyzed the first twenty results generated by this search. McDonald is puzzled by my essay's “silence on what *all* of [the] search results returned (and not just the first twenty).”<sup>78</sup> The first twenty results of a Google search appear on the search's first page of results. Appearing on any other page of results is said to ensure inexistence and invisibility. The “all-important first page”<sup>79</sup> of Google search results is where business owners “want to be,” because

<sup>76</sup> See Glazer, *supra* note 1, at 1419–22; Paulette M. Caldwell, *Reaffirming the Disproportionate Effects of Standard Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 572 (1985). Cf. Adam B. Cox & Thomas J. Miles, *Documenting Discrimination?*, 108 COLUM. L. REV. SIDEBAR 31 (2008), [http://www.columbialawreview.org/Sidebar/volume/108/31\\_CoxMiles.pdf](http://www.columbialawreview.org/Sidebar/volume/108/31_CoxMiles.pdf) (arguing that data indicating the rate of plaintiff success in published voting rights cases cannot demonstrate the frequency of voting rights discrimination against minorities in certain parts of the country) (link).

<sup>77</sup> Any of the classic purposes for the First Amendment's protection of freedom of expression—for example, self-governance, the discovery of truth, the advancement of autonomy, or the promotion of tolerance—is predicated upon an individual's ability to send and receive expressive messages. For a more elaborate discussion of each of the First Amendment's classic purposes, see CHEMERINSKY, *supra* note 46, § 11.1.2, at 924–30.

<sup>78</sup> McDonald, *supra* note 4, at 77–78.

<sup>79</sup> Susan Kinzie & Ellen Nakashima, *Calling in Pros to Refine Your Google Image*, WASHINGTONPOST.COM, July 2, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/01/AR2007070101355.html> (link).

“[y]ou don’t exist from Page 3 on.”<sup>80</sup> Some studies have made even stronger claims, showing that “precious few sleuths go beyond the first page of search results.”<sup>81</sup> According to Danny Sullivan, editor of Search Engine Watch, “If [a search result] is not on the first page, it might as well be invisible.”<sup>82</sup> My analysis of the first page of Google results was not intended to exclude results for the sake of generating impressive statistics, but instead to include only that information that Google’s users are likely to view.

McDonald criticizes as “general comparisons”<sup>83</sup> the quite detailed descriptions of scenes in films rated differently as a result of the homosexual content in those scenes. While in my essay I conceded that a film is rated as a whole rather than scene-by-scene, Mr. Dick’s documentary includes interviews with filmmakers who state that the MPAA communicated to them that the particular scenes described posed barriers to earning a rating of “R” as opposed to a rating of “NC-17.”<sup>84</sup> And, as would be expected, the scenes depicted in films rated “R” and “NC-17” were the most explicit scenes in those films. But what is, perhaps, most telling is that in the aftermath of the documentary’s release, the MPAA changed those practices that Mr. Dick criticized.<sup>85</sup>

### III. IN LIGHT OF *LAWRENCE*

Perhaps because of the doctrine’s relative disuse, the *Miller* obscenity test has remained unchanged since its original formulation. However, since *Miller* was decided in 1973, and specifically since the Supreme Court decided *Lawrence v. Texas* in 2003,<sup>86</sup> attitudes toward gays and lesbians have changed considerably. In my essay, I argued that the obscenity doctrine should be refined in light of *Lawrence*, whether read broadly<sup>87</sup> or narrowly.<sup>88</sup> Under a broad interpretation, the obscenity doctrine’s failure to distin-

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<sup>80</sup> Sara Kehaulani Goo, *For Ted Leonsis, a Quest to Find Himself Faster Online*, WASHINGTONPOST.COM, Nov. 13, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/12/AR2006111200804.html> (link).

<sup>81</sup> Tom Zeller Jr., *Gaming the Search Engine, in a Political Season*, NYTIMES.COM, Nov. 6, 2006, <http://www.nytimes.com/2006/11/06/business/media/06link.html> (link).

