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THE APOLOGETICS OF SUPPRESSION: THE REGULATION OF PORNOGRAPHY AS ACT AND IDEA

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Pornography has recently regained prominence as a popular subject for first amendment analysis. The newfound infamy of pornography is the consequence of a revived anti-obscenity crusade, one of a long series of such efforts this country has experienced. The latest installment of the anti-porn effort is distinctive only in the unique composition of its proponents; the usual cast of political and religious conservatives has been augmented by members of a branch of the feminist movement. The latter group has added to the arsenal of tactical weaponry that has been leveled against pornography; the feminist critics of porn seek to define pornographic expression as a civil rights violation, and thus remove the suppression of porn from the first amendment arena altogether.

Despite the apparent novelty of the feminist argument, the fundamental attributes of the present anti-porn movement reflect its antecedents. The feminist and conservative components of the present movement share two basic attitudes toward pornography, both of which have also characterized prior efforts to censor sexually explicit speech. First, they assert that pornography is socially dysfunctional, and for that reason alone is not worthy of rigorous protection under the first amendment. This is an aspect of what Joel Feinberg has labeled the "principle of moralistic paternalism" often cited to justify suppression of lascivious expression.[1] Second, the conservative and the feminist attacks on pornography each attempt to deny that pornography is communication of any sort. They prefer to categorize pornography as a sex aid, or as a form of sex discrimination, but dismiss the notion that pornographic expression transmits ideas.

This article reviews — and ultimately rejects — each of these propositions. Both are premised on the notion that some forms of expression are so beyond the pale that the first amendment does not even apply. The first problem with this premise is technical: neither the

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1. See, 2 J. FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 189 (1985) (emphasis omitted) [hereinafter FEINBERG, OFFENSE TO OTHERS].

conservative nor the feminist strands of the anti-porn position offers a sufficiently objective method by which to assess when communication ceases to be communication. The central premise of the modern crusaders (*i.e.,* that pornography is not speech) thus collapses into the more familiar debate over the content of particular communication. The more significant problem with the pro-suppression position is that it cannot be limited to pornographic expression; it provides a broader rationale for suppressing deviant expression of many sorts. In effect, the judicial opinions and academic theories supporting the suppression of pornography endorse a first amendment jurisprudence under which the state may certify and enforce a moral code that reinforces and justifies the political status quo. A theory of this nature leaves no theoretically consistent way to distinguish between offensive or obscene speech and the more abrasive, radical political speech that is now protected under the *Brandenburg* standard.[2]

The first three parts of this article discuss in detail the relationship between the Supreme Court's obscenity rulings and the academic theories that have been offered to bolster the conclusions reached by the Court in this area. Part IV of the article considers a contrary theory of free expression that requires constitutional protection for the dissemination and possession of pornography. In this section I argue that the present efforts to ban pornography are directly linked to a tolerance model of free expression. The tolerance model, which is usually contrasted with an analytical approach characterized by Holmesian skepticism, necessarily relies upon some theory of moral certainty. Given the assertion that definitive moral knowledge can be obtained, the repressive aspect of the tolerance model becomes clear; speech is permitted only to the extent that it serves a positive social function, as judged by the moral arbiters lodged in the courts or the legislatures.

A central premise of this article is that first amendment protections should not be based on the tolerance model favored by both traditional liberal and contemporary conservative jurisprudence. Rather, the first amendment should be recognized as one manifestation of the general movement of social thought away from medieval, sectarian theories of epistemology, and toward modern theories based on scientific skepticism. In other words, strong protections for free expression are required by the intellectual framework of the Enlightenment, not from some particular political theory that developed in the context of that framework. Traditional liberalism fails in its effort to justify the regulation of expression because it has not yet fully abandoned the quest

2. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

for moral certainty that characterized the prior historical epoch. The more avowedly restrictive approaches to pornography (and expression generally) fail even more grandly because they propose the impossible return to that prior era.

Having rejected the tolerance model for first amendment jurisprudence, the article then attempts to locate pornographic expression within the broad category of social deviance generally. Under a proper view of the first amendment—that is, one based on the skepticism model—deviance must be protected, not because it is socially beneficial, but rather because its suppression requires that someone be in a position to assert moral primacy in order to suppress the deviant expression. Pornography must be seen not only for what it claims to be, but also for what it represents in the way of a basic rejection of the moral verities of society generally. It is anarchic and anti-social, but for those very reasons is within the range of concerns that should be considered worthy of protection by the first amendment. This leads to the basic conclusion that the anti-porn forces have fundamentally misconstrued the nature of pornography, and that only by accepting their cropped view of communication and ideas can their repressive goals be justified.

I. A Brief History of the Morality Principle in Anti-Obscenity Jurisprudence

Concern with the legal suppression of pornographic materials is a relatively recent phenomenon. It was not considered an issue of great importance by the Framers of the American Constitution, many of whom were consumers or producers of bawdy literature.[3] It also took many years for the problem to merit the attention of the Supreme Court, which did not issue its first definitive pronouncement on por-

3. For example, Benjamin Franklin invented the tale of Polly Baker, which told the story of a woman prosecuted five times for bearing bastard children. During her fifth trial, the woman made an impassioned defense of her sexual adventures by urging the court not to "turn natural and useful Actions into Crimes." Franklin, *The Speech of Miss Polly Baker,* General Advertiser (London), Apr. 15, 1747, *reprinted in* M. Hall, Benjamin Franklin & Polly Baker app. 165 (1960). The story was never reprinted in Franklin's own Philadelphia newspaper. One historian has noted that the reasons for Franklin's uncharacteristic restraint in this case are "not hard to find." *Id.* at 85.

> One reason may have been that the influential members of the community, whose friendship and approval Franklin needed, frowned upon ribaldry. . . . Another reason may have been religious. Franklin may have withheld Polly from publication because her robust deism and the brash enlisting of God's authority against the guardians of law and order would have shocked some of his readers and might even have jolted them off his subscription list.

Id. at 85-86 (footnote omitted). Even in Franklin's day, therefore, sexual expression was viewed as implicating the majoritarian ethos writ large. See C. Van Doren, Benjamin Franklin 150-54 (1938), for other examples of Franklin's "surreptitious writings" during the "salty" period of Franklin's fortieth year.

nography until 1957, in *Roth v. United States.*[4] The issue did, however, receive consideration earlier in the state and lower federal courts. The cases leading up to *Roth* established the basic dimensions of the principles that still govern the courts' consideration of pornographic discourse. This section describes the development of those principles in the case law.

A. *The Common Law Background*

Although the first reported American case involving the censorship of pornography occurred in 1815,[5] it was not until more than fifty years later that a general standard was devised for application in such cases. This standard, which would be the basic reference point for obscenity prosecutions during approximately the next ninety years, was established in a British case decided in 1868.[6] The decision in *Hicklin* set the tone for all subsequent efforts to regulate pornographic materials. In particular, the case provides a very clear statement of the morality principle that has served as the touchstone for regulation in this area.[7] Although recent decisions have altered somewhat the mechanics of applying this principle, the principle itself has been retained.

Hicklin involved the prosecution of an anti-Catholic tract that set forth in some detail sexually suggestive questions allegedly asked of young women in the confessional.[8] The court determined that although the defendant may have been motivated by a legitimate intent to express an opinion concerning ecclesiastical matters, the document by which he expressed his opinion nevertheless contained numerous "filthy and disgusting and unnatural description[s]" of impure practices, and was therefore "in every sense of the term, an obscene publication."[9] The court held that the offending publication could be seized and destroyed, and the defendant could be prosecuted under a statute making it a misdemeanor to publish obscene materials.

The case's enduring significance, however, rests on Lord

4. 354 U.S. 476 (1957).

5. Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa.1815) (obscene drawing). The first prosecution of a book on obscenity grounds was Commonwealth v. Holmes, 17 Mass. 336 (1821). *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 468 (1970). The case involved John Cleland's novel "Memoirs of a Woman of Pleasure" (a.k.a. "Fanny Hill"), a book with which the American courts would become quite familiar over the next century and a half. *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1965).

6. Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868).

7. *See* note 14 *infra* and accompanying text.

8. 3 L.R.-Q.B. at 371 (Cockburn, C.J.).

9. 3 L.R.-Q.B. at 371.

Cockburn's statement of the standard by which obscenity prosecutions could be conducted. "[T]he test of obscenity is this, 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."[10] The task of the obscenity law is thus clearly identified: to protect the existing system of morality against attacks from within. This point was made even more clearly by the arguments of counsel in *Hicklin.* Defendant's counsel relied almost exclusively upon his client's allegedly benign intent. In defending this position, the attorney quoted with approval a passage from a contemporary treatise asserting that blasphemy was punishable as a crime only if it was intended to "destroy or even to weaken man's sense of religious or moral obligations . . . or to bring the established religion and form of worship into disgrace and contempt."[11] The prosecuting attorney responded that intent was not necessary, but rather that "any publication tending to the destruction of the morals of society is punishable by indictment."[12] The significant thing about this exchange between counsel is their substantial agreement upon the proper role of the judiciary. They each concede that the judiciary is properly concerned with protecting society's particular notions of morality. As this proposition was restated by one of the judges in *Hicklin,* "I think it never can be said that in order to enforce your views, you may do something contrary to public morality."[13] Under this scheme, therefore, one may urge "views" only if the urging does not contradict "public morality."

Hicklin thus exemplifies the fundamental component of what I will refer to henceforth as the "morality principle": *i.e.,* the notion that law is properly concerned with the preservation of a particular structure of moral beliefs, coupled with the related axiom that reference to moral precepts can by itself justify censorship of heretical expression.[14]

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10. 3 L.R.-Q.B. at 371.

11. 3 L.R.-Q.B. at 366 (quoting 2 T. STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL 147 (2d ed. 1838).

12. 3 L.R.-Q.B. at 369 (quoting T. STARKIE, *supra* note 11, at 158).

13. 3 L.R.-Q.B. at 377 (Blackburn, J.).

14. The definition of legal moralism offered by Joel Feinberg provides another variation on the same theme, cast somewhat more broadly with reference to moral theory instead of constitutional doctrine. Feinberg defines legal moralism as the principle that "[i]t can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or others." 1 J. FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 27 (1984) [hereinafter FEINBERG, HARM TO OTHERS]. Two other conceptual definitions provided by Feinberg are relevant to the subject of this article. One is the harm principle, which asserts that the prevention of harm to persons other than the actor is "always a good reason in support of penal legislation," if there are no equally effective means of prevention at "no greater cost to other values." *Id.* at 26. The second is the offense

The American courts that applied the *Hicklin* standard in the years before the rejection of that standard in *Roth*[15] understood very well the basis for their power to regulate obscenity, and expressed no compunctions about their reliance on the morality principle. In the years leading up to *Roth,* the morality principle served very well to justify judicial action against scandalous material, and served equally well to rebut the notion that literary value could outweigh the harm such material posed to the moral fabric.[16]

Furthermore, the morality principle immortalized in the *Hicklin* standard fit easily within the American legal tradition. As Justice Brennan pointed out in *Roth,* anti-pornography statutes in this country (which did not exist when the Constitution was drafted) were preceded by blasphemy and profanity statutes in each of the states.[17] Thus, it was natural for the American courts, as it was for the English court in *Hicklin,* to protect not only the metaphysical basis of morality, but the specific proscriptions of the dominant moral scheme as well. Eventually, these specific proscriptions assumed legal significance independent of their sectarian origins. This point was driven home after the Civil War, when, at the urging of the moral crusader Anthony Comstock, the states and federal government began enacting in earnest statutes specifically addressing obscenity in a context di-

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principle. This principle must be distinguished from simple offensiveness. It is modeled on the principles of nuisance law, and asserts that the state may properly regulate offending conduct from which there is no convenient escape. *See* FEINBERG, OFFENSE TO OTHERS, *supra* note 1, at 1-10.

In his discussion of *Hicklin* and subsequent cases, Feinberg contends that the cases are based on the principle of moralistic paternalism. *Id.* at 189. Moralistic paternalism combines the concept of legal moralism with the concept of legal paternalism, which states that "[i]t is always a good reason in support of a prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself." FEINBERG, HARM TO OTHERS, *supra,* at 26-27. I concur with almost everything Feinberg says in his treatment of the history of judicial regulation of pornography, but I prefer to distinguish between judicial justifications based upon morality and justifications based upon paternalism, since the latter has special significance with regard to the issue of sex discrimination. *See* notes 199-203 *infra* and accompanying text.

15. 354 U.S. 476, 489 (1957).

16. "Sincerity and literary art are not the antithesis of obscenity, indecency, and impurity. . . . The same book may be characterized by all of these qualities." Commonwealth v. Isenstadt, 318 Mass. 543, 553, 62 N.E.2d 840, 846 (1945) (upholding obscenity conviction for sale of Lillian Smith's novel *Strange Fruit*). *See also* Attorney General v. The Book Named "God's Little Acre," 326 Mass. 281, 93 N.E.2d 819 (1950) (upholding obscenity conviction for sale of Erskine Caldwell's novel *God's Little Acre,* despite book's acknowledged literary merit); Commonwealth v. Friede, 271 Mass. 318, 322, 171 N.E. 472, 474 (1930) (upholding obscenity conviction for sale of Theodore Dreiser's novel *An American Tragedy* "even assuming great literary excellence, artistic worth and an impelling moral lesson in the story").

