1996

A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech, and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment

Eric M. Freedman
Maurice A. Deane School of Law at Hofstra University

A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment

*Eric M. Freedman**

Table of Contents

---

* Associate Professor of Law, Hofstra University School of Law, (Lawemf@Vaxc.Hofstra.edu). B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand); J.D. 1979, Yale University.

This Article has benefitted greatly from the comments provided on an earlier draft by Dean Stuart Rabinowitz of Hofstra Law School and the students we taught in our seminar on Mass Media and the First Amendment during the fall of 1993, Linda C. McClain, Melissa Nathanson, and Andrew Schepard. I also owe important debts to Connie Lenz and Katherine Walkden of the staff of the Hofstra Law Library; to Victoria J. Saunders and Wade Morris of the Hofstra Law School Class of 1994, Alexander Fear of the Hofstra Law School Class of 1995, and Michael Kneis of the Hofstra Law School Class of 1997 for their comprehensive research assistance; to Nancy A. Grasser for her devoted secretarial support; and to Hofstra Law School for its provision of research funding.

Professor Steven Wermeil of Georgia State University College of Law provided indispensable assistance to my use of the papers of the Justices at the Library of Congress; Professors Cornelia H. Dayton of the History Department at the University of California at Irvine and Mary Beth Norton of the History Department at Cornell University were exceedingly generous in sharing their knowledge of colonial legal developments; and Gary P. Moore did his best to guide me along the information superhighway.

I. INTRODUCTION

A. Summary: The Dangers of Current First Amendment Doctrine and the Steps Needed to Bring the Outside In

The Supreme Court should repudiate its current view that certain categories of expression are of such low value as to be "outside" the protection of the First Amendment. Until it does so, free speech interests will remain vulnerable to attacks:

(a) from those, like the advocates of controls on racial hate speech, pictures demeaning to women, or music glorifying violence, who contend that the particular content of the expression they execrate is so abhorrent that it, too, should be placed "outside" the First Amendment, by analogy to the speech currently there (obscenity, fighting words, and group libel); and

(b) from those, like the advocates of controls on video games and imagery transmitted by computers, who contend that the new media by which messages are being conveyed are so threatening that those modes of communication should be placed "outside" the First Amendment (just as movies originally were).

Ending the dichotomy between speech "inside" and "outside" the First Amendment will require the Court to re-examine the premises underlying its vindication of the summary suppression of obscenity, and to overrule

the moribund yet still-mischievous cases of *Chaplinsky v. New Hampshire*[1] and *Beauharnais v. Illinois*.[2]

By abandoning its inside-out approach to the First Amendment, the Court would take an important step not just towards blunting genuine present threats to freedom of expression, but also towards a much-needed re-alignment of First Amendment legal rules with principle. Most significantly, the reform would restore to primacy the principle that—under a government that is the servant rather than the master of the people who created it—the burden is never on the speaker to explain the social value of his or her speech, but always on the state to justify its suppression.[3]

B. The Problem

Current free speech law resembles the Ptolemaic system of astronomy in its last days. Just as that theory grew increasingly incoherent in an attempt to incorporate new empirical observations that were inconsistent with its basic postulates, so is First Amendment doctrine disintegrating as cases reviewing restraints on speech strive to paper over the fact that analyses based on presuppositions as to the value of particular kinds of expression are inconsistent with the premises of the First Amendment itself.

Most readers of the opinions in *R.A.V. v. City of St. Paul*,[4] for example, will surely find it difficult to shake the feeling that all nine Justices are missing the forest for the trees, disputing hoary categories like "fighting words"[5] in a case whose true conflict bears no relationship to

---

1. 315 U.S. 568 (1942) (denying First Amendment protection to "fighting words"); *see* discussion infra Part III.A (explaining the benefits of overruling *Chaplinsky*).

2. 343 U.S. 250 (1952) (denying First Amendment protection to group libel); *see* discussion infra Part III.B (explaining the benefits of overruling *Beauharnais*).

3. To state the point slightly differently: Beginning from the premise that "[s]peech is free under the First Amendment, not so much because free speech is inherently good as because its suppression is inherently bad," People v. Huss, 241 Cal. App. 2d 361, 368 (1966), the appropriate focus of legal analysis should not be on the purpose of the speech, *e.g.*, Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 274 (1981), but on the purpose of the regulation. *Cf.* David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 82 (1974) ("To argue from the social value of pornography is to meet the Court on its own terms and to dispute the outcome of its balancing test. One may equally reject the constitutional validity of the balancing approach."). My approach is consistent with that taken by Ronald Dworkin in his just-published work, Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1996), *reviewed in* Richard A. Epstein, The First Freedoms, N.Y. Times Book Review, May 26, 1996, at 12; Paul Reidinger, The Moralist View, A.B.A. J., May 1996, at 102; Cass R. Sunstein, Earl Warren is Dead, The New Republic, May 13, 1996, at 35.

4. 505 U.S. 377 (1992). For a full-length account of the case by counsel for the defendant, see Edward J. Cleary, Beyond the Burning Cross: The First Amendment and the Landmark *R.A.V.* Case (1994). *See also* United States v. Juvenile Male J.H.H., 22 F.3d 821 (8th Cir. 1994) (affirming conviction of R.A.V. and others on federal civil rights charges arising out of same incident that led to state charges in *R.A.V.*).

5. *See* Kent Greenfield, Our Conflicting Judgments About Pornography, 43 Am. U. L.

those categories.[6]

The explanation for the Justices' performance is that they are viewing the free speech universe through the distorting lens of an outmoded paradigm, one in which only certain speech is "within" the First Amendment. When the state seeks to regulate such speech, the key questions are:[7]

1. *Is the purpose of the regulation to restrict speech?*

In some cases, the answer may be no. For example, the regulation's purpose may be to suppress non-speech conduct (*e.g.*, heroin sales, consumer fraud) with the restraint on speech being merely incidental.[8] Because, in many areas, simply asking the question comprehensively[9] goes a long way towards answering it, this issue rightly plays a central role in traditional First Amendment analysis.[10]

2. *If so, has the state demonstrated a compelling reason consistent with First Amendment values for restricting this speech?*

This inquiry is inevitably the controversial one. But asking it focuses discussion on the right subject, making explicit the policy choices that close cases will necessarily involve.[11]

3. *If so, has the state demonstrated that the regulation has been narrowly*

Rev. 1197, 1216-17 (1994); Steven H. Shiffrin, Racist Speech, Outsider Jurisprudence, and the Meaning of America, 80 Cornell L. Rev. 43, 46 (1994) (commenting that the "Court simply bungled the first amendment job"); Tona Trollinger, Reconceptualizing the Free Speech Clause: From a Refuse of Dualism to the Reason of Holism, 3 Geo. Mason Indep. L. Rev. 137, 172-73 (1994); Michael S. Degan, Note, "Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws, 26 Creighton L. Rev. 1109, 1135 (1993) ("The fundamental flaw in *R.A.V.* is the Court's attempt to analyze the St. Paul ordinance under the fighting words doctrine."). The bankruptcy of the "fighting words" doctrine is discussed infra Part III.A.

6. *See* infra text accompanying notes 348-50. *See generally* Larry A. Alexander, Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory, 44 Hastings L.J. 921, 957-60 (1993).

7. The doctrinal framework is presented slightly more formally at infra note 25.

8. For more controversial examples than those in the text, see Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), *on remand* 503 N.E.2d 492 (N.Y. 1986); Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961). *See generally* Frederick Schauer, The Aim and the Target in Free Speech Methodology, 83 Nw. U. L. Rev. 562, 562-64 (1989). There is a full discussion of the speech-conduct distinction infra text accompanying notes 136-50.

9. In particular, the court must assess the state's real purpose as well as its articulated one. *See* Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 812-14 (1985).

10. *E.g.*, Lillian R. BeVier, The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 300 (1978); Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 Harv. L. Rev. 603, 683 (1990).

11. *See* Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267, 278-79 (1991); Steven Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 U.C.L.A. L. Rev. 915, 955 (1978). In a forthcoming article whose proofs he has kindly shared with me, Eugene Volokh emphasizes the importance of the inquiry into constitutional values in answering this question. *See* Eugene Volokh, Freedom of Speech Beyond Strict Scrutiny, 144 U. Pa. L. Rev. (forthcoming 1996).

tailored towards achieving its permissible purpose?

As the Supreme Court has long recognized, this standard plays an important practical role in keeping the government within whatever boundaries the legal system has determined are legitimate.[12]

In contrast, according to the Court, speech which falls into the categories of group libel, fighting words, and obscenity is "outside" the First Amendment.[13] Although the Justices disagree about precisely what it means for speech to be "outside" the First Amendment,[14] the underlying concept is clear: the speech categories "outside" the First Amendment are less socially valuable than the ones "inside" it, so governmental restraints on the former are free of the rigorous judicial scrutiny given to governmental restraints on the latter.

There are at least three major problems with this vision of the First Amendment.

First, its simplistic dualism is empirically false as a description of the legal landscape. All libel is plainly "within" the First Amendment.[15] Fighting words, although formally remaining outside it, are for all practical purposes within it.[16] That is, the Court, in addressing the problems posed by those categories of speech, has demonstrated a commendable focus on the three questions listed above. Only obscenity (and a widening sphere of

---

12. *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115, 126 (1989); Schad v. Mount Ephraim, 452 U.S. 61, 75-76 (1981); Martin v. Struthers, 319 U.S. 141, 145-49 (1943); Jamison v. Texas, 318 U.S. 413, 416 (1943); Schneider v. State, 308 U.S. 147, 164-65 (1939); Lovell v. Griffin, 303 U.S. 444, 451-52 (1938).

Thus, in City of Ladue v. Gilleo, 512 U.S. 43 (1994), the Court, in a case involving an individual who had posted an antiwar sign in the front window of her house, indulged in the entirely implausible assumption that the municipality's ban on residential signs was content-neutral (an assumption that saved the ban from summary invalidation under tests deriving from the second question), but went on to hold the ordinance unconstitutional because "more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens." Id. at 2047. *See generally* Mark Cordes, Sign Regulation After *Ladue*: Examining the Evolving Limits of First Amendment Protection, 74 Neb. L. Rev. 36 (1995).

13. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992); New York v. Ferber, 458 U.S. 747, 754, 763-65 (1982); *see also* infra note 115 and accompanying text (discussing incitement).

14. In *R.A.V.*, Justice Stevens (speaking on this point for himself alone) announced that he would conduct a holistic analysis of the speech in question and the regime of regulation being applied to it in order to determine the First Amendment issue. *R.A.V.*, 505 U.S. at 427-31. Justice White (whose views were joined by Justices Blackmun and O'Connor) wrote that the proper approach was to determine whether the speech fell within a category traditionally unprotected because of its absence of social value (*e.g.*, obscenity, fighting words) and to permit or prohibit regulation accordingly. Id. at 398-402. The Court, in an opinion by Justice Scalia (joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas) explained that the classification of the speech as protected or unprotected bore upon, although it was not dispositive of, the issue of the degree of permissible government regulation. Id. at 386-88; *see* infra note 350.

15. *See* New York Times v. Sullivan, 376 U.S. 254, 268-69 (1964); infra note 331-45 and accompanying text; *see also R.A.V.*, 505 U.S. at 382-83.

16. This topic is discussed in greater detail infra Part III.A.

erotically-oriented speech that is not technically obscene) remains truly "outside" the First Amendment,[17] in the sense that the Court has relieved itself of the obligation to address those questions.[18]

Second, the "inside-out" model of the First Amendment, and the obsolete doctrine it perpetuates, clouds clear thinking and reduces the likelihood of correct results on numerous free speech problems. The issue goes far beyond the logical desirability of improving doctrinal tidiness.[19] The current disarray in the law provides ammunition for a variety of attacks on free expression.

As long as certain categories of speech may be defined as "outside" the First Amendment because judges believe them to be unworthy of its noble protections, there is no logically consistent reason why any number of other forms of socially unpopular expression should not be similarly categorized.[20] This would allow their summary suppression without the need for serious consideration of the issues at stake.[21]

---

17. *See* infra Parts II.C.1-2. Although the issue of definition is one of some independent importance, *see* infra text accompanying notes 173, 191-96, 237-46, the argument presented here does not depend on how the legal system may choose to demarcate the material at issue. Hence, for present purposes, I use the terms "pornography" and "obscenity" interchangeably to mean any sexually explicit expression that the state seeks to suppress. *See* Ronald K.L. Collins & David M. Skover, The Pornographic State, 107 Harv. L. Rev. 1374, 1377 (1994) (adopting same approach); Steven G. Gey, The Apologetics of Suppression: The Regulation of Pornography as Act and Idea, 86 Mich. L. Rev. 1564, 1596 n.149 (1988) (same); Frederick Schauer, Response: Pornography and the First Amendment, 40 U. Pitt. L. Rev. 605, 607-08 (1978-79) (distinction between "obscene" and "pornographic" is "constitutionally uninteresting") [hereinafter Schauer, Response]. *But cf.* Edward De Grazia, Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius 298 (1992) (stating that at the time of Roth v. United States, 354 U.S. 476 (1957), "everyone realized—even if no one could define either term—that there *was* a difference between them," and although reputable people could fight for an end to controls on obscenity, "'pornography' was very widely thought of as abominable stuff that no reputable lawyer or judge would care to be found defending"); Frederick F. Schauer, The Law of Obscenity 1 n.1 (1976) ("'Obscene' refers to that which is repugnant or disgusting . . . . Except as used in the law, it does not necessarily have any sexual connotations. 'Pornography,' on the other hand, . . . is limited to depictions of sexual lewdness . . . . Definitionally, obscenity may or may not be pornographic, and pornography may or may not be obscene.") [hereinafter Schauer, The Law of Obscenity]. *See generally* Nicholas Wolfson, Eroticism, Obscenity, Pornography and Free Speech, 60 Brook. L. Rev. 1037 (1994); William Safire, "Explicit" is not a Dirty Word, N.Y. Times Mag., May 26, 1991, at 8.

18. *See* Frederick Schauer, Codifying the First Amendment: New York v. Ferber, 1982 Sup. Ct. Rev. 285, 303 [hereinafter Schauer, Codifying].

19. *See* Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 25-26 ("It is abundantly clear that the effort of the Court to deal with obscenity within its commitment to free speech has opened issues about free speech which transcend in importance the limited problem of obscenity.") [hereinafter Kalven, Metaphysics].

20. *See* Floyd Abrams, Hate Speech: The Present Implications of a Historical Dilemma, 37 Vill. L. Rev. 743, 752 (1992) ("Every major new doctrinal exception to the general rule that speech may not be infringed leads in turn to new demands for further exceptions. What else would one expect?") (citation omitted); infra text accompanying notes 300-06, 351-55 (describing use of present doctrine to support proposals to curb violent entertainment, rap music, and "morally abhorrent speech").

21. *See* Elliot Mincberg, A Look at Recent Supreme Court Decisions: Judicial Prior

Third, the ability to cast certain forms of expression beyond the First Amendment pale poses a special danger to technologically novel communications media. Thus, for example, just as movies originally were placed "outside" the First Amendment because they were thought to be such a threateningly powerful medium of expression,[22] so it is now proposed that the unique characteristics of computers justify imposing special restraints on the communications they transmit.[23]

In response to these problems, this Article proposes that the Supreme Court repudiate the view that some forms of expression, whether defined by their content or by their mode of delivery, are "outside" the First Amendment. This proposal is not designed to provide a "theoretical basis for free speech that is at once true and elegant."[24] In particular, it assumes *arguendo* a continuation of the current proliferation of judicially-recognized sub-categories of speech "within" the First Amendment.[25] The

---

Restraint and the First Amendment, 44 Hastings L.J. 871, 872 (1993):

> In other words, if before reaching the question of whether a restriction is valid under one of the demanding First Amendment tests, such as strict scrutiny, the Court decides *a priori* that the First Amendment does not apply . . . then the conflict is resolved because the Court does not have to get into the First Amendment and strict scrutiny at all. . . . [W]e often say that application of the First Amendment 'triggers' strict scrutiny. This method of analysis puts a trigger lock on the First Amendment.

22. *See* infra notes 364, 381 (discussing Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952)).

23. *See* infra text accompanying notes 371-81.

24. Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 231 (1992).

25. These legal subdivisions are multiplying at a rate that almost insures that any description will be obsolete by the time it sees print. *See* infra note 294.

Thus, for example, the text accompanying supra notes 7-12 presents only a skeletal description of the questions that are asked in the analysis of restraints on speech "inside" the First Amendment. Actually, as helpfully summarized in John T. Haggerty, Note, Begging and Public Forum Doctrine in the First Amendment, 34 B.C. L. Rev. 1121, 1123-30 (1993), the Court first decides:

> (a) that a certain activity is "speech," *see* infra text accompanying notes 136-50; and
>
> (b) that it is "within" the First Amendment; and
>
> (c) that it should not be shunted off to one of a number of special tracks reserved for such matters as:

(i) commercial speech, *see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 775-81 (1976) (Stewart, J., concurring) (comparing and contrasting special track categories to each other and to political speech); Laurence H. Tribe, American Constitutional Law 929-34 (2d ed. 1988) (describing how commercial speech moved from "outside" the First Amendment to within it but in a lower-value category); Steven M. Simpson, Note, The Commercial Speech Doctrine: An Analysis of the Consequences of Basing First Amendment Protections on the "Public Interest," 39 N.Y.L. Sch. L. Rev. 575, 605-06 (1994) (criticizing the Court for analyzing such cases by deciding for itself the social utility of the speech, instead of treating "free speech as a right, rather than a privilege"). *But cf.* Jerome L. Wilson, Commercial Speech Approaches Full Protected Status, N.Y. L.J., Dec. 27, 1993, at 1 (reviewing recent decisions); or

(ii) speech in one of three distinct categories of public forum, *see* infra note 196; Daniel

merits of that development have been much debated elsewhere,[26] and are not addressed here.[27] For the categorization questions only arise with respect to speech that is already "inside" the First Amendment;[28] once it has achieved that status, judicial definition of the extent of legal protection requires an explicit discussion of First Amendment values.[29] Thus, just as freedom of expression was enhanced when libel and commercial speech were moved from "outside" the First Amendment to "inside" it, albeit each in its own category and subject to its own rules, so too will freedom of expression be enhanced when all speech is "inside" the First Amendment.

C. The Proposal: An Outline of this Article

The first needed step is to bring pornography "within" the First Amendment.[30] Part II sets forth the argument for this change. The Part

---

A. Farber & John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Contest in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1226-29 (1984) (criticizing the Court for diverting cases at this point, rather than proceeding to remainder of analysis).

The Court then places the speech onto one of two main tracks:

(1) On what the commentators label Track One are content-based restrictions on speech, which are supportable only if "necessary" to the achievement of a "compelling" state interest and if they are no broader than necessary to serve that interest. *E.g.*, National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978);

(2) On Track Two are content-neutral regulations, which will be upheld if the state interest is "important" or "substantial" or "significant," and the regulation is "narrowly tailored" to achieve this interest. *See* Ward v. Rock Against Racism, 491 U.S. 781, 796-98 (1989).

Track Two owes its origins to United States v. O'Brien, 391 U.S. 367, 377 (1968) (discussed infra note 358), in which defense counsel took the position that O'Brien's burning of his draft card during a protest against the Vietnam War was pure speech, so that the case should be evaluated as though O'Brien had "held aloft his Registration Certificate and said words to the effect that 'I detest and execrate this piece of paper and everything for which it stands,'" Brief for Respondent at 48-49, United States v. O'Brien, 391 U.S. 367 (1968) (Nos. 232, 233), while counsel for the government took the position that it was pure conduct, so that no First Amendment issue was presented at all, Brief for Petitioner at 12-21, United States v. O'Brien, 391 U.S. 367 (1968) (Nos. 232, 233).

26. *Compare, e.g.*, Tribe, supra note 25, § 12-18 (generally disapproving of the development) *and* Nina Kraut, Speech: A Freedom in Search of One Rule, 12 Cooley L. Rev. 177, 178 (1995) (same) *with* Schauer, Codifying, supra note 18, at 314-17 (generally approving) *and* Steven Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1251-53 (1983) (same). Larry Alexander, Cass Sunstein, and Frederick Schauer have debated the issue of whether the judicial system should recognize categories of "low value" speech in the interchange Legal Theory: Low Value Speech, 83 Nw. U. L. Rev. 547 (1989).

27. *See generally* infra note 294.

28. *See* Tribe, supra note 25, at 895; Schauer, Codifying, supra note 18, at 293 n.47.

29. *See* infra text accompanying notes 294-95.

30. Among those who have previously reached the same conclusion by a somewhat different route are Simon Roberts, The Obscenity Exception: Abusing the First Amendment, 10 Cardozo L. Rev. 677 (1989) and Michael J. Perry, Freedom of Expression: An Essay on Theory and Doctrine, 78 Nw. U. L. Rev. 1137, 1178-84 (1983). *See also* Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 424 (1966) (Douglas, J., concurring); United States v. Roth, 237 F.2d 796, 801-27 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476

proceeds chronologically, identifying the purposes that legal regulations of erotica have historically been said to serve in this country, and assessing those purposes in First Amendment terms.[31] After reviewing the goals advanced to justify summary suppression, Part II concludes that pornography presents no unique problems that cannot be better handled by ordinary doctrines applicable to speech "inside" the First Amendment.

Section A examines the rationales for regulation in the period through *Roth v. United States*.[32] It finds that the underlying theme of those rationales was the suppression of impure thoughts, a purpose that *Stanley v. Georgia*[33] correctly rejected as inconsistent with the First Amendment.

Section B presents the leading post-*Roth* rationale, that exposure to pornography would lead to unlawful sexual activity.[34] Applying ordinary First Amendment doctrines to this rationale demonstrates that it is untenable, as the Court also concluded in *Stanley*. Recent scholars who have attempted to undermine this conclusion have succeeded only in showing the correctness of the Court's position.

Section C addresses the purposes for the suppression of pornography that the Court proffered after Richard Nixon's re-election in 1972:[35] the preservation of the tone of communities[36] and the protection of children.[37] Some means of accomplishing these purposes could pass ordinary First Amendment tests. But the failure of the Court to even recognize the applicability of those tests has left it free to validate censorship based on nothing more than its subjective intuitions as to the social worth of the speech at issue. This has resulted not only in the inappropriate suppression of a great deal of expression, with the lines being drawn in ways that contain more than a hint of class bias,[38] but also in an unwarranted assumption of power by the judiciary.[39]

Section D discusses the argument of some feminists in support of the suppression of pornography.[40] It concludes that the adoption of their goal of furthering the equality of women as a reason for categorically excluding

---

(1957); Thomas I. Emerson, The System of Freedom of Expression 487 (1970); Tribe, supra note 25, at 909-10; Leo M. Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 76 (1938); Eileen M. Dempsey, Recent Decisions, 28 Duq. L. Rev. 785, 807 (1990); Robert F. Sebastian, Note, Obscenity and the Supreme Court: Nine Years of Confusion, 19 Stan. L. Rev. 167 (1966). *See generally* John T. Mitchell, An Exclusionary Rule Framework for Protecting Obscenity, 10 J.L. & Pol'y 183 (1994); John Paul Stevens, The Freedom of Speech, 102 Yale L.J. 1290, 1303-08 (1993).

31. *Cf.* Kalven, Metaphysics, supra note 19, at 3-4, 40-42 (identifying four somewhat different purposes and criticizing them on First Amendment grounds).

32. 354 U.S. 476 (1957). *See* infra notes 47-111 and accompanying text.

33. 394 U.S. 557 (1969).

34. *See* infra notes 112-67 and accompanying text.

35. *See* infra notes 168-227 and accompanying text.

36. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

37. New York v. Ferber, 458 U.S. 747 (1982).

38. *See* infra notes 177, 192, 254.

39. *See* infra text accompanying notes 190-96.

40. *See* infra notes 228-88 and accompanying text.

pornography from First Amendment protection would be a self-defeating return to the rightly-repudiated thought control purpose described in Section A. The predictable consequences would be the suppression of precisely that marginal and dissident speech that the First Amendment should most stringently protect,[41] and the atrophy of the tools that lie readily at hand for achieving positive social change: direct regulations of criminal conduct (*e.g.*, enslavement of women), counter-speech (*e.g.*, feminist or non-sexist pornography), and efforts to change social attitudes.[42]

Section E concludes that none of the proffered purposes for controlling pornography support casting it "outside" the First Amendment. Hence, it belongs "inside."

Part III addresses the second doctrinal change necessary to align First Amendment doctrine with current legal realities and social needs: the explicit overruling of the obsolete cases of *Chaplinsky v. New Hampshire*[43] and *Beauharnais v. Illinois*.[44] The important practical result would be to eliminate those decisions as a source of support for new threats to freedom of expression.[45]

Part IV demonstrates that these changes are particularly needed now as new communications technologies proliferate. As a long history shows, novel media are likely to be seen as particularly socially dangerous, and therefore particularly plausible subjects of new First Amendment exceptions.

Part V concludes that the idea that some speech is "outside" the First Amendment must be repudiated because "[t]he constitutional guarantee of a free press was instituted for the protection of unpopular messages, which need it, rather than popular ones, which do not."[46] A First Amendment

---

41. *See* Gey, supra note 17, at 1626-33; *see also* Steven H. Shiffrin, The First Amendment, Democracy, and Romance 108-09 (1990), *discussed in* Mark Tushnet, Book Review, 76 Cornell L. Rev. 1106, 1110-14 (1991). As argued in more detail infra text accompanying notes 249-66, pornography is by definition marginal speech. Mainstream erotica is not "pornography." This not only strengthens the case for protection, *see* Brent H. Allen, Note, The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation, 47 Vand. L. Rev. 1073, 1077-78 (1994), but also weakens most of the arguments for suppression discussed below. Being outside the mainstream, pornographic speech is less likely to have the baleful influences which are said to provide the justification for censorship. *See* Richard Posner, Law and Literature: A Misunderstood Relation 330-31 (1989); *cf.* Abrams v. United States, 250 U.S. 616, 628-29 (1919) (Holmes, J., dissenting) (describing works at issue as "these poor and puny anonymities," the product of "the surreptitious publishing of a silly leaflet by an unknown man").

42. *See* Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 Tex. L. Rev. 1097, 1100-01 (1994).

43. 315 U.S. 568 (1942); *see* infra notes 309-23 and accompanying text.

44. 343 U.S. 250 (1952); *see* infra notes 324-45 and accompanying text.

45. *See* infra notes 346-57 and accompanying text.

46. Eric M. Freedman, The Book Burners of the 1970's, N.Y. Times, Feb. 15, 1977, at A30 (letter to the editor), *reprinted in* Curtis J. Berger, Land Ownership and Use 853 (3d ed., 1983); *see* The First Amendment Under Fire From the Left, N.Y. Times Mag., Mar. 13, 1994, at

that only protects speech that judges and law professors agree is socially useful in form and content, and only those communications technologies with which they feel comfortable, protects nothing that would otherwise be threatened.

It is in just those cases where the courts feel uneasy about the speech at issue that they do their socially important work, by providing a rational legal analysis of the justification for validating or invalidating suppression. And it is in just those cases that the ability to declare some speech "outside" the First Amendment altogether provides a constant temptation to avoid doing that work. If that escape route were sealed off, both law and society would benefit.

II. STEP ONE: APPLYING THE FIRST AMENDMENT TO THE PURPOSES OF PORNOGRAPHY REGULATION

A. Promoting Purity

For a scholar often seduced by the typical historian's view that nothing really starts anywhere—that no phenomenon can be properly understood unless one understands the antecedent phenomena—it is tempting to begin this discussion with the evolution in attitudes towards sexual matters among the early church fathers.[47] But since those attitudes had largely broken down in England by the time of Chaucer,[48] it seems

---

40, 71 (remarks of Floyd Abrams in discussion with Catharine A. MacKinnon).

47. Those views are described in two essays by Vern L. Bullough. Vern L. Bullough, Introduction: The Christian Inheritance, *in* Sexual Practices and the Medieval Church 1 (Vern L. Bullough & James Brundage eds., 1982); Vern L. Bullough, Formation of Medieval Ideals: Christian Theory and Christian Practice, *in* id. at 14. *See also* Wayland Young, Eros Denied: Sex in Western Society 158-68 (1964). *See generally* Joyce E. Salisbury, Medieval Sexuality: A Research Guide (1990) (highly useful annotated bibliography of primary and secondary sources).

Of course, a proper understanding of patriarchal attitudes would require an examination of the Greek and Roman roots out of which they grew. These have been explored by John J. Winkler in a scholarly collection of essays, The Constraints of Desire (1990). *See also* Pornography and Representation in Greece and Rome (Amy Richlin ed., 1992). *See generally* Vern L. Bullough, Medieval Medical and Scientific Views of Women, *in* Sex, Society, and History 43, 44 (1976) (arguing that clerical misogynism resulted from "the medical and scientific assumptions of the ancient world that were incorporated into medieval thinking"); Aline Rousselle, Porneia: On Desire and the Body in Antiquity (Felicia Pheasant trans., 1988) (tracing history of transition from Greek and Roman sexual concerns to early Christian ones).

48. *See* Sidney E. Berger, Sex in the Literature of the Middle Ages: The Fabliaux, *in* Sexual Practices and the Medieval Church, supra note 47, at 162, 175 (noting that tales written by Chaucer and his contemporaries conveyed values at odds with Church's rigid sexual teachings). *See generally* Carolyn Dinshaw, Chaucer's Sexual Poetics 25 (1989) (arguing that Chaucer's work demonstrates "both his investment in patriarchal discourse and his awareness of its limitations"); Thomas W. Ross, Chaucer's Bawdy 7-15 (1972) (tracing critical reactions to Chaucer's ribaldry and arguing that new study is needed in light of contemporary legal developments liberating literature from constraints of pornography law).

more profitable to place the concededly arbitrary starting point of this discussion at the period where obscenity became part of the secular law. From that period through *Roth v. United States*,[49] obscenity law sought to serve two purposes.

1. *Political Purity*

The first of these, which relates exclusively to England and was never formally part of American law, was the suppression of political opposition. The earliest cases, beginning in the 1660s following the restoration of Charles II and continuing through the late 1700s, involved the harassment of political opponents of the King. In these cases, the King's judges held that obscenity was not exclusively a matter for the ecclesiastical courts, and used some form of obscenity charge, either in addition to sedition or instead of it, when they could.[50]

However, although certainly worth remembering,[51] this purpose was never overtly part of American law, perhaps because the legal systems of the most influential colonies were already well established before the movement gained momentum in England.

2. *Moral Purity*

The dominant American purpose for regulation of pornography in the pre-*Roth* era was thought control. Impure thoughts were suppressed because they were sinful.[52] Having erotic fantasies was morally wrong, not

---

49. 354 U.S. 476 (1957).

50. This history is summarized in the witty and engaging article by Alpert, supra note 30, at 41-47, and in Tribe, supra note 25, at 905-06. *See also* David Lawton, Blasphemy 23-36 (1993) (providing an original re-reading of Sir Charles Sydlyes Case, 1 Keble 620 (K.B. 1663)); Leonard Levy, Blasphemy: Verbal Offense Against the Sacred, From Moses to Salman Rushdie 304-08 (1993) [hereinafter Levy, Blasphemy], *reviewed in* Edward de Grazia, Book Review, Wash. Post Book World, Oct. 17, 1993, at 4.

The connection between political opposition and sexual explicitness during this period is the subject of an illuminating essay by Rachel Weil, Sometimes a Scepter is Only a Scepter: Pornography and Politics in Restoration England, *in* The Invention of Pornography: Obscenity and the Origins of Modernity, 1500-1800, at 125 (Lynn Hunt ed., 1993) [hereinafter The Invention of Pornography], *reviewed in* Valerie Steele, Book Review, 99 Am. Hist. Rev. 504 (1994) *and* Michiko Kakutani, Porn and Politics Under the Ancien Regime, N.Y. Times, Aug. 17, 1993, at C18. *See also* Ian McCalman, Unrespectable Radicalism: Infidels and Pornography in Early Nineteenth Century London, 104 Past & Present 75 (1984); *cf.* Arthur Calder-Marshall, Lewd, Blasphemous and Obscene 16 (1972) (reviewing 19th century English prosecutions to show "that though all the trials were ostensibly on charges of blasphemy or obscenity, the motivation in every case was in fact political").

Historians have also argued convincingly that the circulation of obscene tracts, and their attempted suppression by those in power, were intentionally employed as political weapons in the struggle that culminated in the French Revolution. *See* Joan DeJean, The Politics of Pornography, *in* The Invention of Pornography, supra, at 109, 117-18; Lynn Hunt, Pornography and the French Revolution, *in* id. at 301; *see also* Reimut Reiche, Sexuality and Class Struggle 157 (Susan Bennett trans., 1970) (presenting similar interpretation). *See generally* P. N. Furbank, Nothing Sacred, N.Y. Rev. Books, June 8, 1995, at 51.

51. *See* infra text accompanying notes 265 & 377.

52. *See* Louis Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L.

as wrong as acting on them of course, but immoral nevertheless.[53]

As the narrative below will indicate, however, the purpose of protecting moral purity was not expressed in the same way at all times in the three and a half centuries between the founding of the first English colonies and *Roth*. Although accepted as legitimate at the time of the original settlements, this purpose lost legal and social acceptability long before the time of the Constitution. It regained some of the lost ground late in the nineteenth century, and retained it until roughly the Depression. By the time of *Roth*, sustained attacks on the First Amendment legitimacy of thought control had made it so suspect that the Court chose to duck the issue by relying on transparently insufficient historical evidence to label obscenity as "outside" the First Amendment.

a. Rise and Fall

The statutes of the original colonies did not evidence any purpose to control erotica as such. "All of the colonies made blasphemy or heresy a crime by statute, but sexual materials not having an antireligious aspect were generally left untouched."[54] Only a 1711 Massachusetts statute

---

Rev. 391, 394-95 (1963) (arguing that scholars err in treating the control of pornography like all other free speech questions, failing to recognize that the regulations are based on the view that "[o]bscenity is immoral, an individual should not indulge it, and the community should not tolerate it. . . . Obscenity is not suppressed primarily for the protection of others [but rather] for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin."); *cf.* Sheldon H. Nahmod, Adam, Eve and the First Amendment: Some Thoughts on the Obscene as Sacred, 68 Chi.-Kent L. Rev. 377, 378 (1992) (considering Judeo-Christian background, obscenity doctrine can be explained as plausibly by the idea that it enables the state "to maintain the sacred aspect of sexuality" as on any other theory); Arthur J. Mielke, Christians, Feminists, and the Culture of Pornography 4-5 (1991) (unpublished Ph.D. dissertation, Syracuse University) (reviewing contemporary Christian and feminist thinking and concluding that modern American objections to pornography "are constituted, knowingly or unknowingly, by a traditional Christian construction of the sexual imagination . . . which makes sexual excitement of any kind problematic").

53. *See* Matthew 5:28 ("But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart."); Heywood Broun & Margaret Leech, Anthony Comstock: Roundsman of the Lord 24-25 (1927) ("[I]t is possible that out of all the Bible this was the doctrine which [Comstock] took most to heart, for the crusade of his life was directed against sins of thought rather than sins of action."); *see also* Rousselle, supra note 47, at 153 (tracing reception of this verse in early Christian monastic tradition).