<sup>82</sup> *Id.*

<sup>83</sup> McDonald, *supra* note 4, at 77.

<sup>84</sup> See Glazer, *supra* note 1, at 1407 (“For example, a scene in which Hilary Swank performed oral sex on Chloë Sevigny had to be cut because Ms. Sevigny’s orgasm was, according to the MPAA raters, too long.”).

<sup>85</sup> See Shen Shi’an, “*This Film is Not Yet Rated*” for Sex & Violence?, THE BUDDHIST CHANNEL, Jan. 30, 2008, <http://www.buddhistchannel.tv/index.php?id=12,5848,0,0,1,0> (link).

<sup>86</sup> 539 U.S. 558 (2003).

<sup>87</sup> See Glazer, *supra* note 1, at 1415–17 (explaining that the spatial, liberal, moral, and cultural dimensions of the majority opinion in *Lawrence* can be read broadly to incorporate the decision’s underlying equality principle, which mandates that gays and lesbians should be given equal rights to life, liberty, and the pursuit of happiness).

<sup>88</sup> See *id.* at 1417–18 (explaining that the majority opinion in *Lawrence* opinion can be read narrowly to protect the right to adult consensual sex in the privacy of one’s own home).

guish sex from sexual orientation violates *Lawrence*'s "equality principle."<sup>89</sup> Even *Lawrence*'s narrowest interpretation—limiting *Lawrence* to its plain words—would provide reason to refine the obscenity doctrine, however, because the test discriminates against expressive content on the basis of either its subject matter or its viewpoint.

Professor McDonald lodges two objections to my essay's use of the *Lawrence* decision. First, he makes a technical argument that "[i]f perceived tensions between *Lawrence* and *Miller* were put squarely to the Court, it might choose the former as [the doctrine] requiring modification rather than the latter (versus the other way around, as Glazer would have it)."<sup>90</sup> Second, McDonald advises that "[i]nstead of arguing that obscenity discrimination against gay sex portrayals would constitute impermissible viewpoint discrimination pursuant to changes wrought by *Lawrence*, Glazer would do better to rest her argument squarely on the content discrimination principles" that have formed the core of McDonald's other writings.<sup>91</sup>

Before addressing each of McDonald's objections in Part III below, I want to first reiterate the original motivation for incorporating into my essay an analysis of the *Lawrence* decision. *Lawrence* has not been applied in the wide array of contexts that some commentators have suggested that it ought to be.<sup>92</sup> In a recent obscenity case (one of the few), in fact, the Third Circuit not only refused to extend the holding in *Lawrence*, but also declared that the implications of *Lawrence* on morals-based legislation were "analytically irrelevant to the disposition of th[e] case."<sup>93</sup> This declaration of analytical irrelevance between *Lawrence* and the obscenity doctrine motivated my essay.<sup>94</sup> Despite the initial motivation for my essay, which is rooted in the *Lawrence* decision, the argument that *Lawrence* should not cause a change in the obscenity doctrine is one with which I take less issue than my original essay might suggest. For this reason I argued not that the obscenity doctrine should be refined *because* of *Lawrence* (as McDonald suggests<sup>95</sup>), but instead that the obscenity doctrine should be refined "in

<sup>89</sup> *Id.* at 1416 & n.247 (citing William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1053–54 (2005)).

<sup>90</sup> McDonald, *supra* note 4, at 74.

<sup>91</sup> *Id.* at 80.

<sup>92</sup> See Glazer, *supra* note 1, at 1411 n.211 (citing a number of articles in which scholars have prescribed applying *Lawrence* in a variety of legal contexts). Its holding has, however, been extended to some contexts. *Cf. id.* at 1415 n.238 (citing lower court cases applying the holding in *Lawrence*).