17. *Roth* 354 U.S. at 482-83 & n.12. Brennan cites as a representative example the Massachusetts statute passed in 1712, which prohibited the publication of " 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services." 354 U.S. at 483.

vorced from its theological foundation.[18]

B. *The Warren Court Era*

In the period leading up to *Roth,* a few judges had expressed reservations about the repressive consequences of the *Hicklin* standard,[19] but these reservations were directed more at the mechanics of the standard rather than at its theoretical base.[20] Even the famous opinion by Judge Woolsey, which permitted the distribution and possession of James Joyce's *Ulysses,* rejected only *Hicklin*'s antiquated version of the morality principle, not the morality principle itself.[21]

Thus, it should have been no surprise when the Supreme Court finally applied the principles of the first amendment[22] to the matter of obscenity, that it would rework the means by which the morality principle would be applied in the future, but leave the morality principle intact. The Court had, in fact, itself presaged its approach to obscenity several years earlier, when it ruled unanimously that certain kinds of expression — such as the lewd and obscene — "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."[23] The Court had moved away from *Hicklin,* but not from the central aspect of *Hicklin;* and in *Roth v. United States,*[24] the Court for the first time certified as constitutional, efforts to enforce a legally defined "social interest in order and morality."

The *Roth* majority opinion was written by Justice Brennan, who would later renounce both *Roth* and the morality principle on which it was based.[25] The opinion held what had been asserted in dicta fifteen years before: "obscenity is not within the area of constitutionally pro-

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18. *See* W. KENDRICK, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE 129-57 (1987).

19. See, *e.g.,* Judge Learned Hand's grudging application of the *Hicklin* standard in United States v. Kennerley, 209 F. 119, 120 (S.D.N.Y. 1913): "I hope that it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time . . . ."

20. *See* United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring), *affd.,* 354 U.S. 476 (1957).

21. *See* United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *affd. sub nom.* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

22. Roth v. United States, 354 U.S. 476 (1957).

23. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (footnote omitted).

24. 354 U.S. 476 (1957).

25. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting), *cert. denied,* 418 U.S. 939 (1974); *see also* FCC v. Pacifica Found., 438 U.S. 726, 762-77 (1978) (Brennan, J., dissenting).

tected speech or press."[26] This holding was extremely helpful in affirming the convictions in *Roth:* It relieved the Court from having to consider problematic issues, such as the application of the clear and present danger test, and the absence of proof as to whether the material at issue in those cases had incited anti-social conduct (as opposed to merely engendering lascivious thoughts). Even so, *Roth* is considered to have been a liberalization of obscenity law, since it limited the circumstances in which the morality principle could be applied.[27] The new considerations Brennan introduced into the process of prosecuting obscenity certainly helped to avoid many of the more obvious abuses of the *Hicklin* standard. But these immediate benefits pale beside the mark the opinion made on first amendment theory.

The opinion firmly established what Harry Kalven later termed the "two-level theory" of free expression protection under the first amendment: the concept that some forms of expression deserve less protection than other, more traditional, forms.[28] It was this theoretical framework that allowed the Court to justify the continued application of the morality principle. Under the two-level theory, the state could exert heightened control over certain forms of expression that did not conform to dominant moral standards. These forms of expression received diminished protection under the Constitution because of their "slight" social value. The two-level theory thus requires that all forms of expression be measured against a scale of social values, which is, in turn, based on the dominant ethos. Therefore, under the new, purportedly liberal standard imposed in *Roth,* the dominant moral scheme was protected from effective repudiation by competing views of the ethical universe. The opinion's illiberal core was, however, masked by the libertarian patina provided by the Court's explicit holding that theoretical discussions of morality would still be constitutionally protected.[29] But the hitch was that such discussions could take place only on terms set by those defending the status quo. In order to receive constitutional protection, the discussion must be conducted

26. 354 U.S. at 488-89.

27. 354 U.S. at 488-89. Brennan rejected the *Hicklin* standard for determining obscenity because it "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." 354 U.S. at 488-89. In its place, Brennan substituted the standard whose basic elements still govern the area: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489 (citations omitted).

28. *See* Kalven, *The Metaphysics of the Law of Obscenity,* 1960 SUP. CT. REV. 1, 10.

29. This point was the basis for the first obscenity opinion issued by the Court after *Roth. See* Kingsley Intl. Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959) (merely advocating immoral conduct, such as adultery, insufficient to justify obscenity prosecution).

civilly;[30] that is, the conversants must not violate society's version of morality by the mode of discussion itself.

Although the Court has refined the *Roth* standard in several respects since that opinion was issued, the morality principle has become more, not less, prominent in the post-*Roth* obscenity cases. Refinements were necessary because of the flaccid language Brennan used in defining the standard. The Warren Court's subsequent efforts to describe the standard were equally unavailing.[31] Terms such as "current community standards," "dominant theme," "prurient interest," and "patent offensiveness" mean little in the absence of particular applications to specific materials.[32] The inability of the Court to define clearly the obscenity standard caused some Justices to despair that an adequate standard could ever be devised; their solution to this difficulty was simply to give up the task.[33] The frustration felt by the Court is reflected in the number of cases decided by the Supreme Court without opinion in the decade following *Roth*.[34] The numerous and unpredictable nature of the decisions coming before the Court for review led some Justices to conclude that not only should they give up trying to provide an exact definition of obscenity, but they should also abandon their efforts to police lower-court application of the existing vague standard.[35]

The one thing a majority of the Court did not question in the years immediately following *Roth* was that case's central element: the morality principle. The last spate of Warren Court obscenity opinions, issued on the same day in 1966, indicated the growing strength of that principle.[36] The first of these opinions ruled that the infamous book

30. *See, e.g.*, Manual Enters. v. Day, 370 U.S. 478, 485-86 (1962) (obscene material must be "patently offensive," as determined by reference to "customary limits of candor").

31. *See, e.g.*, 370 U.S. at 486 ("patently offensive"); Jacobellis v. Ohio, 378 U.S. 184, 191-92 (1964) (Brennan, J., plurality opinion) (obscene work must be " 'utterly' without social importance"); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413, 418 (1966) (Brennan, J., plurality opinion) (rearranging *Roth* factors; restated constitutional test included three elements: (1) prurient appeal; (2) patent offensiveness; and (3) that material be utterly without redeeming social value).

32. The imprecision of the modern standard mirrors the prior experience under the common law. One early American commentator described that experience as follows. "There is no definition of the term [obscenity]. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it. There is little more than the ability to smell it." Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 47 (1938).

33. *See Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

34. *See* Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1373 (1966).

35. *See Jacobellis*, 378 U.S. at 202-03 (Warren, C.J., dissenting). Justice Harlan expressed this point of view in *Roth*, at least with regard to state-law prosecutions. Roth v. United States, 354 U.S. at 500-03.

36. A Book Named "John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Mass., 383 U.S. 413 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966).

Fanny Hill was constitutionally protected because it was not "utterly" without redeeming social value.[37] More than anything, this opinion (which, like the majority opinions in the other two cases issued that day, was written by Justice Brennan) reflected the uneasiness of the majority about the potential application of the standard to "legitimate" literature. The majority was thus seeking to incorporate into the constitutional standard Justice Stewart's previously stated belief that obscenity law should apply only to "hard-core" pornography.[38]

But even in the speech-protective context of this case, the majority bowed in the direction of the morality principle. As it happened, the particular edition of *Fanny Hill* at issue in *Memoirs* was presented as a stolidly, almost pretentiously, literary work. It was published by a mainstream publishing house (G.P. Putnam's Sons of Boston), and was endorsed at trial by a bevy of well-credentialed experts.[39] The Court warned, however, that a less serious approach toward a work such as this might produce a different result. "Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."[40]

The Court reemphasized this point in the second case decided that day. In *Ginzburg,* the Court upheld a five-year prison sentence that had been imposed for the mailing of several sexually oriented magazines and "handbooks."[41] There was evidence that the handbooks initially had been marketed by their author to members of psychiatric and medical organizations. These individuals were to have used the materials in sexual therapy sessions, and they testified that they had in fact used them for this purpose.[42] Nevertheless, the Court found the marketing techniques used by the defendant in selling the publications to members of the general public, which emphasized the sexual aspects of the material to the exclusion of any other value, vin-

37. *Memoirs,* 383 U.S. at 419-20.

38. *See Jacobellis,* 378 U.S. at 197 (Stewart, J., concurring). This limitation to "hard-core" material has often been cited to suggest that the Court's present obscenity doctrine no longer poses any threat to first amendment values. *See* Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language,* 67 GEO. L.J. 899, 900 n.4 (1979). But the "hard-core" test has never been any more successful than the Court's multiplicity of other "standards" at separating prohibited material from protected material. Even in the opinions issued that day in 1966, Stewart — who originated the "hard-core" emphasis — disagreed with the majority in two of the three cases as to whether the publications in issue were "hard-core" publications. See *Ginzburg,* 383 U.S. at 497 (Stewart, J., dissenting); *Mishkin,* 383 U.S. at 518 (Stewart, J., dissenting).

39. *Memoirs,* 383 U.S. at 415 & n.2.

40. 383 U.S. at 420.

41. 383 U.S. at 463.

42. 383 U.S. at 472.

dicated the trial judge's finding that the material predominantly appealed to the prurient interest. "The 'leer of the sensualist' . . . permeates the advertising for the three publications," the Court noted,[43] and this salacious "leer" was sufficient in itself to render otherwise acceptable material obscene.

Brennan's opinion articulates an approach that has become commonplace in the conservative literature supporting the suppression of pornography. The defendant's "pandering" approach to the marketing of his publications was deemed unprotected by the first amendment because it sought a reader who "looks for titillation, not . . . intellectual content."[44] This judicial expression of squeamishness incorporates both the morality principle — which asserts that some expression is so unsavory that it precludes any claim to constitutional legitimacy — and the elitism that has permeated obscenity prosecutions from the beginning: what is permissible for those with education and training is forbidden to average persons. In *Hicklin* the Court expressed this elitism by focusing on pornography's tendency to "deprave and corrupt those whose minds are open to such immoral influences."[45] As Joel Feinberg has noted, this portion of the *Hicklin* standard is directly attributable to the attitudes the Victorian elite held about the possibly dangerous appetites of the lumpenproletariat, whom they feared but did not entirely understand.[46]

Brennan purported to abandon such a restrictive standard in *Roth* because the *Hicklin* standard "might well encompass material legitimately treating with sex."[47] But what was allegedly abandoned in *Roth* may have resurfaced in *Ginzburg* under the "pandering" guise. This approach accomplishes exactly what was intended under the susceptibility component of *Hicklin:* it permits the suppression of material communicating its crude message in an unsubtle manner that

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43. 383 U.S. at 468.

44. 383 U.S. at 470. *See* notes 99-148 *infra* and accompanying text.

45. *Hicklin,* 3 L.R.-Q.B. at 371.

46. There would appear to be more than a hint of the traditional British patronizing of the lower classes in Lord Cockburn's concern for those "into whose hands a publication of this sort may fall." Educated gentlemen no doubt can read pornographic books without fear of serious corruption, or corruption beyond that which motivates them in the first place, but what if the dirty book should just happen to fall into the hands of their servants, and be disseminated among ordinary workers and others (not to mention their own wives) who may be more susceptible to such influences?

FEINBERG, OFFENSE TO OTHERS, *supra* note 1, at 172. Although Feinberg does not carry his analysis of Cockburn's elitism beyond its moral aspects, it is also possible to detect a sublimated political fear in the *Hicklin* opinion. The danger is not just that the proletariat will be morally corrupted, but that if it is liberated from the fetters of the rigid moral structure imposed upon it from above, it will revolt from encumbrances of a political nature as well. The moral and the political considerations cannot be severed. *See* notes 264-81 *infra* and accompanying text.

47. *Roth,* 354 U.S. at 489.

makes the elite uncomfortable. As if further notice of this reintroduction of the susceptibility test were needed, the Court ruled in the third case decided along with *Ginzburg* and *Memoirs* that the prurient appeal of material "designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large" would be adjudged according to its appeal to the targeted group, rather than the "average" or "normal" person referred to in *Roth*.[48]

The Warren Court issued only two other major opinions on pornography issues.[49] *Ginsberg v. New York* applied the susceptibility test to minors.[50] In the second case, however, a majority of the Court rejected the application of the morality principle in an obscenity case.[51] The defendant in *Stanley v. Georgia* was successfully prosecuted in the lower court for possessing three reels of concededly obscene films. The Supreme Court reversed the conviction unanimously. Six Justices joined in the majority opinion written by Justice Marshall. The state defended its action in large part by relying on the morality principle. But the Supreme Court would have none of it, rejecting "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."[52] On the surface this statement of the majority's rationale flies in the face of every obscenity case previously decided by the Warren Court. This inconsistency can be reconciled only by reference to Marshall's awkward distinction between the state's power to proscribe obscenity and the state's power to investigate and prosecute infringements of its obscenity laws. "[T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individ-

48. Mishkin v. New York, 383 U.S. 502, 508 (1966). Brennan protested strenuously that this did not augur a return to the *Hicklin* standard, because this merely amounted to "adjust[ing] the prurient-appeal requirement to social realities" by assessing the appeal of materials in light of the particular interests of the "deviant sexual group." 383 U.S. at 508-09.