54. Schauer, The Law of Obscenity, supra note 17, at 8; *see* Kevin W. Saunders, Violence and the Obscenity Exception to the First Amendment, 3 Wm. & Mary Bill of Rts. L.J. 107, 116-24 (1994) (listing statutes).

Even in the nonsexual, antireligious area that the statutes did cover, there is reason to doubt whether there was any uniform intensity of enforcement over time and place. For instance, statistics collected by Professor Mary Beth Norton of the Cornell University History Department for seventeenth-century Maryland reveal only fifteen prosecutions for profanity or blasphemy. All of the defendants were men, and such cases constitute just 2.7% of the cases brought against men, 2.1% of the entire sample of cases. *See* Mary Beth Norton, Gender,

specifically targeted the "obscene or profane," and even then only in the context of preventing religious mockery.[55]

An example from Connecticut illustrates the situation. In October 1764, a bill was proposed that recited that the reading, writing, or publishing of "obscene and immodest" books and pictures tended to destroy "the good behaviour and Corrupt the minds and Morals of the People." Accordingly, the bill empowered the Superior Court to punish any person who imported, wrote, published, kept, bought, or sold "any Obscene or Immodest Picture or Representation, Which tend[s] to Recommend and Encourage Lewd and Immoral Practices among the People and Debauch the minds and Corrupt the Morals of Youth." The bill failed.[56]

In short, the general statutory proscriptions against profanity and blasphemy that *Roth* relied upon[57] simply do not support the position that, prior to 1791, the American colonies recognized sexually explicit materials as an exception to their normal rules protecting freedom of speech.[58]

More fundamentally, to focus on the legal formalities is to view the

---

Crime, and Community in Seventeenth Century Maryland, *in* The Transformation of Early American History 123, 135 (James A. Henretta et al. eds., 1991). On the other hand, William E. Nelson, Americanization of the Common Law 38 (1994 ed.), suggests somewhat greater stringency in a sample of Massachusetts cases dating from 1760-74.

For comprehensive accounts of the English background, see Leonard W. Levy, Treason Against God: A History of the Offense of Blasphemy (1981) and Theodore Schroeder, Constitutional Free Speech Defended and Defined (1919).

55. *See* Schauer, The Law of Obscenity, supra note 17, at 9. Moreover, "there are no recorded prosecutions under this statute until 1821." Id. That case was Commonwealth v. Holmes, 17 Mass. 336 (1821) (conviction for selling *Fanny Hill*) (discussed infra text accompanying note 75).

56. Hence, it does not appear in the published Connecticut records. It is found in the Connecticut State Library in the Connecticut Archives series, as Document 213AB in Volume V of the topical series Crimes and Misdemeanors, under the title "An Act to Prevent Lewdness and Unchastity." (Photocopy on file with author). I thank Professor Cornelia Dayton of the History Department at the University of California at Irvine for calling this reference to my attention.

57. Roth v. United States, 354 U.S. 476, 482-83 (1957).

58. *See* Kent Greenwalt, Speech, Crime, and the Uses of the Language 305 (1989) ("Insofar as the Supreme Court has claimed that original understanding places obscenity outside the First Amendment, its historical evidence that, at the time of the Bill of Rights, pornography was viewed as a distinct category of material is dubious.").

In theory, the mere fact that such expression might not have fallen within the proscription of a statute does not mean that it could not be prosecuted. The common law offense of obscene libel did exist, *see* Leonard W. Levy, The Emergence of a Free Press 7, 89 (1985) [hereinafter Levy, Emergence]; infra text accompanying notes 74-77, and detailed studies of primary court records would be required to exclude the possibility that it may have served as the basis for prosecutions.

With respect to New Haven colony and county, this work has been done by Professor Cornelia Dayton of the History Department at the University of California at Irvine, *see* infra note 68, who reports that the records do not reveal any statutory or common law obscenity prosecutions prior to 1800. Telephone Interview (Dec. 15, 1993).

history with blinders on. Whatever archaic statutes may still have remained on the books, the view of the original Puritan settlements that the salvation of each depended upon the salvation of all—and therefore was the proper concern of the entire community[59]—was dead and buried by the time of the Constitution.[60]

The process leading to its disintegration is well-known to historians,[61] and has been usefully summarized by Edward J. McManus in a work synthesizing the voluminous and scattered materials on early law enforcement in the various New England colonies.[62] The earliest settlements displayed a high degree of social cohesion and low crime rates.[63] However, by "the 1660s the enforcement of social mores increasingly required the coercive intervention of the state. People not only became less responsive to neighborly admonitions, but neighbors became more reluctant to meddle in one another's affairs."[64] The "moral consensus of New England faded within a generation, and the lights of the shining city gradually dimmed. By the 1690s all was gone . . . ."[65]

---

59. *See* Kai T. Erikson, Wayward Puritans: A Study in the Sociology of Deviance 170-71 (1966) ("Puritan discipline was largely a matter of community vigilance, and each citizen, no matter what his official function in the control apparatus, was expected to guard the public peace . . . . This meant that he had license to watch over his neighbors . . . or disrupt their privacy, so long as his main purpose was to protect the morality of the community."); Jack P. Greene, The Intellectual Construction of America 55 (1993) (explaining that the design of the Puritan colonies was "to exclude all those who stood outside the broad religious consensus . . . and to use strong institutions of church, town, and family to subject the moral and social conduct of themselves and their neighbors to the strictest possible social discipline"); Edmund S. Morgan, The Puritan Family 6-12 (rev. ed., 1966) (describing the theological basis for Puritan belief in the need to control the morality of all members of the community). *See generally* Barbara A. Black, The Concept of a Supreme Court: Massachusetts Bay 1630-1686, *in* The History of the Law in Massachusetts: The Supreme Judicial Court 1692-1992, at 43 (Russell K. Osgood ed., 1992).

60. *See* An Act for Establishing Religious Freedom, 12 Va. Stat. 84-86 (1786) (authored by Thomas Jefferson) ("[N]o man shall be compelled to freqent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but . . . all men shall be free to profess, and by argument to maintain, their opinion in matters of religion . . . . [A]nd [we] do declare, that the rights hereby asserted are of the natural rights of mankind . . . .").

61. *See* Stephen Botein, Early American Law and Society 18-49 (1983) (summarizing the changing relationship of local communities to church and state from the beginning of the seventeenth century to the Revolution); *see also* Everson v. Board of Educ., 330 U.S. 1, 8-14 (1946).

62. Edward J. McManus, Law and Liberty in Early New England: Criminal Justice and Due Process, 1620-1692 (1993).

63. Id. at 148.

64. Id. at 150; *cf.* Norton, supra note 54, at 125 ("In seventeenth-century Maryland, which lacked an extensive law-enforcement hierarchy, authorities depended almost exclusively on victims or bystanders to report violations of the law. This necessarily involved the entire community, not just provincial legislators and justices, in defining what constituted unacceptable behavior.").

65. McManus, supra note 62, at 181; *see* Roger Thompson, Sex in Middlesex: Popular Mores in a Massachusetts County, 1649-1699, at 92-96, 193-94 (1986) (documenting this

For example, in the "bad books" episode of 1744, the famous pastor Jonathan Edwards denounced from his pulpit in Northampton the behavior of several young men who had read and joked about the explicit descriptions and diagrams of the female anatomy contained in a midwifery book.[66] He gained neither the repentance of the miscreants nor the support of their parents, and the entire incident demonstrated that "[p]iety had become ineffective as a force for social control in Northampton by 1744."[67]

The pattern was similar throughout the colonies and—unsurprisingly, given the lack of community support for morals enforcement—the formal mechanisms of the criminal law were equally unavailing.[68] Those laws concerning blasphemy, profanity and the like that were still on the books in 1791 were obsolete, unenforced relics.[69] As a result of the Enlighten-

---

generational shift); *see also* Erikson, supra note 59, at 155 ("The Puritan experiment ended in 1692 . . . because the sense of mission which had sustained it from the beginning no longer existed in any recognizable form . . . .").

66. *See* Patricia J. Tracy, Jonathan Edwards, Pastor: Religion and Society in Eighteenth-Century Northampton 160 (1988); Thomas H. Johnson, Jonathan Edwards and the "Young Folks' Bible", 5 New Eng. Q. 37, 52 (1932) (identifying the work as Aristotle's Master Piece, discussed infra note 73).

67. Tracy, supra note 66, at 163.

68. Numerous lines of study converge to show that criminal prosecution of morals offenses had lost all force by mid-century. *See* Cornelia H. Dayton, Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789, at 159-61, 187 (1995) (cooling of Puritan zeal meant that by 1700 single white men no longer confessed to fornication; grand jurors kept bringing charges into the 1730s, but this had ceased by 1745); Peter C. Hoffer, Law and People in Colonial America 83-84 (1992) (reporting that in Richmond County, Virginia, "grand jurors' concern for sexual immorality peaked in the 1720s and then faded"); Peter C. Hoffer & N.E.H. Hull, Murdering Mothers, Infanticide in England and New England 1558-1803, at 63-64, 74-75 (1981); *see also* Hendrik Hartog, The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts, 20 Am. J. Legal Hist. 282, 300-02 (1976) (explaining that sometime in the 1740s fornication prosecutions in Middlesex County, Massachusetts ceased to serve the purpose of enforcing religious morality; the system was restructured so that a "fornication case was less a criminal prosecution than a part of an administrative process designed to redistribute the costs of maintaining dependent bastards" between the mother, the town, and the putative father). *But cf.* Nelson, supra note 54, at 36-39 (reviewing a different Massachusetts sample and suggesting that concern with sin remained forcible until Revolution). *See generally* Lawrence Friedman, Crime and Punishment in American History 54 (1993).

There is every reason to believe that additional research in the years ahead will only strengthen this growing consensus, since the most-studied colonies, those of New England, were also the least tolerant. *See* Stephen L. Longengecker, Piety and Tolerance: Pennsylvania German Religion, 1700-1850 (1994) (contending that compared to New England and Virginia, Colonial Pennsylvania was a model of religious pluralism), *reviewed in* 101 Am. Hist. Rev. 234 (1996); *see also* Larry D. Eldridge, A Distant Heritage: The Growth of Free Speech in Early America 91, 137 (1994) (throughout the colonies, growing toleration meant that by 1700 colonists had "a dramatically broadened liberty to criticize their government and its officials," although statutes outlawing seditious speech remained on the books), *reviewed in* 13 L. & Hist. Rev. 181 (1995).

69. *See* Levy, Blasphemy, supra note 50, at 260-71; *cf.* Poe v. Ullman, 367 U.S. 497, 501-02 (1961) (refusing to adjudicate challenge to constitutionality of Connecticut prohibition on use

ment,[70] the underlying purpose of the statutes—requiring conformity of thought—was generally considered to be illegitimate.[71] With the last remnants of even religious majoritarianism disappearing,[72] the concept of the suppression of sexual speech was simply not on the agenda of public debate.[73]

Indeed, the only reported obscenity prosecution scholars have been able to unearth in this country in the forty years on either side of the Declaration of Independence is the 1815 Pennsylvania case of *Commonwealth v. Sharpless*.[74] And the force of even this exceptional instance is diminished by the fact that it, like the 1821 Massachusetts case of *Commonwealth v. Holmes*,[75] was a prosecution for the common-law crime of

---

of contraceptives, which had been on statute books since 1879 but was never enforced except in one test case); Cathryn Donohoe, Adultery; It's Not Just a Sin, It's a Crime, Wash. Times, June 29, 1990, at E1 (despite virtual lack of enforcement, adultery remains a crime in 27 states and the District of Columbia, and views on de-criminalization vary; "profane swearing" is still criminal in Virginia).

70. *See* United States v. Roth, 237 F.2d 796, 806-08 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957) (discussed infra text accompanying notes 86-87, 168-69).

71. *See* David A.J. Richards, A Theory of Free Speech, 34 U.C.L.A. L. Rev. 1837, 1875-89 (1987) (underlying theories of Madison and Jefferson on both freedom of religion and freedom of speech was the importance of individual liberty from state-imposed coercion of thought); Letter from Thomas Jefferson to Benjamin Rush, Sept. 23, 1800, *reprinted in* The Best Letters of Thomas Jefferson 111-12 (J.G. de Rouhlhac Hamilton ed., 1926) (vowing that "any portion of power confided to me" will be exerted in opposition to any plans for the establishment of Christianity, for "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man").

72. In the first generation after the Constitution, some states still had on their books provisions favoring mainstream religious groups, provisions that disappeared long before the Fourteenth Amendment was enacted. *See* School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 232-42 (1963) (Brennan, J., concurring). Whatever inferences this history may support with respect to the Establishment Clause itself, the point for our purposes is clear: the political energy focused on preserving moral purity had always been principally directed at religious matters, not the protection of the community or individuals from offensive erotic expression, and, as support for the imposition of communitarian norms weakened, those persevering in the fight held as their last bastion religious, not sexual, matters. *See* Michael Zuckerman, A Different Thermidor: The Revolution Beyond the American Revolution, *in* The Transformation of Early American History, supra note 54, at 170, 188-89; *see also* Christopher Waldrep, The Making of a Border State Society: James McGready, the Great Revival, and the Prosecution of Profanity in Kentucky, 99 Am. Hist. Rev. 767 (1994) (describing a post-Revolutionary religious campaign against profanity). *See generally* Stephen L. Carter, The Culture of Disbelief 115-20 (1993).

73. Even in earlier periods, a spurious classic known as Aristotle's Master Piece had circulated widely and without official interference, although there is every reason to believe that the erotic aspects of the work accounted for a substantial part of its appeal. *See* Otho T. Beall, Jr., Aristotle's Master Piece in America: A Landmark in the Folklore of Medicine, 20 Wm. & Mary Q. 206, 221-22 (2d ser. 1963); supra note 66 and accompanying text; *see also* Randolph Trumbach, Erotic Fantasy and Male Libertinism in Enlightenment England, *in* The Invention of Pornography, supra note 50, at 253, 264.

74. 2 Serg. & Rawle 91 (Pa. 1815) (upholding a conviction for showing for a fee in a private room a painting representing a man in an "indecent posture with a woman").

75. 17 Mass. 336 (1821) (prosecution of Fanny Hill).

"obscene libel." Quite apart from the First Amendment, the federal government could not have undertaken such a common law prosecution,[76] and since the passage of the Fourteenth Amendment, the same prohibition applies to the states.[77]

b. And Rise and Fall

In the post-Civil War period, there was an upsurge of interest in the suppression of sexually explicit materials, spurred to a great degree by the efforts of Anthony Comstock.[78] This movement was tightly connected to a number of other phenomena of that era, notably:

(1) the rise of restrictions on abortion,[79] which in turn seems to have

---

76. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that the Constitution prohibits federal courts from exercising common-law criminal jurisdiction. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense."). *See generally* Levy, Emergence, supra note 58, at 274-81 (describing threats to freedom of expression posed by federal common-law criminal prosecutions in the period prior to *Hudson*). For a comprehensive and scholarly analysis of *Hudson* and its political background, see Stewart Jay, Origins of Federal Common Law (pts. 1 & 2), 133 U. Pa. L. Rev. 1003, 1231 (1985). *See also* Morton Horwitz, The Transformation of American Law, 1780-1860, at 9-30 (1992); Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 51, 73 (1923) (arguing that *Hudson* was wrongly decided as matter of statutory interpretation).

77. *See generally* Stevens, supra note 30, at 1298; *cf.* Ashton v. Kentucky, 384 U.S. 195 (1966) (unanimously reversing state criminal conviction for common-law libel).

In its opinion authorizing the prosecution of Dr. Jack Kevorkian for the common-law crime of assisting suicide—a prosecution that eventually proved unsuccessful, *see* Jack Lessenberry, Jury Acquits Kevorkian in Common-Law Case, N.Y. Times, May 15, 1996, at A14—the Michigan Supreme Court did not need to confront this issue, since a Michigan statute specifically provided for the punishment of offenses that were indictable at common law. *See* People v. Kevorkian, 527 N.W.2d 714, 738-39 (opinion of Cavanagh, Brickley, & Griffin, JJ.), id. at 746 (Levin, J., concurring in part), id. at 751 (Mallat, J., concurring in part) (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995).

78. *See* Ronald G. Waters, Primers for Prudery: Sexual Advice to Puritan America 11 (1974) ("From the 1870s onward, armies of suppression, energetically led in America by Anthony Comstock, managed to have activities and publications which would have passed through in previous years suddenly declared illegal."); *see also* Janet F. Brodie, Contraception and Abortion in Nineteenth Century America 253-88 (1994); Schauer, The Law of Obscenity, supra note 17, at 13. *See generally* Broun & Leech, supra note 53.

79. Indeed the two are closely linked in the Comstock Act itself, which prohibited both the mailing of "filthy" publications and "obscene, lewd or lascivious items," including specifically devices and information related to "preventing conception and producing abortion." Comstock Act, ch. 258 § 1, 17 Stat. 598 (1873). Congress deleted the ban on "filthy" publications unrelated to abortion or contraception by Act of June 28, 1955, ch. 190, §§ 1, 2, 19 Stat. 183 (1955). The prohibition on mailing contraceptive information and devices was largely removed by Pub. L. 91-662, 84 Stat. 1973 (1971). *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 70 n.19 (1983) (holding the remainder of the prohibitions to be unconstitutional). Nonetheless, 18 U.S.C. § 1461-62, which prohibited the mailing of both information about abortion and devices for inducing abortion, remained on the books. *But see* Bigelow v. Virginia, 421 U.S. 809 (1975) (holding that a state statute prohibiting advertisement for legal abortion violated the First Amendment). Section 507(a) of Title V of the

reflected economic, social and political pressures that the native, Northern European, Protestant population felt from immigrant, Southern European, Catholic newcomers;[80] and

(2) the intensification of an explicitly class-based political and economic struggle between workers and employers, which was reflected in free speech cases in a variety of contexts.[81]

As the intensity of these passions diminished, and sexual attitudes eased correspondingly,[82] the rationale for legal restraints on erotica came under attack. While preventing lustful thoughts remained the stated purpose of the suppression of obscenity,[83] the thoroughly indefensible results of the decided cases[84] strengthened an already strong current of opinion criticizing the validity of that goal.[85] This trend culminated "in a remarkable judicial performance [that] deserves wide reading,"[86] the

---

Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), extended the prohibition to interactive computer services, but Attorney General Reno promptly informed the Congress that the Department of Justice would not defend the provision, "in light of the Department's longstanding policy to decline to enforce the abortion-related speech prohibitions in § 1462 (and in related statutes, *i.e.*, 18 U.S.C. § 1461 and 39 U.S.C. § 3001) because they are unconstitutional under the First Amendment." Letter from Janet Reno to Newt Gingrich, Feb. 9, 1996, *reprinted in* 142 Cong. Rec. S1599 (daily ed. Mar. 6, 1996).

80. *See* Brief of 281 American Historians As Amici Curiae Supporting Appellees at 20-21, Webster v. Reproductive Health Servs., 492 U.S. 490 (No. 88-605) (1989); *see also* Thomas A. Lawrence, Eclipse of Liberty: Civil Liberties in the United States During the First World War, 21 Wayne L. Rev. 33 (1974).

81. *See* Theodore Schroeder, Free Speech Bibliography (1922). *See generally* William E. Nelson, Criminality and Sexual Morality in New York, 1920-1980, 5 Yale J.L. & Human. 265, 268-77 (1993) [hereinafter Nelson, Criminality]. A critique of this article appears as Martha A. Fineman, Gender and Sexual License: The Plot Might Change but the Message Remains the Same (A Response to William Nelson), 5 Yale J.L. & Human. 343 (1993) and the author's reply as William E. Nelson, Multiple Voices as Means to Legal Reform (A Response to Martha Fineman), 5 Yale J.L. & Human. 351 (1993).

82. *See* Herbert W. Richardson, Nun, Witch, Playmate: The Americanization of Sex 101-02 (1971).

83. *See* United States v. One Book Entitled Ulysses, 72 F.2d 705, 707 (2d Cir. 1934) (A. Hand, J.) ("The question in each case is whether a publication taken as whole has a libidinous effect.").

84. Among the most notorious of these was the 4-4 decision in Doubleday & Co. v. New York, 355 U.S. 848 (1948), which, following a thirty-four word oral argument by an assistant district attorney, *see* De Grazia, supra note 17, at 227, upheld without opinion the condemnation by the New York Court of Appeals of Memoirs of Hecate County, by Edmund Wilson, one of America's most distinguished literary critics. *See also* Attorney General v. "God's Little Acre," 93 N.E.2d 819 (Mass. 1950) (banning God's Little Acre by Erskine Caldwell); Commonwealth v. Isenstadt, 62 N.E.2d 840 (Mass. 1945) (banning Strange Fruit by Lillian Smith); Commonwealth v. Friede, 171 N.E. 472 (Mass. 1930) (banning An American Tragedy by Theodore Dreiser). The first of these works was held "not obscene in New York and Pennsylvania." Roth v. United States, 354 U.S. 476, 506 n.7 (1957) (Harlan, J., concurring and dissenting). *See generally* Nelson, Criminality, supra note 81, at 292-301.

85. *See* Alpert, supra note 30, at 73-75. The restraints on contraceptive literature and devices were also coming under increasing legal attacks. *See* Morris L. Ernst & Alexander Lindey, The Censor Marches on: Recent Milestones in the Administration of the Obscenity Law in the United States 142-756 (1940).

86. Kalven, Metaphysics, supra note 19, at 2 n.11; *see also* Harry Kalven, Jr., Book Review,

concurring opinion of Judge Jerome Frank of the Second Circuit in United States v. Roth.[87]

c. *United States v. Roth*

The defendant in *Roth*, a New York publisher convicted under the Comstock Act, sought reversal in the Supreme Court.[88] He argued that his speech could only be punished if the government could demonstrate a clear and present danger of a substantive evil it had a right to prevent. The government could not do so, he contended, because: (1) it could not prove that pornography incited unlawful behavior, and (2) controlling lustful thoughts was not a proper government purpose.[89]

Thus, the issue before the Court in *Roth* was whether the First Amendment permitted suppression of material whose only evil was to stimulate socially undesirable thoughts, as opposed to actions. The Court's response was to beg the question:[90] because obscene material is outside the First Amendment, the majority held, its suppression need not meet First Amendment standards.[91] Hence, regardless of whether or not other

---

24 U. Chi. L. Rev. 769 (1957).

87. 237 F.2d 796, 806 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

88. For a full account of the factual and legal history of the case, see De Grazia, supra note 17, at 273-326. In the Supreme Court, *Roth* was consolidated with the review of Alberts v. California, 292 P.2d 90 (Cal. App. Dep't Super. Ct. 1955), which had affirmed a state conviction for selling obscene books through the mail.

89. *See* Brief for Petitioner at 24-34, Roth v. United States, 354 U.S. 476 (Nos. 582, 61) (1957); *see also* Schauer, The Law of Obscenity, supra note 17, at 34-35.

90. Justice Harlan pointed this out with typical intellectual thoroughness and rigor in his separate opinion. Harlan aptly accused the Court, which affirmed the convictions in both cases, of "beg[ging] the very question that is before us." *Roth*, 354 U.S. at 497 (Harlan, J., concurring in *Alberts* and dissenting in *Roth*); *see* Kalven, Metaphysics, supra note 19, at 20. For an overview of Harlan's thinking about pornography, see Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court 214-22 (1992), *reviewed in* 91 Mich. L. Rev. 1609 (1993). Justice Douglas (joined by Justice Black) dissented in both cases on the basis that material that did no more than arouse certain thoughts could not be constitutionally suppressed.

91. *Roth*, 354 U.S. at 486. In support of this holding, the Court cited Beauharnais v. Illinois, 343 U.S. 250 (1952), which is discussed infra Parts III.B-C.

In an effort to illuminate more fully the underpinnings of the Court's rationale, the author searched through the papers of those Justices participating in *Roth* whose papers are housed in the Library of Congress. This yielded little of substantive interest. In particular, in a result that is not presented here as by any means definitive, the search did not turn up any conference notes by Justice Brennan, who wrote the opinion.

However, a few insights may be gleaned from the papers of Justice Burton (Box 297). From conference notes that he took on the back on his law clerk's certiorari memorandum, it appears that the rationale "obscenity is outside protection of I amt." originated with Justice Brennan. The remainder of the analysis in the published *Roth* opinion shares certain features with the bench memorandum on the merits that Justice Burton's law clerk wrote subsequent to the grant of certiorari. The law clerk in question, Professor Roger C. Cramton of Cornell Law School, reports that it is a "plausible speculation" that Justice Burton may have provided input (or perhaps a copy of the memorandum) to Justice Brennan, but disclaims any

sorts of material could be suppressed on the basis of the thoughts they provoked, pornography could be. This judicial ipse dixit was dead on arrival,[92] for at least three good reasons.[93]

First, the opinion relied on the most questionable historical evidence for its position that the circulation of erotica was illegal throughout the country at the time of the Constitution.[94]

Second, even assuming the correctness of that position, to conclude, as *Roth* did, that the suppression of pornography was ipso facto consistent with the First Amendment as a matter of original intent was to leap too far too fast. The First Amendment was enacted as a restraint on federal, not state, power. Even if *Roth*'s legal history had been correct, it would have been perfectly consistent with the view that while the framers were comfortable with states suppressing pornography, they wished to deny this power to the more threatening federal government.[95] Hence, just as occurred with respect to the establishment of religion, once the Fourteenth Amendment applied the First Amendment to the states, they were bound by a prohibition that originally had constrained only the federal

---

knowledge as to whether this in fact occurred. Telephone Interview (Oct. 20, 1993).

92. *See* Kalven, Book Review, supra note 86, at 769 n.2 (*Roth*, handed down "[j]ust as this goes to press, . . . I find altogether unpersuasive.").

93. To be sure, the *Roth* majority did rule that a judgment of obscenity could only be made on the basis of the effect that the material taken as a whole (not merely isolated passages) would have on the average person (not on a particularly susceptible individual). *See Roth*, 354 U.S. at 488-89. These were important advances in the field, exorcising from American obscenity law the "bad tendency" test of Regina v. Hicklin, 3 Q.B. 360, 370-71 (1868) (holding that test is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"). *See* De Grazia, supra note 17, at 320-21, 325-26; Joel Feinberg, Pornography and the Criminal Law, 40 U. Pitt. L. Rev. 567, 581-85 (1979); Kalven, Metaphysics, supra note 19, at 17. Indeed, it is at least a plausible speculation that Justice Brennan chose to join the majority in order to accomplish these advances. *Cf.* Kenneth Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. Ill. L. Rev. 95, 141-42 (suggesting that Brennan's purpose was to insure robust protection of political speech).

The "natural tendency" doctrine in the field of political speech shares a common origin with the "bad tendency" doctrine in obscenity law, *see* Leon Friedman, Freedom of Speech: Should it be Available to Pornographers, Nazis, and the Klan?, *in* Group Defamation and Freedom of Speech: The Relationship Between Language and Violence 307, 311 (Monroe H. Freedman and Eric M. Freedman eds., 1995) [hereinafter Group Defamation], but has its own history. *See* infra note 117.

94. *Roth*, 354 U.S. at 1308 ("[T]here is sufficient contemporaneous evidence to show that obscenity . . . was outside the protection intended for speech and press."). In State v. Henry, 732 P.2d 9 (Or. 1987), the court, after surveying the legal landscape described supra text accompanying notes 54-77, reached the contrary–and far more persuasive–conclusion that there is no historical justification for an obscenity exception to the guarantee of freedom of expression. Hence, obscene expression is protected speech under the Oregon Constitution.

95. The same point has been powerfully made with respect to seditious libel and other politically dissident speech in William T. Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 91 (1984). *Cf.* Levy, Emergence, supra note 58, at xii ("[T]he First Amendment was as much an expression of federalism as of libertarianism.").

government.[93]

Third, even if the original intent finding had been correct, *Roth*'s legal conclusion would not necessarily have followed. In view of the intervening changes in society, the decision to give that hypothesized original intent binding force would have required justification if the opinion were to be persuasive.[97]

3. The End of Thought Control

The turbulence in social attitudes towards sexual matters increased as the 1950s passed into the 1960s,[98] resulting in a hopelessly fragmented Court[99] that was reduced simply to announcing results in individual cases by per curiam opinions.[100] As social protest movements peaked in the

---

96. *See* Mayton, supra note 95, at 140-42.

97. In 1960, Kalven observed that surely the Court would not simply recite the same history and uphold a statute outlawing blasphemy, and asked pointedly, "And what would the Court say to an argument along the same lines appealing to the Sedition Act of 1798 as justification for the truly liberty-defeating crime of seditious libel?" Kalven, Metaphysics, supra note 19, at 9. The answer came in 1964. *See* New York Times v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [T]he Act . . . was inconsistent with the First Amendment."); *see also* Schauer, The Law of Obscenity, supra note 17, at 36 (observing that "the existence of profanity statutes in 1797 [sic] did not seem to affect the Supreme Court's decision in Cohen v. California," 403 U.S. 15 (1971)); Panel Discussion: Effects of Violent Pornography, 8 N.Y.U. Rev. L. & Soc. Change 225, 236 (1978-79) (remarks of David Richards) (arguing that obscenity law, which allows the prohibition of communications on the grounds of community offense, is the last residuum of the viewpoint that accepted legal prohibitions on seditious libel, blasphemy, heresy, and the like).

98. *See* William Manchester, A World Lit Only by Change, U.S. News & World Rep., Oct. 25, 1993, at 6.

99. *See* Sebastian, supra note 30. The situation was epitomized by the famous dictum of Justice Stewart: "[U]nder the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced in that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

The remark, "I know it when I see it," which has been so frequently quoted that it threatens to loom excessively large in an evaluation of Justice Stewart's generally speech-protective judicial career, does not reflect any analytical failing unique to him, but rather the intellectually untenable position in which the Court as a whole found itself. *See* infra note 100. *See generally* Paul Gewirtz, On "I Know It When I See It", 105 Yale L.J. 1023 (1996).

100. Once the various Justices had staked out their positions in Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966) and Jacobellis v. Ohio, 378 U.S. 184 (1964), the Court began this practice in Redrup v. New York, 386 U.S. 767 (1967). *See* Geoffrey R. Stone et al., Constitutional Law 1211 (2d ed. 1991) ("From 1967 to 1973 some thirty-one cases were disposed of in this fashion."); *see also* Jack H. Pollack, Earl Warren: The Judge Who Changed America 355 (1979) (observing that by 1966, "Warren and his Court were hopelessly confused on the obscenity issue").

The result was a de facto regime of laissez faire, since the previous situation of chaos in the lower courts could hardly be allowed to continue until the Supreme Court reached a doctrinal consensus. For example, Massachusetts and New York had come to opposite results

streets, the Court decided *Stanley v. Georgia.*[101] Ruling unanimously,[102] the Court held that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[103] It reached this result by explicitly adopting both of the arguments that the defendant had unsuccessfully advanced in *Roth.*[104]

The state, the Court wrote, "asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."[105]

This last statement, and its concomitant rejection of thought control as a valid purpose for the suppression of pornography, is correct.[106] The ideals of autonomy underlying the First Amendment[107] support both a radical skepticism about moral truth—whether the received morality is the truth,[108] whether there is such a thing as moral truth,[109] and whether, even if so, it should be sought communally[110]—and a consequent rejection of the liberty-threatening right of government to impose orthodox beliefs by law.[111]

---

with respect to both Henry Miller's Tropic of Cancer, *see* Zeitlin v. Arnebergh, 383 P.2d 152, 153 n.1 (Cal. 1963) (summarizing results around country); *compare* People v. Fritch, 192 N.E.2d 713 (N.Y. 1963) (held obscene) *with* Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328 (Mass. 1962) (held not obscene), and John Cleland's Memoirs of a Woman of Pleasure (commonly known as Fanny Hill), *compare* Attorney General v. Book Named "John Cleland's Memoirs of a Woman of Pleasure," 206 N.E.2d 403 (Mass. 1965) (holding work obscene by 4-3 vote), *rev'd sub nom.* Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966) *with* Larkin v. G.P. Putnam's Sons, 200 N.E.2d 403 (N.Y. 1964) (holding work not obscene by 4-3 vote). These litigations are described at length in Charles Rembar, The End of Obscenity (1968).

101. 394 U.S. 557 (1969).

102. Three Justices concurred in an opinion that neither specifically agreed nor specifically disagreed with the majority's decision on the pornography issue.

103. *Stanley,* 394 U.S. at 568.

104. *See* supra text accompanying note 89. The Court subsequently re-endorsed, although it declined to extend, both of *Stanley*'s holdings in Osborne v. Ohio, 495 U.S. 103, 108-09 (1990). *See* infra note 202.

105. *Stanley,* 394 U.S. at 565-66 (footnote omitted). In the omitted footnote to this passage, the Court reproduced the comment by Professor Henkin set forth supra note 52.

106. For a recent articulation of this position, see Claudia Tuchman, Note, Does Privacy Have Four Walls? Salvaging Stanley v. Georgia, 94 Colum. L. Rev. 2267 (1994).

107. *See* Bruce J. Winick, On Autonomy: Legal and Psychological Perspectives, 37 Vill. L. Rev. 1705, 1744-47 (1992); *see also* Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, *in* Constitutional Domains 268, 278 (1995); James Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1, 64-69 (1995) (drawing analogies between autonomy theories in law of First Amendment and of substantive due process).

108. *See* Emerson, supra note 30, at 7.

109. *See* Gey, supra note 17, at 1565-66.

110. *See* Karst, supra note 93, at 147-49; Susan H. Williams, Feminist Jurisprudence and Free Speech Theory, 68 Tul. L. Rev. 1563, 1577-80 (1994); *see also* Greenfield, supra note 5, at 1218-23.

111. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is

B. Preventing Criminal Conduct

As its second justification for the suppression of pornography, the government asserted in *Stanley* "that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."[112] The Court rejected this argument for lack of proof: "Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to manufacture of homemade spirits."[113]

In so holding, the Court did not articulate the level of connection that the government would need to demonstrate between the speech it sought to suppress and the feared unlawful consequences. But it did so a few months later in the still-governing case of *Brandenburg v. Ohio*,[114] which held that the state could suppress advocacy of law violation only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[115]

This is a very difficult test to meet.[116] It was designed to be.

---

any fixed star in our constitutional constellation, it is that no official, high or petty, shall prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."); supra notes 60, 71.

112. *Stanley*, 394 U.S. at 566.

113. Id. at 567.

114. 395 U.S. 444 (1969).

115. Id. at 447. For an account of how the Court came to this formulation, see Bernard Schwartz, Brennan and the *Brandenburg* Decision—a Lawgiver in Action, Judicature, July-Aug. 1995, at 24. Speech meeting the *Brandenburg* definition is sometimes described as "outside" the scope of the First Amendment. *E.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 504 (1984). In light of the balancing of interests that led to *Brandenburg*—in stark contrast to cases like *Roth* and *Beauharnais*, in which the labelling of speech as "outside" the First Amendment meant that no such balancing was required, *see* supra text accompanying notes 90-91 and infra text accompanying note 329 (discussing these cases)—it would seem more accurate to say that although words that meet the *Brandenburg* test are "within" the First Amendment, a statute that proscribes them, like one prohibiting a person from offering to sell heroin, is one whose purpose is to regulate conduct rather than speech. *See generally* supra text accompanying note 8.