<sup>93</sup> *U.S. v. Extreme Assocs., Inc.*, 431 F.3d 150, 159 n.12 (3d Cir. 2005) (link), *cert denied* 547 U.S. 1143 (2006). A Texas court of appeals also rejected a *Lawrence*-based constitutional challenge to the application of the Texas obscenity statute to the sale of obscene content to consenting adults in a retail establishment that bars minors' entry. See *Ex Parte Valeria Joyce Dave*, 220 S.W.3d 154, 158–59 (Tex. App. 2007) (link), *cert denied sub nom. Dave v. Texas*, 128 S. Ct. 628 (2007). Both *Extreme Associates* and *Ex Parte Valeria Joyce Dave* have been denied certiorari by the U.S. Supreme Court, which suggests that the Court will not decide what, if any, impact *Lawrence* has on the obscenity doctrine.

<sup>94</sup> See Glazer, *supra* note 1, at 1382.

<sup>95</sup> See McDonald, *supra* note 4, at 79–80.



light of *Lawrence*.<sup>96</sup> This is an argument to which Professor McDonald has signed on, assuming that the doctrine could be shown to discriminate against homosexual content in a court of law.<sup>97</sup> The fact that I argued that the obscenity doctrine should be refined in light of *Lawrence* undermines both of McDonald's *Lawrence*-based objections.

#### A. Contextualizing *Miller* and *Lawrence*

McDonald has made the technical argument that if the Court's decision in a later case, like *Lawrence*, is thought to conflict with the Court's decision in an earlier case, like *Miller*, the Court is as free to overrule the later decision as it is to overrule the earlier.<sup>98</sup> No "last-in-time rule" applies to judicial precedent, and the Court could overrule any of its prior decisions.<sup>99</sup> While correct as a technical matter, this argument is incorrect as a practical matter. In arguing that the obscenity doctrine should be refined in light of *Lawrence*, I meant to incorporate into my argument the contexts in which the obscenity doctrine was formulated, in which *Lawrence* was decided, and in which both *Miller* and *Lawrence* have remained good law.

First, the idea that *Lawrence* might be modified in light of *Miller* can be dismissed as a threshold matter; both times the Court has been faced with cases that highlighted the tensions between *Lawrence* and *Miller*, it has denied certiorari. However, McDonald's argument deserves to be analyzed by setting aside the likelihood that the Court will address the impact of *Lawrence* on *Miller* (or, for that matter, of *Miller* on *Lawrence*) any time soon, if ever.

Second, the Court is unlikely to modify *Lawrence* in light of *Miller* because since *Lawrence* was decided, public support for gays and lesbians has increased dramatically. In addition to legal commentary dubbing *Lawrence* one of the Court's landmark decisions,<sup>100</sup> a poll in the Washington Post reported that more respondents support same-sex marriage than oppose it, with a split of 49% of respondents in favor and 46% opposed.<sup>101</sup> While this split is still within the poll's margin of error, it represented a dramatic in-

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<sup>96</sup> Glazer, *supra* note 1, at 1382, 1419.

<sup>97</sup> See *supra* notes 6–8 and accompanying text.

<sup>98</sup> See McDonald, *supra* note 4, at 74.

<sup>99</sup> I borrow the concept of a "last-in-time rule" from the international law context, where it is a well-settled rule that Congress has the authority to override treaties for purposes of U.S. law. Pursuant to the rule, if a federal statute is enacted after a treaty has been ratified, "the statute is 'the latest expression of the sovereign will.'" Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 339 (2007) (quoting *Whitney v. Robertson*, 124 U.S. 190, 195 (1888)).

<sup>100</sup> See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399 n.2 (2004).