However, the operation of this "adjustment" is indistinguishable from the operation of the *Hicklin* susceptibility test: In both instances the Court approved the identification of a suspect group, which was defined in advance by its abnormality. Material appealing to the abnormal interests of this group was then to be assessed by a court or jury composed of "normal" people. Thus, a group of insiders would be given the task of determining what constituted healthy and legitimate sexual expression for a group of outsiders. It is highly unlikely that a value-neutral assessment of "deviant" sexual material will take place under such a system.

49. A large batch of per curiam decisions also addressed pornography. *See* Ginsberg v. New York, 390 U.S. 629, 634 n.3 (1968).

50. *Ginsberg*, 390 U.S. 629 (1968). *Ginsberg* upheld a conviction for the sale of two "girlie" magazines to a sixteen-year-old boy. The magazines were deemed not obscene for adults, but the Court held that New York could appropriately prohibit the distribution of such materials to minors. The Court specifically upheld the state's intent to protect the "ethical and moral development of our youth." 390 U.S. at 641.

51. Stanley v. Georgia, 394 U.S. 557 (1969).

52. 394 U.S. at 565-66 (footnote omitted).

ual in the privacy of his own home."[53] Because the Court refused to own up to the implications of its holding in *Stanley,* the case can only be understood as a privacy decision, rather than the first step in freeing the first amendment from the shackles of the morality principle. *Stanley* did not limit the extent to which the morality principle could be employed by the states as justification for legislation restricting sexually-explicit expression; it merely limited the lengths to which the states could go in enforcing such legislation.

C. *The Burger and Rehnquist Court Era*

Thus understood, *Stanley* was both too little and too late. By 1969, the morality principle was too well ensconced in first amendment law to be eradicated in a single half-hearted swipe. The task was made especially difficult by the advent of the far more conservative Burger Court. Given the ammunition provided by the Warren Court, the Burger Court would have little trouble limiting *Stanley,* first procedurally,[54] then substantively.[55] The Warren Court also left a legacy of confusing, ad hoc decisionmaking that made the field seem ripe for a new approach.[56]

Much is revealed about the nature of the Warren Court standard by the fact that the Burger Court did not have to make any major theoretical adjustments in order to pursue its more conservative agenda. In *Miller v. California*[57] and *Paris Adult Theatre I v. Slaton,*[58] the cases that defined the Burger Court's approach in this area, the majority merely reaffirmed the underlying tendencies of the existing cases. Following the Warren Court pattern, Chief Justice Burger — writing in both cases on behalf of the new Burger Court majority — concentrated on the mechanics of applying the obscenity standard. For reasons that are unclear, he viewed the *Memoirs* decision as

53. 394 U.S. at 568.

54. *See* United States v. Reidel, 402 U.S. 351 (1971) (seller of pornographic material denied standing to raise *Stanley* issue).

55. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986). The Burger Court was never a strong advocate of any aspect of *Stanley.* Whenever the Court chose to limit the first amendment implications of that case, it would characterize *Stanley* as a privacy decision. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-67 (1973), *cert. denied,* 418 U.S. 939 (1974). Whenever the Court chose to limit the privacy implications of *Stanley,* it would characterize that case as "firmly grounded in the first amendment." Bowers v. Hardwick, 106 U.S. at 2846.

56. Beginning with the 1967 decision of Redrup v. New York, 386 U.S. 767 (1967), the Court decided 31 cases by way of per curiam reversals, until the Burger Court took the matter in hand in a group of 1973 decisions. *See Paris Adult Theatre I,* 413 U.S. at 82 n.8 (Brennan, J., dissenting).

57. 413 U.S. 15 (1973).

58. 413 U.S. 49 (1973).

"veer[ing] sharply away from the Roth concept."[59] Burger therefore replaced the three *Memoirs* factors with three of his own.[60] In fact, the new *Miller* standards differed from the *Memoirs* test only in that they introduced a value-balancing test to determine whether a work was worthy of first amendment protection. In lieu of the Brennan formulation "utterly without redeeming social value," Burger substituted an equation more in keeping with the morality principle: "whether the work, taken as a whole, lacks *serious* literary, artistic, political, or scientific value."[61] The practical implication of this change was simply to alter the burden of proof in future obscenity decisions. Whereas the Warren Court's "utterly without social value" criterion could be defeated by the barest assertion of "social value," the Burger Court's formulation required a much stronger showing of social value.[62]

Aside from tinkering with the details of applying the obscenity standard, the Burger Court opinions do not deviate in any major respect from the prior Court's missives on the subject. The majority opinions in *Miller* and *Paris Adult Theatre I* contain extensive, heartfelt paeans to the morality principle. Chief Justice Burger took great effort to point out that he was moving down a well-trod path. He began his *Miller* opinion with extensive quotes from *Chaplinsky* and *Roth,* which established the "two-level" analysis the Warren Court adopted to justify modern obscenity law.[63] Burger then used this two-level analysis to critique what he perceived to be the overly protective *Memoirs* test. After reestablishing an appropriately restrictive constitutional test, Burger returned to the morality principle. "[T]o equate

59. *Miller,* 413 U.S. at 21.

60. The new factors were

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

413 U.S. at 24.

61. 413 U.S. at 24 (emphasis added).

62. Some lower courts quickly took the hint. Only a year after *Miller,* the Supreme Court reversed a Georgia Supreme Court decision that had held the movie *Carnal Knowledge* obscene under a state law deemed by the state court "considerably more restrictive" than the flexible *Miller* standard. Jenkins v. Georgia, 418 U.S. 153, 156 (1974). In an effort to rectify the evident misunderstanding of the new *Miller* standard, the Court was forced to emphasize descriptive terms carried over from the Warren Court era, such as "patently offensive," *see* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General Of Massachusetts, 383 U.S. 413, 418 (1965); Manual Enters. v. Day, 370 U.S. 478, 486 (1962); and "hard-core," *see* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *See also Jenkins,* U.S. at 160 (quoting *Miller,* 413 U.S. at 27) ("[N]o one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual content . . . .").

63. *Miller,* 413 U.S. at 20-21.

the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment," Burger wrote.[64] The alarums of the dissenters, Burger said, "cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."[65] The last portion of the *Miller* majority opinion contains the basic idea that academic sympathizers would later use to raise the two-level theory to a new level of sophistication; not only are certain kinds of speech immune from constitutional protection, but some things that are defended as first amendment "speech" are conceptually indistinguishable from obviously inexpressive acts, and thus not "speech" at all. They are merely "commercial exploitation of obscene material," and the states may therefore treat them like any other tainted articles of commerce.[66]

The Burger Court was not, however, concerned with the philosophical intricacies of its doctrine. To the extent that the Burger Court majority issued any theoretical defense of its position, it relied largely upon attempted explanations of the Justices' visceral valuations of obscene expression. One such explanation was offered by Justice Stevens in an opinion issued three years after *Miller.*

> [E]ven though we [have] recognized that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate .... Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[67]

As this excerpt indicates, Justice Stevens focused close attention on the value choices that had been left unelaborated by the Warren Court's nascent application of the morality principle. Furthermore, the Burger Court's increasingly clear exclusion of obscenity from the

64. 413 U.S. at 34.

65. 413 U.S. at 36.

66. The Court drew an extended analogy between regulation of sexually explicit expression and the regulation of other commercial and business affairs. *See* 413 U.S. at 32 n.13; *Paris Adult Theatre I,* 413 U.S. at 61-64. The Court also discovered some irony in the opposing positions taken by the dissenters: "States are told by some that they must await a 'laissez-faire' market solution to the obscenity-pornography problem, paradoxically 'by people who have never otherwise had a kind word to say for laissez-faire,' particularly in solving urban, commercial, and environmental pollution problems." *Paris Adult Theatre I,* 413 U.S. at 64 (quoting I. KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 37 (1972)).

67. Young v. American Mini-Theatres, 427 U.S. 50, 70 (1976).

protection of the first amendment constituted an endorsement of actions by other political bodies restricting sexually explicit expression. Notwithstanding the language in the Burger Court majority opinions professing the Court's intended deference to legislative choices, the opinions provide abundant historical, political, and moral weight to one side of the legislative debate. The majority's references to federalism interests further bolstered this message. "It is neither realistic nor constitutionally sound," Chief Justice Burger wrote in *Miller,* "to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[68] The Court thus acknowledged that some pockets of resistance to mainstream morality remain. But it simultaneously asserted that the influence of this resistance could now be limited to the already hardened denizens of modern-day Sodom and Gomorrah: most of the country could still be saved from the moral depravity engendered by the libertine spirit.

In adopting its present stance of severe moral advocacy, however, the Court must ignore the internal contradictions of its approach. For if the morality principle were followed to its logical end, and if the standards of the corrupt urbanites of Manhattan in fact no longer define the constitutional standard for the rest of the country, then the third part of the *Miller* test makes no sense. It is not logical to retain the view that the literary (or political, or scientific) merit discerned by a select few can salvage what to the vast majority of Americans merely seems to be evidence of sexual debasement. Indeed, the fact that salacious materials are approved as "art" arguably makes them much more dangerous to the dominant ethos than any number of poorly made videocassettes representing a genre society regularly deplores.[69]

In the Court's most recent pronouncement on the subject of obscenity, *Pope v. Illinois,*[70] it once again grappled with the question of social valuation, and once again it exhibited its discomfort at facing the implications of denying constitutional protection to obscenity. In *Pope,* the Court held that the "serious literary, artistic, political, or scientific value" component of the *Miller* standard was not to be judged by the application of contemporary community standards. Rather, the intellectual values of a given work must be judged by a

68. 413 U.S. at 32 (footnote omitted).

69. *See* notes 182-85 *infra* and accompanying text. I will argue below that the present system avoids this problem in part by incorporating art into a socially approved, meliorating aesthetic. Art receives strong constitutional protection only because it has been successfully domesticated. *See* notes 266-73 *infra* and accompanying text.

70. 107 S. Ct. 1918 (1987).

national standard, to be ascertained by asking "whether a reasonable person would find such value in the material, taken as a whole."[71] The state had objected in its brief that the two standards would in practice amount to the same thing. The Court responded that "[t]he risk . . . is that under a 'community standards' instruction a jury member could consider himself bound to follow prevailing local views on value without considering whether a reasonable person would arrive at a different conclusion."[72]

On its face, therefore, the opinion seems to be a minor, albeit significant expansion of the first amendment's protection. Upon closer inspection, however, *Pope* is more troubling. First, in determining that the intellectual value of a challenged work is to be determined by a national standard, the Court does little more than state what has long been the common understanding.[73] Second, the introduction of a "reasonable man" analysis into the determination of intellectual value may portend a constriction of the protections offered to fringe or avant-garde materials. As Justice Stevens pointed out in his *Pope* dissent, "[t]he problem with [the majority's] formulation is that it assumes that all reasonable persons would resolve the value inquiry in the same way."[74] Furthermore, the "reasonable" person's judgment may not necessarily coincide with the opinion of members of the population who have a professional interest in preserving access to material in their respective areas of expertise, such as artists, writers, art scholars, scientists, and literary critics. "Certainly a jury could conclude that although those people reasonably find value in the material, the ordinary 'reasonable person' would not."[75]

Justice Stevens' reservations about the implications of *Pope* are quite compelling. But it must be said that if these fears are well founded, the case simply will have integrated the third component of the *Miller* standard into the intellectual scheme to which Stevens himself gave voice in *American Mini-Theatres.*[76] The two-level first amendment analysis, and the morality principle on which it is based, by definition eschews the value-skepticism Stevens sanctions in his *Pope* dissent. If expression may be arranged along a constitutional continuum according to its relative social value, and if the Court per-

71. 107 S. Ct. at 1921 (footnote omitted).

72. 107 S. Ct. at 1921 n.3. *But see* 107 S. Ct. at 1926-27 n.4 (Stevens, J., dissenting).

73. *See* Smith v. United States, 431 U.S. 291, 301 (1977). *See also* F. SCHAUER, THE LAW OF OBSCENITY 123-24 (1976).

74. 107 S. Ct. at 1926 (Stevens, J., dissenting).

75. 107 S. Ct. at 1927 n.5.

76. *See* note 67 *supra* and accompanying text.

mits the determination of value to be made based on society's ability to enforce through law the "social interest in order and morality,"[77] then the battle has already been lost. No amount of remonstration about the protection of the unorthodox or the controversial can alter the fact that this interpretation of the first amendment gives the dominant members of society the right to govern such expression in order to enforce their moral code on the society as a whole — which inevitably leads to the suppression of unorthodox and controversial sexually explicit speech.

In the final section of this article, I shall suggest that a regime of radical skepticism is the only possible response to the imperfections of the present model. First, however, it is necessary to investigate more closely the academic support that has been mustered in support of the restrictions on sexually explicit expression. The support provided by these commentators is significant given the Supreme Court's concentration on the mechanics of obscenity law to the almost complete exclusion of the theoretics.