116. Since *Brandenburg*, the Supreme Court has never upheld a conviction based on an incitement theory, and has applied the rule to protect impassioned advocates of social change operating in turbulent conditions. *See* NAACP v. Claiborne Hardware, 458 U.S. 886, 902, 904-05, 927-28 (1982) (invalidating conviction under *Brandenburg* test where boycott leader stated "If we catch any of you going in any of them racist stores, we're going to break your damn neck," and acts of violence against non-boycotters occurred); Hess v. Indiana, 414 U.S. 105 (1973) (reversing under *Brandenburg* disorderly conduct conviction of defendant who said to fellow demonstrators "We'll take the fucking street again" or "We'll take the fucking street later"); Watts v. United States, 394 U.S. 705 (1969) (reversing conviction of defendant who stated at rally, "If they ever make me carry a rifle, the first man I want to get in my sights is LBJ"); *see also* Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974); Bond v. Floyd, 385 U.S. 116 (1966).

These cases make clear that protection does not depend upon the expression being of an elevated nature. Nor is it lost simply because unlawful violence follows the speech; there is

Brandenburg was decided after centuries of experience with weaker formulations, both in England and the United States, had shown how easily the government could impoverish political dialogue by suppressing speech that it deemed subversive of the established order.[117] But subversion of the established order is inextricable from political change, and ongoing, peaceful political change is precisely what a democratic form of government is designed to promote.

Thus, for example, one should be free to express in the press the view that "corn-dealers are starvers of the poor," although one would not be free to do so "to an excited mob assembled before the house of a corn-dealer."[118] This is because people are free to attempt to change the majority's social attitudes towards a group, be that group Communists, feminists, racists, corn-dealers, or incumbent politicians. Limitations are permissible only where the speech will cause physical violence so immediately as to forestall the ability of other voices to be heard,[119] thus precluding the recipients of the message from making an autonomous decision on how to respond.[120] Hence, for example, for an anti-abortion

---

a heavy burden of proof on the government to demonstrate causation. *Cf.* Marshall C. Derks, Note, The Advocacy of "Constitutional Conduct," 68 Ind. L.J. 1385 (1993) (advocating further liberalization of the test). *See generally* Viktor Mayer-Schonberger & Teree E. Foster, More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law, 18 B.C. Int'l & Comp. L. Rev. 59, 84, 103 (1995) (proposing narrowing of *Brandenburg* to permit legislature to punish speech advocating conduct violative of fundamental international norms).

117. This is a familiar history, highlights of which include English prosecutions for seditious libel, and American prosecutions of opponents of World War I, socialists in the early 1920s, and Communists in the 1950s on the grounds that the "natural tendency" of their words would be the overthrow of the government. It is recounted in Tribe, supra note 25, § 12-9; *see also* Gerald Gunther, Learned Hand: The Man and the Judge 156-70, 598-608 (1994) [hereinafter Gunther, Learned Hand]; James F. Fagan, Jr., Abrams v. United States: Remembering the Authors of Both Opinions, 8 Touro L. Rev. 453 (1992); Friedman, supra note 93, at 311-13; Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719 (1975); Thomas C. Mackey, "They are Positively Dangerous Men": The Lost Court Documents of Benjamin Gitlow and James Larkin Before the New York City Magistrate's Court, 1919, 69 N.Y.U. L. Rev. 421 (1994); David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205, 1353-55 (1983); Richard W. Steele, Fear of the Mob and Faith in Government in Free Speech Discourse, 1919-1941, 38 Am. J. Legal Hist. 55 (1994); John F. Wirenius, The Road to *Brandenburg*: A Look at the Evolving Understanding of the First Amendment, 43 Drake L. Rev. 1 (1994). *See generally* Irving Brant, Seditious Libel: Myth and Reality, 39 N.Y.U. L. Rev. 1 (1964).

118. *See* John S. Mill, Of Individuality, As One of the Elements of Well-Being, *in* On Liberty 55, 55 (Alburey Castell ed., 1947).

119. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (unanimous opinion) (holding an ordinance prohibiting posting of "For Sale" signs to forestall "white flight" unconstitutional, citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.")). *See generally* Vincent Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California, 29 Wm. & Mary L. Rev. 653 (1988).

120. This aspect of *Brandenburg* is highlighted in the thoughtful work, Michele Munn,

magazine to identify the new doctor working at a local clinic and describe him as "responsible for the death of thousands of babies" is protected speech, notwithstanding that an individual might act on the information to kill the doctor.[121]

Although the issue has been studied exhaustively,[122] there was no social science evidence at the time of *Stanley*,[123] nor is there any today,[124] demonstrating that pornographic works as a class are "directed

---

Note, The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech, 21 Am. J. Crim. L. 433, 466-67 (1994). *See also* Virginia State Ed. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 769-70 (1976) (holding that the First Amendment precludes the state from the "highly paternalistic approach" of forbidding a speaker to provide information on the ground that the recipient will misuse it). *See generally* infra note 236 (describing courts' implementation of this principle in context of tort litigation).

121. This example is drawn with only slight modification from Michael Cooper, Debate on Role Played by Anti-Abortion Talk, N.Y. Times, Jan. 15, 1995, at A16. *Cf.* Warren M. Hern, How It Feels to Be on Anti-Abortion Hit List, N.Y. Times, Feb. 4, 1995, at A18 (letter to editor from director of abortion clinic suggesting that rule be changed).

122. *See* Augustine Bannigan, Obscenity and Social Harm: A Contested Terrain, 14 Int'l J.L. & Psychiatry 1, 1-5 (1991) (summarizing history of research since 1950s); *see also* Franklin M. Osanka & Sara L. Johann, Sourcebook on Pornography (1989); Mary F. Chervenak, Selected Bibliography on Pornography and Violence, 40 U. Pitt. L. Rev. 652 (1979); Janet Moore, Music and Mayhem: An Examination of the Influence of Music Videos on Interpersonal Aggression 55-81 (1989) (unpublished Ph.D. dissertation, Ohio University) (summarizing research findings 1970-86).

123. *See* Robert B. Cairns et al., Sex Censorship: The Assumptions of Anti-Obscenity Law and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); W. Cody Wilson, Facts versus Fears: Why Should We Worry About Pornography, 397 Ann. Am. Acad. Pol. & Soc. Sci. 105, 115 (1971) (executive director for research of U.S. Commission on Obscenity and Pornography, which began work in 1968 and reported in 1970, details empirical studies that led Commission majority to conclude "that explicit sexual materials could not be considered to play a significant role in the causation of delinquent or criminal behavior among youth or adults"); *see also* Clifford B. Reifler et al., Pornography: An Experimental Study of Effects, 128 Am. J. Psychiatry 67, 73 (1971) (finding "intensive exposure to erotically stimulating material had no discernable lasting effect on [subjects'] feelings or behavior").

124. The social science findings to date are summarized in Edward Donnerstein et al., The Question of Pornography: Research Findings and Policy Implications (1987); Nadine Strossen, A Feminist Critique of "The" Feminist Critique of Pornography, 79 Va. L. Rev. 1099, 1176-85 (1993) [hereinafter Strossen, Feminist Critique]; *see also* Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights 250-56, 260-61 (1995) [hereinafter Strossen, Defending Pornography], *reviewed in* 29 U. Rich. L. Rev. 401 (1995); N.Y.L.J., May 2, 1995, at 2; Wall St. J., Jan. 30, 1995, at A18; N.Y. Times Book Review, Jan. 22, 1995, at 13; New Republic, Jan. 9 & 16, 1995, at 42 (authored by Cass R. Sunstein).

A review of the unpublished literature provides no basis for believing that any changes of scientific view are on the horizon. *See* Barbara G. Collins, A Discriminant Analysis of the Attitudes, Psychological Characteristics, and Behavior of Male Readers and Non-Readers of Soft-Core Pornography 97-109 (1988) (unpublished Ph.D. dissertation, Rutgers University (New Brunswick)); Elizabeth A.L. Cramer, Patterns of Pornography Use Among Men Who Batter Their Female Partners as Compared to Men Who do not Batter Their Female Partners (1987) (unpublished M.S. thesis, Texas Woman's University); Elizabeth C. McDonel, Sexual Aggression and Heterosexual Perception: The Relationship Between Decoding Accuracy and Rape Correlates 75-77 (1986) (unpublished Ph.D. dissertation, Indiana University); Moore,

to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[125] While there is some support for the proposition

---

supra note 122, at 124; Debora K. Tashcher, The Effects of Sex Role Stereotypes and Sexually-Aggressive Film Content on Aggression Against Women 124 (1983) (unpublished Ph.D. dissertation, Hofstra University).

125. *Brandenburg*, 395 U.S. at 447; *see* Marjorie Heins, Sex, Sin and Blasphemy: A Guide to America's Censorship Wars 150-56 (1993); *see also* Berl Kutchinsky, The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience, 29 J. Soc. Iss. 163, 179 (1973) (arguing that the loosening of controls on pornography in Denmark led to a decrease in sex crimes against children).

Presumably the relevant effect is on the "average" consumer. Otherwise, the entire population of the United States would be reduced to buying only that which is fit for the most vulnerable. *Cf.* Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (holding a law aimed at protecting children from violent comics invalid because it reduced the entire population of Michigan to reading only material fit for children); *see also* Virginia v. American Booksellers Ass'n, 484 U.S. 383, 389 (1988) (stating that "this Court has repeatedly held" that laws having such effects are invalid under the First Amendment).

Hence, even direct proof that a single individual was inspired by a particular book to commit a specific crime would be insufficient to ban the book altogether. *See* Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 432 (1966) (Douglas, J., concurring) ("The First Amendment demands more than a horrible example or two of the perpetrator of a crime of sexual violence, in whose pocket is found a pornographic book, before it allows the Nation to be saddled with a regime of censorship."). *But cf.* Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1, 45 (1985) (responding that this argument "is one thing if sex offenders are considered deviants and another if they are considered relatively nonexceptional except for the fact of their apprehension and incarceration") [hereinafter MacKinnon, Pornography, Civil Rights].

If this were not the case, one could ban works ranging from the Bible to the MTV cartoon "Beavis and Butt-head" to Disney movies. *See Memoirs*, 383 U.S. at 432 n.11; Friedman, supra note 93, at 319 n.27 ("Albert Fish, a mass murderer of children, claims to have been motivated . . . by the Biblical story of Abraham and Isaac. Before he killed a child, he waited for God to stop him, which He never did."); Strossen, Defending Pornography, supra note 124, at 256-60; Cartoon on MTV Blamed for Fire, N.Y. Times, Oct. 3, 1993, at A30 (recounting two episodes in which children set fires as a result of watching show); Caryn James, If Simon Says, "Lie Down in the Road," Should You?, N.Y. Times, Oct. 24, 1993, at E2 (one teenager killed and two others seriously injured imitating scene from movie "The Program" in which characters lie down in center of road); John Kifner, Oklahoma Blast: A Tale in 2 Books?, N.Y. Times, Aug. 21, 1995, at A12 (reporting that books found among the belongings of two men indicted for bombing the Oklahoma City federal building "strongly suggest a conscious attempt to imitate the racially motivated crimes described in two books about far-right extremist groups—one a work of fiction, the other a journalistic account"); Harold Schechter, A Movie Made Me Do It, N.Y. Times, Dec. 3, 1995, at E15 (recounting that Heinrich Pommerencke committed four savage rape-murders as a result of seeing the "golden calf" scene in Cecil B. DeMille's movie "The Ten Commandments," which convinced him that all women were immoral and deserved to die); *see also* Child Molester Tells of a Rampage in 5 States, N.Y. Times, Dec. 23, 1993, at A21 (man who confessed to molesting at least eight children "has told the police that he was molested as a child and that it pushed him toward a fascination with pornography, he read detective novels in which children were raped and killed, and 'began fantasizing about that,'" according to a detective); William Grimes, Does Life Imitate Violent Films?, N.Y. Times, Nov. 30, 1995, at B1, B3 (listing numerous mainstream "films and television shows blamed for prompting acts of violence"); Marlise Simons, Blaming TV for Son's Death, Frenchwoman Sues, N.Y. Times, Aug. 30, 1993, at A5 ("A Frenchwoman is suing the head of a state-owned television channel for manslaughter after

that exposure to certain forms of violent pornography can at least temporarily change attitudes so as to make men more aggressive or less likely to interpret particular behaviors as rape,[126] the data do not indicate even positive correlations[127] between these changed attitudes and unlawful activities.[128] Furthermore, the best evidence to date indicates

---

her 17-year-old son was killed by a home-made bomb that she said he learned to make from the American television series 'MacGyver.'"); *cf.* infra note 236 (noting problems of causation and zone of duty in attempts to impose civil liability on media for harm done by recipients of their messages).

126. *See* William A. Fisher & Azy Barak, Pornography, Erotica, and Behavior: More Questions than Answers, 14 Int'l J.L. & Psychiatry 65 (1991) (summarizing and critiquing these studies); *see also* Neil M. Malamuth & James V.P. Check, The Effects of Aggressive Pornography on Beliefs in Rape Myths: Individual Differences, 19 J. Res. in Personality 299 (1985).

127. Of course, as highlighted by Anthony D'Amato, A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence, 31 Wm. & Mary L. Rev. 575 (1990), even a finding of correlation would not demonstrate causation. *See* Douglas E. Mould, A Reply to Page: Fraud, Pornography, and the Meese Commission, 45 Am. Psychol. 777 (1990) (noting that "the correlation between the incidence of rape in the United States and membership in the Southern Baptist church is a highly significant .96"); *see also* Jerry Taylor, Cancer Risks for Thee, but Not for Me, Wall St. J., Jan. 3, 1995, at 8 ("Correlation simply does not equal causation, no matter how impressive the statistics.").

128. *See* Donnerstein et al., supra note 124, at 174-78 (summarizing research findings); Judith Becker & Robert O. Stein, Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?, 14 Int'l J.L. & Psychiatry 85 (1991) (concluding that exposure to erotica does not cause sexual deviance in adolescent males); Berl Kutchinsky, The Politics of Pornography Research, 26 L. & Soc. Rev. 447 (1992) (arguing that contrary viewpoint relies on distortions of published studies); Berl Kutchinsky, Pornography and Rape: Theory and Practice?, 14 Int'l J.L. & Psychiatry 47, 61-62 (1991) (data from laboratory studies and actual experience in U.S.A., Denmark, Sweden and West Germany "would seem to exclude, beyond any reasonable doubt" hypothesis that greater availability of pornography leads to increased sexual violence), *reviewed in* Steven A. Childress, Pornography, "Serious Rape," and Statistics: A Reply to Dr. Kutchinsky, 26 L. & Soc. Rev. 457 (1992); David E. Nutter & Mary E. Kearns, Patterns of Exposure to Sexually Explicit Material Among Sex Offenders, Child Molesters, and Controls, 19 J. Sex & Marital Therapy 77 (1993) (detailing a study designed in accordance with recommendations of Meese Commission which found no link between pornography and sexual offenses); George C. Thomas III, A Critique of the Anti-Pornography Syllogism, 52 Md. L. Rev. 122 (1993) (reviewing empirical evidence to date and finding no link between pornography and rape); *see also* Pornography and Sexual Aggression (Neil M. Malamuth & Edward Donnerstein eds., 1984) (anthology of research reports); The Influence of Pornography on Behaviour (Maurice Yaffe & Edward C. Nelson eds., 1982) (presenting English research). *See generally* Dolf Zillmann, Connections Between Sex and Aggression (1984) (reviewing numerous factors other than pornography relevant to linkage); Virginia Greendlinger & Donn Byrne, Coercive Sexual Fantasies of College Men as Predictors of Self-Reported Likelihood to Rape and Overt Sexual Aggression, 23 J. Sex Res. 1 (1987) (drawing link between coercive fantasies and sexual aggression without reference to pornography).

The data on the much less studied question of whether exposure to pornography makes women more accepting of being raped is at best ambiguous. *See* Shawn Corne et al., Women's Attitudes and Fantasies About Rape as a Function of Early Exposure to Pornography, 7 J. Interpersonal Violence 454, 456 (1992); Wendy E. Stock, The Effects of Violent Pornography on the Sexual Responsiveness and Attitudes of Women 270-74 (1983) (unpublished Ph.D. dissertation, State University of New York (Stony Brook)). Even should such an effect be clearly demonstrated, it would not seem to justify suppression of pornography on an

that the pernicious effects are caused by the violent, rather than the sexually explicit, content of the materials[129]—breaking the link between the stated problem of sexual misconduct and the proposed solution of suppressing sexually explicit communications.[130]

In response to the ineluctable conclusion that regulating pornography on the basis that it leads to unlawful behavior cannot be reconciled with the First Amendment, academic defenders of suppression have developed two responses.

The first, exemplified by the work of Cass Sunstein,[131] begins by admitting that the incitement rationale for regulation cannot be squared with *Brandenburg*. It then asserts that because pornography is associated with a variety of social harms, including the abuse of women in its production and the perpetuation of negative views of women, and because it operates on a "non-cognitive" level, a looser test of causation should be applied.[132]

Pretermitting the "non-cognitive" issue for the moment,[133] the problem with this position is that it does not distinguish pornography from other sorts of speech—pacifist propaganda, a film presenting adultery as

---

incitement theory.

129. *See* Peter Marksteiner, The Ongoing Pornography Debate, 34 Washburn L.J. 49, 62-69 (1994); Steven A. Childress, Reel "Rape Speech": Violent Pornography and the Politics of Harm, 25 L. & Soc. Rev. 177, 212 (1991); Vernon R. Padgett et al., Pornography, Erotica, and Attitudes Toward Women: The Effects of Repeated Exposure, 26 J. Sex. Res. 479, 489 (1989) ("No support was found for the belief that exposure to erotica results in less favorable attitudes towards women and women's issues"; future research might better be directed towards media portrayals of violence); *see also* Susan H. Gray, Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male, 29 Soc. Prob. 387, 396 (1982) (review of research findings indicates that male anger towards women, rather than pornography, is at the root of violent behavior).

130. *See* Donnerstein et al., supra note 124, at 178-79; Daniel Linz et al., Sexual Violence in the Mass Media: Legal Solutions, Warnings, and Mitigation Through Education, 48 J. Soc. Issues 145, 149-51 (1992); Strossen, Feminist Critique, supra note 124, at 1174-75; *see also* supra notes 12, 25 and accompanying text (describing First Amendment principle that even restraints on speech designed to achieve permissible purposes must be narrowly tailored). *See generally* Joseph E. Scott & Steven J. Cuvelier, Violence and Sexual Violence in Pornography: Is it Really Increasing?, 22 Arch. Sex. Beh. 357, 369 (1993) (finding that the percentage of violent content in pornography has remained stable over time; contention "that pornography is becoming more violent and therefore dangerous to society is simply not a viable position to maintain").

131. *See* Cass R. Sunstein, Democracy and the Problem of Free Speech 208-26 (1993); Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 536.

132. *Cf.* Debra D. Burke, Cybersmut and the First Amendment: A Call for a New Obscenity Standard, 9 Harv. J.L. & Tech. 87, 135 (1996) (proposing that obscenity should be re-defined as "sexually explicit speech that proximately causes physical harm through the reckless instigation of illegal acts"); Note, Anti-Pornography Law and First Amendment Values, 98 Harv. L. Rev. 460, 480 (1984) (suggesting that courts should not require conclusive proof of harm, but should permit banning of sexually explicit images that associate women's physical abuse or degradation with sexual pleasure as long as there has been a "reasonable legislative determination" that pornography threatens women's safety and social equality).

133. *See* infra text accompanying notes 157-67.

alluring, a song extolling LSD trips, the display of a red flag or the burning of an American one—that may be thought to have long-run negative effects on the community.[134] The *Brandenburg* formulation was required precisely because permitting suppression on the basis of intuitions about correlations rather than proof of causation enabled the government to silence speakers on the basis of the unpopularity of their views to the majority.[135] To weaken the test in order to get at pornography would be to take a large step backwards.

The second academic response does not attack *Brandenburg*'s causation requirement, but instead seeks to evade it by asserting that pornography is not "speech," but "conduct." As a result, the First Amendment does not apply at all. As articulated by Frederick Schauer, the argument is that pornography is touch, a masturbatory aid, and thus no more protected by the First Amendment than the sale of sexual devices.[136] Hence, there is no First Amendment violation in suppressing pornography in the belief—however strongly or weakly supported by empirical evidence—that exposure to the material leads to crime.

There are two problems with this argument. First, the place where it seeks to draw the line between speech and conduct is untenable as a matter of law and policy. Second, Schauer apparently does not actually mean that pornography is "conduct." His point, like Sunstein's, is that because pornography achieves its effects by "non-cognitive" means, it is not "speech" within the meaning of the First Amendment. But, for good reason, the Amendment's protections are not limited to those forms of communication that characterize university classrooms.

First. The idea that one must define "speech" for First Amendment purposes is thoroughly conventional. As has been observed repeatedly,[137] not every activity carried out through words is protected, nor is every non-verbal act unprotected. But, notwithstanding the perplexities that may be propounded by the philosophically inclined,[138] the definitional task is not a difficult one, and may be accomplished with readily accessible materials[139] if one proceeds with a firm focus on the purpose of the inquiry.[140]

Viewing the matter abstractly, it is possible to hypothesize all sorts of

---

134. In addition, as described infra notes 361-70 and accompanying text, the same argument has historically been made many times to justify stifling novel media of expression—and ultimately rejected in light of actual experience.

135. *See* supra note 117 and accompanying text.

136. *See, e.g.*, Schauer, Response, supra note 17, at 606-08.

137. *E.g.*, Arnold H. Loewy, Distinguishing Speech From Conduct, 45 Mercer L. Rev. 621, 621-22 (1994); Stevens, supra note 30, at 1296.

138. *E.g.*, Lawrence Alexander & Paul Horton, The Impossibility of a Free Speech Principle, 78 Nw. U. L. Rev. 1319, 1321-22 (1983).

139. *E.g.*, Tribe, supra note 25, at 827-832.

140. *See, e.g.*, Pamela M. Capps, Note, Rock on Trial: Subliminal Message Liability, 1991 Colum. Bus. L. Rev. 27, 32-34 (presenting a reasonable proposal concerning the contours of civil liability based on subliminal messages while rejecting the idea that they are not "speech").

human activities—speaking from a soapbox, burning a flag, burning a draft card, copulating in Times Square, pouring blood over draft files, urinating on the steps of City Hall, bombing an abortion clinic—and to show that there is nothing intrinsic to those acts that enables one to label some "speech" and others "conduct."[141] But the purpose at hand is not an abstract one. It is, rather, to assist in the legal analysis of restraints on freedom of expression—an analysis animated by a purpose to protect human communication.[142]

Taking this approach, the Court has appropriately focused on two factors. The first, which the Court states explicitly, is the communication factor: the degree of the actor's intent to communicate, and the degree to which a reasonable observer would understand the activity to be communication.[143]

The second factor, which is drawn more from the results of the cases than their language, is the extent of the valid (*i.e.*, unrelated to suppression of ideas) governmental interest in regulating the behavior. While this issue might seem on the surface to be unrelated to the question of whether or not an activity is First Amendment "speech," the Court has perceived correctly that there is in fact an important evidentiary connection. If the only plausible reason that the government would want to regulate the activity is to suppress an idea, as in the case of flag-burning, then the behavior necessarily is overwhelmingly communicative, and is, for First Amendment purposes, pure speech.[144]

Where an analysis of the two factors does not lead to the categorization of the activity as pure "speech," the result is not that any regulation of the activity suddenly becomes permissible because it is "conduct." Rather, the standard "is little, if any, different from the standard applied to time place and manner restrictions" on pure speech.[145]

---

141. *See* Alexander, supra note 6, at 933-35; Louis Henkin, Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 79-80 (1968).

142. *See generally* Melville Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 UCLA L. Rev. 29, 35-37 (1973); Peter M. Tiersma, Nonverbal Communication and the Freedom of "Speech," 1993 Wis. L. Rev. 1526, 1589.

143. *See* Spence v. Washington, 418 U.S. 405, 406-11 (1974); Stevens, supra note 30, at 1310-11; Note, Symbolic Conduct, 68 Colum. L. Rev. 1091, 1113-14 (1968).

144. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (burning American flag is speech); Texas v. Johnson, 491 U.S. 397 (1989) (same); Spence v. Washington, 418 U.S. 405, 410 (1974) (taping peace symbol on flag is speech); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 505 (1969) (wearing black armband is speech); Gerritsen v. City of Los Angeles, 994 F.2d 570, 576-77 (9th Cir. 1993) (handing out political leaflets is speech). *But cf.* Huffman and Wright Logging Co. v. Wade, 857 P.2d 101, 106 (Or. 1993) (climbing onto logging equipment and preventing its use is conduct, even when accompanied by display of banner and chanting of slogans concerning environment). For an analysis of the cases consistent with that presented in this paragraph of text, see Srikanth Srinivasan, Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence, 12 Const. Commentary 401, 416-20 (1995).

145. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (sleeping in tents in a park); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (nude

Whatever the weaknesses of applying the standards governing the non-content regulation of pure speech to restraints on expressive activities that are not pure "speech," the critical point for the present discussion is that the latter category remains within the First Amendment. Although the activity being regulated may not be "speech," it falls somewhere on a continuum of expressiveness, and the Court's purpose is to insure that any restraint is as protective as possible of the communicative elements of the activity. This is just what the tests for the validity of time, place, and manner regulation are designed to do when the activity in question is "speech" (like picketing): to validate regulation of the less-communicative aspects (no picketing so as to trap individual at home), while making sure the message gets through (no total bans on picketing in front of residences).[146]

Hence, whether defended as a "time, place, and manner" restriction of speech, or as a regulation of "conduct," the enactment must meet the same three tests:

1. The regulation must be content-neutral.[147]

2. There must be no intent to suppress speech.[148]

3. The regulation must leave adequate alternative channels open so that it does not have the effect of suppressing speech.[149]

In addition, the closer the activity comes to "speech" on the speech-conduct spectrum, the more narrowly tailored the regulation must be to achieve the government's legitimate purpose.[150]

Whatever may be said of the results in particular cases,[151] the

---

dancing).

146. *See* Frisby v. Schultz, 487 U.S. 474 (1988); Vittitow v. City of Upper Arlington, 43 F.3d 1100 (6th Cir.), *cert. denied*, 115 S. Ct. 2276 (1995); City of San Jose v. Superior Court, 38 Cal. Rptr. 2d 205, 210 (Cal. Ct. App.), *cert. denied*, 116 S. Ct. 340 (1995); Sylvia Arizmendi, Residential Picketing: Will the Public Forum Follow Us Home?, 37 How. L.J. 495 (1994) (reviewing case law on First Amendment right to picket); *see also* John H. Ely, Democracy and Distrust: A Theory of Judicial Review 110-11 (1980). *See generally* Kovacs v. Cooper, 336 U.S. 77 (1949). For a different explanation than the one in the text, see Anne D. Lederman, Comment, Free Choice and the First Amendment or Would You Read This if I Held it in Your Face and Refused to Leave?, 45 Case W. Res. L. Rev. 1287, 1309-16, 1321-23 (1995).

147. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S 60, 69 n.18 (1983) (observing that because statutory restriction on communication was content-based, any justification of it as a time, place, or manner restriction would be untenable); Schacht v. United States, 398 U.S. 58 (1970) (invalidating conviction under a statutory scheme prohibiting the unauthorized wearing of military uniforms in theatrical productions except ones that did "not tend to discredit" the military); Stromberg v. California, 283 U.S. 359 (1931) (invalidating statute prohibiting any banner expressing "opposition to organized government").

148. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 812-14 (1985); United States v. Handler, 383 F. Supp. 1267, 1276-77 (D. Md. 1974).

149. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (discussed supra note 12) (unanimously striking down ban on residential signs for failure to meet this requirement); Clark v. Community for Creative Non-Violence, 486 U.S. 288, 293 (1984).

150. *See* Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

151. Recent developments in the field are reviewed and criticized in Jeffrey S. Raskin,

conventional doctrinal framework sketched out above focuses on the correct questions, and shows clearly the bankruptcy of labeling pornography as "conduct." Under the ordinary two-factor First Amendment test, a movie consisting of nothing other than a display of sexual activity is just as clearly pure speech as "Gone With the Wind." But even if one were to reject this conclusion, and apply the weaker three-part test just described, a ban on pornography could not pass First Amendment muster on the basis that it was merely a prohibition of conduct rather than speech.

Second. Indeed, even Schauer implicitly concedes this point. In response to his many critics, who accurately point out that the difference between the sale of a sexual device and the sale of a salacious magazine is that the latter only achieves the sexual stimulation of its audience through mental intermediation;[152] Schauer says that this, while perhaps true,[153] is irrelevant.[154] According to him, the First Amendment permits government suppression of any communication that "is designed to cause actual sexual simulation and generally does so for its intended audience."[155] His rationale is that communications leading to direct sexual excitement "are not sufficiently intellectual in content to come within the scope of the underlying principles of freedom of speech."[156] In short, Schauer's basis for the regulation of pornography is not that it is conduct, but rather that it is speech that achieves its effects by non-cognitive means. This argument

---

Comment, Dancing on the Outer Perimeters: The Supreme Court's Precarious Protection of Expressive Conduct, 33 Santa Clara L. Rev. 395 (1993). *See also* Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2524 (1994) (discussed infra note 294).

152. *See, e.g.*, Franklyn S. Haiman, "Speech Acts" and the First Amendment 54 (1993) (arguing that the Schauer position is "sleight of hand" because "the responses of human beings to words, pictures, and other symbols are mediated by their minds"), *reviewed in* 20 N.Y.U. Rev. L. & Soc. Change 667 (1993-94); Gey, supra note 17, at 1595 ("[T]he physical response cannot occur without the intercession of a series of mental processes."); Arnold H. Loewy, Obscenity, Pornography, and First Amendment Theory, 2 Wm. & Mary Bill of Rts. L.J. 471, 475 (1993) (rejecting Schauer's view because physical feelings occur "only after mental digestion of the material"); Roberts, supra note 30, at 711 ("[T]he mind must respond in a certain way to produce the physical response to obscenity.").

153. The social science data support the proposition that pornography's arousing effects depend on the imaginative processes it triggers. *See* Marvin Brown et al., Behavioral Effects of Viewing Pornography, 98 J. Soc. Psychiatry 235, 243 (1976). This proposition is at the root of the extremely sensible critique of the MacKinnon-Dworkin position on pornography, *see* infra Part II.D, contained in Susan E. Keller, Viewing and Doing: Complicating Pornography's Meaning, 81 Geo. L.J. 2195 (1993). *See generally* Michiko Kakutani, Sometimes an Artful Cigar is Just an Artful Cigar, N.Y. Times, Dec. 26, 1995, at C19 (reviewing Wendy Steiner, The Scandal of Pleasure: Art in an Age of Fundamentalism (1995)).

154. Schauer, Response, supra note 17, at 607 ("The fact that I adore escargots, while many others find them disgusting . . . is primarily a mental distinction. But that does not make the sale or ingestion of escargots an activity protected by the concept of free speech.").

155. Id.

156. Id. at 608 & n.14. In order to maintain this argument, Schauer rejects various articulations of the "underlying principles" of free speech, *e.g.*, C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978), that are not so limited.

is no more persuasive coming from Schauer than from Sunstein.

Even assuming one could make a meaningful distinction between "cognitive" and "non-cognitive" communications,[157] limiting First Amendment protections to the former would, as the Supreme Court has recognized on a number of occasions, radically impoverish public discourse.[158] The expressions at issue in *Texas v. Johnson*,[159] *Cohen v. California*,[160] *Spence v. Washington*,[161] *Tinker v. Des Moines*,[162] *Barnette v. Board of Education*,[163] and *Stromberg v. California*,[164] all drew their power from their "non-cognitive" aspects. Indeed, if the speakers in those cases had confined themselves to reasoned lectures on social conditions, they probably never would have run afoul of the government.[165] In each instance, the Court intervened to declare unambiguously that constitutional protection is not limited to those forms of communication that are "sufficiently intellectual in content" so that law professors would choose to admit them to the hallowed sanctuary of the First Amendment.[166]

---

157. *But see* Paul Chevigny, Pornography and Cognition: A Reply to Cass Sunstein, 1989 Duke L.J. 420 (persuasively attacking the distinction on logical and empirical grounds).

158. This point has been made evocatively by Kenneth L. Karst with his usual eloquence and insight in Karst, supra note 93.

159. 491 U.S. 397 (1989) (flag-burning).

160. 403 U.S. 15, 26 (1971) (jacket saying "Fuck the Draft").

161. 418 U.S. 405 (1974) (peace symbol taped to American flag).

162. 393 U.S. 503 (1969) (black armband).

163. 319 U.S. 624 (1943) (flag salute).

164. 283 U.S. 359 (1930) (Communist Party flag).

165. *Cf.* Karst, supra note 93, at 97 ("When deliberative reasoning is going on, it hardly ever needs the Constitution's protection.").

166. *See* Cohen v. California, 403 U.S. 15, 26 (1971) (rejecting dissent's view that case involved conduct, not speech; "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas. . . . [It] is a short cut from mind to mind."); *see also* Texas v. Johnson, 491 U.S. 397, 420 (1989) ("We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness did here—according its remains a respectful burial."). *See generally* Marci A. Hamilton, Art Speech, 49 Vand. L. Rev. 73, 108-11, 121-22 (1996) (arguing that First Amendment protection for art should not be premised on an attempt to identify articulable messages being conveyed; "artworks whose communicative essence is nondiscursive and nonrational" deserve protection because they enlarge citizens' perspectives).

Appropriately applying these teachings, the Ninth Circuit in a notable recent case assessing the First Amendment validity of an "English-only" amendment to the Arizona Constitution rejected the argument that the regulation was one of conduct, pointing to the "expressive choice" inherent in deciding to speak to a particular hearer using one language rather than another. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 934-36 (9th Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1316 (1996); *cf.* id. at 959 (Wallace, J., dissenting)

Under a consistent application of the Schauer view, because Wagner's music achieves its effects by "non-cognitive means," the First Amendment would permit the government to ban it in the belief that this would help to forestall a Nazi takeover of the United States.[167]

To its credit, the Supreme Court has resisted the scholars' suggestions to weaken or evade *Brandenburg*, perhaps because it understands the negative effects that adopting them would have on the entire corpus of First Amendment law. Since *Stanley*, the Court has shown no inclination to defend the suppression of pornography on the basis that its consumption leads to criminal activity.

C. Protecting Communities and Their Children

In light of *Stanley's* explicit repudiation of the then-existing rationales for the suppression of pornography (and its favorable citation[168] to Judge Frank's opinion in *Roth*[169]), as well as the generally liberal mood of the country, there seemed good reason to predict that—despite the opinion's explicit reaffirmation of *Roth*—pornography as a legal topic would soon take its place in the history books beside blasphemy.[170]

(arguing that it was untenable for the majority to consider the case one of pure speech because the plaintiff was unable to identify any message that could be expressed only in Spanish).

167. In apparent recognition of this fact, Schauer creates an exception for "the artistic and the emotional as well as the propositional." *See* Frederick Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899, 922 (1979). As Professor Gey accurately observes, the effect of this attempt to accommodate the cases is to undercut "the purity of the appeal to the intellect," and thereby render "an already questionable theory intellectually incoherent as well . . . . It is senseless to protect all emotive aspects of expression except those of a sexual nature, unless one is making judgments about the relative quality or value of different emotions." Gey, supra note 17, at 1593.

168. Stanley v. Georgia, 394 U.S. 557, 566 n.9 (1969).

169. United States v. Roth, 237 F.2d 796 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957) (discussed supra text accompanying notes 86-87).