<sup>101</sup> See Jennifer Agiesta & Alec MacGillis, *Poll: Rising U.S. Support for Social Issues, Such as Gay Marriage*, WASHINGTONPOST.COM, Apr. 30, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043001640.html?hpid=topnews> (link).

crease from the same poll taken in 2006, when only 36% of respondents favored same-sex marriage and 58% opposed it.<sup>102</sup> Professor Sonja Starr contends that because “the composition of the population hasn’t changed fast enough to explain shifts of this magnitude in a few years,” it must be “that a lot of people, young and old, have changed their minds.”<sup>103</sup> For Starr, court decisions play a big role in causing a shift in people’s attitudes, whether “by direct persuasion, by starting a statewide or nationwide conversation that gets people to question traditions, or simply by allowing gay and lesbian couples to marry (which could shape public opinion as people realize that fears about the effects on marriage as a social institution have not panned out).”<sup>104</sup> Currently, as a result of court decisions and enacted laws, same-sex couples can marry in five states<sup>105</sup>: Connecticut,<sup>106</sup> Iowa,<sup>107</sup> Massachusetts,<sup>108</sup> New Hampshire,<sup>109</sup> and Vermont.<sup>110</sup> Other states offer same-sex couples some benefits of marriage but do not allow same-sex couples to marry.<sup>111</sup> Though equal rights for gays and lesbians are not synonymous with equal marriage rights, the fight for marriage equality has been a top priority for gay rights activists for some time and a leading bone of contention between supporters and detractors of gay rights. It therefore seems reasonable to gauge public support for gays and lesbians by reference to public support for same-sex marriage. And while evidence from polls, court decisions, and legislative action in a handful of states does not mean that attitudes toward gays and lesbians have changed entirely, it does suggest that

<sup>102</sup> *Id.*

<sup>103</sup> Posting of Sonja Starr to Concurring Opinions, Public Opinion on Same-Sex Marriage, [http://www.concurringopinions.com/archives/2009/04/public\\_opinion.htm](http://www.concurringopinions.com/archives/2009/04/public_opinion.htm) (April 30, 2009, 14:07 EST) (link).

<sup>104</sup> *Id.*

<sup>105</sup> Until very recently, same-sex couples could marry in six states, but voters in Maine repealed the state’s same-sex marriage law. See Posting to CruzLines, *Marriage Equality Defeated (for now) in Maine*, <http://mylaw.usc.edu/blogCruz/1/2009/11/Marriage-Equality-Defeated-for-now-in-Maine.cfm> (Nov. 4, 2009, 7:33 PST) (link).

<sup>106</sup> See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that the state statutory prohibition against same-sex marriage impermissibly discriminated against gay people on account of their sexual orientation in violation of the Connecticut constitution) (link).

<sup>107</sup> See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that a provision in the Iowa Code prohibiting same-sex marriages was unconstitutional because it violated the equal protection clause of the Iowa constitution) (link).

<sup>108</sup> See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts marriage licensing statute, which did not permit same-sex couples to marry, violated the protections of individual liberty and equality in the Massachusetts constitution) (link).

<sup>109</sup> See Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, NYTIMES.COM, Jun. 3, 2009, <http://www.nytimes.com/2009/06/04/us/04marriage.html> (link).

<sup>110</sup> See Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, WASHINGTONPOST.COM, Apr. 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html> (link).

<sup>111</sup> For an overview of states’ recognition of same-sex relationships, see Lambda Legal, *Status of Same-Sex Relationships Nationwide*, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last visited Nov. 1, 2009) (link).

the public accepts homosexuality to a larger degree than in the past. One might argue that because public opinion of gays and lesbians is increasingly positive, the obscenity doctrine need not specify that homosexual identity is not obscene. It is at least arguable, however, that public opinion has begun to increase only after cases and laws, like those related to the legalization of same-sex marriage, have made legal constitutive aspects of gay and lesbian identity (such as coupling with a member of the same sex, as in the case of same-sex marriage, or depicting the copulation between same-sex couples, as in the case of obscenity).