II. The Conservative Censors

The Supreme Court's emphasis on the practical aspects of regulating pornography has left a theoretical vacuum to be filled by academic supporters of the Court's basic conclusions. The efforts of conservative scholars to fill this vacuum have produced two distinct justifications for suppressing obscene expression. One theory relies on an analysis of the historical and structural roots of the first amendment, and finds that the amendment was never intended to protect nonpolitical expression of any sort. The other theory seeks to distinguish between "communication," which is afforded constitutional protection, and something else — "nonspeech" — which is denied constitutional protection. Both theories profess to base their legitimization of suppression on a value-free assessment of the policies and purposes of the first amendment. But they take very different paths to this end. The first theory fully and explicitly embraces the morality principle, and for this reason has failed to gain acceptance by advocates of nonprotection who find such forthrightness unpalatable or impolitic. The second theory has obtained greater support, in part because its proponents share with the Supreme Court an unwillingness to confront the theory's roots in the morality principle. Efforts by the proponents of this theory to avoid the one fundamental issue in the obscenity area give the theory an air of pristine unreality, which is altogether consis-

77. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

tent with the intellectual gamesmanship that has characterized the obscenity area from the outset.

A. *Pornography in the Constitutional Hierarchy*

The first theory justifying the suppression of pornography is based on a development of the hierarchy of first amendment values suggested by Alexander Meiklejohn.[78] In his early theoretical writings, Meiklejohn asserted that the first amendment protected only public discussions of matters of public policy.[79] Under this early articulation of his scheme, first amendment protection would be afforded only to expression that *on its face* addressed some issue of public political concern; the tangential political importance of facially nonpolitical speech would not be sufficient to bring that speech within the ambit of the first amendment.[80] The highly circumscribed reach of this theory would necessarily deny protection to many works recognized as having artistic, literary, or scientific value.

This result was unacceptable to Meiklejohn, who had proposed his theory in order to substantiate the libertarian view that speech was "absolutely" protected.[81] In his later writings, therefore, Meiklejohn backtracked, contending that of course "novels and dramas and paintings and poems" should be protected under the first amendment.[82] He arrived at this conclusion by adopting the attitude that the first amendment must protect not only political values, but also everything that goes into the makeup of a good political actor. Self-government is possible, Meiklejohn asserted, only if voters acquire "intelligence, integrity, sensitivity, and generous devotion to the general welfare."[83] Meiklejohn's "good citizenship" modification of his earlier theory allowed him to cast his protective net much more widely. He now granted constitutional protection to thought and expression concerning education, philosophy and science, literature and the arts — even that "which portray[s] sexual experiences with a frankness that, to the prevailing conventions of our society, seems 'obscene'. . . ."[84] But this

78. *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1960) (reprinting Meiklejohn's 1948 book FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT).

79. *Id.* at 24-28.

80. Speech falling outside the parameters of the first amendment would obtain only limited due process protection. *Id.* at 34-38, 54-60.

81. *See* Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245.

82. *Id.* at 263.

83. *Id.* at 255.

84. *Id.* at 257, 262-63. Meiklejohn's reasons for protecting obscenity are not at all clear, even granting his "good citizenship" codicil to the first amendment hierarchy. Whatever can be said of obscenity, it does not seem to serve quite the same uplifting, character-building function as the other items on Meiklejohn's list. The protection of obscenity thus seems to be based on a tempo-

key concession to his libertarian instincts robbed Meiklejohn's early theory of its only substance, and transformed it into yet another variation of the Black/Douglas invocation that "speech is good."

Meiklejohn's original theory exerted a strong appeal, however, on other, more conservative commentators who did not shrink from the repressive implications of the first amendment hierarchy. Robert Bork provides the strongest example of this group.[85] Bork's variation on Meiklejohn's hierarchy theory draws upon Herbert Wechsler's famous article on neutral principles.[86] Bork resorts to a "principled" view of free speech adjudication because the history and text of the first amendment provide little guidance. The Framers of the amendment "seem to have had no coherent theory of free speech," Bork says, therefore "[w]e are . . . forced to construct our own theory of the constitutional protection of speech."[87] In order to avoid constitutionally illegitimate judicial lawmaking, the theory to be generated must conform to Wechslerian neutrality; principles "must be neutrally derived, defined and applied."[88]

Bork's quest for neutral principles leads him to consider the various benefits that have been proposed as derived from free speech.[89] He concludes that only one of these interests — "the discovery and spread of political truth" — provides a justifiable basis for judicial intervention to protect speech.[90] "All other forms of speech raise only issues of human gratification," the regulation of which should be left to the legislatures.[91] Bork's view of constitutionally protected speech is further defined by the limitation he places on the term "political truth." "Truth" in Bork's sense "is what the majority thinks it is at any given moment . . . . Political truth is what the majority decides it wants today. It may be something entirely different tomorrow, as truth is rediscovered and the new concept spread."[92] Thus, not only is constitutional protection denied to nonpolitical speech, it is also denied to those who express a desire to operate outside the preexisting political

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rary abandonment of the entire notion of a hierarchy, in favor of pure first amendment absolutism: "Here, as elsewhere," Meiklejohn writes, "the authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the subordinate branches of government." *Id.*, at 262.

85. *See* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971).

86. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

87. Bork, *supra* note 85, at 22.

88. *Id.* at 23.

89. *Id.* at 24-26.

90. *Id.* at 26 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

91. *Id.* at 26.

92. *Id.* at 30-31.

structure to achieve something other than incremental change in the system.[93]

Bork's system has the undeniable attribute of clarity. His narrowly delimited definition of protected speech allows him to avoid the unconvincing circumlocutions employed by Meiklejohn in order to protect artistic and other nonpolitical expression within the first amendment hierarchy. Bork unequivocally makes such nonpolitical expression susceptible to regulation by federal and state legislatures. He rejects absolutely Meiklejohn's notion that such expression is constitutionally significant in a political sense because it contributes to the formation of political values. This is irrelevant, Bork says, because "[o]ther human activities and experiences also form personality, teach and create attitudes just as much as does [literary expression]."[94] Since those other activities are clearly beyond the reach of the first amendment, Bork says, literary and artistic expression must be outside the amendment's scope as well. It's all just human gratification, and therefore subject to majority rule.

Having denied protection to *Ulysses* and its rarefied ilk, Bork has no difficulty proscribing pornography as well: "constitutionally, art and pornography are on a par with industry and smoke pollution."[95] Bork also has no problem with the morality principle, because his entire theory is built on the premise that legislative majorities have nearly absolute authority over every aspect of human expression save what concerns political governance, including matters entailing moral judgments. Judgments about social value "always involve[ ] a comparison of competing values and gratifications."[96] These judgments therefore can never be principled or neutral, and thus cannot be made by judges.

The disarming honesty of Bork's rendition of the morality principle has never found favor with the Court. On the contrary, the Court has behaved as if most nonpolitical expression has always been under the protective wing of the first amendment.[97] The Court adopted the theory of a first amendment hierarchy in *Chaplinsky;*[98] then, following

93. "Speech advocating forcible overthrow of the government contemplates a group less than a majority seizing control of the monopoly power of the state when it cannot gain its ends through speech and political activity. Speech advocating violent overthrow is thus not 'political speech'. . . ." *Id.* at 31.

94. *Id.* at 27.

95. *Id.* at 29.

96. *Id.*

97. "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

98. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *Chaplinsky* actually inaugurated

the lead of Professor Meiklejohn, it has proceeded abruptly to abandon that theory whenever its consequences turn out to be unsavory. Although it is possible to swallow a large dollop of theoretical inconsistency if the result is to require recalcitrant legislatures to permit the publication of *Ulysses,* the point made by Bork is impossible to avoid: both artistic regulation and the regulation of sexually explicit materials are the products of social and moral value judgments. Logically, the legislature either has the power to make such judgments or it doesn't, and the fact that it is easier to arrive at damning moral judgments about some materials than it is about others does not alter the nature of the judgment itself. The Court has refused to endorse Bork's explanation of the morality principle because his consistent application of that principle returns censorship power to political bodies that have never demonstrated much intellectual discrimination in regulating expression. As lamentable as this might be, it is unavoidable under an honest application of the Court's present theory.

B. *Pornography as Nonspeech.*

Bork's theory is unsatisfactory to most of those seeking to justify the suppression of obscene publications because it explains the implications of the morality principle all too well. In one sense, the early censors were too effective; it is in large measure due to their zealotry that the morality principle cannot be brought out of the closet or applied consistently. The Comstocks of previous generations are the laughingstocks of the present era, and the one true legacy of their efforts is an inherent hesitancy on the part of most judges and scholars to advocate censoring artistic or literary works whose merit might be fully recognized only fifty years hence. This intellectual squeamishness manifests itself in the resort to a "scientific" explanation of censorship. The "scientific" approach looks to disciplines outside the law in order to justify censorship. It frees the advocates of censorship from the need to defend the value choices they have made in enforcing

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the "two-level theory." But levels, like prongs, have a way of multiplying in legal analysis, as evidenced by the development of first amendment law since *Chaplinsky.* Over the years the Court gradually adopted a series of gradations in first amendment law, ranging from highly protected speech, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969) (advocacy of political action), to speech receiving somewhat less protection, *see* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (commercial speech), to speech entitled only to procedural, rather than substantive protection, *see* New York Times v. Sullivan, 376 U.S. 254 (1964) (libel), to totally unprotected speech, *see* Miller v. California, 413 U.S. 15 (1973) (obscenity). For the purposes of this article, it does not matter whether the Court employs a "two-level" theory, a "hierarchy" theory, or a "balancing" theory, *see* Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring). The significant factor for my purposes is that the morality principle is the primary basis for all decisions allowing the suppression of pornography, regardless of the manner in which that principle has been applied by the Court.

the morality principle, because an airtight "scientific" explanation denies that any such choice has taken place.

The most prominent example of the "scientific" approach is characterized by an attempt to explain pornography as "nonspeech." This theory refers to psychology, aesthetics, and linguistic philosophy in an effort to demonstrate that pornography has no communicative value, and therefore is not covered by the first amendment. This provides an unassailable rationale for the advocates of censorship, for the theory moves the debate to a different plane. It seeks to transform the debate about constitutional policy or the allocation of responsibility for moral determinations into an empirical matter of classification; the debate begins and ends with the factual question of whether an object of regulation is speech or nonspeech.[99] This theory was originally propounded in a 1967 law review article by John Finnis.[100] More recently, the theory has been adopted and slightly modified by Frederick Schauer.[101] The latter version of the theory is also the conceptual centerpiece of the constitutional law section of the Report of the Attorney General's Commission on Pornography,[102] part 2 of which apparently was written largely by Schauer.[103] There is also some indication that the theory has influenced the Burger Court.[104]

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99. In Frederick Schauer's version of this theory, he tries to turn this characteristic into a libertarian virtue. He argues that by using a definition of "speech" that encompasses something less than "all uses of words" one enhances the protection available under the amendment to those forms of expression that remain within the protected classification.

> At the heart of a definitional approach to the first amendment is the idea that decreased pressure at the level of coverage is reflected in increased pressure at the level of protection. Ultimately, the argument of those who would narrow the scope of the first amendment is not for less protection, but for stringent protection of a more restricted area instead of weaker protection of a broader area.

Schauer, *supra* note 38, at 908. But if, as I argue below, the proposed definition of "speech" neither reflects commonly held notions concerning the coverage of the first amendment nor is based on an intellectually plausible refutation of those commonly held precepts, then Schauer's proposal is revealed as infinitely manipulable and thus a threat to all speech. Viewed in light of its immediate consequences, the theory is merely another method of limiting the protections offered by the first amendment (and an especially dangerous one at that, if it is allowed to pose as a theory intended to protect speech). Protestations that one is cutting off the hand in order to save the arm are hardly dispositive if the hand is not injured in the first place.

100. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity,* 116 U. PA. L. REV. 222 (1967).

101. Schauer, *supra* note 38. *See also* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 178-88 (1982) [hereinafter SCHAUER, FREE SPEECH].

102. *See, e.g.,* ATTORNEY GENERAL'S COMMN. ON PORNOGRAPHY, U.S. DEPT. OF JUSTICE, FINAL REPORT 251-69 (1986) [hereinafter PORNOGRAPHY COMMN. REP.].

103. Schauer was one of the Commission members. According to one report, Schauer rejected an early draft written by the Commission's executive director Alan Sears because Sears had included much unreliable and lurid testimony, and had produced a "one-sided and oversimplified" statement of the law. Hertzberg, *Big Boobs,* THE NEW REPUBLIC, July 14 & 21, 1986, at 22. Schauer then produced his own draft that served as the basis for part 2 in the final version.

104. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67-68 (1973), *cert. denied,* 418 U.S. 939 (1974) (citing Finnis, *supra* note 100); Miller v. California, 413 U.S. 15, 34-35 (1973).