170. *See* David E. Engdahl, Requiem for *Roth*: Obscenity Doctrine is Changing, 68 Mich. L. Rev. 185, 201 (1969) (observing that *Stanley* "cuts at the very foundation of the *Roth* rule" and treats regulations of "obscenity as subject to the same considerations that the Court has employed with respect to other classes of speech"); Al Katz, Privacy and Pornography: Stanley v. Georgia, 1969 Sup. Ct. Rev. 203, 217 (noting that the majority opinion "weakens, if it does not destroy, the theoretical premises and doctrinal content of *Roth*"; future controls on obscenity probably will be limited to cases of "distribution to minors or exposure to an unwilling (captive) audience"). Katz also argued, id. at 213, that a recognition of the right to possess pornography in one's home would be meaningless without recognition of the right to purchase it. This position was rejected by the Supreme Court under the First Amendment in United States v. Orito, 413 U.S. 139, 143-44 (1973) and United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973), two cases decided together with Miller v. California, 413 U.S. 15 (1973) (discussed infra text accompanying notes 172-75), but was accepted under the Hawaii Constitution in State v. Kam, 748 P.2d 372 (Haw. 1988). *See generally* Milton Diamond & James E. Dannemiller, Pornography and Community Standards in Hawaii: Comparisons with Other States, 18 Arch. Sex. Beh. 475, 494 (1989) (reporting a study finding Hawaiians' view, that adults should have such sexually explicit material as they desire,

However, between 1969 and 1972, Richard Nixon appointed four Justices to the Supreme Court. As a result, 1973 saw not the abolition of the concept that obscenity was "outside" the First Amendment, but rather a new attempt to justify it.[171] Although this development is frequently identified with *Miller v. California*[172] and its redefinition of "obscenity,"[173]

---

to be consistent with the nationwide view).

171. *See* Feinberg, supra note 93, at 600 ("By that time the membership of the Court had undergone a new change and a 'conservative' majority had emerged under the leadership of Chief Justice Warren Burger. There had been a great outcry in the country against pornography and excessively 'permissive' Supreme Court decisions. Chief Justice Burger and his conservative colleagues clearly wished to tighten legal controls on obscenity to help 'stem the tide.' . . . The result was a pair of 5-4 decisions in which the opinion of the Court [was] delivered by Chief Justice B[u]rger."); Warren Weaver, Jr., Reversing Field on Obscenity, N.Y. Times, June 24, 1973, § 4, at 3 ("The decision seemed one of the clearer examples in Supreme Court history where the Justices, while dividing 5-4, had followed the election returns. The ruling was the product of a Nixonized Court, and it was a triumph for the President in his campaign against 'permissiveness.'"); *see also* Kevin T. McGuire & Gregory A. Caldeira, Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court, 87 Am. Pol. Sci. Rev. 717 (1993) (presenting a statistical analysis of the change in attitude that the Burger Court brought to obscenity cases). *But cf.* Timothy M. Hagle, But Do They Have to See it to Know it? The Supreme Court's Obscenity and Pornography Decisions, 44 W. Pol. Q. 1039 (1991) (presenting a statistical model suggesting no such change).

172. 413 U.S. 15 (1973).

173. The *Miller* definition has three prongs:

> (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.

Miller, 413 U.S. at 24 (citations omitted).

This reformulation, which did away with the "utterly without redeeming social value" test that the Court attributed to Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 419 (1966), *see Miller*, 413 U.S. at 24, and explicitly imposed local community standards on the First Amendment in prong (a), *see* Weaver, supra note 171, was widely criticized at the time. *See, e.g.*, Douglas H. Wallace, Obscenity and Contemporary Community Standards: A Survey, 29 J. Soc. Iss. 53, 67 (1973) (reporting an empirical study rebutting the concept that, even within a locality, there is some single "contemporary community standard"); Freedom and Obscenity, N.Y. Times, June 25, 1973, at A32 (editorializing that the decision gives "license to local censors," and in the long run "will reduce all sex related literary, artistic and entertainment production to the lowest common denominator of toleration. Police-court morality will have a heyday."); *see also* Marc B. Glassman, Community Standards of Patent Offensiveness: Public Opinion Data and Obscenity Law, 1978 Pub. Opinion Q. 161 (acceptability of materials varies by community size).

The criticisms are no less apt today. *See* Joseph T. Clark, The "Community Standard" in the Trial of Obscenity Cases—A Mandate for Empirical Evidence in Search of the Truth, 20 Ohio N. U. L. Rev. 13, 17-26 (1993) (trial judge canvasses practical difficulties with community standard concept); Pamela A. Huelster, Note, Cybersex and Community Standards, 75 B.U. L. Rev. 865 (1995) (describing how the growth of computer services makes the *Miller* community standards test even more problematic than it originally was); Frederick B. Lim, Note, Obscenity and Cyberspace: Community Standards in an On-line World, 20 Colum.-VLA J.L. & Arts 291, 322 (1996) (arguing that a national obscenity standard should apply in cyberspace); *see also* Amy M. Adler, Note, Post-Modern Art and the Death of Obscenity Law, 99 Yale L.J.

the factual context of that case was too unusual to provide a broad basis for the suppression of pornography. The Court viewed *Miller* as dealing with the "thrusting" of obscene material upon unwilling viewers, householders who had opened unsolicited mail that turned out to be sexually explicit.[174] Whatever its First Amendment merits,[175] a legal rule designed simply to eliminate that evil would apply to only a handful of cases.

1. Communities

Rather, the truly important case was *Miller's* companion, *Paris Adult Theatre I v. Slaton*,[176] which concerned willing adult patrons attending a discreet downtown theater to view sexually explicit movies. The Court said that the government could prohibit the exhibition to promote the interest "of the public in the quality of life and the total community environment, the tone of commerce in the great city centers."[177]

1359 (1990) (arguing that *Miller* provides an unworkable standard for evaluating modern art). And if obscenity were brought "inside" the First Amendment, the Court would need to grapple seriously with these issues.

After all, it seems hardly probable that the Court would have ruled in New York Times v. Sullivan, 376 U.S. 254 (1964), that, while the New York Times was free to criticize the plaintiff in an article circulated in New York, it was subject to liability for doing so in Birmingham, which had different community standards concerning personal reputation. The Court would not have ruled that way because the entire point of the decision was that the First Amendment prevented the mobilized local majority in Birmingham from imposing its standards on the local minority; otherwise, the local majority would be able to entrench itself by drowning out competing views. *See* infra text accompanying note 280.

Thus, it is a telling commentary on how unsatisfactory is the current state of the law that defenders of freedom of expression, such as those who rallied in 1990 to protest the obscenity prosecution in Cincinnati of the Contemporary Arts Center and its director for presenting a show of photographs by Robert Mapplethorpe, *see* City of Cincinnati v. Contemporary Arts Ctr., 566 N.E.2d 214 (Hamilton County Mun. Ct. 1990); Justice in Cincinnati, N.Y. Times, Oct. 6, 1990, at A22, and again in the same city in 1994 in defense of Pier Paolo Pasolini's film "Salo, or the 120 Days of Sodom," *see* Peter M. Nichols, Judge Refuses to Void Ohio Obscenity Charges, N.Y. Times, Oct. 5, 1994, at C13, today deploy *Miller* as their strongest legal weapon. *See* Memorandum Amicus Curiae of the Film Society of Lincoln Center et al. in Support of Defendants' Motion to Dismiss at 4-5, City of Cincinnati v. The Pink Pyramid, No. 94 CRB021245 (Hamilton County Mun. Ct. Sept. 1, 1994).

174. *See Miller*, 413 U.S. at 18 ("This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.").

175. *Compare* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (holding unconstitutional a statute forbidding unsolicited mailing of contraceptive advertising) *with* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (upholding constitutionality of statute enabling householder to secure order against further mailings of erotic advertising).

176. 413 U.S. 49 (1973).

177. Id. at 58. Justice Brennan, having been an active participant since his decision in *Roth* in attempting to formulate a workable obscenity doctrine, finally rebelled, stating in dissent: "[T]he State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill-defined." Id. at 109.

As Professor Tribe has noted, Tribe, supra note 25, at 919 n.96, among the negative

If ordinary First Amendment principles were applicable, this rationale would certainly not suffice. One could hardly ban the distribution of Communist or Moslem literature on the grounds that it was bad for the tone of the community.[178] Speech offensive to the aesthetic or moral sense of the majority on the basis of content cannot be banned for that reason.[179] Otherwise, the government could close every modern art museum in town because of the majority's belief that the displays subverted the total community environment by promoting decadent standards of beauty.

Perhaps under the impact of this consideration, or perhaps in an effort to justify regulation of more material than would fall under the *Miller* definition, the Court has increasingly relied on the rationalization that in suppressing sexually oriented expression in the interests of community tone, the state is not legislating against the speech as such, but rather against its "secondary effects."[180]

---

effects of the ruling was the perpetuation of the class bias so frequently observed in obscenity law. *See* infra notes 192, 254. People who are able to afford facilities for the viewing of pornography at home are, under *Stanley*, protected by the Constitution. People who must resort to downtown theaters are not.

178. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (invalidating ordinance that banned newsracks disseminating advertising publications while permitting ones disseminating newspapers); *see also* Loper v. New York City Police Dep't, 999 F.2d 699, 701 (2d Cir. 1993) (invalidating on First Amendment grounds statutory ban on begging on streets; rejecting City's defense that "what starts out as peaceful begging inevitably leads to the ruination of a neighborhood"). *See generally* Schauer, Response, supra note 17, at 617.

Moreover, as Professor Tribe points out, there is the awkward fact that the Court's jurisprudence, *see* supra note 170, sanctions government interception of "unmarked brown envelopes speeding through the mails to Mr. Stanley's protected home," which can hardly be justified as a protection of the tone of the community. *See* Tribe, supra note 25, at 917.

179. *See* Metromedia v. San Diego, 453 U.S. 490 (1981); Cohen v. California, 403 U.S. 15 (1971); Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 483-84 (1985)

> ([T]he natural, and indeed often rational, social impulse to enforce canons of good taste must not be permitted to serve as a justification for speech regulation. Particularly when a political community feels threatened, persons who challenge prevailing standards of taste come to be viewed as alien, unsocialized, ill-motivated, in some ways even subhuman. The legitimation of regulation on grounds of taste would reinforce those attitudes and thereby support one of the strongest causes of the intolerance of unorthodox ideas.)

(footnotes omitted); *see also* Cynthia R. Mabry, Brother Can You Spare Some Change?—And Your Privacy Too?: Avoiding a Fatal Collision Between Public Interests and Beggars' First Amendment Rights, 28 U.S.F. L. Rev. 309, 340 (1994).

180. Of course, to the extent that such "secondary effects" consist of majoritarian disapproval of the contents of the speech, they are not a valid basis for regulation. The government could not close down every modern art museum in town because—although it acknowledged that the exhibits were of undoubted artistic merit—the action was needed to forestall the disruption to the community that would be caused by demonstrations of citizens who benightedly opposed the works. *See* infra note 314 and accompanying text. The courts currently accept this rule in theory, but do not enforce it in practice. *See* infra note 184.

Thus, for example, in *Renton v. Playtime Theaters*[181] the Court upheld a zoning regulation specifically directed against outlets purveying sexually explicit material[182] (some of which was not "obscene")[183] as a method of controlling such evils as prostitution. Choosing to believe that the motivation for the ordinance was content neutral (even though the enactment was not),[184] the Court did not require the state to show any specific likelihood of the feared ills occurring,[185] to first exhaust the

---

181. 475 U.S. 41 (1986).

182. Such plans have become increasingly popular with local governments, *see* Steven L. Myers, Giuliani Proposes Toughening Laws on X-Rated Shops, N.Y. Times, Sept. 11, 1994, at A1 (reporting New York City proposal for sweeping new zoning regulations "that would restrict sex-oriented video stores, X-rated theaters and topless bars to a few relatively isolated nonresidential neighborhoods"; cities adopting similar plans in recent years include Detroit, Boston, St. Louis, Philadelphia, and Los Angeles). For a full discussion of the New York regulations that were eventually adopted, see Rachel Simon, Note, New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis, 23 Fordham Urb. L.J. 187 (1995) (concluding that the plan is unconstitutional); *see also* id. at 188 n.11 (same conclusion reached by the Association of the Bar of the City of New York, whose written analysis this author presented orally to the City Council's Land Use Committee on October 20, 1995). The New York Civil Liberties Union and numerous affected business owners filed suits challenging the constitutionality of the plan in state court at the end of February 1996. *See* Thomas J. Lueck, Sex Shops and Patrons Join in Suits Challenging Zoning, N.Y. Times, Feb. 28, 1996, at B2; *see also* Guy Trebay, Live Sex Acts: Will Porn Survive Giuliani's Blue Nose Gang, Village Voice, March 12, 1996, at 12.

183. Schauer argues against this extension in Frederick Schauer, Free Speech: A Philosophical Enquiry 187-88 (1982). His position is sound. "Obscene" expression at least is "outside" the First Amendment. But, as Justice Brennan cogently warned in his concurrence in Boos v. Barry, 485 U.S. 312, 334-38 (1988), as long as *Renton* remains on the books, there will exist the danger of its expansion to other categories of speech that, although "within" the First Amendment, the Justices consider of low value, including unpopular political speech. After all, governments in this country rarely announce that they are seeking to curtail particular speech because they are at odds with its content. They usually proffer the need to forestall some unprotected and undoubtedly negative consequence that they foresee from the speech, such as armed revolution. *See* John H. Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1496 (1975). The tests contained in established First Amendment doctrine, *see* supra text accompanying notes 8-12, are designed for the very purpose of probing such justifications.

184. The lower courts, faithful to the spirit of *Renton*, are infinitely credulous in believing the protestations of local authorities that their actions are motivated by a concern with the "secondary effects" of erotically-oriented establishments, rather than by hostility to the materials within. *See, e.g.*, Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858, 863-865 (8th Cir.), *cert. denied*, 115 S. Ct. 186 (1994) (holding ordinance valid although district court found after bench trial that City was motivated by content rather than by secondary effects; City Attorney wrote memo to staff saying "I want to shut these places down! Somehow," and then testified at trial that he was in no way attempting to put establishments out of business, since "We knew the law didn't allow that.").

185. The report of the New York City Department of City Planning released in support of the proposal described supra note 182 frankly admits that it is unable to make such a demonstration. *See* Myers, supra note 182, at 39; *see also* Nick Ravo, Zoning Out Sex-Oriented Businesses, N.Y. Times, Mar. 6, 1994, at R1, R16 (reporting that the New York City official in charge of efforts to limit adult establishments says they are harder to shut down now because "in the 1970's and 1980's, the businesses were often theaters and were usually closed using

possibilities of direct regulation of the hypothesized problems,[186] or—most importantly, in light of the explicitly content-based nature of the classification[187]—even to link the putative negative effects on the neighborhood to the erotic nature of the materials being distributed.[188] In short, having disingenuously declared a content-based statute to be content-neutral, the Court then tested it by standards far more deferential than those that would have been applicable if the regulation had in fact been content-neutral.[189]

The result of this approach, apart from the deliberate suppression of a good deal of non-obscene speech that the local communities consider of low value,[190] has been a massive shift in power to the judiciary. It seems that—although the standards cannot be known with any certainty in advance,[191] the negative "secondary effects" of erotic speech do not result

---

nuisance laws, which meant that the city found evidence that crimes like drug use or prostitution were occurring on the premises. Rarely, however, do such activities occur in a 1990's adult video store, which [is] often as clean, safe and well-lit as any chain store in a suburban mall.").

186. *But cf.* Schneider v. State, 308 U.S. 147, 162 (1939) (holding that the state could not justify a ban on handbilling by asserting an interest in controlling litter; instead, its remedy was to penalize litterers).

187. *See* supra note 147 and accompanying text; Freedman, supra note 46 (arguing in opposition to an earlier similar New York plan that zoning bookstores on the basis of the contents of their wares is indistinguishable from taxing newspapers on the basis of the contents of their columns).

188. *See* Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 59 (1994). After reviewing the various issues noted in this paragraph of text, the en banc Oregon Supreme Court, in a persuasive opinion by Justice Hans Linde, rejected *Renton* as a reading of the Oregon Constitution. *See* City of Portland v. Tidyman, 759 P.2d 242 (Or. 1988).

189. *See* supra note 25 and text accompanying notes 148-50; *see also* Shiffrin, supra note 5, at 53 ("*Renton*'s failure to recognize the ordinance as content-based is quite remarkable."); Keith Werhan, The Liberalization of Freedom of Speech on a Conservative Court, 80 Iowa L. Rev. 51, 68 (1994) (arguing that the treatment of *Renton* ordinance as content-neutral "is hard to justify" and risks transforming test "for content neutrality into a test that always will be satisfied").

190. This effect has been well described in Gianni P. Servodidio, Comment, The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment, 67 Tul. L. Rev. 1231 (1993). *See also* Anne Salzman, Note, On the Offensive: Protecting Visual Art With Sexual Content Under the First Amendment and the "Less Valuable Speech" Label, 55 U. Pitt. L. Rev. 1215 (1994).

One of the few published defenses of *Renton* is based on the theory that—notwithstanding the wishes of the communities involved—such suppression will not occur in fact. After perceptively demolishing the *Renton* Court's rationale, one commentator proceeds to defend its result on the basis that "restricting the sale of merchandise to certain areas of the city is a particularly ineffective method of censorship." Kimberly K. Smith, Note, Zoning Adult Entertainment: A Reassessment of *Renton*, 79 Cal. L. Rev. 119, 144 (1991). She concedes, however, that if this is not so, and the courts fail to guard against censorship, then the First Amendment will be violated. Id. at 159. As already indicated, supra note 184, the courts have indeed so failed.

191. *See, e.g.*, ILQ Invs., Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 578 (1994). On the authority of *Renton*, the court reversed a preliminary injunction against an ordinance which differentially zoned establishments "a substantial or significant

from those sorts of entertainment events that the Justices could imagine themselves attending openly.[192]

Thus does the Court inform We the People what we may see without danger of mental corruption. What we wish to see is irrelevant.[193] This sort of judicial paternalism is unique to the area of erotic speech,[194] and

---

proportion" of whose merchandise "is characterized by an emphasis on" sexually explicit material. Id. The Court rejected a vagueness attack because "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." Id. at 1419 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976) (plurality opinion)).

192. *See* Jenkins v. Georgia, 418 U.S. 153, 158 n.5 (1974) (holding "Carnal Knowledge" not obscene; film "appeared on many 'Ten Best' lists for 1971," featured Art Garfunkel, Jack Nicholson, Candice Bergen, and Ann Margret (who received an Academy Award nomination for her performance)); *see also* Posner, supra note 41, at 332-35 (arguing against any legal control of literary classics); infra note 254 and accompanying text. *See generally* Nicola Beisel, Morals Versus Art: Censorship, the Politics of Interpretation, and the Victorian Nude, 58 Am. Soc. Rev. 145, 145-46, 150-53 (1993) (describing uproar created by Anthony Comstock when he arrested the owner of an upper class art gallery on Fifth Avenue for selling material that had previously led, without controversy, to the prosecution of a store clerk from a poor neighborhood); The Invention of Pornography, supra note 50; Lionel R.C. Haward, Pornography and Forensic Psychology, *in* The Influence of Pornography on Behavior 151, 152-53 (Maurice Yaffe & Edward C. Nelson eds., 1982) (stating that in English crackdowns on pornography, "[o]ne thing was clear: what was good enough for the upper classes was too good for the lower orders. The elite could remain uncorrupted, but the working classes were vulnerable to the depraving effects which only an unhealthy mind could possibly imagine."); Wendy M. Rogovin, The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and are Heard, 42 Cath. U. L. Rev. 51, 61 n.37 (1992) (noting the isolation of members of the Supreme Court who pass on obscenity cases from the popular culture of their day).

193. *Cf.* Collins & Skover, supra note 17, at 1382-83 (observing that 410 million pornographic videos were rented in 1991, approximately 40% by women); Despite U.S. Campaign, A Boom in Pornography, N.Y. Times, July 4, 1993, at A20; Michael deCourcy Hinds, Starring in Tonight's Erotic Video: The Couple Down the Street, N.Y. Times, Mar. 22, 1991, at A14 (noting that perhaps 30% of pornographic videotape sales, amounting to hundreds of thousands of cassettes annually, are of amateur videos, made by non-professionals wishing to share their experiences); Michel Marriott, Virtual Porn: Ultimate Tease, N.Y. Times, Oct. 4, 1995, at C1, C4 (reporting that producers of adult CD-ROMS, which are being widely sold through a variety of channels, made about $260 million last year); John J. O'Connor, The Home Screen is Getting Sexier, N.Y. Times, Nov. 3, 1994, at C30; Nick Ravo, A Fact of Life: Sex-Video Rentals, N.Y. Times, May 16, 1990, at C1 ("At a time when battles are being fought in communities around the country to limit access to sexually explicit magazines, films and rock lyrics, millions of Americans are routinely bringing naked strangers into their homes to perform sex acts on the small screen.").

194. *See* Feinberg, supra note 93, at 604. The Court has abandoned a similar quest in the libel field. In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), three Justices took the view that the First Amendment protections for libelous utterances about public officials recognized in New York Times v. Sullivan, 376 U.S. 254 (1964), should be extended to all matters "of public or general concern." *Rosenbloom*, 403 U.S. at 51. Justice Marshall (joined by Justice Stewart) objected that in applying such a standard the Court would have to adopt either (a) a descriptive view that what was published was by definition newsworthy, which would make the test meaningless, or (b) a normative view in which the Justices told the public what topics were of public concern, which would make the test censorial. Id. at 78-81

antithetical to the appropriate judicial role in the protection of free speech: creating First Amendment doctrine that both resists majoritarian pressures[195] and works from the bottom up rather than the top down.[196]

(Marshall, J., dissenting). Justice Marshall's views prevailed. *See* Gertz v. Robert Welch, 418 U.S. 323, 334 (1974); Shiffrin, supra note 11, at 924-25. There is an extended discussion in Post, supra note 10, at 667-79. *See also* Brian C. Murchison et al., *Sullivan's* Paradox: The Emergence of Judicial Standards of Journalism, 73 N.C. L. Rev. 7 (1994) (arguing that similar problems are emerging in the application of the actual malice test under New York Times v. Sullivan, 376 U.S. 254 (1964)).

195. *See* Texas v. Johnson, 491 U.S. 397, 414-15 (1989). Politically, this is far more likely to occur if, as in *Johnson*, the doctrinal position is such that the Court is in the position of opining, "Whether or not we like this speech, the Constitution requires us to protect it," rather than, "Our assessment of the social value of the speech leads us to the conclusion that it should be protected."

196. The importance of this second point, which is the theme of Richard D. Parker, "Here, the People Rule": A Constitutional Populist Manifesto, 27 Val. U. L. Rev. 531, 573-76 (1993) (later expanded into Richard D. Parker, "Here, The People Rule": A Constitutional Populist Manifesto (1994), *reviewed in* 108 Harv. L. Rev. 1196 (1995)); *see also* William N. Eskridge, Jr., Public Law From the Bottom Up, 97 W. Va. L. Rev. 141 (1994), has been starkly illustrated by the Court's sorry performance over the years with respect to the public forum doctrine. *See* Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1716-17 (1987) (observing that the Court's "myriad formal rules" are "virtually impermeable to common sense"; doctrine has become "serious obstacle" to sensitive First Amendment analysis, "received nearly universal condemnation from commentators, and is in such a state of disrepair as to require a fundamental reappraisal"); John T. Haggerty, Note, Begging and the Public Forum Doctrine in the First Amendment, 34 B.C. L. Rev. 1121, 1127-30 (1993) (summarizing cases and commentary).

Rather than asking the functional question of "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time," Grayned v. Rockford, 408 U.S. 104, 116 (1972), *but see* Lillian R. Bevier, Rehabilitating Public Forum Doctrine: In Defense of Categories, 1992 Sup. Ct. Rev. 79, 118 (criticizing this test), the Court—perversely committed to a property theory of where and how free speech rights can be exercised—veers between:

(1) taking the bottom-up approach, and asking whether the people by long usage have established "a kind of First Amendment easement," Harry Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 13, over the space in question, *see, e.g.*, United States v. Grace, 461 U.S. 171, 179-80 (1983); Jamison v. Texas, 318 U.S. 413 (1943); Hague v. CIO, 307 U.S. 496 (1939); and

(2) approaching the matter from the top down and asking whether the government has chosen to dedicate the space to First Amendment purposes, *e.g.*, Greer v. Spock, 424 U.S. 828 (1976); Adderley v. Florida, 385 U.S. 39 (1966); Davis v. Massachusetts, 167 U.S. 43 (1897). *See generally* Geoffrey R. Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 237-38.

If the Court must continue to use a property-based analysis—and there are some grounds for hoping that the artificial intricacies of that approach are beginning to become clear to the Justices, *see* United States v. Kokinda, 497 U.S. 720, 726-27 (1990); Brett W. Berg, Diminishing the Freedom to Speak on Public Property: International Society for Krishna Consciousness, Inc. v. Lee, 26 Creighton L. Rev. 1265, 1265-66 (1993); C. Thomas Dienes, The Trashing of the Public Forum: Problems in First Amendment Analysis, 55 Geo. Wash. L. Rev. 109, 110 (1986); Stevens, supra note 30, at 1301-03—the appropriate question is the first one.

The reason was pithily stated by James Madison: "If we advert to the nature of

2. Children

Nonetheless, when confronted in the 1982 case of *New York v. Ferber*[197] with a First Amendment challenge to a legislative prohibition on "any performance which includes sexual conduct by a child less than sixteen years of age"[198]—a definition that was explicitly not limited to obscene performances,[199] and that could potentially cover protected expression "ranging from medical textbooks to pictorials in the National Geographic"[200] to a "serious but occasionally explicit version of *Romeo and Juliet*"[201]—the Court responded by "classifying child pornography as a category of material outside the protection of the First Amendment."[202]

Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress 934 (1794), *quoted in* New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964); *see* Stephen K. Schutte, International Society for Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to a Government Intent Standard, 23 Golden Gate U. L. Rev. 563, 597 (1993) (criticizing the second approach listed above for "erod[ing] one of the bulwarks against censorial action by government officials" and "depend[ing] on the intent of the very officials it was designed to constrain"); Lee Rudy, Note, A Procedural Approach to Limited Public Forum Cases, 22 Fordham Urb. L.J. 1255, 1284-87 (1995) (arguing that the second approach is one of dizzying circularity, which enables the government to silence selectively precisely those who most need to use public property for speech purposes); *see also* Robert J. Krotoszynski, Jr., Celebrating Selma: The Importance of Context in Public Forum Analysis, 104 Yale L.J. 1411, 1412 (1995) (suggesting that the extent of the right to use a public forum should vary with the magnitude of the wrong being protested).

197. 458 U.S. 747 (1982).

198. N.Y. Penal Law § 263.15 (McKinney 1980).

199. The defendant was also charged under N.Y. Penal Law § 263.13 (McKinney 1980), which did require obscenity, but was acquitted. *See Ferber*, 458 U.S. at 752. On oral argument in the Supreme Court, his counsel conceded that the materials at issue, films "devoted almost exclusively to depicting young boys masturbating," could have been found "obscene." Id. at 777 n.1 (Stevens, J., concurring).

200. Id. at 773 (summarizing the concerns of the New York Court of Appeals, which, in invalidating the statute, People v. Ferber, 422 N.E.2d 523, 526 (N.Y. 1981), had noted that it covered the use of children as actors to simulate sexual conduct and journalistic photographs of New Guinea fertility rites).

201. This example is given by Schauer, Codifying, supra note 18, at 292, 298 n.70. It illustrates the fact that, since the Court held that the obscenity test of Miller v. California, 413 U.S. 15 (1973), *see* supra note 173, need not be met, "the material at issue need not be considered as a whole." *Ferber*, 458 U.S. at 764; *see* infra note 215. In addition, the majority did not rule on a point that divided the concurrences: whether the First Amendment requires an exemption for works of serious literary, artistic, political, or scientific value. *Compare Ferber*, 458 U.S. at 774 (O'Connor, J., concurring) ("The compelling interests identified in today's opinion . . . suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions," since the harm to the minor is the same in any case) *with* id. at 776 (Brennan, J., joined by Marshall, J., concurring) (concluding that the application of the statute "to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value would violate the First Amendment") *and* id. at 778 (Stevens, J., concurring) (concluding that it was "at least conceivable" that a serious work incorporating scenes from films at issue would be entitled to protection).

202. *Ferber*, 458 U.S. at 763. The Court subsequently adhered to all of its major *Ferber*

The special irony of *Ferber*'s resort to the ipse dixit technique of declaring some forms of expression "outside" the First Amendment is that it is precisely in the context of child pornography that the application of normal First Amendment tests would be most likely to uphold legislative restrictions.[203]

Indeed, the *Ferber* opinion itself travelled part of the way down that road, stating that:

(1) The state's interest in this case was not in preventing the public from viewing the material, but rather in protecting children from being used in its production, and "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[204] This is an observation as unexceptionable as it is doctrinally relevant under the usual tests for evaluating restrictions on material "within" the First Amendment.[205]

(2) A ban on the distribution of materials depicting sexual activity by juveniles furthers this interest because (a) "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," and (b) "the 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."[206]

Observation (a) is doubtlessly correct. Under normal principles of narrow tailoring,[207] it would certainly justify a ban on the circulation of materials that had been produced under conditions constituting abuse of the child.[208] But what about, for example, a film taken by a doctor of a

---

holdings. Osborne v. Ohio, 495 U.S. 103 (1990) (holding that punishing at-home possession of child pornography did not violate the Constitution; distinguishing Stanley v. Georgia, 394 U.S. 557 (1969), as involving adult pornography).

203. In fact, Schauer's argument in defense of *Ferber* is to re-cast it as having essentially done this. *See* Schauer, Codifying, supra note 18, at 305-06; *cf.* Abraham Chayes, The Supreme Court, 1981 Term, 96 Harv. L. Rev. 4, 145 (1982) ("Justice White identified a new area of unprotected speech without articulating a coherent constitutional theory to explain such a result; moreover, he did so with a nonchalance that portends further proliferation of unprotected speech categories.").

204. *Ferber*, 458 U.S. at 757.

205. *See* supra note 25.

206. *Ferber*, 458 U.S. at 759.

207. *See* supra note 25.

208. It is clear that the use of children in the making of "hard-core" pornography is child abuse. *See* Ann W. Burgess et al., Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography, 141 Am. J. Psychiatry 656 (1984) (describing effects).

The same may not be true, however, of a child's participation in a simulated sex scene in a stage production of Romeo and Juliet, and in a number of cases the authorities have been accused of over-zealousness in their pursuit of amateur family photographers or professional mainstream artists. *See* Doreen Carvajal, Pornography Meets Paranoia, N.Y. Times, Feb. 19, 1995, at E4 (recounting examples); *see also* Father to Be Tried Over Nude Photos of Daughter, N.Y. Times, Jan. 13, 1995, at B6 (reporting that the court refuses to dismiss charges of endangering welfare of minor against Ejlat Feuer, who spent ten minutes taking nude photos of 6-year-old daughter as assignment for photography class; child "had been found

compulsively masturbating juvenile in a mental hospital which was presented to a meeting of medical professionals?[209]

Observation (b) is a statement of empirical fact subject to proof. Ordinary First Amendment standards would require that the state prove its truth.[210] Although the matter is not free from doubt,[211] a state might well be able to show that direct prohibition of the abusive conduct had been ineffective, leaving the prohibition on circulation as the least restrictive means of accomplishing the valid state objective. But the *Ferber* Court did not require the government to make this demonstration.

Instead, it ran out of patience, and wrote two successive paragraphs with no indication of the logical link between them:

(3) The "value" of the speech at issue "is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important or necessary part of a literary performance or scientific or educational work."[212]

Of course, if the statute under review had required the state to prove that there was no literary, scientific, educational, or other social value to the portrayal, the Court would not have had to engage in such sweeping editorial speculations,[213] and the First Amendment might have been more nearly satisfied.[214] But the statute did not. Thus, in order to uphold it,

---

unharmed after examinations by her pediatrician, a psychiatrist, her school and the State Division of Youth and Family Services," but the judge ruled that many of the photos are pornography, not art); Doreen Carvajal, Family Photos or Pornography? A Father's Bitter Legal Odyssey, N.Y. Times, Jan. 30, 1995, at A1 (following public outcry over case, prosecutor agrees "to enroll Mr. Feuer in a special pretrial intervention program that could clear his record of the arrest on child endangerment charges," but no agreement will "erase the family pediatrician's evaluation that the youngest daughter has suffered 'not from the pictures, but from the arrest of her father and questioning by the police.'").

209. *Cf. Ferber*, 458 U.S. at 778 (Stevens, J., concurring) ("[T]he exhibition of these films before a legislative committee studying a proposed amendment of a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime.").

210. *See* supra note 186 and accompanying text.

211. *See Ferber*, 458 U.S. at 779 n.1 (Stevens, J., concurring) ("The Court's analysis is directed entirely at the permissibility of the statute's coverage of nonobscene material. Its empirical evidence, however, is drawn substantially from congressional Committee Reports that ultimately reached the conclusion that a prohibition against obscene child pornography—coupled with sufficiently stiff sanctions—is an adequate response to this social problem.").

212. Id. at 762-63.

213. *Cf.* Cohen v. California, 413 U.S. 15, 25 (1971) (rejecting argument that petitioner might have communicated the same message in another fashion, "because governmental officials cannot make principled distinctions in this area"); *see also* infra note 379.

214. *Cf.* Schauer, Codifying, supra note 18, at 298 (arguing that the Court should establish a First Amendment-derived affirmative defense under which "a disseminator could avoid conviction by proving by clear and convincing evidence that the material, taken as a whole, is predominantly a serious literary, artistic, political, scientific, medical, or educational work and that the depictions of children engaged in sexual conduct are reasonably necessary to the

the Court was required to relieve the state from any burden whatsoever, by declaring:

(4) "[N]o process of case-by-case adjudication is required," because the entire class of "child pornography"[215] is "without the protection of the First Amendment."[216]

This conclusion is no more supportable in the "child pornography" context than in the others previously discussed. As indicated, normal First Amendment doctrine would in all likelihood have permitted the government to get virtually as much regulation as in fact it did. What is at stake, therefore, is not the protection of children. It is, rather, the role of the Court and the First Amendment in checking the popular branches.

The *Ferber* Court took great pains to note the universal condemnation

---

work as a whole").

This proposal is of some interest as an indication that even so staunch an advocate of regulation as Schauer recognizes the impropriety of the blanket proscription announced in *Ferber*. However, it would be insufficient in at least two respects if pornography were "within" the First Amendment.

First, in accordance with well-established First Amendment law, *e.g.*, Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767 (1986); Freedman v. Maryland, 380 U.S. 51 (1965), and principle, *see* supra note 3 and accompanying text, it is the state that must carry the burden of proof. *Cf.* Cooper v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90 (1981) (not questioning this proposition in obscenity proceeding, but holding that the state need not meet burden "beyond a reasonable doubt").