A third reason that the Court is unlikely to modify *Lawrence* in light of *Miller* is that the obscenity doctrine's very roots—its earliest cases, and *Miller* in particular—involved material whose content included a lot of homosexual sex.<sup>112</sup> Currently, however, the *Miller* test makes no distinction between content determined to be obscene because it depicts gay sex and content determined to be obscene because it is patently offensive. Because the obscenity doctrine does not disaggregate sex from sexual orientation,<sup>113</sup> purveyors of material classified as obscene due to the material's homosexual content are unable to argue against such a classification. Thus, the obscenity of gays' and lesbians' identity has “informed the construction of the obscenity doctrine itself.”<sup>114</sup> But even though the doctrine was constructed in response to materials depicting homosexual sex, it was nonetheless constructed so as to guide the obscenity determination away from one based on the subjectivity of judges—a purpose arguably not achieved in a post-*Lawrence* world. After all, the *Miller* test was constructed in order to help judges and juries disaggregate what about a work was truly offensive. But because the test fails to disaggregate sex from sexual orientation, a work that is classified as obscene because of its homosexual content is as doctrinally acceptable as a work that is classified as obscene because it is especially graphic.

### B. Viewpoint Discrimination

As I explained in my essay, discrimination claims can derive not only from the Equal Protection Clause, but also from the First Amendment itself. The First Amendment has long been considered to prohibit laws that dis-

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<sup>112</sup> Glazer, *supra* note 1, at 1399–1400. This is, as a result of the reasonable strategy that a prosecution is likely to adopt in bringing an obscenity lawsuit, unsurprising. See *supra* notes 20–21 and accompanying text. When the government focused on censoring pornography, it focused on censoring “pornography outside of the mainstream: gay male pornography, true lesbian pornography, transsexual pornography, depictions of interracial sex, and so forth.” PAUL R. ABRAMSON & STEVEN D. PINKERTON, WITH PLEASURE: THOUGHTS ON THE NATURE OF HUMAN SEXUALITY 184 (1995).

<sup>113</sup> I borrow the move to disaggregate sex from sexual orientation from Professor Mary Anne Case's landmark piece about employment discrimination on the basis of gender-stereotyping. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

<sup>114</sup> Glazer, *supra* note 1, at 1385.

criminate against particular viewpoints and, to a lesser extent, laws that discriminate against particular subject matters.<sup>115</sup> In my essay, I argued that even the narrowest reading of *Lawrence* can support an argument that the obscenity doctrine violates the First Amendment because it discriminates on the basis of viewpoint. Professor McDonald has urged me to reconsider this argument in favor of an argument based simply on the principles of content discrimination that McDonald has written about in the past.<sup>116</sup> McDonald argues that “[s]mut is smut, and in terms of obscenity-related harms the government can legitimately seek to address, it appears to make little difference whether such materials involve heterosexual or same-sex actors.”<sup>117</sup>

The “obscenity-related harms the government can legitimately seek to address” are, for McDonald, “reasons [that] have to do with the low ‘truth’ value of extreme pornographic material and its potential harm to societal interests in shielding youths, adults, and the greater community from conduct and materials that threaten society’s interests in preserving minimum levels of decency and morality.”<sup>118</sup> McDonald answers, in my opinion correctly, that homosexual sex does not implicate the low truth value or potential harm of obscene material any differently than heterosexual sex. Thus, McDonald and I agree that obscenity containing homosexual sex is of no lesser First Amendment value than obscenity containing heterosexual sex. However, McDonald argues that as a result of the equally low truth value or equally high harm value of depictions of homosexual and heterosexual sex, a court demonstrating a bias against homosexual content when making an obscenity determination would only violate principles of content discrimination. But McDonald’s argument that “[s]mut is smut”—that depictions of heterosexual and homosexual sex have equal First Amendment value—indicates that he should object to the obscenity doctrine’s second level of content discrimination, as well.

I agree with McDonald that such a determination would violate principles of content discrimination, but I argue further that it would specifically violate the prohibition against “second-level”<sup>119</sup> content discrimination articulated by the Court in *R.A.V. v. City of St. Paul*.<sup>120</sup> The fact that the obscenity test, by its own terms, invites a second level of content discrimination does not mean that adjudicators at this second level should be able to discriminate against content that contains homosexual sex. This is the very

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<sup>115</sup> See Glazer, *supra* note 1, at 1391–92.