The basic outline of the theory is remarkably simple. The theory turns on the ancient distinction between "reason" and "passion." In the original statement of the theory, Finnis asserted that there was a constitutionally significant difference between "two often competing aspects of the human mind: the intellect or reason and the emotions or passions."[105] According to Finnis, the Supreme Court's early obscenity opinions did indeed install a "two-level" theory of free speech, but the levels were not, as Professor Kalven[106] believed, based on the Court's subjective judgments of social value. Rather, the level of constitutional protection offered to a particular instance of expression was defined by an objective analysis of whether the expression in question appeals to the "intellectual" aspect of the human mind or the "passionate" aspect. Finnis contends that the subjective, moralistic language used by the Supreme Court is not to the contrary.[107] Obscenity lacks "redeeming social importance,"[108] Finnis writes, "precisely because it pertains, not to the realm of ideas, reason, intellectual content and truth-seeking, but to the realm of passion, desires, cravings and titillation. . . . The two constitutional levels of speech, in effect, are defined in terms of two realms of the human mind."[109]

Finnis cites sources ranging from Plato and Aristotle to Freud and Jacques Maritain in support of the reason/passion dichotomy.[110] He implicitly acknowledges, however, that modern psychological analysis may have rendered such clean classical distinctions obsolete. Indeed, Finnis does not cite any empirical studies supporting the proposed distinction. Nevertheless, he retains the dichotomy. "Empirical psychology could abandon the distinction between intellect and emotions

105. Finnis, *supra* note 100, at 223.

106. *See* Kalven, *supra* note 28.

107. This account of the Supreme Court's standard is difficult to reconcile with Justice Brennan's own highly subjective reading of the language in his early first amendment opinions. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

108. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484-85 (1957).

109. Finnis, *supra* note 100, at 227. In a recent article that resembles the Finnis theory in many respects, Frederick Schauer contends that the theory is consistent with the results of the Supreme Court's obscenity decisions. But he recognizes that the Court's statements about what it is doing do not always support this interpretation:

> In order fully to understand the Court's approach to obscenity, it is necessary to ignore much of what the Court has *said* about its approach, and look instead at what it has *done*. The Court has unwittingly encouraged criticism of its treatment by using language that is inconsistent with the method actually employed . . . .

Schauer, *supra* note 38, at 900 (emphasis in originial, footnotes omitted). *See also* PORNOGRAPHY COMMN. REP., *supra* note 102, at 253-54. An alternative explanation, of course, is that the Court has wittingly said exactly what it means — *i.e.*, that the regulation of morality is a permissible justification for censoring expression.

110. Finnis, *supra* note 100, at 227-29, 233 nn.69-70.

without the distinction being thereby invalidated either for commonsense or for the philosophy of human nature."[111]

The implicit concession that there may be no scientific evidence to support his theory is telling, for it reveals the manner in which Finnis utilizes his crucial distinction. Although he casts his argument in value-neutral terms, the reason/passion distinction is really not a "scientific" measure at all. It is actually a metaphor by which courts are given the power to evaluate the subjective value of certain kinds of speech. In short, it is a tool to enforce the morality principle.[112]

Finnis imputes to the courts the ability to distinguish between appeals to reason and incitement of passion. In order to fulfill their assigned task, however, the courts are not required to assess empirically the effect of expression such as pornography on the intended recipients, or to determine that the dissemination of pornography has a deleterious effect on members of the society who choose not to expose themselves to sexually explicit materials. Rather, the nature of the expression itself is sufficient to justify suppression. The challenged material can be suppressed because the initial definition of protected speech excludes material of a certain type. But this begs numerous questions. No legal term is self-defining. Finnis' assumptions about the nature of speech (not to mention the nature of the human mind) are by no means uncontroversial. By using these assumptions to impose one set of definitions and then asking that the analysis proceed from that point, Finnis seeks to win his prize without a contest. Finnis's standard is nothing more than the familiar neutral principles argument in another guise. It is an attempt to impose value judgments in the form of value-neutral terminology.[113] Fundamental questions

111. *Id.* at 227.

112. For this reason, Finnis' contention that *Roth* altered the *Hicklin* standard is unpersuasive. Finnis asserts that the *Hicklin* standard contained two independent aspects. The first was that material could be suppressed if it corrupted the morals of members of society; the second was that material could be suppressed if it tended to excite passions or was designed to encourage lascivious thoughts. *See* Finnis, *supra* note 100, at 225-26. Finnis contends that *Roth* dropped the former and adopted the latter as the sole modern criterion for the regulation of obscenity. But this interpretation can be supported only if one ignores the overwhelmingly moralistic tenor of *Roth* and subsequent opinions. *Cf.* notes 19-77 *supra* and accompanying text. It is more accurate to read *Roth* and subsequent cases as merely streamlining the *Hicklin* standard. *Roth* simply subsumed the corruption facet of *Hicklin* within the Court's new overall approach. The prevention of moral corruption was deemed in *Roth* to be a permissible legislative purpose under the first amendment, and morally corrosive material would be judged by its appeal to prurient interests. As noted previously, *Roth* and its progeny can be viewed as protective first amendment cases only to the extent to which they restricted the circumstances in which the morality principle could be applied; the principle itself survived those cases intact. *See* notes 19-77 *supra* and accompanying text.

113. This is an increasingly popular tack among politically conservative constitutional theorists. *See* Gey, *A Constitutional Morphology: Text, Context, and Pretext in Constitutional Interpretation,* 19 ARIZ. ST. L.J. 587 (1987).

may thus be decided without revealing the underlying premises or defending the actual consequences of a particular approach.

Frederick Schauer's update of this theory carries forward Finnis' conceptual framework. Schauer's task is to fill in some of the theoretical gaps left by his predecessor. However, Schauer's more elaborate rendition of the theory unearths even more problems than it solves. Finnis' presentation displayed the elegance of a simple argument relying on intuitive appeal. The argument succeeds or fails depending on the accuracy of Finnis' intuition that dirty books belong to the sphere of "passion" rather than that of "reason" and therefore are not "speech." In Schauer's hands the theory's one virtue is lost in the miasma of academese. Finnis included a few references to classical philosophy in order to demonstrate that many thoughtful people have shared his intuitive assessment of human psychology. Schauer, on the other hand, lades his argument with references to linguistic and analytic philosophy, seemingly to support the author's belief that his central metaphor concerning the different aspects of the human psyche can be proved syllogistically. Again, this illustrates the theory's "scientific" appeal: it translates interpretive arguments into the uncontroversial vernacular of value-neutral formalism.

Instead of reinforcing the intellectual framework provided by Finnis, Schauer's efforts actually undermine the argument by identifying the many specifics on which the theory is vulnerable. One example of Schauer's difficulties is provided by his attempt to bolster the most obvious weakness in Finnis' presentation. As noted previously, Finnis refused to rest his theory on empirical psychological analysis, choosing to rely instead on "common sense" and "the philosophy of human nature."[114] The philosophy of human nature on which he relies is, however, only superficially articulated[115] and fundamentally inadequate if divorced from the theory's intuitive appeal.

Schauer attempts to rectify Finnis' failings in this regard by assembling various strands of linguistic philosophy in support of his definition of "speech" within the context of the first amendment as a "term of art."[116] But the philosophical support Schauer musters for his theory is relevant only in an elementary sense. Indeed, a more sophisticated reading of the same philosophical materials indicates that they actually contradict the conclusions Schauer has drawn. For example, at one point Schauer writes that the "meaning is use" theory associ-

114. *See* text at note 111 *supra.*

115. *See* Finnis, *supra* note 100, at 227-30.

116. Schauer, *supra* note 38, at 902-19.

ated with the later Wittgenstein is "implicit in this entire article."[117] It is true that the basic premise of Wittgenstein's late philosophy denied that there is an absolute correlation between words and their objects, which led him to the conclusion that a definitive meaning for any particular word can never be ascertained.[118] To this limited extent Wittgenstein's later linguistic philosophy is compatible with Schauer's theory. But Schauer uses Wittgenstein's linguistic relativism only when it suits him. He uses it initially in order to dispute the common view that sexually explicit expression must be "speech" under the first amendment because such expression is "speech" according to ordinary usage.[119] He ultimately replaces that view with a definition of first amendment "speech" that does not encompass sexually explicit expression. By defining "speech" as used in the first amendment as any communication with cognitive content, Schauer is able to lump sexually explicit expression with a variety of other activities that everyone would agree are not covered by the first amendment: *e.g.*, murder, rape, speeding, and littering.[120]

This deft sleight of hand owes more to Humpty Dumpty than to Wittgenstein: the word "speech" means just what Schauer chooses it to mean — neither more nor less.[121] Schauer does not challenge the notion of objective meaning, as did Wittgenstein; rather, Schauer seeks to interpret the word "speech" in the context of the first amendment by replacing one objective meaning — that of ordinary usage — with another — communication with cognitive content. This effort contradicts one of Wittgenstein's central premises. Wittgenstein's object was to free words from preordained, unchanging meanings. He intended to refocus linguistic analysis from objective meaning to the context in which meaning is ascribed, with special attention given to the frame of reference in which words are used.[122] Two fundamental aspects of this frame of reference are the motive of the speaker and the consequence of the speech. The result of Schauer's new definition of "speech" is to place pornography beyond the reach of the first amendment, and thus, pornography may be banned by legislatures and its possession prose-

117. *Id.* at 908 n.54.

118. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 3d ed. 1958); L. WITTGENSTEIN, THE BLUE AND BROWN BOOKS: PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS" (1958); L. WITTGENSTEIN, ON CERTAINTY (D. Paul & G. Anscombe trans. 1969).

119. Schauer, *supra* note 38, at 905-10.

120. *Id.* at 903.

121. *See* L. CARROLL, THE PHILOSOPHER'S ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 193 (P. Heath ed. 1974).

122. *See generally* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 118, at 1-23.

cuted. The discussion concerning the meaning of "speech" cannot be carried on without reference to those factors. The new meaning of "speech" offered by Schauer should be accepted only upon adoption of the policy of which it is a component. Yet Schauer proceeds as if "speech" were a disembodied concept, for which there can be an objective definition. Only after deriving an objective meaning for the term "speech" does he then apply that definition to sexually explicit expression. He therefore reaches his conclusion disingenuously; this conclusion has nothing to do with social policy, he implies, but rather is required by "a functional, purposive, and contextual view of the definitional process" in constitutional interpretation and is supported by a disinterested analysis of linguistic philosophy.[123]

Schauer encounters problems from the outset in attempting to define first amendment "speech" instead of confronting the more difficult task of defending the policy of proscribing pornography.[124] As evidence that the Court has never protected all "speech" as the word is ordinarily used, Schauer cites several obvious examples, such as conspiracy, verbal betting, and perjury.[125] But in each of these examples, the speech itself is not the target of the state regulation. The speech is merely evidence that may be used to prove the violation of a law that is justified on grounds other than the regulation of speech, however broadly the term "speech" may be defined. These regulations may be described as speech-neutral; speech is simply one instrumentality by which a crime unrelated to expression is committed. Although issues of free speech may arise as a limit on the means by which these regulations may be enforced,[126] issues of overbreadth or chilling effect do not

123. Schauer, *supra* note 38, at 910. The counterintuitive nature of Schauer's conclusion that sexually explicit speech is not "speech" also makes it vulnerable to Daniel Farber's critique of "brilliant" legal analysis. "If a theory is brilliant, by definition everyone in history prior to its discovery was systematically wrong about something." Farber, *The Case Against Brilliance,* 70 MINN. L. REV. 917, 924 (1986). Farber argues that universal error is unlikely, and therefore "brilliant" theories are usually false. The widespread acceptance of theories such as Schauer's indicates, however, that Farber was wrong to apply his critique to Mark Tushnet's observations concerning the nature of constitutional interpretation. *See id.* at 927-29. Tushnet has argued that constitutional terminology and precedent are fundamentally indeterminate; constitutional interpretation "leaves the judge free to enforce his or her personal values, as long as the opinions enforcing those values are well written." Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 HARV. L. REV. 781, 819 (1983). The presumption of credibility given to claims of the nature that speech is not "speech" offers convincing support of Tushnet's analysis.

124. Finnis specifically refused to mount any such policy defense, on the grounds that "any attempt to balance interests or even to articulate the rationale for proscribing obscenity, would be beyond judicial competence." Finnis, *supra* note 100, at 243. The logic of Schauer's analysis makes the constitutional justification of censorship unnecessary, since the constitution does not even apply.

125. Schauer, *supra* note 38, at 905.

126. For example, a facially neutral statute may not be enforced in a manner that infringes

implicate the primary justifications for the regulations themselves — *i.e.,* preventing criminal activity, protecting the integrity of the judicial process, or prohibiting gambling. No such speech-neutral justification is available for the regulation of pornography. The regulation of pornography is intended solely to prohibit speech that is "designed to produce a purely physical effect."[127] Schauer argues that the regulation of "hard-core" pornography is analogous to the regulation of "rubber, plastic or leather sex aids" and "[t]he mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same."[128] But in order to analogize the regulation of pornography to the regulation of perjury, etc., some more clearly speech-neutral justification must be presented for the regulation. That is Schauer's problem; the only plausible justification that has yet been offered for such regulation is the morality principle, which is neither speech-neutral nor compatible with a consistent interpretation of the first amendment.[129]

Instead of addressing these problems, Schauer develops a scheme reminiscent of Finnis's distinction between reason and passion to justify lumping pornography with "nonspeech" activities ranging from murder to littering. The endpoints of Schauer's spectrum of communicative activities is similar to that in Finnis' treatment: on one end is the realm of pure reason (the "communication of ideas");[130] on the other end is sexually explicit expression. But Schauer works a subtle change in Finnis' scheme. Schauer introduces a third category — the "emotive"[131] — which is protected to the same extent as the communication of pure ideas. This change has profound significance, for, as Schauer recognizes, the use of language "to arouse feelings or emotions, to induce someone to take action, to create a sense of beauty, to shock, [or] to offend" is also the use of language "for some purpose other than the exposition of ideas."[132] These activities logically should fall on the "passion" side of the continuum, and should be subjected to unfettered regulation by the legislatures. So why does Schauer create a separate category to save "emotive" expression from such a fate? I suspect the answer has more to do with the practical need to recognize

upon protected expression. *See, e.g.,* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

127. Schauer, *supra* note 38, at 922.

128. *Id.* at 923.