Second, to vest in courts the determination of whether or not the depictions "are reasonably necessary to the work as a whole" is to "get the courts too far into second-guessing literary, artistic, and similar judgments." Schauer, Codifying, supra note 18, at 298 n.75; *see* supra notes 191-94 and accompanying text; *cf.* Clyde H. Farnsworth, Canadian Test Case: "Pornography" vs. Imagination, N.Y. Times, Jan. 7, 1994, at A10 (reporting case of Eli Langer, artist arrested in Toronto for displaying images of child sexuality that were painted from imagination; statute prohibits depictions of sexual acts by those under 18 unless defendant demonstrates artistic merit); Richard Huntington, Conjuring Up the Fears of Childhood, Buffalo News, Sept. 28, 1995, at 4B (reviewing show of Langer's drawings; "Langer is the Canadian artist who had his work confiscated by Toronto authorities for alleged obscenity. He subsequently won the case, and justly so: These are powerful statements of the horrors and guilty pleasures of childhood. Though they depict forbidden sex acts, they never titillate or exploit. They have a harrowing honesty, and they give voice to a segment of the population that seldom is allowed to speak."); infra note 378 (arguing that statute proscribing computer animations depicting child sex is unconstitutional).

215. The Court provided the following guidance on the meaning of this term:

> [T]he state offense [must] be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described. The test for child pornography is separate from the obscenity standard of Miller, but may be compared to it for the purpose of clarity. The Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct [be portrayed] in a patently offensive manner; and the material at issue need not be considered as a whole.

Ferber, 458 U.S. at 764; *see* Schauer, Codifying, supra note 18, at 295 (to say that *Ferber* "adjusted" the *Miller* test "is like saying that a butterfly is an adjusted camel"). *See generally* supra note 173 (setting forth standard of Miller v. California, 413 U.S. 15 (1973)).

216. *Ferber*, 458 U.S. at 764.

by the states of sexual displays featuring children.[217] In any substantive area, such strong popular feeling will, if sustained, eventually influence the course of constitutional adjudication. But in the First Amendment field, the meanwhile matters.[218] The current unpopularity of the material at issue supports greater scrutiny of government regulation, not less. It is a reason to do the hard work of "case-by-case adjudication," not abdicate it. Today, any controversy featuring the words "pornography" and "children" is likely to be politically explosive, and thus one where the courts should take a particularly hard look at the justification for majoritarian regulation.

Recent history illustrates the point. In late 1993, the Supreme Court granted certiorari to consider whether a federal statute that criminalizes the receipt or possession of visual depictions of sexually explicit conduct by minors, defined to include a "lascivious exhibition of the genitals or pubic area,"[219] includes (as the Third Circuit held) depictions in which those areas are covered by clothing.[220] Assessing his apparently weak position in defending a Court of Appeals ruling that a depiction becomes criminal when "a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles,"[221] Solicitor General Drew S. Days III sensibly decided to repudiate that constitutionally dubious interpretation of the statute. He argued instead that, in order to fall within the statutory proscription, the depictions had to be ones in which the pubic areas were at least visible (as, for example, through transparent or clinging clothing), and which portrayed the child "lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)."[222] The Supreme Court responded by vacating the conviction and remanding the case to the Court of Appeals for reconsideration.[223]

The result was a torrent of political outrage, as fundamentalist groups and numerous members of Congress charged that this sequence of events represented untoward leniency on the part of the Clinton administration towards child pornography.[224] In response, President Clinton instructed Attorney General Janet Reno to submit legislation ensuring that "federal law reaches all forms of child pornography."[225] She complied, and the

---

217. Id. at 749-51.

218. *See* infra text accompanying notes 393-97.

219. 18 U.S.C. § 2256(2)(E) (1994).

220. *See* United States v. Knox, 977 F.2d 815 (3d Cir.), *cert. granted*, 508 U.S. 959 (1993).

221. Id. at 822.

222. Brief for the United States at 9, Knox v. United States, 508 U.S. 959 (No. 92-1183) (1993).

223. Knox v. United States, 510 U.S. 939 (1993); *see* Linda Greenhouse, Child Smut Conviction Vacated After U.S. Shift, N.Y. Times, Nov. 2, 1993, at B7.

224. On remand, 104 members of Congress filed an amicus brief arguing in favor of the government's former interpretation of the statute. *See* 104 in Congress Petition to Argue Child Pornography Case in Court, N.Y. Times, Dec. 28, 1993, at A8; *see also* Patrick A. Trueman, Clinton Justice Department Errs in Diluting Child Pornography Law, N.Y. Times, Jan. 8, 1994, at A22 (letter to the editor).

225. Letter from Bill Clinton to Janet Reno, Nov. 10, 1993, *reprinted in* 139 Cong. Rec.

resulting legislation unsurprisingly triggered a new round of controversy replicating the original one.[226]

Any legislation that emerges from a process like this surely would, under ordinary First Amendment thinking, be the legitimate subject of close judicial scrutiny.[227] For the courts to do less—to declare the speech immune from normal First Amendment analysis precisely because it is unpopular with the political majority—is a dereliction of duty, even if, as will frequently be the case, the analysis concludes that the legislation is permissible.

S15838 (1993). *See* Anthony Lewis, Law and Politics, N.Y. Times, Nov. 29, 1993, at A17; Stuart Taylor, Jr., As Politics Takes Over, Justice Suffers in Kidporn Case, Conn. L. Trib., Dec. 6, 1993, at 19.

226. *See* Julie Cohen, A Legal About-Face Into a Minefield; Clinton Approach to Child Porn Pleases No One, Legal Times, Nov. 23, 1993, at 2; Neil A. Lewis, Clinton to Widen Law on Child Smut, N.Y. Times, Nov. 16, 1993, at A24; *see also* Marjorie Garber, Secrets of the Flesh; Maximum Exposure, N.Y. Times, Dec. 4, 1993, at A21.

In September 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-352, 108 Stat. 1796 (1994), in which it declared that its intent in enacting the statute had been in accordance with the Third Circuit's reading in *Knox*, *see* supra text accompanying notes 219-21, and that the Department of Justice in its Supreme Court brief "did not accurately reflect the intent of Congress." 108 Stat. at 2038.

Meanwhile, the Third Circuit on remand had re-affirmed Knox's conviction, United States v. Knox, 32 F.3d 733 (3d Cir. 1994), and he again sought Supreme Court review. This time, the government's brief in opposition was signed and filed by Attorney General Reno, not by Solicitor General Days, and argued that "[n]either nudity nor discernibility of the genitals through clothing is a required element of the offense." *See* Linda Greenhouse, U.S. Changes Stance in Case on Obscenity, N.Y. Times, Nov. 11, 1994, at A15. "The brief was greeted with glee by the organizations that had led the opposition to the earlier brief," and a spokesman for one of them attributed it to the national elections a few days earlier in which the Republicans had scored significant gains. Id. On January 17, 1995, the Supreme Court denied certiorari, Knox v. United States, 115 S. Ct. 897 (1995), thus giving "the Clinton Administration some most welcome news." Linda Greenhouse, Court Rejects Appeal of Man Convicted in Child Smut Case With Political Overtones, N.Y. Times, Jan. 18, 1995, at D20.

One effect of the political uproar over *Knox* was that the much more legally significant case of United States v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1993), received relatively little attention. The Court of Appeals held that 18 U.S.C. §2252(a), which criminalizes interstate transportation of depictions of sexually explicit performances by minors, (1) does not require the defendant to know that the performers are minors, and (2) is therefore unconstitutional. *See* Linda Greenhouse, Supreme Court to Consider Constitutionality of 1977 Child Pornography Law, N.Y. Times, Mar. 1, 1994, at A21; *see also* Robert R. Strang, Note, "She Was Just Seventeen . . . And the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth, 90 Colum. L. Rev. 1179 (1990). At the end of 1994, the Supreme Court extricated the Administration from a potential political quagmire, *see* Michael Kirkland, Child Pornography Case: More Consternation for Administration, UPI, Nov. 23, 1993, *available in* LEXIS, News Library, Wires File, by rejecting "the most natural grammatical reading" of the statute, reversing the Court of Appeals, and holding, as Solicitor General Days had urged, that the law does indeed contain a scienter requirement. *See* United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467 (1994).

227. *See* supra note 41 and accompanying text; *see also* Texas v. Johnson, 491 U.S. 397, 414-15 (1989); Richard S. Pope, Note, Child Pornography: A New Role for the Obscenity Doctrine, 1978 U. Ill. L. F., 711, 712, 752-53.

D. *Furthering the Equality of Women*

The most recent justification for control of pornography has come from a group of feminist scholars and activists spearheaded by Catharine A. MacKinnon and Andrea Dworkin.[228] They contend that women cannot be equal in a society where pornography flourishes because pornography teaches by its content and demonstrates by its very existence that women are not full members of the community. This shapes social attitudes and behaviors accordingly,[229] making impossible women's full participation in dialogue to change the situation.[230]

The present discussion of this position[231] does not aim to evaluate its

---

228. *See* Paul Brest & Ann Vandenberg, Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 Stan. L. Rev. 607 (1987) (recounting history); *see also* Andrew M. Jacobs, Rhetoric and the Creation of Rights: MacKinnon and the Civil Right to Freedom From Pornography, 42 Kan. L. Rev. 785 (1994). *See generally* Nat Hentoff, Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other 336-55 (1992), *reviewed by* Bradley L. Smith, 91 Mich. L. Rev. 1172 (1993).

229. *See* Catherine A. MacKinnon, Not A Moral Issue, 2 Yale L. & Pol'y Rev. 321, 323-24 (1984) ("Obscenity as such probably does little harm; pornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population.") [hereinafter MacKinnon, Moral Issue]; *see also* Kathleen A. Lahey, Pornography and Harm—Learning to Listen to Women, 14 Int'l J.L. & Psychiatry 117, 129-30 (1991) (listing ways in which pornography "broadcasts messages which negatively affect women's life options and make female existence risky in a way that male existence is not"); Amy Richlin, Roman Oratory, Pornography, and the Silencing of Anita Hill, 65 S. Cal. L. Rev. 1321, 1330-31 (1992) (arguing that Anita Hill's testimony was heard within "the rules of pornographic discourse," and was therefore discredited); Stella Rozanski, Obscenity: Common Law and the Abuse of Women, 13 Adel. L. Rev. 163, 191-95 (1991) (arguing that pornography is dangerous because it determines the male view of the world, and male views control institutions of power). *See generally* Lee C. Bollinger, The Tolerant Society 184-85 (1986) (arguing that relevant considerations ought to be the extent to which pornography causes "a pattern of thinking that, if allowed to be entertained, will affect people's behavior in many different ways, well beyond the power of legal sanctions," and, in any event, reflects such attitudes so graphically that it is appropriate for the society "to symbolically reject, through legal prohibition, such ways of thinking").

230. *See* MacKinnon, Pornography, Civil Rights, supra note 125, at 64 ("Anyone who cannot walk down the street or even lie down in her own bed without keeping her eyes cast down and her body clenched against assault is unlikely to have much to say about the issues of the day, still less will she become Tolstoy."); *see also* MacKinnon, Moral Issue, supra note 229, at 340 (arguing that classic First Amendment theory "tends to presuppose that whole segments of the population are not silenced *socially*, prior to government action. The place of pornography in the inequality of the sexes makes such a presupposition untenable and makes any approach to *our* freedom of expression so based worse than useless."). For a response to this argument, see Mayer supra note 42, at 1190-93.

231. The subject has generated a great deal of literature. Significant contributions include Sallie Tisdale, Talk Dirty to Me: An Intimate Philosophy of Sex 123-66 (1995); Gey, supra note 17; Keller, supra note 153; Meyer, supra note 42; Robert C. Post, Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment, 76 Cal. L. Rev. 297, 334-35 (1988); Strossen, Feminist Critique, supra note 124. Also notable is Ronald Dworkin, Women and Pornography, N.Y. Rev. Books, Oct. 21, 1993, at 36 (reviewing Catharine A. MacKinnon, Only Words (1993) [hereinafter MacKinnon, Only Words]), which resulted in an exchange of letters between author and reviewer, Pornography: An Exchange, N.Y. Rev. Books, Mar. 3,

importance for feminist theory, much less its implications for a more general debate over what forms of government and social structure are most congenial to the accomplishment of particular reforms.[232] Rather, the goal here is to assess the feminism-based argument as a distinct purpose offered for the removal of pornography from the sphere of First Amendment protections.

Hence, the discussion sets aside two additional purposes for the control of pornography that appear frequently in the feminist literature:

(1) to reduce the abuses inflicted on women involved in its production.[233] This argument is the same as the one made in the context of child pornography, and has already been discussed;[234] and

(2) to reduce sexual violence against women.[235] This justification was considered previously in connection with *Stanley*.[236]

1994, at 47. For a book-length presentation of competing views, see Ronald J. Berger et al., Feminism and Pornography (1991). For a shorter summary of some of the key issues, see Gordon Hawkins & Franklin Zimring, Pornography in a Free Society 151-74 (1988). For a collection of essays attacking the Mackinnon-Dworkin position from a feminist perspective, see Caught Looking: Feminism, Pornography and Censorship (Kate Ellis et al. eds., 2d ed. 1988).

232. The passion with which people who are normally allies disagree on this issue, *see* Carole S. Vance, Introduction, Pleasure and Danger: Exploring Female Sexuality (Carole S. Vance ed. 1992); Kathleen Currie & Art Levine, Whip Me, Beat Me and While You're at it Cancel My N.O.W. Membership, Wash. Monthly, June 1987, at 17; *see also* Tad Friend, Yes; Feminist Women Who Like Sex, Esquire, Feb. 1994, at 48; Where Do We Stand on Pornography?, Ms., Jan./Feb., 1994, at 32, reflects a more general underlying disagreement. Some—wary of the repressive potential of the state—believe that progress towards greater egalitarianism will ultimately be best achieved by embracing a model placing individuals, their rights, and their choices at the center of social life and political change. *See, e.g.*, Thomas I. Emerson, Pornography and the First Amendment: A Reply to Professor MacKinnon, 3 Yale L. & Pol'y Rev. 130, 140-42 (1984); Gey, supra note 17; *see also* Jonathan Rauch, Kindly Inquisitors: The New Attacks on Free Thought (1993); Linda McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. Cal. L. Rev. 1171 (1992). Others favor a group-oriented model. *E.g.*, Marie-France Major, Obscene Comparisons: Canadian and American Attitudes Toward Pornography Regulation, 19 J. Contemp. L. 51, 90-91 (1993); *see* Post, supra note 231, at 334-35; Eric Hoffman, Comment, Feminism, Pornography, and Law, 122 U. Pa. L. Rev. 497, 530-31 (1985). *See generally* Cynthia V. Ward, The Radical Feminist Defense of Individualism, 89 Nw. U. L. Rev. 871 (1995); Cynthia V. Ward, A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature, 61 U. Chi. L. Rev. 929 (1994); Ellen Willis, Porn Wars, N.Y. Times Book Rev., Sept. 10, 1995, at 24 (reviewing Wendy McElroy, XXX: A Woman's Right to Pornography (1995)).

233. *See, e.g.*, MacKinnon, Pornography, Civil Rights, supra note 125, at 32-38; *see also* Catharine A. MacKinnon, Turning Rape Into Pornography: Postmodern Genocide, Ms., July/Aug., 1993, at 24.

234. *See* supra text accompanying notes 210-11; *see also* Greenfield, supra note 5, at 1212; MacKinnon, Pornography, Civil Rights, supra note 125, at 37-38 (observing that her proposed ordinance provides that people portrayed in "pornography" as defined therein, *see* infra text accompanying notes 233-34, may obtain "an injunction to remove these materials from public view. The best authority we have for this is the *Ferber* case," which "recognized that child pornography need not be obscene to be child abuse").

235. *See* MacKinnon, Pornography, Civil Rights, supra note 125, at 43-60; *see also* Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1302-03 (1991).

236. *See* supra notes 122-30 and accompanying text. Although, as noted there, this purpose

is not a new one, the renewed interest in it provoked by feminist arguments has increased the public visibility of long-ignored proposals by conservative members of Congress to provide compensation by means of tort actions against producers to victims of crimes alleged to have been caused by pornography. *Cf.* Schiro v. Clark, 963 F.2d 962, 971-73 (7th Cir. 1992) (rejecting argument of capital defendant that he should have been allowed to show in mitigation that his crimes were caused by his exposure to pornography), *aff'd on other grounds sub nom.* Schiro v. Farley, 510 U.S. 222 (1994).

A recent version of the proposed federal statute is contained in the Pornography Victim's Compensation Act of 1993, H.R. 2174, 103d Cong., 1st Sess. (1993). The report of the Senate Judiciary Committee recommending passage of the 1992 version (a separate bill entitled the Pornography Victims Compensation Act of 1992, S. 1521) is S. Rep. No. 372, 102d Cong., 1st Sess. (1992). For a sampling of views on this legislation, see Daniel A. Cohen, Compensating Pornography's Victims: A First Amendment Analysis, 29 Val. U. L. Rev. 285 (1994); Strossen, Feminist Critique, supra note 124, at 1188; John Irving, Pornography and the New Puritans, N.Y. Times Book Rev., Mar. 29, 1992, at 1; Pornography and the New Puritans: Letters from Andrea Dworkin and Others, id., May 3, 1992, at 15; Teller, Movies Don't Cause Crime, N.Y. Times, Jan. 17, 1992, at A29. For an argument in support of an earlier version, see Shelia J. Winkelman, Recent Development, Making a Woman's Safety More Important than Peep Shows: A Review of the Pornography Victims' Compensation Act, 44 Wash U. J. Urb. & Contemp. L. 237 (1993). *See generally* Patricia G. Barnes, A Pragmatic Compromise in the Pornography Debate, 1 Temp. Pol. & Civ. Rts. L. Rev. 117 (1992).

The attempt to impose regulation by means of civil liability presents formidable problems under both the First Amendment, *see* Mike Quinlan & Jim Persels, It's Not My Fault, the Devil Made Me Do It: Attempting to Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly "Inspired" by Media Speech, 18 S. Ill. U. L.J. 417, 436-37 (1994), and general concepts of tort law, including the strength of the causal link that would need to be shown between any particular pornographic production and a specific crime, and the extent of the zone of duty, *see* supra note 125. *See generally* Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993); Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 439 U.S. 1024 (1990).

In light of these concerns, courts to date have generally not allowed plaintiffs to proceed on state law claims that injuries have been caused by media portrayals. *See, e.g.*, Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990), *aff'g* 715 F. Supp. 819 (W.D. Ky. 1989) (affirming on Kentucky tort law grounds the District Court's First Amendment dismissal of an action on behalf of minor allegedly driven to suicide by defendant's game "Dungeons and Dragons"); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (holding that the First Amendment barred recovery by minor who allegedly hanged himself after reading article in defendant publication about autoerotic asphyxiation), *cert. denied*, 485 U.S. 959 (1988); Rice v. Paladin Enters., 24 Med. L. Rptr. 2185 (D.Md. 1996) (dismissing on First Amendment grounds wrongful death actions brought by survivors of victims killed by a hit man who followed instructions contained in a how-to manual published by defendants); Zamora v. Columbia Broad. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) (denying recovery to minor plaintiff whose exposure to television violence allegedly caused him to commit murder); Lewis v. Columbia Pictures Indus., 23 Med. L. Rptr. 1052 (Cal. App. 1994) (holding that First Amendment and tort doctrines of duty and proximate cause barred recovery by plaintiff injured at showing of "Boyz 'n the Hood" suing movie's distributor for advertising campaign alleged to encourage audience violence); Olivia N. v. National Broad. Co., 178 Cal. Rptr. 888 (Cal. App. 1981) (First Amendment barred recovery by minor allegedly raped by perpetrator imitating scene in drama broadcast by defendant), *cert. denied*, 458 U.S. 1108 (1982); DeFilippo v. National Broad. Co., 446 A.2d 1036 (R.I. 1982) (denying recovery on behalf of a minor who allegedly hanged himself in imitating stunt broadcast by defendant).

For an excellent discussion of the area, see Laura W. Brill, Note, The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm, 94

The pornography that MacKinnon and Dworkin would suppress as a necessary condition for sexual equality encompasses far more than the material traditionally identified as "obscene."[237] Thus, in adopting an ordinance based upon their work, the Indianapolis City Council defined "pornography" as "the graphic sexually explicit subordination of women . . . that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or . . . (5) Women are presented in scenarios of degradation . . . [or shown as inferior] . . . in a context that makes these conditions sexual; or (6) Women are presented as sexual objects for domination . . . or through postures or positions of servility or submission or display."[238]

As James Lindgren has elucidated in a highly instructive article based both upon MacKinnon's writings and conversations with her, "the subordination element is entirely distinct from the specific act requirement."[239] In other words, works may depict the prohibited sexual activities (as, for instance, Andrea Dworkin's novels do). What the works "may not do is to include such depictions if their inclusion has the effect of subordinating women."[240]

In *American Booksellers Association v. Hudnut*,[241] the Seventh Circuit struck down the Indianapolis ordinance on the basis that the "state may not ordain preferred viewpoints in this way."[242] To have ruled otherwise would have taken the law three large steps backwards to a revival of: (1) the communitarian imposition of moral values that *Stanley* rejected;[243] (2) the bad tendency test of *Regina v. Hicklin* that *Roth* rejected;[244] and (3) *Beauharnais v. Illinois*,[245] a case whose explicit repudiation by the Supreme Court is long overdue.[246]

Colum. L. Rev. 984 (1994). *See also* Barry Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 Harv. C.R.-C.L. L. Rev. 27, 90-92 (1986) (summarizing cases). *See generally* Caryn Jacobs, Patterns of Violence: A Feminist Perspective on the Regulation of Pornography, 7 Harv. Women's L.J. 5, 52-53 (1984); Edith L. Pacillo, Note, Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography, 28 Suffolk U. L. Rev. 123 (1994).

237. *See* MacKinnon, Moral Issue, supra note 229, at 322-24.

238. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir.), *aff'd mem.*, 475 U.S. 1001 (1985).

239. James Lindgren, Defining Pornography, 141 U. Pa. L. Rev. 1153, 1219 (1993).

240. Id. at 1220.

241. 771 F.2d 323 (7th Cir.), *aff'd mem.*, 475 U.S. 1001 (1985).

242. Id. at 325; *see* Bruce Ackerman, Liberating Abstraction, 59 U. Chi. L. Rev. 317 (1992); *see also* Brennan Neville, Note, Anti-Pornography Legislation As Content Discrimination Under R.A.V., 5 Kan. J.L. & Pub. Pol'y 121, 127-29 (1995) (re-examining ordinance in light of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) and concluding that the Court would hold the ordinance unconstitutional).

243. *See* supra notes 105-11 and accompanying text.

244. *See* supra note 93.

245. 343 U.S. 250 (1952).

246. *See* infra Parts III.B-C; *see also Hudnut*, 771 F.2d at 331 n.3 (noting court's previous conclusion in Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)

But the constitutional strength[247] of *Hudnut* is more than simply doctrinal; it contains a realistic hope of political change, while MacKinnon's credo "pornography is the ruling ideology"[248] does not. That which articulates the ruling ideology is, by definition, not "pornography."[249] This, of course, is precisely why MacKinnon has to define "pornography" in a way that captures far more material than has ever been included under the term "obscenity"[250] and why her definition

---

that *Beauharnais* was no longer good law, and expressing doubt whether the case would, in any event, sustain the ordinance). *But cf.* MacKinnon, Only Words, supra note 231, at 82-85 (defending *Beauharnais* and lamenting subsequent cases undermining it).

247. I use this term to manifest an awareness of the Fourteenth Amendment as well as the First. MacKinnon's idea that there is antagonism between them, *see* MacKinnon, Pornography, Civil Rights, supra note 125, at 25-27 (explaining that the MacKinnon-Dworkin ordinance was designed to make visible the "conflict of rights between the equality guaranteed to all women, and . . . the freedom of the pornographers to make and sell, and their consumers to have access to, the materials. . . . Judicial resolution of this conflict . . . is likely to entail balancing of the rights"), can only be harmful to liberty. *See* Eugene Volokh, Freedom of Speech and the Constitutional Tension Method, 3 U. Chi. L. Sch. Roundtable 223 (1996); C. Edwin Baker, Of Course, More Than Words, 61 U. Chi. L. Rev. 1181 (1994). This danger is made quite clear by Alon Harrel's remarkable proposal that First Amendment protections be granted only to speech that the courts determine furthers the public good. *See* Alon Harel, Free Speech Revisionism: Doctrinal and Philosophical Challenges, 74 B.U. L. Rev. 687, 713-14 (1994).

Such an approach promotes tyranny. It both grants the government the final say as to what shall constitute social truth, and enables it to weaken its challengers by pitting some individuals who are entitled to constitutional protections against others who also are. For example, it is a linguistic and conceptual trap to speak of a "conflict" between rights under the First Amendment and under the Sixth Amendment, and to devise ways to "balance" the "competing" interests. The government has a duty both to open its proceedings to the press and to grant the defendant a fair trial; if it cannot fulfill both duties, it cannot prosecute the defendant. Open trials and fair trials are part of a common vision of liberty, designed to work together, and the government should not be allowed to subvert that design. *See* Hans Linde, Fair Trials and Press Freedom—Two Rights Against the State, 13 Willamette L. Rev. 211 (1977); *see also* Canadian Broad. Corp. v. Dagenais, 3 S.C.R. 835, 881-84 (Can. 1994) (adopting this view and rejecting "clash model").

Similarly, First Amendment rights support Fourteenth Amendment rights to racial equality. *See* Richard Delgado & Jean Stefanic, Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly, 82 Cal. L. Rev. 851, 855 (1994); Nadine Strossen, Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?, 46 Case W. Res. L. Rev. 449, 462-64 (1996). The First Amendment, *pace* MacKinnon, does not privilege in-groups, whose power is in any event assured, but out-groups, the very ones who are the object of Fourteenth Amendment solicitude. *Cf.* Zechariah Chafee, Jr., Free Speech in the United States xiii (2d ed. 1941) ("The real value of freedom of speech is not to the minority that wants to talk, but to the majority that does not want to listen."). Racist speech is a manifestation of the harm done by racism, not speech. *See* Shiffrin, supra note 5, at 103 ("The problem is not the first amendment; the problem is that racism is now and always has been a central part of the meaning of America."); *see also* infra notes 354-57 and accompanying text (discussing current proposals to curb racial hate speech).

248. MacKinnon, Moral Issue, supra note 229, at 337.

249. *See* infra text accompanying note 265; *see also* supra Part II.A.1.

250. *See generally* Jeanne L. Schroeder, The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory, 5 Yale J.L. & Feminism 123, 146-48 (1992).

will not be adopted[251] so long as the forces she seeks to fight retain power.[252]

More fundamentally, her campaign (insofar as it actually seeks to achieve the enactment of legislation)[253] is misguided. As a long history of

---

251. *See, e.g.*, Dworkin v. Hustler Magazine, 867 F.2d 1188, 1199-1200 (9th Cir.) (refusing to adopt Dworkin's position that the court should "create a new category of expressive activity—non-obscene 'pornography'—that is 'not entitled to constitutional protection.'" To apply a standard less restrictive than *Miller* "would require us to flout the fundamental principle that the first amendment is designed to foster robust public debate on such matters. We refuse to do so." Speech "may not be suppressed simply because it is offensive," nor has the *Brandenburg* test been met), *cert. denied*, 493 U.S. 812 (1989).

252. *See generally* Emerson, supra note 232, at 134.

253. Insofar as the idea is to raise the consciousness of a sympathetic community, perhaps to generate social pressures like those described infra note 272 and accompanying text, or to inspire lawyers to think of creative solutions consistent with the First Amendment, *see* Panel Discussion: Effects of Violent Pornography, supra note 97, at 239 (remarks of Sylvia Law), it is a matter of local political judgment whether these beneficial effects will outweigh the negative consequences of strengthening the most repressive forces in the community—the feminists' natural allies in this fight, and natural enemies in all others. *See* Friedman, supra note 93, at 319 n.23

> (On political grounds, the antipornography campaign that has been launched by some feminists (over the opposition of many other feminists) seems foolish and self-defeating. The only allies of the feminists against pornography are right-wingers who in every other area reveal the most negative attitudes and are the worst oppressors of women. . . . The antipornography feminists end up attacking publisher groups and civil libertarians generally, who are otherwise their supporters in eliminating sexist laws and attitudes in society.);

Jacobs, supra note 228, at 824-25 ("The lesson of this Article, doubtless bitter to antipornography crusaders, is that an alliance with the fundamentalist Right and use of obscenity arguments are the movement's only realistic hope . . . ."); Meyer, supra note 42, at 1101, 1144-46 (arguing that by joining forces with them, "feminist porn-suppressionists have already strengthened groups seeking to enact and enforce regressive and hostile limitations on women's freedom"); Strossen, Feminist Critique, supra note 124, at 1164-66 (arguing "that when women's rights advocates form alliances with conservatives over such issues as 'pornography' or 'temperance,' they promote the conservatives' anti-feminist goals, relegating women to traditional sexual and gender roles"); Ellen Willis, Feminism, Morality, and Pornography, *in* Powers of Desire: The Politics of Sexuality 460, 467 (Ann Snitow et al. eds., 1983) ("Despite the insistence of [Women Against Pornography] organizers that they support sexual freedom, their line appeals to the anti-sexual emotions that feed the backlash. Whether they know it or not, they are doing the good cops' dirty work."); *cf.* Clint Bolick, Hard-Core First Amendment Activist Speaks, Wall St. J., Jan. 30, 1995, at A18 (suggesting appropriateness of alliance between libertarians of left and right against authoritarians of left and right seeking antipornography laws).

Thus, MacKinnon partially relies for support on the "findings" of the 1986 Meese Commission on pornography, *see, e.g.*, Catharine A. MacKinnon, Pornography as Defamation and Discrimination, *in* Group Defamation, supra note 93, at 253, 263 n.6 ("Much of the relevant research is summarized elegantly in [the Commission's] Final Report.") [hereinafter MacKinnon, Pornography as Defamation], thereby strengthening the credibility of the work of a transparently political body whose conclusions on the relationship between pornography and crime are entirely at odds with the empirical evidence, *see* supra notes 122-30 and accompanying text, and have been universally denounced as a tendentious distortion of the data. *See, e.g.*, Philip Nobile & Eric Nadler, United States of America vs. Sex: How the Meese Commission Lied About Pornography (1986); Michael S. Van Dyke, Note, Regulation of

judicial protection of "classics" and other socially acceptable erotica shows,[254] there is no realistic chance that, even if the MacKinnon-Dworkin ordinance were to be adopted as a federal statute, it would succeed in suppressing the mainstream productions that are most influential in creating social images.[255]

Andrea Dworkin's fiction is another matter. As several people have noted,[256] and she is said to have acknowledged,[257] her novels *Mercy* and *Fire and Ice* contain numerous scenes portraying specific acts condemned by her own ordinance.[258] This may be a delicious irony, or an occasion to

---

Expression: Is Erotica Self-Expression Deserving of Expression?, 33 Loy. L. Rev. 445, 449-55, 460-61 (1987) (summarizing criticisms and concluding that report "due to its many inadequacies as to valid scientific evidence, valid analytical methods, and other shortcomings, will serve to do little more than cloud the debate"); Daniel Goleman, Researchers Dispute Pornography Report on its Use of Data, N.Y. Times, May 17, 1986, at A1. The executive director of the Commission responded in an interview by Vicki Quade in Barrister, Fall, 1986, at 13, 39.

For MacKinnon's response to these criticisms, see Catharine A. MacKinnon, Pornography Left and Right, 30 Harv. C.R.-C.L. L. Rev. 143, 147, 164 (1995) (reviewing De Grazia, supra note 17, and Richard A. Posner, Sex and Reason (1992) and asserting that the charge "that Andrea Dworkin and I are in bed with the right" is a "fabrication." It is a "press lie that the [Meese Commission Report], which calmly reviewed the research to date and concluded that it substantiated [harmful] effects of exposure is wild, exaggerated, and unsupported. In fact, it is cautious and measured." The contrary impression "testifies to the success of the public relations campaign to cast doubt on the existence of pornography's harms by distorting the research findings and discrediting the Commission.").

254. *See* Alpert, supra note 30, at 57 (explaining cases holding works not obscene by reference to "certain factors which seem obvious to none but those of legal training"; books at issue were "classics," so the courts measured them by a special yardstick, and "the editions in question here were choice—excellent examples of artistic bookbinding"); Jason Epstein, The Obscenity Business, Atlantic Monthly, Aug. 1966, at 56, 59 (observing that the meaning of Ginzburg v. United States, 383 U.S. 463 (1966) appears to be that The Autobiography of a Flea "will become a legitimate publication if only the Harvard University Press brings it out"); Paula Findlen, Humanism, Politics and Pornography, *in* The Invention of Pornography, supra note 50, at 49, 101-02 (stating that in the eyes of the Italian authorities who banned his works, the sixteenth century writer Pietro Aretino "was more dangerous than all the erotically inclined artists and humanist pornographers put together, not because of his frank portrayals of sexual behavior but because of his refusal to restrict his audience to men of virtue who were allowed to read the erotic classics due to their 'eloquence and quality of style'"); Walter Kendrick, Increasing Our Dirty Word Power: Why Yesterday's Smut is Today's Erotica, N.Y. Times Book Rev., May 31, 1992, at 3 (reviewing Nicholson Baker, Vox (1992) and stating that although it contains such "lewdly luscious detail" that the "hotter passages" may not be quoted, the work, "is a class act, slickly marketed by Random House; you can buy it at the genteelest bookstores and it has been reviewed in the highest-minded journals . . . . [w]hich means it isn't, perish the thought, pornography"); supra note 192 and accompanying text.

255. *See* Karst, supra note 93, at 137-38; Meyer, supra note 42, at 1172-78; Wendy Kaminer, Feminists Against the First Amendment, Atlantic Monthly, Nov. 1992, at 111, 118; *see also* Tara Parker-Pope, Violence and Obscenity: British Agencies Use Antisocial Ads to Reach Generation X, Wall St. J., April 10, 1995, at B1. *See generally* Michiko Kakutani, Howard Stern and the Highbrows, N.Y. Times Mag., Jan. 28, 1996, at 22.

256. *See* De Grazia, supra note 17, at 595-97, *discussed in* Linda Kauffman, Book Review, 11 Cardozo Arts & Ent. L.J. 765, 773-774 (1993); Lindgren, supra note 239, at 1215.

257. *See* Strossen, Feminist Critique, supra note 124, at 1142.

258. As noted supra text accompanying note 239-40, however, this would not lead to their

accuse her of hypocrisy. But such reactions miss the serious point. If Dworkin's ordinance were enforced against her writings—and, whatever the legalities, they would surely be a more likely target than the writings of de Sade[259]—public discourse would lose the angry and eloquent message that her work conveys about the reality of sexual violence,[260] a message that, under current circumstances, the mainstream press picks up and appreciates.[261]

Recent experience in Canada demonstrates the point. Since 1992, when that country's Supreme Court, relying on the works of MacKinnon and Dworkin, held in *Butler v. The Queen* that freedom of speech did not protect "degrading" or "dehumanizing" images,[262] officials have in fact seized two of Dworkin's books under a vaguely-defined set of criteria that have operated to target works expressing non-conformist views, particularly those with homosexual and lesbian themes.[263]

---

condemnation under a correct interpretation of the MacKinnon-Dworkin statute, "[b]ecause her purpose is to end subordination rather than promote it." Lindgren, supra note 239, at 1220; *cf.* Edwin McDowell, Some Say Meese Report Rates an "X," N.Y. Times, Oct. 21, 1986, at C13 (reporting that many religious bookstores are refusing to stock or display Meese Commission report calling for crackdown on pornography because of "the vulgar language in it and its graphic descriptions of sexual acts").