<sup>116</sup> McDonald, *supra* note 4, at 79–85. See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006) (link).

<sup>117</sup> McDonald, *supra* note 4, at 84–85.

<sup>118</sup> *Id.* at 84.

<sup>119</sup> *Id.*

<sup>120</sup> 505 U.S. 377 (1992) (holding that content-based restrictions within a category of low-value speech are impermissible) (link).

issue that the obscenity doctrine, in its current formulation, cannot disaggregate. If a work is indeed “smut,” then McDonald and I agree that it should be classified as obscenity. But the fact that McDonald and I also agree that homosexual smut and heterosexual smut equally implicate the truth value of speech protected by the First Amendment does not mean that the obscenity doctrine is equipped to determine whether homosexual smut and heterosexual smut are actually valued equally. It is this additional weighing function that I propose the obscenity doctrine should be able to perform.

#### IV. CONCLUSION

In *When Obscenity Discriminates*, I argued that the First Amendment’s obscenity doctrine has generated discriminatory collateral effects against gays and lesbians. I analyzed possible biases against gay and lesbian content by private actors with undeniable power and authority to filter content through some of the most popular media through which content is disseminated. I argued that in light of the *Lawrence* decision, the doctrine’s discriminatory collateral effects are unconstitutional on both equal protection and First Amendment grounds. In this Reply, I respond to Professor Barry McDonald’s objections and explain further the analysis in my essay. Ultimately, both pieces reach the same conclusion: the obscenity doctrine should be refined in light of *Lawrence*.

McDonald would propose to refine the obscenity doctrine only on the condition that the doctrine is shown to discriminate against content solely because of its homosexual nature in a court of law. I propose to refine the obscenity doctrine earlier, before the conditions that McDonald would require are satisfied. While my proposal may seem hasty, achieving transparency in the doctrine is important because of the ways in which the obscenity doctrine’s effect is measured and because of the impact of the *Lawrence* decision. Achieving transparency requires that the doctrine differentiate between sex and sexual orientation. Under the current doctrine, a determination that content is obscene because it contains homosexual sex is not one that the doctrine would prohibit.

Moreover, the refinement I suggest is quite modest for at least three reasons. First, unlike anti-discrimination efforts in the contexts of marriage or employment discrimination, my proposal does not require any change in the law; rather, it clarifies an existing doctrine.<sup>121</sup> Second, my proposal

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<sup>121</sup> To the extent that my discussion in Part II.A appears to propose a change in the law, I wish to offer a point of clarification. As I have argued in this Reply and in my essay, accepting a change in the state action doctrine is not a necessary component of accepting my argument. See Glazer, *supra* note 1, at 1432–33. My essay argued that the obscenity doctrine generates discriminatory collateral effects against gays and lesbians. That either Google or the MPAA may fall within the exceptions to the state action is a point I make as a cautionary note more than anything else. I do not mean to argue that a court must or even should hold that either of these actors is a state actor, but instead hope only that courts deciding cases recognize the collateral effects that their decisions have on private actors who wield near

builds on successes in other arenas in which gays and lesbians have experienced discrimination by protecting, as free speech, portrayals of conduct now protected. Third, my clarification is consonant with the original purpose of the obscenity test: namely, to replace intuitive individual reactions with a more objective standard. A doctrine based entirely upon intuition does not help future judges or juries determine what differentiates protected expression from unprotected obscenity. Although knowing obscenity when one sees it may not offer much in the way of doctrinal guidance, Justice Stewart's infamous insight does highlight an underlying truth about obscenity—in order to know whether expression constitutes obscenity, one must be able to see it. And seeing obscenity depends upon knowing what to look for.

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absolute control over the filtering of expressive content, private actors who adopt as their own rules the rules that courts have made in obscenity cases.