129. *See* notes 204-81 *infra* and accompanying text.

130. Schauer, *supra* note 38, at 920.

131. *See id.* at 921-22.

132. *Id.* at 921.

as legitimate a large body of case law than it does with the intellectual requirements of Schauer's argument. The application of Finnis' simple dichotomy would invalidate a range of decisions, including those protecting artistic expression (Schauer acknowledges that some argue that art may not be communicative at all[133]) and offensive speech.[134] Schauer's scheme leaves these cases intact while also providing a rationale for suppressing pornography.

Schauer accomplishes this feat only at the expense of rendering an already questionable theory intellectually incoherent as well. By diluting the purity of the appeal to the intellect that figured so prominently in Finnis' theory, Schauer has undercut the entire point of Finnis' original analysis. If we are to take the Court's reference to ideas "with a grain of salt," and substitute in its stead the highly amorphous concepts of "cognitive content," or "mental effect," or "appeal to the intellectual process," thus permitting protection for "the artistic and the emotive as well as the propositional,"[135] then the theory ceases to have any discernable meaning at all. 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. That is what occurs when the Court applies the morality principle, and although Schauer denies it, that is what his theory does as well.

Obscenity, says Schauer, should be viewed "as essentially a physi-

133. *Id.* at 922.

134. *See* Cohen v. California, 403 U.S. 15 (1971) (holding that the words "Fuck the draft" on a jacket constitute constitutionally protected speech). *Cohen* was decided after Finnis published his article, but the language used by the Court in that case undercuts many of Finnis' assertions about the nature of the first amendment's protections. *Compare Cohen,* 403 U.S. at 26 ("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."), *with* Finnis, *supra* note 100, at 230 ("It is . . . possible to draw a constitutional theorem from the basic thought of *The Federalist:* to the extent that expressions derive from the passion end of the reason-passion continuum, the rationale for their freedom disappears.")

Finnis managed to protect artistic expression only by ignoring the art and concentrating on the ideas that art is intended to communicate. Finnis, *supra* note 100, at 230-37. His basic concept is that art does not "stimulate feelings," *id.* at 232, but rather "expresses *ideas* of feeling." *Id.* at 233. Art is constitutionally protected because the observer must distance himself or herself from the artistic object in order to achieve a proper aesthetic appreciation of the ideas being communicated. Art cannot be properly appreciated in its original form: It must be distilled first, to remove matter alien to "intellectual" concerns. Any aspects of the art falling outside the narrow category composed of "ideas" are presumably filtered out by the process of distancing. Schauer nods approvingly in the direction of this extremely conservative view of art, but does not explicitly endorse it. *See* Schauer, *supra* note 38, at 922 n.136. This aesthetic theory is probably inherent in every pro-censorship proposal discussed in this article, including Schauer's. *See* notes 264-73 *infra* and accompanying text.

135. Schauer, *supra* note 38, at 922.

cal rather than a mental stimulus."[136] "Physical stimulus" often entails some tactile element; something physically stimulates by actually touching the body. But Schauer declares that for first amendment purposes there is no difference between hard-core pornography and a rubber or plastic sex aid, because "[n]either means [of stimulation] constitutes communication in the cognitive sense."[137] Thus, "the use of pornography may be treated conceptually as a purely physical rather than mental experience."[138] But this simply does not describe human behavior in a way that anyone would recognize. Pornography must be seen by a conscious viewer; the viewer must read the prose (or watch the video) and translate the images into some mental diagram that then may well trigger some physical response. But the physical response cannot occur without the intercession of a series of mental processes. So how can this possibly be viewed as a "purely physical experience"? Furthermore, how can hardcore pornography possibly be viewed as more of a physical experience than wearing a jacket on which is sewn the phrase "Fuck the draft"?[139]

In equating the reading or viewing of pornography with truly physical sexual experiences, Schauer also neglects a traditional distinction drawn between reading about a prohibited act and doing a prohibited act. It is permissible to purchase and possess the "Anarchists' Cookbook"; it is not permissible to follow the instructions in that book by buying the ingredients of a Molotov cocktail and mixing up a few incendiaries on the kitchen table.[140] The first amendment permits many things to be experienced second-hand through print or videotape that cannot be done in person. It is not constitutionally significant that the vicarious experience may produce in the viewer the same emotions or responses as the act itself.[141]

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136. *Id.*

137. *Id.* at 923.

138. *Id.*

139. *See* Cohen v. California, 403 U.S. 15 (1971).

140. *See* United States v. Giese, 597 F.2d 1170, 1201-13 (9th Cir. 1979) (Hufstedler, J., dissenting).

141. Schauer's heavy emphasis on the response of the viewer of pornography is problematic in yet another way. In one attempt to explain the difference between protected sexually explicit expression and unprotected pornography, Schauer states that

> [A] speech act may have multiple effects. . . . [T]he result in the case of *Lady Chatterly's Lover* . . . is protected intellectual appeal and effect inseparably admixed with physical appeal and effect . . . . The sexual stimulus in *Lady Chatterley's Lover* is only a side effect. . . . Just as the government can censor noise but not a noisy political speech, as it can rigidly control automobile traffic but must be more circumspect in regulating parades and demonstrations, so the government under the first amendment may censor physical stimulation but not mentally oriented art or literature producing physical stimulation. The essence of exclusion of hardcore pornography under the first amendment is not that it has a physical effect, *but that it has nothing else.*

Despite his high-minded denials, Schauer ultimately fails to cloak the real justification for the interpretation of the first amendment he endorses. Schauer asserts that pornography may be suppressed because it lacks "a certain kind of value."[142] Pornography can, he admits, have social value, but he says that that is not the question, the question is "whether it is speech," for some social value may also be found in "pollution, sex, political assassination, twelve-hour days, small children working at sewing machines, long hair, or short skirts."[143] Presumably, then, the problem is that pornography has the wrong kind of social value. It is deleterious to the commonweal, like pollution and child labor. This analysis, however, is outside the realm of linguistic analysis and inside that dominated by the morality principle. The determination that "cognitive, emotive, aesthetic, informational, persuasive, or intellectual"[144] expression is constitutionally protected while sexual expression is not involves an ordering of values, an assessment of moral worth, and a determination that some thoughts are bad thoughts, and therefore may be thwarted by any means available to the state. Schauer is correct when he states that the relevant precedent for his position is not a first amendment opinion, but rather *Doe v. Commonwealth's Attorney*[145] — the progenitor of

Schauer, *supra* note 38, at 924-25 (footnotes omitted) (emphasis in original). But the assertion that the sexual stimulus in *Lady Chatterly's Lover* is only a side effect is open to question. A side effect to whom? To Lawrence? To Schauer? To the average reader? To the film maker who used Lady Chatterley as the basis of a soft-core sex film? *See* Kingsley Intl. Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959). Could it not be argued that since its publication the book has made a much larger splash as a sexual stimulus than as a piece of literature? If the likely response of the viewer of a book is the most significant factor in determining whether something has a purely physical appeal or also contains some intellectual appeal and is therefore constitutionally protected, then all of these questions are relevant. They indicate the difficulty in preventing Schauer's theory from encompassing a wide range of sexually explicit materials.

Moreover, from Schauer's perspective, there is no compelling reason to allow the artistic merits of a book or movie to outweigh its probable effect on those who will probably constitute its audience. In fact, it seems more consistent with Schauer's theory to create a censorship calculus; if a book's sexual stimulus value is very high and its artistic value is very low, the logic seems to run in favor of censoring the book. As Schauer says, "there is no reason to believe that the recipient [of pornography] desires anything other than sexual stimulation." Schauer, *supra* note 38, at 923. But is it not the case that a receptive reader/viewer of any sexually oriented work is likely to concentrate on its sexual content to the exclusion of other attributes? And if the recipient is likely to ignore whatever modicum of artistic merit the work may possess, should not the courts ignore it also? Schauer says that he intends to suppress material "not [because] it has a physical effect, *but [because] it has nothing else.*" *Id.* at 925 (emphasis in original). But this assertion cannot be taken literally. If even the most minuscule intellectual appeal could save a work from suppression, then "a quotation from Voltaire in the flyleaf of [an obscene] book" could save it. *See* Kois v. Wisconsin, 408 U.S. 229, 231 (1972) (per curiam). Schauer obviously would not reach this result, so he must mean that a work's physical effect will be balanced against its artistic merit to some extent. The censorship calculus is unavoidable.

142. Schauer, *supra* note 38, at 927 (emphasis omitted).

143. *Id.* at 927.

144. PORNOGRAPHY COMMN. REP., *supra* note 102, at 268.

145. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd. mem.*, 425 U.S. 901 (1976).

Bowers v. Hardwick.[146] For it appears to be Schauer's unstated position that "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed."[147] It is possible to defend this position under some conceptions of the first amendment,[148] but not by repackaging speech as "speech."

III. THE FEMINIST CENSORS

Mainstream academics such as Frederick Schauer recently have been joined by a group of *outré* theorists led by Catharine MacKinnon who search for a justification of censorship unrelated to the morality principle. In one sense, the groups are quite distinct. MacKinnon has pursued a different remedial route to the suppression of pornography than that typically taken by her compatriots. MacKinnon represents a branch of feminist analysis that has sought to define pornography as discrimination against women.[149] MacKinnon, along with Andrea Dworkin, drafted an anti-pornography ordinance embodying this con-

146. 106 S. Ct. 2841 (1986).

147. 106 S. Ct. at 2846; *cf.* Schauer, *supra* note 38, at 925-28.

148. *See* Bork, *supra* note 85.

149. Throughout this article I use the terms "obscenity" and "pornography" interchangeably, as they are commonly employed, to refer to materials presently denied constitutional protection due to their sexual content. One idiosyncrasy exhibited by many of the diverse efforts to justify censorship of sexually explicit expression is a desire to separate "obscenity" from "pornography." Frederick Schauer, for example, initially used the distinction to emphasize his professed respect for civil liberties. Schauer considers the common usage of the word "obscene" too imprecise and value-laden. Instead, he employs the term "hardcore pornography" in his discussion of first amendment protection. Schauer, *supra* note 38, at 920 n.118. "The word 'obscenity' should be entirely excluded from any discussion of this area of the law. It is 'pornography' and not 'obscenity' that is the focus of the non-speech approach that the Court has adopted." *Id.* at 920 n.119. But when Schauer's ideas were incorporated into the Pornography Commission Report, the contrary assertion was made. It was said that some pornography was illegal and other pornography was not. PORNOGRAPHY COMMN. REP., *supra* note 102, at 221. *See* also F. SCHAUER, FREE SPEECH, *supra* note 101, at 179 ("Thus obscenity may or may not be pornographic, and pornography may or may not be obscene."). At some point along the way, the point of Schauer's distinction has been lost.

Catharine MacKinnon has made the same distinction between pornography and obscenity, but for entirely different reasons. To MacKinnon the concept of obscenity represents the intervention of the first amendment where it does not belong; pornography is an act of discrimination, not an exercise of the ability to conceptualize and express ideas. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POLY. REV. 321, 322-25. The concept of obscenity, furthermore, is viewed as an instrument for the preservation of the dominant male power structure. It is, in fact, indistinguishable from the material it purports to regulate. "[T]he obscenity standard . . . *is* built on what the male standpoint sees. My point is: *so is pornography.* In this way, the law of obscenity reproduces the pornographic point of view of women on the level of Constitutional jurisprudence." *Id.*, at 325 (emphasis in original).

Each of the efforts to distinguish pornography from obscenity is obviously inextricable from the theory of suppression to which it is attached. Both are subject to the temptation that the Pornography Commission noted only in order to reject: "[I]t is tempting to note that 'pornography' seems to mean in practice any discussion or depiction of sex to which the person using the word objects." PORNOGRAPHY COMMN. REP., *supra* note 102, at 227.

cept, and providing for civil remedies against violators. After an unsuccessful effort to pass such a statute in Minneapolis,[150] a version of this ordinance was passed by the city of Indianapolis. The latter version was later held unconstitutional on first amendment grounds by the U.S. Court of Appeals for the Seventh Circuit.[151] The novelty of MacKinnon's method of attacking pornography masks the considerable similarity between the conceptual basis of her approach and the more traditional analysis of Schauer and others. This theoretical confluence is reflected in the Pornography Commission Report, which includes a section strongly endorsing the MacKinnon/Dworkin approach.[152] The complementary relationship of the two perspectives is also marked by the fact that more traditional academic theorists favoring the censorship of pornography have begun to cite the MacKinnon analysis as ancillary support for their proposals.[153]

A careful examination of MacKinnon's explanation of her position indicates that the feminist and traditional approaches to censorship are not the strange bedfellows they first seem. For example, MacKinnon shares the basic elements of the Finnis/Schauer view of pornography. She sees no significant legal difference between the sex act and its representation on paper or videotape.[154] Likewise, she shares the traditional theorists' narrow view of the first amendment. Both groups believe that the amendment simply does not (or, more accurately, should not) apply to pornographic materials. Therefore, MacKinnon and the conservatives agree, legislatures should be free to draft laws regulating or proscribing pornography without judicial interference.[155] MacKinnon also shares with the more extreme conservatives (such as Robert Bork) the view that legislative power to regulate sexually explicit speech extends even into the realm of literary and

150. The statute was passed twice by the Minneapolis City Council, but was vetoed both times by the mayor. *See* Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis,* 39 STAN. L. REV. 607 (1987).