259. *Cf.* Andrea Dworkin, Pornography: Men Possessing Women 70-100 (1981) (analyzing de Sade's life and writings).

260. This is particularly so because the MacKinnon-Dworkin ordinance "relies heavily upon the injunctive powers of the courts" to impose prior restraints on the circulation of the proscribed materials. Emerson, supra note 232, at 137. *But cf.* infra note 263 (noting Dworkin's more recent de-emphasis of this strategy).

261. Consider, for example, the reviews of Mercy by Madison S. Bell in the Chicago Tribune, Sept. 15, 1991, at C5 ("If Andrea Dworkin is the Malcolm X of feminism, then this novel is her version of his "Autobiography"), by K. Kaufman in the San Francisco Chronicle, Oct. 6, 1991, at 6 ("Women [whose] lives have been torn apart by sexual violence do exist. To understand their pain and outrage, we need more books like 'Mercy' and more writers like Dworkin"), and by Rebecca Mead in Newsday, Sept. 24, 1991, at 54 ("Dworkin's language of pain and resistance is strikingly original and rings shockingly true.").

262. Butler v. The Queen, 1 S.C.R. 452 (Can. 1992). For an analysis of the case, see David O. Conkle, Harm, Morality, and Feminist Religion: Canada's New—But Not So New—Approach to Obscenity, 10 Const. Comm. 105 (1993) (describing justification of *Butler* for regulation of pornography, enforcement of particular view of the proper role of women, as similar to American courts' justification, enforcement of a particular view of morality). For a history of Canadian obscenity jurisprudence, see Bradley J. Shafer, Patent Offensiveness: The Black Hole of *Miller*, 10 Cooley L. Rev. 1, 59-65 (1993). *See also* Kent Greenwalt, Fighting Words: Individuals, Communities and Liberties of Speech 11-27, 99-123 (1995) (comparing American and Canadian approaches to speech regulation in general and obscenity regulation in particular).

263. *See* Strossen, Defending Pornography, supra note 124, at 229-44; Strossen, Feminist Critique, supra note 124, at 1145-47; Chris Bearchell, Gay Porn is Getting Skinned Alive, Toronto Star, Jan. 15, 1993, at A23; Human Rights Watch, Free Expression Project, A Ruling Inspired by U.S. Anti-Pornography Activists is Used to Restrict Lesbian and Gay Publications in Canada (Feb. 1994); Leanne Katz, Censors' Helpers, N.Y. Times, Dec. 4, 1993, at A21 ("Since the Butler decision, the incessant customs seizures have netted novels by noted authors like David Leavitt and Katty Acker, and 1,500 copies of "Black Looks: Race and Representation," by the black feminist scholar Bell Hooks—the last on the suspicion that it contains 'hate

This should not surprise anyone.[264] "Pornography" is a label which those in power apply to the speech of outsiders who seek to subvert the status quo, whether sexual, political, artistic, or social.[265] This is precisely the speech that, in the interests of evolutionary change, deserves the greatest protection.[266]

---

speech.' There were even seizures of two of Ms. Dworkin's books on why pornography should be banned."); Sarah Lyall, Canada's Morals Police: Serious Books at Risk?, N.Y. Times, Dec. 13, 1993, at A8; *see also* Deirdre Carmody, Canada May Prohibit Entry of Penthouse's Comic Book, N.Y. Times, June 23, 1994, at D19; supra note 214.

In apparent reaction to this situation, Dworkin recently has placed greater stress on her suggestion that, at the same time that her ordinance is enacted, existing obscenity laws "should be repealed." Ms., Jan./Feb. 1994, at 41. *See* Jeffrey Toobin, X-Rated, New Yorker, Oct. 3, 1994, at 70, 78 (expressing disagreement with MacKinnon for supporting *Butler*; "Obscenity law is a total dead end in dealing with the pornography industry. . . . I think obscenity laws are real censorship laws, easy to use against literature that should be protected, and hard to use against what really harms women;" seizure of her books by Canada Customs was a typical abuse of police power; preferable course for women is to continue to pursue civil, rather than criminal, anti-pornography statutes, focusing on damage remedies for actual harm); *see also* Andrea Dworkin, Pornography is a Civil Rights Issue for Women, 21 Mich. J.L. Reform 55, 64 (1988) (criticizing obscenity laws in testimony before 1986 Meese Commission on pornography).

264. Many commentators on the MacKinnon-Dworkin position specifically predicted this danger. *See, e.g.*, Emerson, supra note 232, at 138-39; Lindgren, supra note 239, at 1217; Hoffman, supra note 232, at 532-33. Such commentators included a number of contributors to the Canadian volume Women Against Censorship (Varda Burstyn ed., 1985). *See, e.g.*, Varda Burstyn, Political Precedents and Moral Crusades: Women, Sex and the State, *in* id. at 4, 4-6; Lynn King, Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?, *in* id. at 79, 79-88; Mariana Valverde & Lorna Weir, Thrills, Chills and the "Lesbian Threat" or, the Media, the State and Women's Sexuality, *in* id. at 99, 103-06.

265. *See* David A.J. Richards, Pornography Commissions and the First Amendment: On Constitutional Values and Constitutional Facts, 39 Me. L. Rev. 275, 296-98 (1987); Strossen, supra note 247, at 464 ("The . . . enforcement record of laws against sexual speech make[s] clear that . . . the freedom to produce or consume anything called 'pornography' is an essential aspect of the freedom to defy prevailing political and social mores."); supra Part II.A.1.

266. *See, e.g.*, Gey, supra note 17, at 1625-26; Strossen, Feminist Critique, supra, note 124, at 1169-71; supra note 41 and accompanying text.

With specific respect to advancing the status of women, a number of those opposed to the MacKinnon-Dworkin position have observed that one of its effects would be to cut off the exploration by feminists of those models of sexuality disapproved by the political majority that enacted the ordinance. *See* Brief Amicus Curiae of Feminist Anti-Censorship Taskforce at 6-12, American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *aff'd mem.*, 475 U.S. 1001 (1986), *reprinted in* 21 Mich. J.L. Reform 69, 105-111 (1987-88) [hereinafter FACT Brief]; Strossen, Feminist Critique, supra note 124, at 1164; Remarks of Mary Dunlop in Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buff. L. Rev. 11, 75 (1975); infra notes 274-76 and accompanying text. *See generally* Schroeder, supra note 250, at 162-74 (explicating "striking parallels between [MacKinnon's] theory and Christian theology").

It is unconvincing for Professor MacKinnon to respond to the charge of thought control by stating, "women are not the government." MacKinnon, Only Words, supra note 231, at 39. The issue only arises, after all, once she has enlisted the government on her side.

The further response, given by Professor MacKinnon in the case of pornography, id. at 106-07, and Professor Charles Lawrence, If He Hollers Let Him Go: Regulating Racist Speech

One can of course reject the view that public discourse in fact changes public attitudes, or that public attitudes achieve expression in public policy. But rejecting the power of discussion means embracing the power of physical force,[267] an unpromising strategy. Moreover, as many examples show and classic First Amendment theory recognizes,[268] even a successful revolution only sets the stage for further counter-revolutions if the new power structure is as intolerant of dissent as the old one.[269]

---

on Campus, *in* Words That Wound 61 (Mari Matsuda et al. eds., 1993) in the case of racial hate speech, that this argument is overblown because they advocate only suppression of speech expressing ideas that the Fourteenth Amendment has already condemned, is unpersuasive, both legally and operationally. *See* Post, supra note 11, at 292-93.

As a legal matter, if the argument were correct, then it would be constitutional for the government to criminalize advocacy of the repeal of the Fourteenth Amendment. *See* MacKinnon, Only Words, supra note 231, at 107-08 (stating it is perhaps permissible to prohibit teaching "that Fourteenth Amendment equality should be repealed"). *But see* Owen M. Fiss, Freedom and Feminism, 80 Geo. L.J. 2041, 2058 (1992) ("Democracy requires that all laws, including the constitutional guarantee of equality, always be open to reconsideration, revision, and repeal."). As a practical matter, enforcement will necessarily be carried out by the political group in power, not by those whose interests are ostensibly being protected. *See* Ira Glasser, Introduction, *in* Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties 1, 7-9 (1994); Strossen, supra note 265, at 470 ("If you belong to a group that has traditionally suffered discrimination, including women, restrictions on hate speech are especially likely to be wielded against your speech."); Ronald Dworkin, Women and Pornography, N.Y. Rev. of Books, Oct. 21, 1993, at 36, 40; supra notes 262-63 and accompanying text. *See generally* Kenneth L. Karst, Faith, Flags and Family Values: The Constitution of the Theater State, 41 UCLA L. Rev. 1, 16 (1993).

267. *See* Craig B. Bleifer, Looking at Pornography Through Habermesian Lenses: Affirmative Action for Speech, 22 N.Y.U. Rev. L. & Soc. Change 153, 201 (1996) ("MacKinnon underestimates the human capacity for reason." But if she is correct, and "a formal right result is all we can hope for, then only power can prevent a reversion to a wrong result."); *cf.* Lawrence, supra note 266, at 77 (stating that people of color "are skeptical about the absolutist argument that even the most injurious speech must remain unregulated because in an unregulated marketplace of ideas the best ideas will rise to the top and gain acceptance. Our experience tells us the opposite. . . . Racism is an epidemic that distorts the marketplace of ideas and renders it dysfunctional.").

268. *See* Emerson, supra note 30, at 7.

269. The experience of Eastern Europe in emerging from Communism would seem to vindicate in practice the theory that governments that respond to unacceptable expression with "This is outrageous, let's ban it," rather than "This is outrageous, let's respond to it," tend over time to weaken rather than strengthen themselves. *Cf.* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."); Eric M. Freedman, The People of the State of New York v. Jesse A. Stump: Dissenting Opinion, *in* Group Defamation, supra note 93, at 331, 331 (American founders, having just seen their underground revolutionary movement, whose only power lay in the political ideas it espoused through newspaper columns, topple the world's greatest empire, deliberately formed a government whose only protection against suffering the same fate was its continuing responsiveness to the ideas of its citizens); Tom Gerety, Pornography and Violence, 40 U. Pitt. L. Rev. 627, 647 (1979) (First Amendment "guaranteed impunity not only to those who cursed King George but even to those who cursed George Washington himself"); William Safire, Yeltsin's Tiananmen, N.Y. Times, Jan. 9, 1995, at A15 ("A

Thus, even a MacKinnon-Dworkin type federal statute—enforced by MacKinnon-Dworkin judges who had magically ascended to the bench—would not itself bring about the transformation in public viewpoint concerning sexual equality that its authors wish to accomplish. Legal change may support political change, but, in a democratic society, it is insufficient to achieve it alone. Accomplishing permanent political reform requires altering social attitudes. [270] Thus, pictures of lynched blacks have no market today, although they did at one time,[271] not because the images were suppressed by law (which might, indeed, have increased their attractiveness both to those who wished to make a statement about race relations and those who wished to protest censorship), but because of social changes brought about by vigorous political activism.

In the context of feminism in general, political pressure to change social behavior has achieved many victories,[272] and in the context of pornography in particular, it has the potential to achieve many more.[273] For example, the explicitly non-sexist pornography written by Anne

---

monolithic, totalitarian state, repressing the spirit of freedom, only seems secure; we have seen how it can suddenly collapse. A noisy, unruly democratic state, drawing on the legitimacy of free elections, is more secure."); Mark Tushnet, New Meaning for First Amendment, A.B.A. J., November 1995, at 56 (effect of traditional First Amendment doctrine is to put both liberal and conservative legislation at risk).

270. The differing trajectories of the civil rights movement in the wake of Brown v. Board of Educ., 347 U.S. 343 (1954) and the reproductive choice movement in the wake of Roe v. Wade, 410 U.S. 113 (1973) could serve as an illustration of this point. *See also* Brest & Vandenberg, supra note 228 at 660-61; Sex and Law, Nat'l L.J., Mar. 22, 1993, at 14 (editorial discussing University of Chicago conference described infra note 355, and arguing that appropriate response to pornography is not legal but rather "a concerted effort to change attitudes").

271. *See* Catharine A. MacKinnon, Pornography as Defamation and Discrimination, 71 B.U. L. Rev. 793, 813-14 (1991); Don Terry, Man's Museum of Memories Relives the Terror for Blacks, N.Y. Times, July 10, 1995, at A1.

272. *See, e.g.*, James Bennet, Coffee Commercial Withdrawn by Kraft, N.Y. Times, Jan. 19, 1995, at D23 (responding to complaints, Kraft Foods withdraws commercial in which one woman said "You know I said no, but I didn't really mean no," and another replied, "No, yes, yes, no. It's all interchangeable."); Kevin Goldman, Sexy Sony Ad Riles a Network of Women, Wall St. J., Aug. 23, 1993, at B5 (group of women who communicate via nationwide computer network protest Sony commercial on grounds of blatant objectification of women and sexual double entendre; company says it has no plans to pull the spot); Kevin Goldman, Sony Changes Tune, Wall St. J., Sept. 1, 1993, at B8 (responding to criticism, Sony says it will modify spot); *see also* Stuart Elliott, Calvin Klein to Withdraw Jean Ads, N.Y. Times, Aug. 28, 1995, at D1 ("The designer Calvin Klein, bowing to a castigation perhaps unmatched in almost 15 years of testing the limits of using sexuality to sell products, is withdrawing a jeans campaign that critics likened to child pornography."); Kevin Goldman, From Witches to Anorexics, Critical Eyes Scrutinize Ads for Political Correctness, Wall St. J., May 19, 1994, at B1.

273. *See* Meyer, supra note 42, at 1196-99; Geoffrey R. Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv. J.L. & Pub. Pol'y 461, 480 (1986); Marilyn J. Maag, Note, The Indianapolis Pornography Ordinance: Does the Right to Free Speech Outweigh Pornography's Harm to Women?, 54 U. Cin. L. Rev. 249, 269 (1985); *see also* Emerson, supra note 232, at 142-43.

Rice[274] not only provides models of egalitarian sexuality for readers,[275] but also gives the author entree to influential media outlets, from which she preaches a message of sexual relationships based upon equality.[276] Perhaps her vision of the future is unduly optimistic, undesirable, or reflective of oppressive social conditioning[277]—but the suppression of her works on those bases would serve no interest other than perpetuation of the status quo.

One powerful influence that led the Supreme Court in *New York Times v. Sullivan*[278]—a case that Professor MacKinnon vigorously attacks in her most recent book[279]—to repudiate the view that libel was "outside" the First Amendment was the realization that libel law was being used by those in power to suppress dissent,[280] and that to defer to the state's character-

---

274. This consists of a trilogy published under the name of A.N. Roquelaire, The Claiming of Sleeping Beauty (1983), Beauty's Punishment (1984), and Beauty's Release (1985), and one book published under the name Anne Rampling, Exit to Eden (1985).

275. *See* Robin West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wis. Women's L.J. 3, 81, 119 (1987); *see also* Hans-Bernard Brosius et al., Exploring the Social and Sexual "Reality" of Contemporary Pornography, 30 J. Sex Res. 161 (1993) (while contemporary pornography continues to spotlight male sexual desires, there has been a trend toward more egalitarian portrayals); Lennard J. Davis, Text Sex, The Nation, Mar. 19, 1993, at 418, 420 (reviewing six recent erotic collections: "For those who feel that pornography or erotica degrades women, these new anthologies provide empowering scenarios for female sexuality."). *See generally* Robert Darnton, Sex for Thought, N.Y. Rev. Books, Dec. 22, 1994, at 65, 68-70 (arguing that, although intended as masturbatory aids, pornographic works circulated in France in period 1650-1800 tended, contrary to MacKinnon-Dworkin thesis, to "advance ideas that undercut simplistic notions of phallocracy," provide positive models of independent-thinking women, and expose social abuses).

276. *See, e.g.*, Sarah B. Conroy, Anne Rice's of 'The Queen of the Damned', Creating a Vampire History of the World, Wash. Post, Nov. 6, 1988, at F1; Anne Rice: Author Interview, Playboy, Mar. 1993, at 53; Anne Rice's Imagination May Roam Among Vampires and Erotica, But Her Heart is Right at Home, Time, Dec. 5, 1988 at 131.

Of course, there is no particular reason why "egalitarian sexuality" need be "the" feminist model. One important benefit of the relaxation of legal constraints on sexually explicit expression should be facilitating the ability of each woman to choose whatever forms of sexual experience she finds "the most liberating and exciting," regardless of others' judgments. *See* Katherine Franke, Cunning Stunts: From Hegemony to Desire, A Review of Madonna's Sex, 20 N.Y.U. Rev. L. & Soc. Change 549, 572 (1993-94); supra note 266. *See generally* Daphne Merkin, Unlikely Obsession, The New Yorker, Feb. 26 & Mar. 4, 1996, at 98, 99 (recounting history of sexual pleasure attained through fantasy and actuality of being spanked, and liberating effect of "finally giving voice to this confession, at putting down on paper, under my own name, what I know to be true of myself"); supra note 232.

277. *But see* Laura W. Brill, MacKinnon and Equality: Is Dominance Really Different?, 15 U. Ark. Little Rock L.J. 261, 268 (1993) ("It requires a strong dose of paternalism to argue that women who gain erotic pleasure from pornography are actually injured by it and simply suffering from false consciousness.").

278. 376 U.S. 254 (1964).

279. *See* MacKinnon, Only Words, supra note 231, at 78-82.

280. *See* Brief of the Washington Post Company as Amicus Curiae in Support of the Petitioner 1-10, New York Times v. Sullivan, 376 U.S. 254 (1964) (Nos. 39, 40); Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 35-36 (1991), *reviewed by*

ization of defamatory speech as socially worthless insults would be to cut off a vigorous political debate on the desirability of the existing racial situation. One lesson that Professor MacKinnon and her allies have certainly taught the community is that sexually explicit works convey a political meaning.[281]

Although unconvinced by the formulation of pornography as "outside" the First Amendment,[282] MacKinnon wishes to suppress it precisely because of its negative social effects, its bad tendencies.[283] This is not a new justification for suppression, but simply a repetition of the rationale offered for the censorship of speech—political as well as erotic—for centuries.[284] In fact, the First Amendment came into being in response to this rationale, and the very purpose of First Amendment law is to assess its validity in particular contexts.[285] Thus, MacKinnon's argument, whatever it may say about the application of ordinary First Amendment doctrines to sexually explicit material,[286] offers no support for casting pornography "outside" the sphere of the First Amendment. Rather, the fact that her position—with all of its negative consequences—finds its support in existing caselaw doing just that,[287] provides a powerful additional reason for repudiating the caselaw.[288]

Pierre N. Leval, 91 Mich. L. Rev. 1138 (1993); Richard A. Epstein, Was New York Times v. Sullivan Wrong?, 53 U. Chi. L. Rev. 782, 787, 817-18 (1986); Harry Kalven, The New York Times Case: A Note on "the Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 208-10.

281. *See* FACT Brief, supra note 266, at 20-23, *reprinted in* 21 Mich. J.L. Reform at 119-22; Meyer, supra note 42, at 1150-57; *see also* Dworkin v. Hustler Magazine, Inc., 867 F.2d. 1188, 1195-86 (9th Cir.) ("[T]he conflict about pornography is . . . an ongoing political debate."), *cert. denied*, 493 U.S. 812 (1989); *cf.* MacKinnon, Moral Issue, supra note 229, at 323 ("Obscenity is a moral idea; pornography is a political practice."). Slightly expanded forms of this thought are found in MacKinnon, Pornography, Civil Rights, supra note 125, at 21 and MacKinnon, Pornography as Defamation, supra note 253, at 258-59.

282. *See* MacKinnon, Moral Issue, supra note 229, at 335 ("The legal fiction whereby the obscene is 'not speech' has deceived few. . . . But obscenity law got one thing right: pornography is more act-like than thought-like. The fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, a political idea, does not make that practice into an idea. Pornography is not an idea any more than segregation is an idea, although both institutionalize the idea of the inferiority of one group to another.").

283. *See* MacKinnon, Only Words, supra note 231, at 76-77 (attacking idea "that speech cannot be restricted because you fear its consequences: the 'bad tendency' or 'witch hunt' doctrine").

284. *See* Mark A. Graber, Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech, 48 Vand. L. Rev. 349, 354 (1995); supra note 93; supra notes 116-17 and accompanying text.

285. *See* Kenneth Lasson, To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment, *in* Group Defamation, supra note 93, at 267, 271.

286. As indicated supra text accompanying notes 233-34, some of the purposes that MacKinnon is seeking to achieve might well be accomplished consistently with those doctrines.

287. *See* MacKinnon, Pornography, Civil Rights, supra note 125, at 61.

288. *Cf.* Comment, R. v. Butler: Recognizing the Expressive Value and the Harm in Pornography, 23 Golden Gate U. L. Rev. 651, 677 (1993) (supporting both *Butler*, *see* supra

E. Conclusion

The mischievous doctrinal formulation that obscenity is "outside" the First Amendment should be repudiated. This does not mean that no regulation of sexually-oriented speech should be permissible.[289] It does mean that when the government asserts an interest in the control of erotic communication, it should be required to answer the same probing questions as it is in ordinary First Amendment contexts.

A possible objection to this conclusion is the same as that which was made as commercial speech first came "within" the First Amendment: if the Amendment were expanded to cover speech generally thought to be of lesser social value, legal protection for all speech—including core political speech—would be weakened.[290] Even if one rejects the notion that pornography is in fact a form of political speech,[291] this is unpersuasive,[292] both legally and empirically.

Legally, the fact that speech is "within" the First Amendment is only the beginning of the analysis;[293] once there, it may very well be placed in one sub-category or another. The point of bringing pornography "within" the First Amendment is simply to require the courts to make explicit, for better or worse,[294] the weighing of interests that casting such speech

---

text accompanying note 262, and also the idea of bringing pornography within the ambit of ordinary free speech doctrine: "Labelling obscene material as 'unprotected' merely masks the true issues and disempowers American courts from directly tackling concerns about the effects of pornography.... The intensity surrounding the pornography debate testifies to pornography's expressive power.").

289. Again, the analogy to libel is instructive. The fact that libel is now "within" the First Amendment has not stopped the Supreme Court from approving the imposition of liability in particular cases. *E.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).

290. *See, e.g.*, Blasi, supra note 179, at 486-88.

291. *See* supra note 50; text accompanying notes 265-66, 278-81.

292. *See* Karst, supra note 93, at 141-42.

293. *See* supra note 25 (outlining Supreme Court's current First Amendment methodology).

294. Although it is certainly possible for courts to thread the judge-made labyrinth described supra note 25 with appropriate sensitivity to the underlying policy concerns, *see, e.g.*, AIDS Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1 (1st Cir. 1994); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994), the practical danger presented by its complexity is that in deciding every definitional point, not to mention some not included in that brief sketch (such as whether a "content" restriction is also a "viewpoint" restriction, *see* R.A.V. v. St. Paul, 505 U.S. 377, 385-92 (1992); Edward J. Eberle, Hate Speech, Offensive Speech, and Public Discourse in America, 29 Wake Forest L. Rev. 1135 (1994)), as well as in generating new distinctions based on previously immaterial facts (such as whether a prior restraint is embodied in a statute or an injunction, *see* Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2524 (1994); Kraut, supra note 26, at 178 (arguing that creation of a new category in *Madsen* "brings free speech analysis to the brink of the absurd"), Jennifer J. Seibring, Note, If It's Not Too Much to Ask, Could You Please Shut Up?, 20 S. Ill. U. L.J. 205, 206 (1995) (arguing that *Madsen* standard based on distinction between injunction and legislation is "unsupported and unworkable")), opportunities for judicial manipulation—and the

"outside" the First Amendment enables them to avoid.[295] Empirically, there is no basis for suggesting that bringing some categories of speech "within" the First Amendment—as has happened formally over the last thirty years with respect to commercial speech[296] and libel[297] and as a practical matter with respect to fighting words[298]—has had any weakening effect on the level of solicitude accorded to other sorts of speech that were previously within the charmed circle.[299]

In fact, far from threatening the bulwarks around speech generally thought to be at the core of the First Amendment, the abolition of the inside-out dichotomy will protect them, by removing a potent weapon from the hands of those who wish to assault those bulwarks.

III. STEP TWO: ALIGNING FORMAL AND REAL ANALYSIS

The issue of pornography regulation highlights dangerous inadequacies in the legal arsenal of the defenders of freedom of expression.

The argument, for instance, that there is as much basis in history and policy for treating extreme portrayals of violence as "obscene" under the First Amendment as there is for treating sexually graphic material as "obscene" is correct[300]—and demonstrates the importance of re-aligning doctrine and principle in the pornography field.[301] Otherwise, the

---

subordination of free speech values—arise. *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1070-76 (1991) (creating special category, governed by its own standard, for lawyer's out-of-court statements while representing client); *see* Eric M. Freedman, The First Amendment Also Applies to Lawyers, Nat'l L.J., Sept. 11, 1995, at A21 (criticizing case).

295. *See* Tribe, supra note 25, at 792 ("Any exclusion of a class of activities from first amendment safeguards represents an implicit conclusion that the governmental interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas."); *cf.* Shaffer v. Heitner, 433 U.S. 186, 205-12 (1977) (whether action is denominated "in rem" or "in personam" is irrelevant for due process analysis, because in either case the rights of a person to a thing are being adjudicated), *rev'g* Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (Del. 1976).

296. *See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760-70 (1976).

297. *See* infra note 331 and accompanying text.

298. *See* infra Part III.A.

299. *See* Ohralik v. Ohio State Bar, 436 U.S. 447, 455-56 (1978) (Because "to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution . . . of the force of the Amendment's guarantee with respect to the latter kind of speech . . . , we have . . . afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.").

300. This is the thesis of Saunders, supra note 54. *See* id. at 176-77. He is scheduled to explicate it more fully in Kevin W. Saunders, Violence as Obscenity: Limiting the Media's First Amendment Protection (forthcoming 1996).

301. *See* Jessalyn Hershinger, Note, State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis, 46 Vand. L. Rev. 473 (1993) (controls on violent expression could pass muster under tests the Supreme Court has used for obscenity, but not under a proper analysis, which would require, inter alia, demonstration of link between violent expression and violent action); *see also* Donnerstein et al., supra note 124, at

precedents established there could be used to cast "outside" the First Amendment this category of currently unpopular but protected[302] speech.[303] Next, on similar reasoning, surely the category of racial hate speech should also be excluded from the Amendment's ambit.[304] What then becomes of those forms of rap music that combine the most inflammatory elements of both categories?[305] Indeed, it has now been

---

108-36, 178-79 (evidence for connection between violent media portrayals and antisocial behavior, though weak, is stronger than for connection between sexually explicit portrayals and antisocial behavior); Amy L. Freeman, Note, Why Violent Media Producers Remain Unpenalized for Movie-Induced and Imitative Crimes, 24 Suffolk U. L. Rev. 1075 (1990) (current empirical evidence of causal connection between media portrayals of violence and actual crimes too weak to satisfy normal First Amendment criteria; actions by concerned citizens offer best hope of controlling violent slasher films).

302. *See* Video Software Dealers Ass'n v. Webster, 773 F. Supp. 1275, 1278 (W.D. Mo. 1991) (overturning Missouri statute restricting availability of violent videotapes to minors; "Unlike obscenity, violent expression is protected by the First Amendment"), *aff'd*, 968 F.2d 684, 688 (8th Cir. 1992).

303. *See, e.g.*, Deana Pollard, Regulating Violent Pornography, 43 Vand. L. Rev. 125, 154-59 (1990) (arguing for constitutionality and desirability of statutory ban on any "film that concurrently depicts both sexual explicitness and physically violent acts between or among those engaged in the sexual activity"). *But cf.* Donald A. Downs, The New Politics of Pornography 189-98 (1989) (proposing that class of proscribable speech be limited by adding fourth prong, violence, to *Miller* test, described supra note 173).

304. For a comprehensive collection of essays assessing the problem of group defamation from a variety of viewpoints—historical, comparative, and linguistic—as well as presenting competing perspectives on the First Amendment issues by leading scholars, see Group Defamation, supra note 93. *See also* infra notes 354-57 and accompanying text.

305. *Compare* Dennis R. Martin, The Music of Murder, 2 Wm. & Mary Bill of Rts. L. Rev. 159 (1993) (First Amendment should not protect rap songs advocating killing of police officers) *with* Jimmie L. Briggs, Jr., Where They're Calling From: Cultural Roots of Rap, 2 Wm. & Mary Bill of Rts. L. Rev. 151 (1993) (rap music serves important, social, educational, and political functions) *and* Jason Talerman, Note, The Death of Tupac: Will Gangsta Rap Kill the First Amendment?, 14 B.C. Third World L.J. 117, 121-22 (1994) (rap lyrics have sociopolitical message worthy of First Amendment protection).

The question of constitutional protection is of some practical importance because in recent years a number of politicians have attempted to mobilize public opinion against such music. *See* Frank Rich, Hypocrite Hit Parade, N.Y. Times, Dec. 13, 1995, at A23 (describing political developments of previous year); Basil Talbott, Moseley-Braun Seeks "Gangsta Rap" Strategy, Chi. Sun-Times, Feb. 24, 1994, at 34 (after chairing five-hour hearing, Sen. Carol Moseley-Braun denounces "gangsta rap" as misogynistic and claims some of its lyrics have a "causal relationship" to street violence). *See generally* Clarence Page, Congress' Rap Session Was Just That, Chi. Sun-Times, Feb. 27, 1994, at 3 (rap is protest of current generation, "much like the blues and jazz and rock that came before," and should lead Americans to consider what they "are going to do about the conditions that led to its creation"); Michael E. Dyson, Bum Rap, N.Y. Times, Feb. 3, 1994, at A21 (gangster rap often sexist and viciously misogynistic, but calls attention to complex dimensions of ghetto life ignored by many Americans, black and white, including the embarrassing legacy of sexism and misogyny in the black church); Blue Noses: Greensleeves!, N.Y. Times Mag., Jan. 30, 1994, at 8 (pointing out that level of sex and violence in traditional folksongs would create outrage if contained in rap music); infra note 365.

Much of this discussion followed an unsuccessful attempt to prosecute the rap group 2 Live Crew in Florida for obscenity on the basis of its album Nasty as They Wanna Be. *See* Luke Records v. Navarro, 960 F.2d 134 (11th Cir.), *cert. denied*, 505 U.S. 1022 (1992); *see also* Bruce

seriously argued that all "morally abhorrent" speech should forfeit First Amendment protection.[306]

Such an argument is only plausible legally because of *Chaplinsky v. New Hampshire*[307] and *Beauharnais v. Illinois*.[308] These cases are the authorities for adding to the question of whether a particular form of expression is "speech" the further question of whether it is speech "inside" or "outside" the First Amendment. The superimposition of this additional inquiry is thoroughly mischievous, as the last half century of experience has shown. Both decisions have long since lost any vitality in their own fields, and should now be overruled—thereby aligning doctrine with the empirical reality as measured in the results of the decided cases, and clearing the field for a more useful analysis of current and future problems.

A. Overruling Chaplinsky

Chaplinsky involved the conviction of a street preacher for calling a city marshall "a God damned racketeer" and "a damned Fascist."[309] A unanimous Court affirmed the conviction, writing:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[310]

Rogow, Essay: Too Live a Crew, 15 Nova L. Rev. 241 (1991) (description of case by counsel); Steven E. Butler, Note, The Recent Assault on Sexually-Explicit Music Lyrics, 12 Whittier L. Rev. 367, 368-76 (1991) (album was not legally obscene); Recent Developments in First Amendment Law, 19 J. Contemp. L. 1, 343-350 (1993). As the case illustrates, most existing legislation that might be applicable focuses on the erotic content of lyrics, rather than any other antisocial aspects they may have. *See* Jim McCormick, Note, Protecting Children From Music Lyrics: Sound Recordings and "Harmful to Minors" Statutes, 23 Golden Gate U. L. Rev. 679, 698-99 (1993) (criticizing laws in 17 states which seek to regulate erotic song lyrics on the basis of potential harm to minors); *see also* Soundgarden v. Eikenberry, 871 P.2d 1050 (Wash. 1994) (invalidating Washington's "Erotic Sound Recordings" statute).

In Germany, the government does prosecute musicians for inciting racial hatred, and destroys their records, tapes, and compact discs. *See* Stephen Silver, Music of Hate, N.Y. Times, Feb. 8, 1994, at A23; Don't Label All Young Germans as Neo-Nazis, N.Y. Times, Feb. 22, 1994, at A20 (letters to the editor commenting on Silver's article). But, quite apart from legal considerations, such prosecutions in this country would almost surely be seen as expressions of racial bias and have a negative effect on racial relations. *See* Rogow, supra, at 255-57; Talerman, supra, at 144.

306. Alon Harel, Bigotry, Pornography and the First Amendment, 65 S. Cal. L. Rev. 1887, 1889 (1993); *see also* Harel, supra note 247. *But cf.* supra note 46 and accompanying text (noting that purpose of First Amendment is to protect from government suppression of unpopular, not popular, speech).

307. 315 U.S. 568 (1942).

308. 343 U.S. 250 (1952).

309. *Chaplinsky*, 315 U.S. at 569.

310. Id. at 571-72 (two footnotes omitted, neither of which cites to case authority support-

From this, commentators have concluded that *Chaplinsky* casts "outside" the First Amendment two groups of "fighting words."[311] The first consists of insults that would provoke an average addressee to fight. As many observers have noted, the Supreme Court—despite numerous opportunities to do so[312]—has never upheld a conviction on this theory since *Chaplinsky* itself in 1942. They have concluded, accurately, that this doctrinal category is dead as a practical matter.[313] Since it measures the rights of the speaker by the self-control of the audience,[314] discriminates against the language of the street in favor of that of the classroom,[315] and is implicitly sexist,[316] its demise has been greeted with universal applause.[317]

---

ing the text). The passage continues: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. (citing Chafee, supra note 247, at 150).

311. *E.g.*, Note, The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for its Internment, 106 Harv. L. Rev. 1129, 1130 (1993). It is far from clear that the commentators are correct on either point.

First, as discussed infra note 323 and accompanying text, it seems likely that *Chaplinsky* was only attempting to define one sort of statement, not two.

Second, despite the characterizations of later courts, *see, e.g.*, New York v. Ferber, 458 U.S. 747, 754 (1982), *Chaplinsky* itself does not define fighting words as "outside" the First Amendment. Rather, the most natural reading of the language is that they are "within" it, but the state has a compelling interest in suppressing them. This willingness to engage in an explicit discussion of ends and means, and thus to address the three questions set forth at the beginning of this Article, *see* supra text accompanying notes 7-12, distinguishes the case from *Beauharnais*, *see* infra text accompanying notes 328-29. Thus, it is *Beauharnais* that appears to be the true source of the concept of speech "outside" the First Amendment, and of the technique of question-begging later employed so effectively in Roth v. United States, 354 U.S. 476 (1957), *see* supra text accompanying note 90. Indeed, as noted supra note 91, *Roth* relied on *Beauharnais*, not *Chaplinsky*.