151. American Booksellers Assn. v. Hudnut, 771 F.2d 323 (1985), *affd.,* 106 S. Ct. 1172 (1986).

152. PORNOGRAPHY COMMN. REP., *supra* note 102, at 747-56. The Commission's conclusions regarding the harm done by pornography also reflect the influence of MacKinnon. *See generally id.* at 299-351.

153. *See, e.g.,* Sunstein, *Pornography and the First Amendment,* 1986 DUKE L.J. 589, 589-602.

154. MacKinnon, *Pornography, Civil Rights, and Speech,* 20 HARV. C.R.-C.L. L. REV. 1, 19 (1985) [hereinafter MacKinnon, *Civil Rights*]; MacKinnon, *supra* note 149, at 335.

155. Although MacKinnon's efforts have concentrated on her civil rights statute, everything she has written suggests that she would prefer the most direct approach to regulating pornography. Her civil rights statute is merely one means by which to circumvent judicial rulings that prevent the implementation of the preferred direct regulation.

artistic expression.[156] Finally, given the broad theoretical territory she occupies in common with the conservative theorists, it is no surprise that MacKinnon also shares their main failing. Like the conservatives, her efforts to justify the control of pornography amount to little more than an elaborate apologia for the morality principle.

There are, of course, differences as well as similarities between the MacKinnon and the conservative approaches to censorship. The major difference lies in MacKinnon's motive for controlling pornography. MacKinnon views pornography as the source of gender inequality in society. Her attack on pornography is "part of a larger project that attempts to account for gender inequality in the socially constructed relationship between power — the political — on the one hand and knowledge of truth and reality — the epistemological — on the other."[157] The conservatives display antagonism toward sexual expression of every sort. MacKinnon displays antagonism only toward sexual expression involving women. Moreover, while Schauer conceives pornography in solipsistic terms (*i.e.,* as a masturbatory aid), MacKinnon concentrates on the social functions of porn. Pornography "constructs the social reality of gender,"[158] by which MacKinnon seems to mean not merely that pornography reflects the sexual inequality endemic in society generally, but rather the more radical proposition that pornography actually *produces* this inequality by "constructing" reality.

The description of pornography as producing sexual inequality provides MacKinnon the opportunity to deny any allegiance to the morality principle. As the title of one of her articles asserts, pornography is "not a moral issue."[159] She attempts, instead, to justify the regulation of pornography on the basis of a harm principle.[160] MacKinnon identifies three distinct categories of harm. The first two categories of harm are organized around a fairly traditional argument. This argument states that pornography commits violence against women.[161] The two categories of harm refer to separate groups of women

156. *See* notes 182-85 *infra* and accompanying text.

157. MacKinnon, *supra* note 149, at 325 (footnote omitted).

158. MacKinnon, *Civil Rights, supra* note 154, at 7.

159. MacKinnon, *supra* note 149.

160. I again refer to the concepts articulated by Joel Feinberg. Feinberg defines the harm principle as follows: "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor [and that it is a necessary means to that end]." FEINBERG, HARM TO OTHERS, *supra* note 14, at 26.

161. The concept here is only "fairly" traditional because the usual argument asserts that pornography provokes, and therefore indirectly results in, the commission of violence against women. In MacKinnon's conception, however, pornography does not *instigate,* it *acts.* The

identified as subject to this violence. Category 1 includes women who participate in the making of pornography. Category 2 includes all other women in society who are harmed as a direct consequence of the distribution of pornography. Unfortunately, the evidence produced in support of the first two categories of harm fails to sustain MacKinnon's reliance on the harm principle. MacKinnon must therefore rely upon her third, and more esoteric, category. This category is based on her basic premise that pornography "constructs" reality. There are serious epistemological problems with this notion, as well as problems of political consistency. In the end, her difficulties lead MacKinnon to rely directly (if not avowedly) upon the morality principle.

A. *Pornography and the Identification of Harm*

MacKinnon's allegations concerning the first group of women injured by pornography can be answered relatively easily. MacKinnon makes the indisputable assertion that "[w]omen are known to be brutally coerced into pornographic performances."[162] Linda Lovelace's experience during the filming of *Deep Throat* is the commonly cited example.[163] But MacKinnon's response to this problem — to ban all pornography — does not necessarily follow from the existence of the problem itself.[164] In the first place, MacKinnon does not consider the

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harm identified by MacKinnon is the very existence of the pornography itself. In MacKinnon's world pornography takes on a life of its own, no longer requiring human intervention in order to perpetrate its harms.

162. MacKinnon, *supra* note 149, at 339.

163. L. LOVELACE, ORDEAL (1980). *See* MacKinnon, *supra* note 149, at 339 n.55; PORNOGRAPHY COMMN. REP., *supra* note 102, at 866 n.1006.

164. The problem itself is more complicated than MacKinnon is willing to acknowledge. The Lovelace case is easy, since the victim claims that she was psychologically and physically coerced into participating in the production of pornographic movies. But other pornographic film actors who testified before the Commission adamantly denied the existence of coercion. *See* PORNOGRAPHY COMMN. REP., *supra* note 102, at 868 n.1012. I infer from MacKinnon's writings that she would respond to testimony of this nature by noting that coercion does not have to be physical or overt; it can also take the more subtle form of adverse socialization. This is one implication of MacKinnon's notion that pornography "constructs" reality. *See* notes 186-203 *infra* and accompanying text. She seems to believe, therefore, that the women who do not view themselves as coerced are the ones who have been coerced most successfully. This view is deeply demeaning to all the women who do not agree with MacKinnon. *Cf.* PORNOGRAPHY COMMN. REP., *supra* note 102, at 194 (statement of Judith Becker, Ellen Levine, and Deanne Tilton-Durfee) ("We reject any judgmental and condescending efforts to speak on women's behalf as though they were helpless, mindless children.") It carries a heavy residue of paternalism, which in fact permeates all of MacKinnon's work. The proposition that male-dominated social conditioning leads to the development of false consciousness among women is a recurring theme in MacKinnon's writings. *See, e.g.*, C. MACKINNON, *On Collaboration*, in FEMINISM UNMODIFIED 198 (1987). One measure of the paternalism evident in a particular theory is the extent to which that theory rejects the *Volenti* maxim. ("*Volenti non fit injuria.* A person is not wronged by that to which he consents." 3 J. FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 11 (1986) [hereinafter FEINBERG, HARM TO SELF].) MacKinnon necessarily denies the validity of the *Volenti* maxim, since she asserts that "consent" can never be given freely by wo-

existence of other remedies for the violations that undoubtedly take place. A variety of other remedies may be applicable: criminal sanctions such as kidnapping, sexual battery, or contributing to the delinquency of a minor; traditional civil tort sanctions such as false imprisonment or battery; or new variations of remedies for invasion of privacy or the right of publicity.[165] MacKinnon does not explicitly answer Justice Brandeis' assertion that where speech is alleged to incite illegal behavior "the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law."[166] If a response may be implied from the general thrust of MacKinnon's argument, however, it is that the legal system cannot be relied upon to redress such claims adequately. This response is inadequate. Although it may be true that existing remedies should be applied more rigorously, it is also the case that MacKinnon's own preferred remedy does nothing at all to address the real problems of the women who tend to become involved in the making of pornography. The women who perform in pornography tend to be young, poorly educated, and impoverished individuals who are often escaping from an abusive — if not life-threatening — family background.[167] MacKinnon's solution would, at best, remove one opportunity for exploitation, only to leave the victims susceptible to virtually certain exploitation in another context. Her solution is therefore neither necessary nor sufficient to address the very real, pressing, and particularized harm she has identified.

The performers in pornography are not, however, the primary focus of MacKinnon's analysis regarding the direct violence done to women. She is more deeply concerned with the second group of victims. This group is composed of all women in society. MacKinnon asserts that women have suffered direct sexual subjugation resulting from the distribution of sexually explicit books and movies. The problem with this aspect of her analysis is that no one has been able to demonstrate that identifiable, physical harms result directly from pornography. A short analysis of the evidence produced by the Commission (which

men who do not adequately understand their own subordination. Her theory is, therefore, highly paternalistic.

165. One recent attempt to develop the latter possibility can be found in Colker, *Published Consentless Sexual Portrayals: A Proposed Framework for Analysis,* 35 BUFFALO L. REV. 39 (1986).

166. Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring), *overruled,* Brandenburg v. Ohio, 395 U.S. 444 (1969).

167. The Commission acknowledged the preponderance of these factors among performers in pornography. PORNOGRAPHY COMMN. REP., *supra* note 102, at 855-61.

incorporates much of the MacKinnon point of view on this subject) will illustrate this point.

The Commission divided the universe of sexually explicit materials into four groups: sexually violent material; nonviolent materials depicting degradation, domination, subordination, or humiliation; nonviolent and nondegrading materials; and nudity.[168] The Commission found that material in groups 1 and 2 is definitely harmful. Group 3 was the subject of much dispute within the Commission, and so received a compromise verdict stating that "[w]e unanimously agree that material in this category in some settings and when used for some purposes can be harmful."[169] Only simple nudity escaped relatively unscathed. The Commission concluded that, in general, simple nudity was not harmful.[170]

By phrasing its conclusions in this manner, the Commission moved forcefully in the direction of the harm principle. This movement toward a harm analysis received its impetus from the MacKinnon approach. A large portion of the group 2 materials includes "material that, although not violent, depicts people, usually women, as existing solely for the sexual satisfaction of others, usually men, or that depicts people, usually women, in decidedly subordinate roles in their sexual relations with others,"[171] a description that coincides with one of the more abstract components of the MacKinnon/Dworkin legal definition of pornography.[172]

Having recognized the attractiveness of the harm principle in attempting to justify the suppression such "degrading" expression, the Commission defined "harm" in the broadest possible terms:

> [W]e certainly reject the view that the only noticeable harm is one that causes physical or financial harm to identifiable individuals. An environ-

168. *Id.* at 320-49.

169. *Id.* at 346.

170. Even with regard to nudity, however, the Commission hedged its bets: "There may be instances in which portrayals of nudity in an undeniably sexual context, even if there is no suggestion of sexual activity, will generate many of the same issues [as those relating to groups 1 through 3]." *Id.* at 347.

171. *Id.* at 331.

172. The MacKinnon/Dworkin definition of pornography includes depictions of "graphic sexually explicit subordination of women" in which "women are presented dehumanized as sexual objects, things or commodities . . . ." MacKinnon, *supra* note 149, at 321 n.l. The introduction of an amorphous "degradation" factor into group 2 explains why the Commission could dismiss as inconsequential the dispute over the harmful effects of group 3 materials. "[T]he class of materials that are neither violent nor degrading is at [sic] it stands a small class, and many of these disagreements are more theoretical than real." PORNOGRAPHY COMMN. REP., *supra* note 102, at 347. In other words, by including "degrading" materials in group 2, the Commission emptied group 3 of almost all content. "[E]rotica of the Playboy-Penthouse variety . . . suddenly became 'degrading' — and therefore, in the commission's view, subject to suppression." Hertzberg, *supra* note 103, at 23.

> ment, physical, cultural, moral, or aesthetic, can be harmed, and so can a community, organization, or group be harmed independent of identifiable harms to members of that community.[173]

Only by defining "harm" so broadly could the Commission reach its desired result. Moreover, by stating the harm principle so expansively, the Commission inadvertently segues right back into the morality principle. "To a number of us, the most important harms must be seen in moral terms, and the act of moral condemnation of that which is immoral is not merely important but essential."[174]

The Commission's conclusions regarding the first two groups of materials advert to a narrower type of harm that is specific enough to give meaning to an argument for suppression based on the harm principle — *i.e.,* individual, identifiable, physical harms that would not occur but for the effect of pornography. The Commission purported to find "a causal relationship between exposure to material of this type and aggressive behavior towards women,"[175] which in turn was found to lead to "an increase in the level of sexual violence directed at women."[176] But this relationship is neither supported by the evidence, nor justified by any systematic treatment in the Report of the relevant sociological data on which the Commissioners relied.[177] Indeed, the Commission did not profess to rely primarily upon clinical evidence linking pornography to specific acts of sexual violence. Instead, the Commission relied upon its all-inclusive definition of "harm," along with assumptions "plainly justified by our own common sense"[178] about the likelihood that the attitudes induced by pornography would lead to sexual violence against women. The Commission's concentration on the anti-social attitudes engendered by pornography under-

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173. PORNOGRAPHY COMMN. REP., *supra* note 102, at 303.