312. *E.g.*, Texas v. Johnson, 491 U.S. 397, 408-10 (1989); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (described supra note 116); Lewis v. New Orleans, 415 U.S. 130 (1974); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) (described supra note 116); Gooding v. Wilson, 405 U.S. 518, 524 (1972); Cohen v. California, 403 U.S. 15, 23 (1971); Ashton v. Kentucky, 384 U.S. 195, 199-200 (1966); Terminiello v. Chicago, 337 U.S. 1, 4-6 (1949).

313. *See, e.g.*, Stephen W. Gard, Fighting Words as Free Speech, 58 Wash. U. L.Q. 531, 534-535, 580 (1980).

314. *See* Allen, supra note 41, at 1093-94. This is a violation of basic First Amendment principles. *See* Texas v. Johnson, 491 U.S. 397, 408-10 (1989); Cohen v. California, 403 U.S. 15, 23 (1971); Ashton v. Kentucky, 384 U.S. 195, 199-200 (1966); Terminiello v. Chicago, 337 U.S. 1, 4-6 (1949); People v. Huss, 241 Cal. App. 2d 361, 369 (1966).

315. *See* Tribe, supra note 25, at 840; Parker, supra note 196, at 577.

316. *See* Note, supra note 311, at 1133-34; *see also* Cynthia G. Bowman, Street Harassment and the Informal Ghettoization of Women, 106 Harv. L. Rev. 517, 558, 563 (1993) (containing an insightful critique of the fighting words doctrine as applied to female addressees).

317. *See, e.g.*, Frederick M. Lawrence, Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech, 68 Notre Dame L. Rev. 673, 706-11 (1993); Harvey A. Silverglate, 'Fighting Words' Redux, Nat'l L.J., Dec. 12, 1994 at A21. *But see* infra note 353.

One slightly dissonant voice in this chorus comes from a work which suggests that, since

The commentators' second prong of *Chaplinsky*, which the Supreme Court has never utilized, casts beyond the pale those words "that by their very utterance inflict injury."[318] As a definition of a separate category of utterances, this formulation is legally useless.[319] Obviously, one can be "injured" in some sense by the mere utterance of many statements, such as "Your theory about pornography vividly demonstrates your twisted thinking," that are "within" the First Amendment. Whatever injuries such words may inflict are simply not legally cognizable.[320] As the Court correctly recognized in *Hustler Magazine v. Falwell*,[321] this is true irrespective of how state tort law may characterize the words. Since Falwell could not collect for libel, he could not collect for the intentional infliction of emotional distress—and it quite properly did him no good to argue that the contested portrayal of him "by its very nature" inflicted injury, and was therefore "outside" the First Amendment under *Chaplinsky*.[322] In short, *Chaplinsky*'s putative second prong adds nothing to the first in terms of defining expressions that are automatically proscribable as "outside" the First Amendment; as a category, it is an empty set.[323]

---

the Supreme Court apparently assumed the continuing viability of "fighting words" as a proscribable category of speech in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), *see* infra text accompanying notes 348-50, the doctrine should be re-cast in terms of Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (discussed supra text accompanying notes 114-21), so as to permit punishment only of fighting words "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *See* Michael J. Mannheimer, Note, The Fighting Words Doctrine, 93 Colum. L. Rev. 1527, 1528-29 (1993); *see also* Aviva O. Wertheimer, Note, The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence, 63 Fordham L. Rev. 793, 842-43, 849-50 (1994) (making a similar suggestion on the basis that such words should be considered conduct rather than speech). *Cf.* Tribe, supra note 25, at 850 (implying that the Supreme Court has largely adopted the suggested limitation already).

Since adoption of this proposed narrowing would in effect abolish "fighting words" as a separate First Amendment category, its intellectual justification is not immediately obvious. But its political attractiveness to a Supreme Court that did not wish to take the perceived bold step of overruling *Chaplinsky* outright might be considerable.

318. *Chaplinsky*, 315 U.S. at 572.

319. *See* Anthony D'Amato, Harmful Speech and the Culture of Indeterminacy, 32 Wm. & Mary. L. Rev. 329 (1991); Loewy, supra note 137, at 628-29.

320. *See* Milkovich v. Lorain Journal, 497 U.S. 1, 41 (1990) (hypothetical statement "Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" would be protected by the First Amendment, so its target could not recover for libel); Gard, supra note 313, at 577-79.

321. 485 U.S. 46 (1988). The case is fully considered in Post, supra note 10.

322. *See* Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1193 & n.2 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989).

323. That is exactly why there is some reason to doubt that the Supreme Court in fact was attempting to define two separate classes of statement. It is at least as likely that the Court was simply attempting to articulate the distinction between utterances that inflict injury due to the insulting form of the expression, like walking up to the author of a law review article and saying, "You are a perverted idiot," and ones that inflict injury on the basis of their contents, like the example given in the text.

B. Overruling Beauharnais

Beauharnais v. Illinois[324] is even more unsound than *Chaplinsky*. The petitioner in *Beauharnais* had distributed a segregationist leaflet referring to the "rapes, robberies, knives, guns and marijuana of the negro,"[325] and was convicted under a statute that prohibited publications portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion which [exposes it] to contempt . . . or which is productive of breach of the peace."[326] The trial judge "refused to charge the jury, as requested by the defendant, that in order to convict they must find 'that the article complained of was likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.'"[327]

The 5-4 Court began its analysis by characterizing the statute as a criminal libel law, and proceeded to quote its statement in *Chaplinsky* that the suppression of certain narrowly-defined classes of speech, including libel, had never been thought to raise any constitutional problem.[328] "Libelous utterances not being within the area of constitutionally protected speech," the majority continued, "it is unnecessary, either for us or the State courts, to consider the issues behind the phrase 'clear and present danger.'"[329]

Of course, after *New York Times v. Sullivan*,[330] the statement that libelous utterances are not "within the area of constitutionally protected speech" is simply no longer true.[331] The doctrinal tides that have swept libel in general into the First Amendment ocean have left *Beauharnais*—which isolated "group libel"—high and dry.[332] Not

---

324. 343 U.S. 250 (1952).

325. The document is reproduced in full in id. at 276.

326. Id. at 251.

327. Id. at 253. Although the Court's reasoning enabled it to avoid confronting the fact, the language of this requested charge was taken straight from Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949), in which far more inflammatory speech that—unlike Beauharnais'—had in fact provoked a riot was held protected.

328. Beauharnais, 343 U.S. at 253-57 (citing *Chaplinsky*, 315 U.S. at 571-72).

329. Id. at 266. The passage continues: "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class." Id. Of course, the contention disparaged by the majority was precisely the one that Roth made several years later, only to have it rejected by a divided Court relying on this case. *See* supra text accompanying notes 88-91.

330. 376 U.S. 254 (1964).

331. *See* Herbert v. Lando, 441 U.S. 153, 158-59 (1979); Garrison v. Louisiana, 379 U.S. 64, 68 n.3 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 381-85 (1992); Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 505-07 (3d Cir. 1978) (summarizing doctrinal change); Rosner v. Field Enters., 564 N.E.2d 131, 137-40 (Ill. App. Ct. 1990) (same), *appeal denied*, 137 Ill. 2d 672 (1991); A.S. Abell Co. v. Barnes, 265 A.2d 207, 209-10 (Md. 1970), *cert. denied*, 403 U.S. 921 (1971); Long v. Egnor, 346 S.E.2d 778, 782 (W. Va. 1986).

332. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir.)

surprisingly then, the most serious attempt in recent times to make use of *Beauharnais*—the effort of Skokie, Illinois to exclude Nazi marchers[333]—met with a summary rebuff in the Supreme Court, with only two Justices suggesting that the case retained any vitality as precedent.[334]

Hence, it is perfectly clear that today's Court would not summarily dismiss a constitutional challenge to a group libel statute with the simple statement that group libel is "outside" the First Amendment.[335] *Beauharnais*, the authority for that proposition, has approximately the precedential force of *Dred Scott*.[336]

Indeed, if the Court did not quickly invalidate such a statute for failure to meet the strict incitement test of *Brandenburg v. Ohio*,[337] the development of a rich First Amendment-based libel jurisprudence in the wake of *Sullivan*[338] would present the challenger with at least three potent lines of attack.[339] First, even in a civil libel case, the Constitution requires that the plaintiff bear the burden of proving falsity.[340] Surely, the government must bear at least as high a burden in a criminal prosecution.[341] Second, statements of opinion are protected by the Constitu-

---

(reiterating circuit's previous conclusion "that cases such as New York Times v. Sullivan have so washed away the foundations of Beauharnais that it could no longer be considered authoritative"), *aff'd mem.* 475 U.S. 1001 (1985); Collin v. Smith, 578 F.2d 1197, 1204-05 (7th Cir.) (declining to follow *Beauharnais*), *cert. denied*, 439 U.S. 916 (1978); Emerson, supra note 30, at 396-99 ("Little remains of the doctrinal structure of *Beauharnais*," whose result is unsound in any event); *see also* Dworkin v. Hustler Magazine, Inc., 867 F. 2d 1188, 1200 (9th Cir.) (agreeing with *Hudnut*), *cert. denied*, 493 U.S. 812 (1989); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973) ("extremely doubtful" that *Beauharnais* still authoritative); Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring) ("Far from spawning progeny, *Beauharnais* has been left more and more barren by subsequent first amendment decisions, to the point where it is now doubtful that the decision still represents the view of the Court."), *cert. denied*, 394 U.S. 930 (1969).

333. The background is described in Aryieh Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979) and Samuel Walker, Hate Speech: The History of an American Controversy 120-26 (1994), *reviewed in* 14 L. & Hist. Rev. 191 (1996).

334. *See* Smith v. Collin, 436 U.S. 953 (1978) (Blackmun, J., joined by White, J., dissenting from the denial of certiorari).

335. *Cf.* United States v. Handler, 383 F. Supp. 1267, 1277-80 (D. Md. 1974) (holding unconstitutional a statute criminalizing mailing of defamatory matter; even assuming, improbably, that *Beauharnais* remains good law, "in any given case a court is required to weigh the purposes furthered by the particular statute against the particular restraints placed by that statute on expression").

336. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For an alternative view, see Lasson, supra note 285, at 273-75.

337. 395 U.S. 444 (1969) (discussed supra text accompanying notes 114-21).

338. *See generally* C. Thomas Dienes & Lee Levine, Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan, 78 Iowa L. Rev. 237 (1993).

339. As a teaching exercise, Monroe H. Freedman has set forth in The People of the State of New York v. Jesse A. Stump: Majority Opinion, *in* Group Defamation, supra note 93, at 323, 325-28 how the proponent of such a statute might attempt to respond.

340. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

341. *See* Garrison v. Louisiana, 379 U.S. 64 (1964).

tion,[342] and most statements covered by such a statute likely would be within that category. Third, even if the statements were in the form of factual assertions, the protection accorded to opinion may well require that, in accordance with the rule at common law,[343] there can be no liability for the defamation of large groups, because the imposition of such liability would "seriously interfere with public discussion of issues, or groups that are in the public eye."[344]

Whether or not these arguments prevailed,[345] the point for present purposes is that they would be based on well-established First Amendment principles, and whatever responses the Court made to them would be squarely in the mainstream of its jurisprudence analyzing speech "within" the First Amendment.

C. *The Practical Effects of Doctrinal Change*

As indicated in the two previous sections, the Supreme Court's performance in both fighting words and libel cases has been—and by all signs will continue to be[346]—commendably policy-oriented, focused on a model of promoting discourse. Fighting words and libel may be "outside" the First Amendment, but they are analyzed as though they were within it.[347]

Under these circumstances, what difference does it make whether the Supreme Court actually overrules *Chaplinsky* and *Beauharnais*, and aligns its stated doctrines with the realities of its analytical approach? The answer is that the continued formal existence of a category of speech "outside" the

---

342. *See* Gertz v. Robert Welch Inc., 418 U.S. 323, 340 (1974); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (under First Amendment, no libel liability for statements that are inherently incapable of factual proof or disproof).

343. *See* Arcand v. Evening Call Pub. Co., 567 F.2d 1163 (1st Cir. 1977).

344. Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981); *see also* Anyanwu v. Columbia Broad. Sys., 887 F. Supp. 690 (S.D.N.Y. 1995) (dismissing libel claim on behalf of more than 500 Nigerian businessmen); Talal v. Fanning, 506 F. Supp. 186 (N.D. Cal. 1980) (dismissing libel claim on behalf of large group of Muslims).

345. *Cf.* City of Cincinnati v. Black, 220 N.E.2d 821 (Ohio Ct. App. 1966) (holding unconstitutional statute very similar to one in *Beauharnais*). For the suggestion that a narrowly-defined tort of "group vilification" could be constitutional, see Mark S. Campisano, Note, Group Vilification Reconsidered, 89 Yale L.J. 308 (1979).

346. For a discussion of the current status of *Beauharnais* in light of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), see G. Sidney Buchanan, The Hate Speech Case: A Pyrrhic Victory for Freedom of Speech?, 21 Hofstra L. Rev. 285, 299-304 (1992); Comment, supra note 288, at 666 n.102 (suggesting that the Court's decision in *R.A.V.* "again brings into question the vitality of *Beauharnais*. The Court seems to be moving away from allowing regulation of speech on the basis of non-imminent harm to a group."). For a discussion of the effect of *R.A.V.* on the fighting words doctrine, see Ronald D. Rotunda, A Brief Comment on Politically Incorrect Speech in the Wake of R.A.V., 47 SMU L. Rev. 9, 13-18, 20-22 (1993). *See also* Mannheimer, supra note 317.

347. *See* Tribe, supra note 25, §§ 12-10, 12-12; *see also* J. Harvie Wilkinson III, Toward a Jurisprudence of Presumptions, 67 N.Y.U. L. Rev. 907, 918 (1992). *See generally* Hadley Arkes, The Philosopher in the City: The Moral Dimensions of Urban Politics 23-91 (1981).

First Amendment has at least two very practical negative consequences.

First, it hinders clear analysis. The Supreme Court's opinions in *R.A.V. v. St. Paul*,[348] which presented a First Amendment challenge to a local hate speech ordinance, illustrate the problem. Influenced by existing doctrine, the Minnesota Supreme Court implausibly construed the enactment as reaching only "fighting words," a construction binding on the Court.[349] Hence, the Court wound up writing an opinion about whether a government could discriminate on a content basis when regulating speech "outside" the First Amendment, and most of the Justices' intellectual energy went into debating the meaning of their previous holdings that certain categories of speech are "outside" the First Amendment.[350]

At all judicial levels, the debate should have been over whether the state had (a) demonstrated a constitutionally legitimate purpose for suppressing the speech at issue—the central question presented by the case, but one whose discussion throughout the legal system was constricted by the "fighting words" straitjacket, and (b) chosen the least restrictive means to do so.

Second, by validating the summary suppression of sexually-oriented speech on bases that would otherwise be untenable,[351] while providing precedents for the addition of new categories of speech to this group,[352] the inside-out model encourages the use of flawed old doctrine to justify flawed new doctrine.[353] Arguments in favor of the regulation of racial

---

348. 505 U.S. 377 (1992).

349. *See* id. at 381-82.

350. *See* supra note 14. On behalf of the five-member majority, Justice Scalia wrote that although the Court has sometimes said that obscenity, defamation, and fighting words are not within the area of constitutionally protected speech, such statements are not to be taken literally, but rather as meaning that these forms of speech "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content . . . —not that they are categories of speech entirely invisible to the Constitution." *R.A.V.*, 505 U.S. at 383-84.

Justice White's concurrence responded that the prior statements of the Court "meant precisely what they said." Id. at 400. This part of his opinion commanded only three votes, however. Justice Stevens refused to join it, and has since made more clear than he did in his own separate concurrence that he agrees with Justice Scalia's view. *See* Stevens, supra note 30, at 1308 (Court surely correct to say that categories of speech "outside" First Amendment are not invisible to the Constitution).

351. *See* supra Part II.

352. *See* supra text accompanying notes 300-06.

353. The proposal by Saunders to treat violence as obscenity, *see* supra note 300 and accompanying text, is one instance of such reasoning. Another fine example of this form of analysis is found in Jerome O'Callaghan, Pornography and Group Libel: How to Solve the *Hudnut* Problem, 27 New Eng. L. Rev. 363 (1992). The author proposes that, on the authority of *Beauharnais*, pornography could be suppressed as group libel, and continues:

> Critics of the proposed reform will likely argue that it adds insulting or unpopular views to the list of exceptions to the First Amendment. Thus, offensive speech will lose First Amendment protection, despite memorable declarations to the contrary in Texas v. Johnson, Cohen v. California, and West Virginia State Board of Education v. Barnette. The critics will argue that this reform signifies majoritarian needs

hate speech commonly display this pattern as they seek to expand the categories of expression "outside" the First Amendment,[354] and rely explicitly on the pornography analogy to urge that the speech in question should be banned because it is socially worthless.[355]

Leaving entirely aside the merits of the various suggestions, reliance on such dubious precedent is at best a distraction.[356] Reaching sound conclusions on this issue—not to mention avoiding unsound ones on other matters—requires that the First Amendment validity of the proposals be considered afresh,[357] rather than being accepted as just one more step

---

> overwhelming First Amendment rights. To a large extent the critics are correct. But the damage to any broad view of the First Amendment lies not in the expansion of group libel to protect women, but in earlier decisions such as Schenck v. United States, Miller v. California, Chaplinsky v. New Hampshire, and *Beauharnais* itself. . . . The reform of the law suggested here capitalizes on the reasoning already used to create exceptions to freedom of speech. That is why the *Chaplinsky* reasoning, relied on in *Beauharnais*, is so important. . . . Critics who balk at extending group libel this far will have to explain why freedom of speech has been limited for several groups other than pornographers.

Id. at 379 (footnotes omitted); *see also* MacKinnon, Only Words, supra note 231, at 80-85 (arguing that the Court was right in *Beauharnais* and wrong in Skokie case, described supra text accompanying notes 333-34); Rhonda G. Hartman, Revitalizing Group Defamation as a Remedy for Hate Speech on Campus, 71 Or. L. Rev. 855, 878-79, 894, 900 (1992) (racial hate speech on campus proscribable since *Beauharnais* holds libel outside First Amendment); Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 22 & n.88 (1992) (relying on *Chaplinsky* to justify regulation of pornography on a lesser showing of harm than would otherwise be required). *But see* Karst, supra note 93, at 134-47 (criticizing *Beauharnais* as support for restrictions on racial hate speech and MacKinnon pornography position); Henry L. Gates, Let Them Talk, New Republic, Sept. 20-27, 1993, at 37, 39-40 (*Chaplinsky* and *Beauharnais* weak as legal justifications for prohibitions on racial hate speech, and for MacKinnon-Dworkin pornography ordinance).

354. *E.g.*, Brian Owsley, Note, Racist Speech and "Reasonable People:" A Proposal for a Tort Remedy, 24 Colum. Hum. Rts. L. Rev. 323, 346-48 (1993); *see also* Richard Delgado & David Yun, The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd, 47 Vand. L. Rev. 1807, 1823 (1995) ("Although our system of free speech has carved out or tolerated dozens of 'exceptions' and special doctrines, opponents conveniently forget this, treating the demand for even narrowly tailored anti-hate speech rules as a shocking request calculated to endanger the entire edifice of First Amendment protection.").

355. *E.g.*, Calvin R. Massey, Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression, 40 UCLA L. Rev. 103, 136-40 (1992). *See generally* Isabel Wilkerson, Foes of Pornography and Bigotry Join Forces, N.Y. Times, Mar. 12, 1993, at B16 (reporting conference at University of Chicago Law School designed to forge alliance between feminist opponents of pornography and scholars seeking to limit racial hate speech; conference papers subsequently published as The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography (Laura J. Lederer & Richard Delgado eds., 1995)).

356. Worse, it is a political trap, guaranteeing the instability and undermining the legitimacy of whatever victories proponents of the proposals might achieve.

357. This has been done with characteristic thoroughness and insight by Robert C. Post in Post, supra note 11, and, more recently, by Larry Alexander, Banning Hate Speech and the Sticks and Stones Defense, 13 Const. Commentary 71 (1996). *See also* Marc Fleisher, Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation, 2 J.L. & Pol'y 1

down an existing slippery slope.

The solution to these two negative consequences is straightforward. Insofar as they recognize a category of "speech" that is "outside" the First Amendment, *Beauharnais* and *Chaplinsky* should be overruled.

IV. THE IMPORTANCE OF INSIDER STATUS TO THE COMMUNICATIONS TECHNOLOGIES OF THE FUTURE

A rule that all forms of speech are "within" the First Amendment will insure the non-discriminatory coverage of all current or future methods by which expression may be conveyed.[358] Such technology-neutrality has at

---

(1994); Craig P. Gaumer, Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes, 39 S.D. L. Rev. 1, 47-48 (1994); Vince Herron, Note, Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth, 67 S. Cal. L. Rev. 407 (1994); William G. Ortner, Note, Jews, African-Americans, and the Crown Heights Riots: Applying Matsuda's Proposal to Restrict Racist Speech, 73 B.U. L. Rev. 897 (1993). *See generally* Bad Motives, New Yorker, June 21, 1993, at 4.

358. *See generally* Thomas G. Krattenmaker & L. A. Powe, Jr., Converging First Amendment Principles for Converging Communications Media, 104 Yale L.J. 1719, 1719 (1995) (arguing that "the latest advances in telecommunications provide federal courts the opportunity to discard the inherently silly notion that freedom of speech depends on the configuration of the speaker's voicebox or mouthpiece"); Laurence H. Tribe, The Constitution in Cyberspace, The Humanist, Sept./Oct., 1991, at 15, 20, 39 (arguing that "the Constitution's norms, at their deepest level, must be invariant under merely *technological* transformations"); Terri A. Cutrera, Note, Computer Networks, Libel and the First Amendment, 11 Computer/L.J. 555, 580-82 (1992) (criticizing differential First Amendment standards based on technology by which message is carried).

As in the preceding Parts, the argument here is limited to defining the speech as "inside" the First Amendment, not to formulating the substantive tests that may be applied in evaluating the regulation at issue.

It is a good prediction, however, that, encouraged by the ruling in Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457-64 (1994), for the near future; cases dealing with almost all speech "inside" the First Amendment in non-print media will be tempted to apply the standard of United States v. O'Brien, 391 U.S. 367, 377 (1968) (discussed supra note 25).

The powerful appeal of using the *O'Brien* standard is that, despite the severe distortion of doctrine often needed to make it applicable, *see* Marc Peritz, Note, Turner Broadcasting v. FCC: A First Amendment Challenge to Cable Television Must-Carry Rules, 3 Wm. & Mary Bill of Rts. J. 715, 757 (1994), it maximizes judicial discretion, since it is an intermediate balancing test that falls halfway between the deferential criteria of Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (holding that the government could require radio station to allow a reply by individual attacked) and the strict ones of Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (holding that the government could not impose such a requirement on a newspaper). *Cf.* supra note 294 (discussing effects on freedom of speech of maximizing judicial choice). *See generally* Jerome A. Barron, On Understanding the First Amendment Status of Cable: Some Obstacles in the Way, 57 Geo. Wash. L. Rev. 1495, 1495-96 (1989) (noting struggle between *Red Lion* and *Tornillo* in cable field, and criticizing courts' "use of the clumsy and unsuitable *O'Brien* standard" as "the default choice"); Ashutosh Bhagwat, Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture, 74 N.C. L. Rev. 141, 166-72 (1995) (criticizing Court's use of *O'Brien* standard to decide *Turner*); Erik F. Ugland, Cable Television, New Technologies and the First Amendment After *Turner*, 60 Mo. L. Rev. 799, 818-22 (1995) (*Turner* court should have applied *Tornillo*, not *O'Brien*); James C. Goodale, Do Telephone Companies Really Have

least two major advantages.

First, the rapid proliferation of new communications media—a development that shows every sign of accelerating for the foreseeable future[359]—means that tying the degree of permissible regulation to the identity of the medium will necessarily promote ad hoc fragmentation in the law.[360] The view that such a development would be undesirable is not based upon its untidiness, but upon a long record demonstrating that permitting technological discrimination is inimical to freedom of expression. Historical experience—with, among others, printing presses,[361] secular dramatic troupes,[362] photographs,[363] movies,[364]

---

the Right to Speak?, N.Y.L.J., Feb. 3, 1995, at 3 (arguing that the six recent Court of Appeals cases invalidating prohibitions on local telephone companies originating video programming have reached correct results, but criticizing courts for relying on *O'Brien* and applying "a watered-down, mid-level First Amendment test . . . . [Courts] should be applying 'strict scrutiny,' because censorship in the information age should be just as difficult to effect as it was before Telcos, Cablecos, Computercos, and the like entered our lives."); infra note 366.

359. *See generally* Robert L. Pettit & Christopher J. McGuire, Video Dialtone: Reflections on Changing Perspectives in Telecommunications Regulation, 6 Harv. J.L. & Tech. 343 (1993); James Gleick, The Telephone Transformed—Into Almost Everything, N.Y. Times Mag., May 16, 1993, at 26.

360. *See, e.g.*, John V. Edwards, Note, Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia(?), A National Obscenity Standard, and Other Miscellany, 33 Wm. & Mary L. Rev. 949, 993 (1992) ("Direct broadcast satellite transmission is unique among media forms for obscenity analysis."); Karl A. Groskaufmanis, Note, What Films We May Watch: Videotape Distribution and the First Amendment, 136 U. Pa. L. Rev. 1263 (1988) (unique characteristics of videocassette medium warrant extensive First Amendment protection, particularly with regard to sexually explicit images); Randolph S. Sergent, Note, Sex Candor and Computers: Obscenity and Indecency on the Electronic Frontier, 10 J.L. & Pol'y 703, 705 (1994) ("The approach to regulation of sexual speech taken by the Supreme Court does not translate well to the new medium of computer networks.").

There has been for the past several years a broad accord among policymakers in Washington that uniform legislative and regulatory treatment of the various newer communications technologies is appropriate, *see* Edmund L. Andrews, New Tack on Technology, N.Y. Times, Jan. 12, 1994, at A1, and the Telecommunications Act of 1996 represents movement in this direction. *See* Edmund L. Andrews, A Measure's Long Reach, N.Y. Times, Feb. 2, 1996, at A1; Richard E. Wiley, Communications Law, Nat'l L.J., Mar. 11, 1996, at B4.

361. *See* William E. Ringel, Obscenity Law Today 148-49 (1970) (explaining the English system requiring prior licensing of publications as a response to arrival of printing press and resulting fear on the part "of the King, members of the church hierarchy, and other members of the 'Establishment'" of the dissemination of undesirable publications); Robert Shackleton, Censure and Censorship: Impediments to Free Publication in the Age of Enlightenment 11 (1975) (describing how invention of printing intensified French regime of censorship); *see also* Vincent Blasi, Milton's Areopagitica and the Modern First Amendment 16-17 (1995); *cf.* Kendrick, supra note 254 (arguing that America today is divided into "a two-class culture, the top that reads and the bottom that does not or cannot. Even alarmists hardly fear the corrupting effect of pornography on literate adults; danger looms when it falls into the hands of the subliterate, and of course children. The subliterate avoid bookshops—they prefer video stores—and today's children read only under compulsion. Pictureless books can say what they please; they are impotent."). The broader implications of this latter trend are the subject of Neil Postman, Amusing Ourselves to Death (1985).

362. *See generally* Margot Heinemann, Drama and Opinion in the 1620s: Middleton and

rock music,[365] broadcasting,[366] sexually explicit telephone services,[367]

Massinger, *in* Theatre and Government Under the Early Stuarts 237 (J.R. Mulryne & Margaret Shewring eds., 1993) (describing impact of censorship on political content of English drama of 1620s).

363. "Photography became a frequent censorship target in the late nineteenth century because it was supposedly more graphic and realistic than painting." Meyer, supra note 42, at 1189-90. *See generally* Sam Roberts, Giving Hardship and Poverty a Human Face, N.Y. Times, Jan. 19, 1995, at H28 (nineteenth-century audiences, confronted with the novelty of "magic lantern" shows, "'were often so shocked by the portrayal of this new and terrifying world that they fainted, cried, or talked back to the lantern-slide screen,' according to Peter Bacon Hales, a historian of photography"); infra note 368 (quoting similar account of history).

364. *See* Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915) (holding that there is no First Amendment violation in a censorship system for movies because they are not part of the "press"). This case is analyzed at length in John Wertheimer, Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America, 37 Am. J. Legal Hist. 158 (1993). *See also* Daniel J. Pivar, Purity Crusade: Sexual Morality and Social Control, 1868-1900, at 234-35 (describing attempts at motion picture censorship in late 1890s); infra note 381 (describing overruling of *Mutual Film*).

365. *See* Robert N. Houser, Note, Alleged Inciteful Rock Lyrics—A Look at Legal Censorship and Inapplicability of First Amendment Standards, 17 Ohio N.U. L. Rev. 323, 325-327 (1990) (sketching history of attempts to censor rock and roll); Trent Hill, The Enemy Within: Censorship in Rock Music in the 1950's, 90 S. Atlantic Q. 675 (1991) (comprehensive account); *see also* Record Labelling: Hearing Before the Senate Committee on Commerce, Science, and Transportation, 99th Cong., 1st Sess. (1985) (hearing inspired by Tipper Gore and others to see if, in the words of Senator Hollings, id. at 3, "there is . . . an approach that can be used by Congress to limit this outrageous filth, suggestive violence, suicide, and everything else in this Lord's world that . . . the writers and framers of our first amendment never perhaps heard . . . in their time"); Jon Pareles, Should Rock Lyrics be Sanitized?, N.Y. Times, Oct. 13, 1985, at H1; Calvin Sims, Gangster Rappers: The Lives, The Lyrics, N.Y. Times, Nov. 28, 1993, at E3 ("From Mozart to Frank Sinatra to Michael Jackson, popular music has had a long history of run-ins with the law. But the recent arrests of three major hip-hop artists on charges including sexual assault and murder have heightened concerns that some of these performers, particularly the stars of gangster rap, have become dangerous emblems for an immensely popular, primarily black musical genre that celebrates violence, gangs, guns, and sexual conquest."). *See generally* Richard Greener, It's the Same Old Cry About Black Music, N.Y. Times, Sept. 17, 1993, at A28 (letter to the editor arguing that attempts to censor popular music have long had a racist component); supra note 305.

Martha Bayles has addressed the area comprehensively in her book, The Hole in Our Soul: The Loss of Beauty and Meaning in American Popular Music (1994), which argues that although much of the music of the last decade lacks the social worth of the dissenting voices of earlier years, the answer lies in the aesthetic judgment of the public rather than government censorship. *Cf.* Song Lyric Ratings Are Backed by A.M.A., N.Y. Times, June 23, 1995, at A20 (AMA calls upon recording industry to develop mandatory system for rating song lyrics for violent content).

366. In FCC v. Pacifica Found., 438 U.S. 726 (1978), the Court held that the particular pervasiveness of the broadcast media permitted the government to suppress "indecent" speech there—and only there. *See* Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457-59 (1994) (holding that the relaxed First Amendment scrutiny of restraints on broadcasters is due to "the special physical characteristics of broadcast transmission," and is inapplicable to cable); Sable Communications v. FCC, 492 U.S. 115, 124-28 (1989) (striking down restraints on "indecent" messages offered by "dial-a-porn" services). For a comprehensive analysis, see Lili Levi, The Hard Case of Broadcast Indecency, 20 N.Y.U. Rev. L. & Soc. Change 49 (1992-93). *See also* Michael I. Meyerson, The Right to Speak, the Right to Hear, and the Right Not to

and video games[368]—shows that each new medium is seen at first as

---

Hear: The Technological Resolution to the Cable/Pornography Debate, 21 Mich. J.L. Reform 137, 138-39 (1987-88) (concluding that, even presuming correctness of all relevant Supreme Court decisions and rationales, "the power of government to regulate cable pornography is limited to that which is legally obscene"); Theresa M. Sheehan, Note, A Post-*Sable* Look at Indecent Speech on the Airwaves and Over the Telephone Lines, 15 W. New Eng. L. Rev. 347 (1993); Edmund L. Andrews, 2 Views of Decency, N.Y. Times, Dec. 28, 1992, at A12 (reviewing current regulatory predicaments). *See generally* supra note 179 and accompanying text (describing ordinary First Amendment prohibition on regulations based on premise that content is offensive to community taste).

In his persuasive opinion in Telecommunications Res. and Action Ctr. v. FCC, 801 F.2d 501, 507-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), Judge Bork showed that neither a rationale resting upon the alleged greater impact of the medium nor one resting upon considerations of spectrum scarcity could justify imposing greater restrictions on broadcasters than on newspaper publishers, *see* Tribe, supra note 358, at 21 (making same point), and invited the Supreme Court to extend to the former the freedoms now enjoyed by the latter. The Court should take an early opportunity to accept this invitation and overrule *Pacifica*. *See* Matthew L. Spitzer, Seven Dirty Words and Six Other Stories 131 (1986) (full-length presentation of same argument); Seth T. Goldsamt, Note, "Crucified by the FCC"? Howard Stern, the FCC, and Selective Prosecution, 28 Colum. J.L. & Soc. Probs. 203, 250-52 (1995) (describing recent efforts at enforcing indecency standards as constituting selective prosecution and suggesting re-examination of *Pacifica*); Tara Phelan, Note, Selective Hearing: A Challenge to the FCC's Indecency Policy, 12 N.Y.L. Sch. J. Hum. Rts. 347, 390-92 (1995) (both *Pacifica* and FCC's implementation of its indecency policy are "in total contradiction to the preservation of a meaningful First Amendment").

Among other desirable effects of this development would be an end to the pattern in which legislators repeatedly test the limits of *Pacifica* by imposing indecency regulations on new media (like dial-a-porn services or computer networks, *see* infra note 380 and accompanying text) and then wait to see whether the medium is or is not held to be within the boundaries of that decision. Even when the ultimate result is—as it invariably has been in all post-*Pacifica* cases—that such broad suppression is impermissible, there are serious chilling effects in the meanwhile, with new technologies being discriminatorily targeted.

367. *See* Christian A. Davis, Comment, Revisiting the Lurid World of Telephones, Sex, and the First Amendment: Is This the End of Dial-A-Porn?, 2 Widener J. Pub. L. 621 (1993) (arguing that the unique nature of pre-recorded message services warrants regulating them on the basis of indecency, either because they are like radio or because they constitute a separate medium for First Amendment purposes); Brian D. Woolfall, Comment, Implications of a Bond Requirement for 900-Number Dial-A-Porn Providers: Exploring the Need for Tighter Restrictions on Obscenity and Indecency, 30 Cal. W. L. Rev. 297, 310-11 (1994) (arguing that because "dial-a-porn has been linked to an increase in sexual violence and sexually deviant thought," providers of indecent phone messages that are not legally obscene should be required to post bonds to compensate potential victims of crimes committed by those who listen to the messages).

368. After legislation was introduced in Congress to require the video game industry to implement a rating system, it agreed to do so voluntarily. *See* John Burgess, Video Game Industry Plans Rating System; Move is Response to Congressional Pressure, Wash. Post, Dec. 8, 1993, at F1; *see also* 1994 Ann. Surv. Am. L. 461-69 (setting forth rating system eventually adopted). The producer of one of the video games attacked at Senate hearings commented, "[I]f my name were Steven Spielberg or Francis Coppola, they wouldn't be criticizing me. . . . Much of the reaction to 'Night Trap' is the shock of the new. When Thomas Edison started making short films around the turn of the century, patrons ran from theaters in horror when they saw a steam engine barreling directly toward the front-row seats. . . . Interactive TV is here, and like rock-and-roll it's here to stay." Tom Zito, Senate Demagoguery; Leave My Company's Video Game Alone, Wash. Post, Dec. 17, 1993, at A25.

uniquely threatening,[369] because uniquely influential,[370] and therefore a uniquely appropriate target of censorship.

This is the backdrop against which we currently find governments reacting with near-hysteria to the possibility of the creation, dissemination and viewing through the use of computer technology of messages even vaguely related to sexuality.[371] To be sure, computers are already covered by the existing statutory prohibition on the interstate distribution of obscene materials;[372] 18 U.S.C. Section 2252 (a)(2) already specifically criminalizes computer dissemination of depictions of minors engaging in sexually explicit conduct;[373] the existing general federal prohibition on the possession of child pornography already extends to one's home computer;[374] and prosecutions in computer-related cases are already

---

369. For a good historic overview of this phenomenon in modern times, together with a well-reasoned discussion of the appropriate judicial approach to such problems, see Philip H. Miller, Note, New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services, 61 Fordham L. Rev. 1147 (1993). It is commonly the case that one of the first experimental uses of a new medium involves the transmission of sexual imagery, *see* Anne W. Branscomb, Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society?, 83 Geo. L.J. 1935, 1935-37 (1995); John Tierney, Porn, the Low-Slung Engine of Progress, N.Y. Times, Jan. 9, 1994, at H1; PC Magazine, Aug., 1993, at 525-26, 535-36, 545 (advertisements for sexually-oriented material in numerous formats obtainable by computer modem), which tends to reinforce the perceived threat.

370. *See generally* United States v. Roth, 237 F.2d 796, 799 n.5 (2d Cir. 1956) (noting special concern of authorities with "the perversion of young minds through the mass media of the movies, television, radio, and the press, especially so-called comics"), *aff'd*, 354 U.S. 476 (1957); Joseph T. Klapper, The Effects of Mass Communications 143-59 (1960) (reviewing 1950s' studies exploring this concern); Gail Johnston, Note, It's All in the Cards: Serial Killers, Trading Cards, and the First Amendment, 39 N.Y.L. Sch. L. Rev. 549, 552-53, 555-57 (1994) (noting that 1950s concern about comic books had been preceeded by campaign against dime novels in late 1800s); Dorothy Rabinowitz, The Attorney General as Scriptwriter, Wall St. J., Nov. 1, 1993, at A14 (comparing recent campaign against TV violence, discussed infra note 391, with congressional hearings of 1950s on dangers of comic books). The longer-term cultural impact of the fears of the 1950s about the influence of new commercial media is explored in Tom Engelhardt, The End of Victory Culture: Cold War America and the Disillusioning of a Generation (1995), *reviewed in* N.Y. Times, Jan. 16, 1995, at C16.

371. *See* Peter H. Lewis, About Freedom of the Virtual Press, N.Y. Times, Jan. 2, 1996, at B14; David L. Wilson, Restricting the Networks, Chron. Higher Educ., June 30, 1995, at A17; infra note 378.

372. 18 U.S.C. § 1465 (1994); *see* United States v. Thomas, 74 F.3d 701 (6th Cir.), *cert. denied*, 65 U.S.L.W. 3257 (U.S. Oct. 7, 1996). But, lest there be any doubt, Section 507 of Title V of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), so provides explicitly.

373. The statutory penalties were drastically increased by the Sexual Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 110 Stat. 3009 (1995), which President Clinton signed into law on December 23, 1995. *See* Child-Sex Bill Is Signed, N.Y. Times, Dec. 24, 1995, at A14. On the presidential campaign trail five months later, Senator Bob Dole denounced these new sentences as insufficiently harsh, and promised that they would be increased if he were elected. *See* Katherine Q. Seelye, Revisiting the Issue of Crime, Dole Offers Test of Remedies, N.Y. Times, May 29, 1996, at A1.

374. *See* Sentenced for Cyber Porn, Nat'l L.J., Dec. 26, 1994-Jan. 2, 1995, at A10.

regularly brought under such statutes.[375] But unfamiliarity makes this new medium seem particularly dangerous,[376] and governments are haunted by the fear that the mechanisms of communications may be outrunning those of control.[377] Hence there arises a widespread view that neither the

---

375. *See, e.g.*, Jail for Couple Over Computer Pornography, N.Y. Times, Dec. 3, 1994, at A9; David Johnston, Use of Computer Network for Child Sex Sets Off Raids, N.Y. Times, Sept. 14, 1995, at A1; Stephen Labaton, Computer Stings Gain Favor As Arrests for Smut Increase, N.Y. Times, Sept. 16, 1995, at A1; Glenn R. Simpson, U.S. Arrests Three In Customs Probe of Computer Porn, Wall St. J., Jan. 12, 1996, at B7. *See generally* Thomas J. DeLoughry, Existing Laws Called Adequate to Bar Children's Access to On-Line Pornography, Chron. Higher Educ., Aug. 4, 1995, at A17.

376. For a brief summary of the primary forms of computer-based communications technologies in current use, see Robert F. Goldman, Note, Put Another Log on the Fire, There's A Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications, 29 Ga. L. Rev. 1075, 1079-88 (1995). *Cf.* James Gleick, This is Sex?, N.Y. Times Mag., June 11, 1995, at 26 (arguing that recent legislation to control access to on-line sexual imagery "reflects a mental picture of how the on-line world works that does not match the reality"). Once these technologies are understood, it can be plausibly argued that—contrary to current fears—their spread will have a positive effect on children, by teaching "complex analytical skills similar to those required of a fully literate person," thereby tending to overcome the negative effects caused by the substitution of television and videocassettes for books, *see* Neil Postman, The Disappearance of Childhood 149 (1982), and by providing access to beneficial sexual education that would otherwise be unavailable, *see* Carlin Meyer, Reclaiming Sex from the Pornographers: Cybersexual Possibilities, 83 Geo. L.J. 1969, 1974-76 (1995).

The pervasive misperceptions were exacerbated by the publication in mid-1995 of Marty Rimm, Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories, 83 Geo. L.J. 1849 (1995), which was featured on the front cover of the Time Magazine of July 3, 1995. The article's depiction of major portions of cyberspace as awash in sexual imagery was quickly demolished, *see* Philip Elmer-De Witt, Fire Storm on the Computer Nets, Time, July 24, 1995, at 57; Mike Godwin, Villains and Heroes, Internet World, Jan. 1996, at 32; Peter H. Lewis, Critics Troubled by Computer Study on Pornography, N.Y. Times, July 3, 1995, at B37; Peter H. Lewis, New Concerns Raised Over a Computer Smut Study, N.Y. Times, July 16, 1995, at A22; Senator Grassley's Surf Police, N.Y. Times, July 28, 1995, at A26, but doubtless lingers in the official mind.

377. Among the many examples of this concern are the sudden awakening of countries around the world to the potential of computers to assist in the spread of the two phenomena "authoritarian government most dreads, political dissent and pornography," Beijing Seeks to Build Version of the Internet that Can be Censored, Wall St. J., Jan. 31, 1996, at A1; *see* Human Rights Watch, Silencing the Net (1996) (documenting recent worldwide trend towards governmental censorship of the Internet); Charles Platt, Americans Are Not As Free As We Think We Are, Wired, Apr. 1996, at 82 (describing current campaigns by state and local authorities to suppress erotic on-line speech), and the long-running obsession of the American government with maintaining controls on encryption technology. *See* Denise Caruso, Digital Commerce, N.Y. Times, Mar. 25, 1996, at D5 ("The key issue for the Net is not smut, it is the use of encryption," since "Big Brother legislation that would give law enforcement the ability and rationale to monitor all the electronic messages of citizens" could "suffocate the Internet."); James P. Lucier, Jr., The Government Would Like a Key to Your Computer Files, Wash. Times, Mar. 5, 1996, at A15.

While the governments' perceptions may well be correct—computer technologies may empower ordinary citizens to bypass both governmental and private gatekeepers, effectively

doctrinal categories nor the substantive content of current First Amendment law are adequate to deal with emerging problems.[378]

This common pattern of legal response to new communications

---

enabling Everyman to be a publisher, *see* Mike Godwin, Witness Against Net Prosecution, Internet World, Dec. 1995, at 102; Jim Hoagland, Around the World on a Modem, Wash. Post, Apr. 4, 1996, at A31; infra note 384—the First Amendment requires our government at least to embrace rather than suppress this potential. *See* supra note 269. *See generally* Jeremy S. Weber, Note, Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising From Computer Bulletin Board Speech, 46 Case W. Res. L. Rev. 235 (1995) (proposing that when private libel plaintiff has been defamed on computer bulletin board to which she has access to post reply, First Amendment requires her to prove actual malice).

378. Thus, in an effort at thought control that flatly defies the First Amendment as understood to date, the 104th Congress buried in the omnibus budget bill that it passed just before adjourning the Child Pornography Prevention Act of 1996. *See* Pamela Mendels, Budget Bill Extends Child Pornography to Computer Graphics, N.Y. Times, Oct. 3, 1996, at A19; John Schwartz, New Law Extends Legal Definition of Child Pornography, Wash. Post, Oct. 4, 1996, at A10. Introduced by Senator Orrin G. Hatch of Utah, this legislation broadly criminalizes the dissemination of all visual images that "appear to be" ones of children engaging in "sexually explicit" conduct, notwithstanding that the images were generated purely electronically, without the use of any children (or adult actors, for that matter) at all. According to the legislative findings contained in § 121(1)(4) of the Act, viewing such images "can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." Moreover, according to § 121(1)(11)(B), such images create an unwholesome moral environment. *Cf.* Kingsley Int'l Pictures Corp. v. Board of Regents, 360 U.S. 684, 688-89 (1957) (State "struck at the very heart of constitutionally protected liberty" under the First Amendment by censoring movies portraying adultery as attractive, notwithstanding that such relationships were "contrary to the moral standards, the religious precepts, and the legal code of its citizenry"). *See generally* New York v. Ferber, 458 U.S. 747, 763 (1982) (relying upon fact that challenged statute left open the alternatives of using older actors or simulating the performance); Stanley v. Georgia, 394 U.S. 559, 565-66 (1969) (discussed supra notes 102-11 and accompanying text); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (discussed supra notes 241-46 and accompanying text).

The committeee report in support of the statute explains that it "is needed due to technological advances" in the creation of visual images, "particularly through the use of computers," that have "made possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct." S. Rep. No. 104-358, 104th Cong., 2d Sess., pt. 1, at 7 (1996). *See* David B. Johnson, Comment, Why the Possession of Computer-Generated Child Pornography Can be Constitutionally Prohibited, 4 Alb. L.J. Sci. & Tech. 311, 326, 331 (1994) (arguing that images of child pornography made with animation software are indistinguishable as a policy matter from depictions involving real children, and urging new legislation outlaw their sale, transportation or possession). The issues arising under such a statute were the subject of the thirteenth annual John Marshall Law School National Moot Court competition in Information Technology and Privacy Law, whose bench memorandum and party briefs have been published as Sysop, User and Programmer Liability: The Constitutionality of Computer Generated Child Pornography, 13 J. Computer & Info. L. 481 (1995). *See also* Henry J. Reske, Computer Porn a Prosecutorial Challenge, A.B.A. J., Dec. 1994, at 40 (predicting that "computer porn prosecutions are likely to continue, perhaps forcing a re-evaluation of First Amendment law on obscenity," in light of the mutability of computer images and the difficulty of defining community standards); Andrea Gerlin, Electronic Smut is Drawing Fire of Prosecutors, Raising Questions, Wall St. J., May 27, 1994, at B3; Future Watch (CNN Cablecast, Sept. 7, 1993) (summarizing issues).

technologies reflects the reality that new media achieve their initial marketplace success precisely because they are for some purposes a more effective form of communication than pre-existing ones.[379]

As long as the courts enforce the First Amendment in the context of new media just as they do in the context of old ones—with an awareness that, historically, erring on the side of freedom of speech under conditions of uncertainty, whether technological, political (as during World War I or the Cold War), or empirical (as in the case of the Pentagon Papers) has proven in retrospect to be the wiser course—the damage that such fears may do to public discourse will be minimized. Thus, for example, the Communications Decency Act of 1996 is patently unconstitutional,[380] and

---

379. *Cf.* Superior Films, Inc. v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring) ("[T]he First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. . . . Which medium will give the most excitement and have the most enduring effect will vary. . . . It is not for the censor to determine in any case.").

380. The Act, which is Title V of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), subjects to fines and imprisonment for up to two years:

(a) the knowing transmission of "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication," id. § 502(1)(a)(1)(B); and

(b) the knowing use of "any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication," id. § 502(1)(d).

In accordance with the special judicial review provisions contained in § 561, these restrictions (along with related ones imposing vicarious liability on information service providers, *see* Daniel G. Bergstein & Michelle W. Cohen, Federal Legislation Confronts Cybersmut, N.Y.L.J., Apr. 22, 1996, at S8, and the ones on abortion-related speech, *see* supra note 79) were challenged in two major actions, ACLU v. Reno, No. 96-963, and American Library Ass'n v. United States Dep't of Justice, No. 96-1458, that were consolidated before a three-judge court in the Eastern District of Pennsylvania. As a result of a combination of a temporary restraining order issued by District Judge Ronald Buckwalter on February 15, 1996, *see* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), and a subsequent agreement between counsel, neither provision took effect pendente lite, *see* U.S. Will Not Prosecute for 'Offensive' Internet Material, Chron. Higher Educ., Mar. 1, 1996, at A29. *See also* infra note 383 (noting subsequent grant of preliminary injunction).

Both restrictions are manifestly invalid. The principal reasons are:

(1) As described supra note 366, regulation on the basis of indecency has been pointedly limited by the Court to the broadcast media, a context in which it has been justified on the basis of spectrum scarcity and the special intrusiveness of those media. *See* Joanna H. Kim, Comment, Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age, 15 Loy. L.A. Ent. L.J. 415, 435-38 (1995). The Internet is not a physically limited medium; on the contrary, it is infinitely expandable as people set up additional nodes. *See* Jerry Berman & Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 Yale L.J. 1619, 1623-24 (1995). Nor is the medium intrusive; on the contrary, one has to search with considerable diligence to find what one is seeking. *See* Gleick, supra note 376; Joan E. Rigdon, For Some, the Web Is Just a Slow Crawl To a Splattered Cat, Wall St. J.,

the Supreme Court should so hold. In time, a consensus will arise that the first reaction to the perceived threat of cyberspace was as overblown as with other new media.[381]

As in all of First Amendment law, though, the danger is in the

---

Jan. 25, 1996, at A1; *see also* Cybertech in Philadelphia, Wash. Post, May 18, 1996, at A18 ("The Internet is not a broadcast medium, where the basis for regulation is that transmissions can be 'pervasive' and viewers can't avoid being exposed to them. It's something entirely new—a medium where you choose at every step what you want to see or read.").

(2) Assuming regulation on the basis of indecency were permissible, the term is not defined in the provision quoted in paragraph (a) above, while the definition quoted in paragraph (b) above does no more than reiterate the FCC's definition in the broadcast context, *see* Richard Raysman & Peter Brown, Liability of Internet Access Providers Under Decency Act, N.Y.L.J., Mar. 12, 1996, at 3, 31; both suffer from the same vices of vagueness, overbreadth and potential for selective enforcement that have led to the universal condemnation of those standards. *See* supra note 366.

(3) In any event, in contrast to the broadcast media (and analogously to the case of dial-a-porn), there are less restrictive alternatives to a total ban available, in the form of a variety of access control and content-labelling systems. *See* Peter H. Lewis, Microsoft Backs Ratings System for the Internet, N.Y. Times, Mar. 1, 1996, at D1; John Markoff, New Internet Feature Will Make Voluntary Ratings Possible, N.Y. Times, July 3, 1995, at D40; Frank Rich, Newt to the Rescue, N.Y. Times, July 1, 1995, at A19; *see also* Cyber-Regs, Nat'l L.J., June 26, 1995, at A20 (editorial urging that appropriate method of protecting children from Internet threats is "encouraging service providers to devise virtual lockboxes, as cable TV companies have done").

(4) Technical considerations make the statute so extremely unlikely to achieve its stated purpose—while so extremely likely to suppress speech that is protected by any standard, *see* Meyer, supra note 376, at 1979-94; Anna G. Eshoo, Nanny On the Net, Wash. Post, Jan. 31, 1996, at A15—as to render it invalid under the First Amendment on the grounds of simple irrationality. *See* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593 (1995) (holding unconstitutional a prohibition against stating alcohol content on beer labels because, although the asserted goal of the statue was valid, "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end").

This challenge is particularly strong in a context where pursuit of the unattainable goal of keeping the targeted material out of the hands of minors will necessarily "restrict all communications on the Internet to a level suitable for children." Harvey A. Silverglate, Cyber Speech at Risk, Nat'l L.J., Mar. 4, 1996, at A19. *See* supra note 125 (noting statements in Virginia v. American Booksellers Ass'n, 484 U.S. 383, 389 (1988) and Butler v. Michigan, 352 U.S. 380, 383-84 (1957) that statutes having this effect violate the First Amendment).

381. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (overruling Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915) (discussed supra note 364); rejecting argument "that motion pictures should be disqualified from First Amendment protection" because they "possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression"; such considerations relevant only to permissible scope of controls); Chafee, supra note 247, at 542-48 (arguing that *Mutual Film* should be overruled in light of economic power of audiences to determine film content, and importance of art in furthering discussion of social issues); Wertheimer, supra note 364, at 160 (summarizing history of professional reaction to *Mutual Film*); *see also* supra note 361 (noting change in perceived power of print media). *See generally* Robert Corn-Revere, New Technology and the First Amendment: Breaking the Cycle of Repression, 17 Hastings Comm. & Ent. L.J. 247, 252 (1994) ("Initially, new technologies are given little or no First Amendment protection. As each medium gains cultural penetration and becomes more mainstream, courts are increasingly willing to recognize its First Amendment status.").

meantime[382]—when the ability to declare certain technologically-defined categories of speech "outside" the First Amendment provides the courts an ever-available escape hatch from the need to provide coherent justifications for imposing otherwise impermissible regulations on just those communications formats in which the public has the liveliest interest.[383]

This is not only unjustifiable, but unnecessary. For the second consideration in favor of a single standard is that the marketplace will tend to do effectively—perhaps too effectively[384]—that which would be a threat to civil liberties if done by the government.[385] Today, for example, as all

---

382. *See* supra text accompanying note 218; infra text accompanying note 397.

383. There are a number of sound reasons—including the overwhelming factual record assembled by the wide range of plaintiffs challenging the Communications Decency Act—to believe that the Court will not utilize the escape hatch in that particular instance, and will instead apply its well-established jurisprudence to strike down the law. Indeed, as this article went to press, two separate three-judge District Courts, in powerful opinions, granted preliminary injunctions against enforcement of the key provisions of the Act. *See* Shea v. Reno, 930 F. Supp. 916 (E.D.N.Y. 1996); ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996). But, as the example of movies demonstrates, until the escape hatch is bolted tight, the temptation to use it will always exist. Moreover, a technology-based definition of speech "outside" the First Amendment may interact perniciously with a content-based one. *Cf.* Peter F. Lewis, Group Urges an Internet Ban on Hate Groups' Messages, N.Y. Times, Jan. 10, 1996, at A10 (in urging Internet service providers not to provide access to hate groups' World Wide Web sites, Simon Wiesenthal Center explains that the "unprecedented potential and scope of the Internet" gives it "incredible power to promote violence, threaten women, denigrate minorities, promote homophobia and conspire against democracy").

384. *Compare* Jerome A. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967) *and* Owen Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405 (1986) *and* Owen Fiss, Why the State?, 100 Harv. L. Rev. 81 (1987) *with* L.A. Powe, Jr., Scholarship and Markets, 56 Geo. Wash. L. Rev. 172 (1987). *See generally* C. Edwin Baker, Advertising and a Democratic Press (1994), *reviewed in* 108 Harv. L. Rev. 489 (1994); Jonathan Weinberg, Broadcasting and Speech, 81 Cal. L. Rev. 1101, 1193-1204 (1993) (arguing that deficiencies of present system of broadcast regulation reflect contradiction between underlying goals: keeping government out of marketplace of ideas, and regulating that marketplace to eliminate distortions caused by private censorship).

For the suggestion that the expansion of new information technologies will reduce speakers' distribution costs and hence make it more difficult for private gatekeepers to stifle speech, see Eugene Volokh, Cheap Speech and What It Will Do, 104 Yale L.J. 1805, 1834-38 (1995). Quite apart from the problem that the effect may be to "compound our current social divisions, given that men, whites, the young and the affluent so far tend to be the information 'haves' while women, blacks, the old and the poor are the have-nots," Frank Rich, Gates Goes Public, N.Y. Times, Dec. 2, 1995, at A21, it remains to be seen whether and to what extent this development may counter a trend favoring private censorship: the increasing consolidation of businesses in such a way that the financial interests of the entity as a whole are adversely impacted if the speech-related sub-unit is aggressive in the defense of First Amendment rights. *See* Ken Auletta, The Wages of Synergy, The New Yorker, Nov. 27, 1995, at 8; Max Frankel, Couplings, N.Y. Times Mag., Sept. 24, 1995, at 30; Leon Friedman, The Scary Shift Towards Corporate News, Newsday, Nov. 27, 1995, at A21; Mark C. Miller, Free the Media, The Nation, June 3, 1996, at 9; *see also* Jane E. Kirtley, Media Cave Despite High Court Support, Nat'l L.J., Dec. 4, 1995, at A19.

385. *Compare* Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation, 56 Tenn. L. Rev. 291, 310-11 (1989) (questioning whether this distinction makes sense) *with* Kathleen M. Sullivan, Free Speech

consumers know, standards for sexual explicitness differ among the commercial broadcast, cable, and movie industries, and, within the movie industry, between productions designed to be seen in movie theaters and in hotel rooms.[386] So too, there was greater reluctance among the long-distance telephone carriers than the local ones to carry "dial-a-porn" services, even though the latter were subject to more stringent legal regulations.[387] In all of these cases, marketplace considerations, not legal ones, have determined the outcomes.

However distressing those outcomes may be to some aesthetic or political tastes,[388] this process represents the First Amendment working as it usually does in fact.[389] Just as the Constitution provides a quite lax

---

and Unfree Markets, 42 UCLA L. Rev. 949 (1995) (arguing that it does).

386. *See* Ravo, supra note 193 ("One factor cited by industry officials for the increased popularity of adult videotapes is that more people are seeing them—and discovering they enjoy them—in hotel rooms and on home televisions, via satellite dish antennas and on some cable channels. But most of the broadcast versions are less explicit than those available on videocassette."). Similarly, "[v]iewers—especially parents—have known for years" that "premium cable channels like HBO and Showtime are more violent than broadcast and basic cable." Hal Boedeker, TV Violence: Latest Study is a Rerun, Orlando Sentinel, Feb. 15, 1996, at E1.

387. There is a complete discussion in Jerome A. Barron, The Telco, The Common Carrier Model and the First Amendment—The "Dial-A-Porn" Precedent, 19 Rutgers Computer & Tech. L.J. 371 (1993) (arguing on the basis of this experience that local phone companies should remain subject to common carrier regulation as they move into the provision of information services). The content and regulatory environment of the remaining long-distance providers of sexually-oriented messages are described in Jack Glasock & Robert LaRose, Dial-A-Porn Recordings: The Role of the Female Participant in Male Sexual Fantasies, 37 J. Broad. & Elec. Media 313 (1993).

388. *See, e.g.*, Mary E. Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. Chi. L. Rev. 453, 486-94 (1992) (criticizing messages that are heard when "a 'free' market in speech means that the market, governed by ability to pay, determines who can speak," and suggesting that the Free Speech Clause be reinterpreted or amended to permit government intervention to correct the situation).

389. *See* Telecommunications Res. and Action Ctr. v. FCC, 801 F.2d 501, 508 & n.3 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); William E. Hocking, Freedom of the Press: A Framework of Principle 13-15 (1947) (tracing the rising influence of market forces on press content in nation's early years; "what in other times and places the king's censor might have done, the 'gentle bribery of one's own pocket book' accomplished silently in the New World"); MacKinnon, Only Words, supra note 231, at 77-78; Ronald K.L. Collins & David M. Skover, Pissing in the Snow: A Cultural Approach to the First Amendment, 45 Stan. L. Rev. 783 (1993); *see also* Fred Cohen, The Tabloid Press Abuses Children, N.Y. Times, Mar. 13, 1993, at 21 (if the press is insufficiently restrained in reporting sensational stories involving school children, the public should respond with advertiser boycotts); Kevin Goldman, "Beavis and Butt-Head" Stirs Advertisers, Wall St. J., Oct. 28, 1993, at B12 (following incidents discussed supra note 125, and under pressure from American Family Association, some major advertisers are abandoning show); Elizabeth Jensen, Crusade Against ABC's "NYPD Blue" Goes Local, Wall St. J., Oct. 6, 1993, at B1 (tactics of groups supporting or opposing particular shows "have become increasingly sophisticated"); Michael Marriott, Hard-Core Rap Lyrics Stir Backlash, N.Y. Times, Aug. 15, 1993, at A1 (segments of Black community are protesting rap lyrics that have socially negative messages); Armistead Maupin, A Line that Commercial TV Won't Cross, N.Y. Times, Jan. 9, 1994, at H29 (commercial television will not permit gay couples to be shown kissing, on basis that the audience wouldn't stand for it); Lawrie Mifflin,

outer framework within which ordinary politics operates to produce results that, whatever one may think of their substance, have been determined after a generally unimpeded contest between political groups of varying power,[390] so does it provide very broad limits within which the marketplace operates to disseminate that which the public wishes to obtain.[391]

Talk-Show Critics Urge Boycott of Programs by Advertisers, N.Y. Times, Dec. 8, 1995, at A22 (two Senators and former Secretary of Education urge advertisers to "take the trash out" of daytime talk shows by refusing to sponsor ones that broadcast "degrading material" with offensive sexual themes; as a result, six such shows are expected to be canceled, *see* John Elvin, Talk Shows Damaged by Publicity Barrage, Wash. Times, Jan. 22, 1996, at 2E); N.Y. Times, Aug. 23, 1993, §4, at 16 (advertisement by American Family Association urging boycott of companies that "are the leading sponsors of sex, violence and profanity on prime-time, network television"); John J. O'Connor, Is the BBC Too Adult for American Viewers?, N.Y. Times, Dec. 29, 1994, at C11 ("It's hardly news that America is inhabited by large numbers of Puritanical hysterics. A week rarely goes by without some watchdog group railing against four-letter words, nudity and—the all-purpose smear—pornography. . . . All of which is having an accelerated impact on what viewers can or, more precisely, cannot see at home."); Tom Redburn, Toys 'R' Us Stops Selling a Violent Video Game, N.Y. Times, Dec. 17, 1993 at B1 (nation's largest toy seller announces it has stopped selling video game "Night Trap" because it is too violent for children, but will continue selling "Mortal Kombat," a much more widely available game that has also generated protests over violence; only a few hundred thousand machines able to play "Night Trap" have been sold, in contrast to the more than 15 million able to play "Mortal Kombat"); Vernon Silver, Loss of Gay TV Shows Stirs a Key West Debate, N.Y. Times, Feb. 28, 1994, at D6 (producers of two gay television programs say the owner of a small station in Key West canceled their shows because of pressure from a Christian network that buys time on the channel); Brent Staples, The Politics of Gangster Rap, N.Y. Times, Aug. 27, 1993, at A28 (consumers should boycott gangster rap music because it perpetuates negative stereotypes).

390. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955).

391. *See* Ronald K.L. Collins & David M. Skover, Commerce & Communication, 71 Tex. L. Rev. 697 (1993); Monroe E. Price, The Market for Loyalties: Electronic Media and the Global Competition for Allegiances, 104 Yale L.J. 667, 691-94 (1994).

Broadcasters, however, because of the flaccid regime of First Amendment protections applicable to them, *see* supra notes 358 and 366, are to some extent more easily intimidated by the possibility of government regulation than other media of equal economic power. *See generally* Edmund L. Andrews, Employer of Howard Stern Wins F.C.C. Purchase Vote, N.Y. Times, Feb. 1, 1994, at D1 (in effort to punish employer of disc jockey Howard Stern for his "crude commentaries," FCC blocks it for a month from acquisition of new stations, costing company approximately $1 million, and then reluctantly permits consummation of deal on constraint of Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993)); Daniel Pearl, Broadcasters Ready to Fight Clinton Plan, Wall St. J., Jan 30, 1995, at A4 ("[P]oliticians in both parties may use the threat of spectrum auctions to browbeat broadcasters over content issues."); Stan Soocher, Stern's Radio Flap: FCC Indecency Rules, N.Y.L.J., Aug. 6, 1993, at 9.

This is the background against which the second half of 1993 saw a number of federal officials engage in one of the campaigns against violence on television that have taken place regularly since the 1950s. *See* Stephen J. Kim, Comment, "Viewer Discretion is Advised": A Structural Approach to the Issue of Television Violence, 142 U. Pa. L. Rev. 1383, 1385 (1994); Elizabeth Jensen & Ellen Graham, Stamping Out TV Violence: A Losing Fight, Wall St. J., Oct. 26, 1993, at B1 (recounting history); Bernard Weinrub, Despite Clinton, Hollywood is Still Trading in Violence, N.Y. Times, Dec. 28, 1993, at A1 (attempts at pressuring TV into showing less violence take place in period when "[e]ven critics of violence acknowledge that the major television networks . . . have generally curbed violent programs," while "[v]iolence in films . . .

The key constitutional concern is that control rest with the people, not the government.[392]

To be sure, there is implicit in this view the realization (which one may, according to taste, label realistic or cynical) that the political/economic marketplace, not the legal system, will determine the ultimate extent of speech regulation,[393] a conclusion that may initially cause all of those sparring over First Amendment standards to wonder why they are bothering.[394] The Supreme Court does not exist apart from the

---

seems to have gone in the opposite direction"); *see also* Edmund L. Andrews, Mild Slap at TV Violence, N.Y. Times, July 1, 1993, at A1; Peggy Charren, It's 8 P.M. Where Are Your Parents?, N.Y. Times, July 7, 1993, at A15; Clinton Takes on Film, TV Violence, Newsday, Dec. 6, 1993, at 6; Mark Conrad, Violence on Television: What Congress is Doing, N.Y.L.J., Aug. 27, 1993, at 5; Patrick Cooke, TV Causes Violence? Says Who?, N.Y. Times, Aug. 14, 1993, at A19; Elizabeth Kolbert, Entertainment Values Vs. Social Concerns in TV-Violence Debate, N.Y. Times, Aug. 3, 1993, at C13. *See generally* Frank Rich, Crime Crusaders on Parade, N.Y. Times, Jan, 27, 1994, at A21; Ronald Slaby, Combating Television Violence, Chron. Higher Educ., Jan. 5, 1994, at B1 (summarizing research findings on effect of TV violence).

The campaign continued into the run-up to the 1996 Presidential election, with candidates Pete Wilson, Bob Dole and Bill Clinton all issuing denunciations. *See* Gov. Wilson Joins Attack on Movies, N.Y. Times, June 15, 1995, at A18; Todd S. Purdum, Clinton Takes on Violent Television, N.Y. Times, July 11, 1995, at A1; Gerald F. Seib, Time Warner is Assailed by Sen. Dole For Sex and Violence in Entertainment, Wall St. J., June 1, 1995, at B7. The eventual result was that Section 551 of Title V(B) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) provided for the so-called V-chip. Under its provisions, manufacturers were required to equip newly-made television sets with microchips capable of detecting ratings codes contained in broadcast programs so that viewers could choose not to receive unacceptable programs. The ratings system was to be formulated by the industry, or, failing that, one would be established by the FCC. On February 29, 1996, the broadcasters announced at a White House ceremony that they had agreed to set up their own system. *See* Alison Mitchell, TV Executives Promise Clinton a Violence Ratings System by '97, N.Y. Times, Mar. 1, 1996, at A1. *See generally* Kevin W. Saunders, Media Self-Regulation of Depictions of Violence: A Last Opportunity, 47 Okla. L. Rev. 445 (1994).

Although—in light of the power of market forces, *see* Jon Pareles, Rapping and Politicking: Show Time on the Stump, N.Y. Times, June 11, 1995, at H32, and the likelihood that children are more technologically sophisticated than their parents, *see* Walter Goodman, Fixing TV Violence With a Gizmo, N.Y. Times, Dec. 19, 1995, at C15—there is reason to doubt how effective this system will ultimately prove, there is tentative research indicating that "[v]iewer discretion notices on films during the 1987-1992 television seasons did have a negative and statistically significant impact on ratings for children 2-11, while the ratings had no impact on the ratings among teens and adults." James T. Hamilton, Marketing Violence: The Impact of Labeling Violent Television Content 17 (1995).

The subject of television violence is currently undergoing a comprehensive review by the Communications Law Committee of the Association of the Bar of the City of New York, whose report should reach publication during 1996 or 1997. In addition, Gordon Hawkins and Franklin E. Zimring are planning to publish new empirical data rebutting the causal link between televised and actual violence.

392. *See generally* supra notes 194-196 and accompanying text.

393. *See* Collins & Skover, supra note 17, at 1398 (drawing this conclusion with respect to pornography regulation).

394. *Cf.* Eric M. Freedman, Book Review, 48 Brook. L. Rev. 391, 393 (1982) (liberals and conservatives share central problem of how much faith is to be placed in democracy); David Post, New Rules for the Net?, Am. Law., July-Aug. 1995, at 112 (ultimate problem in

culture that it both shapes and reflects,[395] and, as we should have learned long ago from Learned Hand, Americans will in the long run have just as much freedom of speech as the majority desires.[396]

But "in the long run we are all dead."[397] As the now-vanished flag-burning uproar illustrates, First Amendment doctrine makes a difference in keeping the channels of discourse open during the interval that elapses between the initial urge towards suppression and the time, if ever, that the majority overcomes the Constitutional obstacles to the exercise of its will. As the rapid pace of modern communications works to shorten that interval, the importance of robust First Amendment standards increases.

V. CONCLUSION

The repudiation of the view that there exist categories of speech "outside" the First Amendment is a matter of some social urgency. A number of current threats to free expression have a surface plausibility only because their proponents are able to exploit the current doctrinal muddle, and these dangers will increase as new communications technologies mushroom. If the supporters of a Ptolemaic proliferation of First Amendment "exceptions" succeed in overwhelming whatever core of "rule" may be left, majoritarian orthodoxy (whether judicially or legislatively defined) will be the winner, and—unless today's social arrangements are incapable of further perfection—political, artistic, and intellectual progress will be the loser.

---

application of First Amendment to cyberspace may arise not from need to adapt legal doctrines, but from discovery "that many among us are in fact less interested in speech that is truly free than we might have previously believed").

395. *See* Thomas R. Marshall & Joseph Ignagni, Supreme Court and Public Support for Rights Claims, 78 Judicature 146, 151 (1994) (presenting empirical data showing close relationship between Supreme Court civil liberties rulings and public opinion on same issues).

396. *See* Learned Hand, The Spirit of Liberty, *in* The Spirit of Liberty: Papers and Addresses of Learned Hand 189-90 (Irving Dilliard ed., 3d ed. 1963); *see also* Gunther, Learned Hand, supra note 117, at 547-52.

397. John Maynard Keynes, A Tract On Monetary Reform 80 (1923).