174. *Id.*

175. *Id.* at 324.

176. *Id.* at 325.

177. The Commission's slipshod research and overstatement of the supporting data has been recounted elsewhere. *See* B. LYNN, POLLUTING THE CENSORSHIP DEBATE: A SUMMARY AND CRITIQUE OF THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 75-88 (1986). The Commission, which did not authorize a systematic study of the extant social sciences data, reached conclusions exactly opposite to those reached on this point by a study of the data commissioned in 1985 by Canada's Fraser Commission. *See* McKay & Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings,* in WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION, Report No. 13 (1985). Two members of the Pornography Commission dissented from the Commission's findings, and objected to the misuse of data to establish a causal relationship between pornography and violence against women. "[I]t is essential to state that the social science research has not been designed to evaluate the relationship between exposure to pornography and the commission of sexual crimes; therefore efforts to tease the current data into proof of a causal link between these acts simply cannot be accepted." PORNOGRAPHY COMMN. REP., *supra* note 102, at 204 (statement of Dr. Judith Becker and Ellen Levine).

178. PORNOGRAPHY COMMN. REP., *supra* note 102, at 325.

scores its ultimate resort to the morality principle to justify its policy of suppression. No meaningful rendition of the harm principle can justify the state's regulation of the attitudes and world views of its citizens. A policy of that nature must be justified on other grounds. It must be justified by a scheme that permits some apparatus of the state to certify and enforce a set of proper attitudes; *i.e.,* it must be justified under some variation of the morality principle.

The MacKinnon analysis of pornography shares the Commission's strong emphasis upon the linkage between pornography and negative attitudinal development. Indeed, MacKinnon is somewhat more forthcoming than the Commission about the inconclusive nature of the evidence regarding the connection between pornography and sexual violence.[179] Frustration at the failure of the social sciences to provide evidence to support this linkage leads MacKinnon to attack the concept of causation itself,[180] and especially the use of strict causation

179. "Courts and commissions and legislatures and researchers have searched largely in vain for the injury of pornography in the mind of the (male) consumer or in 'society,'or in empirical correlations between variations in levels of 'anti-social' acts and liberalization in obscenity laws." MacKinnon, *supra* note 149, at 339 (footnote omitted). *See also id.* at 324 n.9, 339 n.57.

180. *See id.* at 338-39. The Commission, which faced the same problems of proof, responded in the same fashion. *See* PORNOGRAPHY COMMN. REP., *supra* note 102, at 306-12. MacKinnon's critique of causation is more theoretical than that of the Commission, but it is also more unclear. Her argument seems to boil down to one of two propositions. The first is that the effects of pornography are so pervasive that the harms pornography perpetrates can no longer be perceived as such by those operating within the system of thought it engenders. The harm done by pornography thus cannot be subjected to traditional analyses of cause and effect. Causes cannot be isolated because women are not harmed individually, "but as members of the group 'women.'" MacKinnon, *supra* note 149, at 338. This aspect of MacKinnon's critique is a good example of the theoretical defenses that are built into her work. Women who do not see the harm of pornography, MacKinnon asserts, are dupes. Their perspective is warped by the conditioning to which they have been subjected since birth. Men ignore the harm done by pornography because it is in their interest to do so. In either case, criticism of MacKinnon's approach is damned from the outset by the irrefutable claim of bad faith. The second proposition implied by MacKinnon's critique of causation also exemplifies this tendency. The second proposition asserts that harm cannot be causally linked with pornography because the two are indistinguishable. "Pornography and harm may not be two definite events anyway; perhaps pornography *is* a harm." *Id.* at 338 n.53. This handy tautology is hermetically sealed against all attacks. MacKinnon follows in the footsteps of Frederick Schauer: if one defines the terms of discussion in just the right way, the proper conclusions fall into place quite logically.

The answer to MacKinnon's animadversions regarding causation actually can be found in one of her own citations. She cites an essay by Morton Horwitz describing the use of "objective" causation in the nineteenth century to prevent plaintiffs from using tort law as a redistributive mechanism. Horwitz, *The Doctrine of Objective Causation,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 201 (D. Kairys ed. 1982). One point of the essay is that legal concepts such as causation are bound up with the policy objectives they advance. The use of causation in first amendment law is not, as MacKinnon asserts, "an attempt to privatize the injury pornography does to women in order to insulate the same system from the threat of gender equality, also a form of redistribution." MacKinnon, *supra* note 149, at 338-39. Rather, the use of strict causation requirements in the first amendment area can be explained much more plausibly (and much less insidiously) as reflecting the modern Court's reluctance to increase the state's power to regulate expression of any sort. *See* note 181 *infra.* MacKinnon's haste to discard the concept of strict causation in this area thus may have ramifications far beyond those she discusses. These

requirements to protect expression under the first amendment.[181] Her primary response to the problems posed by the inadequate evidence, however, is to embrace with relish the notion that the state should rigorously control the attitude-shifting effects of pornography.

The MacKinnon view reduces all expression to its explicit or implied position on one issue — the subjugation of women. If the expression carries the wrong message on this issue, then the expression may be properly suppressed.[182] Other measures of value do not come into

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ramifications are the real issue here, which MacKinnon's focus on the abstract theory of causation permits her to avoid.

181. "First Amendment logic," MacKinnon writes, "like nearly all legal reasoning, has difficulty grasping harm that is not linearly caused in the 'John hit Mary' sense." MacKinnon, *supra* note 149, at 337. She seems to believe that the strict causation limitation on state efforts to control expression was generated by the Court's desire to protect pornography. "It is difficult to avoid noticing that the ascendancy of the specific idea of causality used in obscenity law dates from around the time that it was first believed to be proved that it is impossible to prove that pornography causes harm." *Id.* at 337-38 (footnote omitted). In fact, the strict requirement of direct causation in first amendment law has a somewhat less nefarious lineage. It first appeared as a limitation on the extent to which the state could prohibit or prosecute radical speech. *See* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *revd.*, 246 F. 24 (2d Cir. 1917); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). This aspect of the requirement has survived in the form of the modern *Brandenburg* test, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969), and has served to protect the expression of many activists for whom MacKinnon presumably feels some sympathy. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) (antiwar protestors); Street v. New York, 394 U.S. 576 (1969) (civil rights supporter); Gregory v. Chicago, 394 U.S. 111 (1969) (civil rights demonstrators). MacKinnon's contrary, more lenient view of first amendment causation holds that speech is harmful if it creates an atmosphere or context in which direct injuries are legitimized. *See* MacKinnon, *supra* note 149, at 337-38. This view is not, as MacKinnon seems to believe, an incisive or radical critique of the present court's conservative ideology. It is, rather, nothing less than a throwback to a much more conservative era, in which the mere statement of "bad" or "dangerous" ideas could be the basis for criminal sanctions, without regard to the probable consequences of the expression.

182. This is a classic example of viewpoint-based discrimination, which has traditionally received the strictest scrutiny under the first amendment. *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 200-33 (1983). For an application of this principle in obscenity law, *see* Kingsley Intl. Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684 (1959); *see also* Stone, *Antipornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POLY. 461 (1986). Although MacKinnon does not see much value in first amendment analysis generally, *see* note 181 *supra*, she nevertheless consistently denies that her approach constitutes viewpoint discrimination. However, her denials rarely rise above a typical admixture of *ad hominem* claims of bad faith on the part of those who disagree. *See, e.g.*, C. MACKINNON, *The Sexual Politics of the First Amendment*, *supra* note 164, at 212: "When do you see a viewpoint as a viewpoint? When you don't agree with it. When is a viewpoint not a viewpoint? When it's yours. . . . The reason Judge Easterbrook saw a viewpoint in [the Indianapolis civil rights statute] was because he disagrees [sic] with it."

Cass Sunstein has recently attempted to rescue MacKinnon from the viewpoint-discrimination trap. Sunstein, *supra* note 153, at 609-17. Sunstein identifies three factors that are helpful in identifying viewpoint-based legislation: "the connection between means and ends"; "the nature of the process by which the message is communicated"; and "whether the speech is low- or high-value." *Id.* at 616. Sunstein applies these factors to antipornography legislation, and concludes that the legislation does not discriminate on the basis of viewpoint. This analysis is flawed for reasons that have already been discussed. The application of the first factor asserts the state's ability to regulate harm. *Id.* It thus relies on evidence of harm stemming from pornography, which the social sciences have not yet been able to provide. *See* note 177 *supra*. The second factor assumes that speech appealing to "noncognitive capacities" deserves less protection than other speech. *Id.* at 606, 616. This relies on the distinction drawn by Frederick Schauer, and is

play, and matters such as artistic or literary worth evidently cannot salvage noncompliant expression. Indeed, MacKinnon contends that these other measures of value are part of the whole, corrupt system. "[I]f a woman is subjected, why should it matter that the work has other value? Perhaps what redeems a work's value among men enhances its injury to women. Existing standards of literature, art, science and politics are, in feminist light, remarkably consonant with pornography's mode, meaning and message."[183]

The refusal to distinguish between pornography and other types of expression is a necessary characteristic of MacKinnon's position. No theory can consistently justify the suppression of sexually explicit materials on the ground that they reflect (or, from MacKinnon's perspective, create) the hierarchical relations of an undesirable social structure, and simultaneously preclude suppression of artistic speech that reflects (or creates) the same undesirable social attributes. Indeed, as MacKinnon honestly admits, she does not desire to protect legitimately artistic works that reflect existing relations of sexual dominance.[184] MacKinnon's main target is not pornography as such, but rather the "ideology" embodied in and communicated by pornography. Conventional artistic expression that portrays women in a derogatory light must therefore be considered even more dangerous than porn, because art carries the additional message of social legitimacy.

Artistic expression and pornographic expression both reflect the society in which they are produced. Both forms of expression will therefore often reproduce and bolster the attitudes of males who seek to continue their historically dominant position in society.[185] But unlike pornography, art provides an extra increment of support for the

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invalid for the reasons discussed above. *See* notes 113-48 *supra* and accompanying text. The third factor begs the question in the manner of all hierarchical theories of first amendment protection. If something is defined preemptively as "low-value speech," it is a pretty good bet that the speech can easily be found to have forfeited its constitutional protection.

183. MacKinnon, *supra* note 149, at 332-33.

184. Courts' difficulties framing workable standards to separate . . . obscenity from great literature make the feminist point. These lines have proven elusive in law because they do not exist in life. Commercial sex resembles art because both exploit women's sexuality. The liberal's slippery slope is the feminist totality. Whatever obscenity may do, pornography converges with more conventionally acceptable depictions and descriptions like rape does with intercourse because both express the same power relation.

MacKinnon, *supra* note 149, at 334.

185. Although MacKinnon denies it, neither all art nor all pornography carries the same bias. Just as some art challenges present social arrangements of male dominance, so does some pornography. This point is articulated forcefully in Brief Amici Curiae of the Feminist Anti-Censorship Taskforce, American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *aff'd.*, 475 U.S. 1001 (1986). MacKinnon's rigid treatment of all art and pornography as ideologically tainted leads her to ignore the imperfect, multidimensional, and often contradictory nature of human expression.

system of dominance. It puts the imprimatur of social legitimacy on dominance. It not only communicates a single author's view that "women should be subordinated," but also the much more oppressive message that "the subordination of women is approved by society at large." If it is the negative attitudinal effects of literary or visual expressions of dominance with which MacKinnon is primarily concerned, then artistic expression should be the first target, since its effect is far more powerful than "outlaw" expression such as pornography. Although pornography communicates values of sexual domination, it nevertheless undermines those values by communicating its own antisocial nature.

From MacKinnon's perspective, therefore, it should be much more important to suppress the works of Henry Miller or *Last Tango in Paris* than it is to eliminate the likes of *Debbie Does Dallas.* Works portraying sexual domination accorded "legitimate" artistic status not only reach a far greater number of people than do works with pornographic content, but they transmit their message to readers or viewers who are receptive to the dissemination of the social values in those works. If someone reads a book in school, or checks it out of a library, or goes to see a critically acclaimed movie, the person naturally treats the message of that material in a fundamentally different way from the message communicated by a bawdy video checked out of an "adults-only" store in a bad section of town.

B. *Pornography and the "Construction" of Reality*

The primary difficulty with MacKinnon's analysis is much more serious than her inability to distinguish art from porn. The principal flaw can be found in her main premise, the leitmotif of all her work; this premise is based on MacKinnon's notion that pornography "constructs" reality.[186] "Pornography," MacKinnon writes, "is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation or symbol either. It is sexual reality."[187] For Frederick Schauer and the Meese Commission, pornography is something more than speech. For MacKinnon, pornography is reality. Both views ascribe extraordinary powers to expression. Words and images take on fearsome attributes. They can literally drive history, by "constructing" entire political, economic, and social structures.

For the conservatives, this imputation of power to speech is at least

186. *See* notes 159-61 *supra* and accompanying text.

187. MacKinnon, *supra* note 149, at 326-27.

consistent with the views of an earlier generation of conservatives, which believed that the Yiddish leaflets of Jacob Abrams posed a serious social threat.[188] But for Catharine MacKinnon, who professes at least a passing admiration of Marxism, putting the ideological cart before the socioeconomic horse is downright bizarre.[189] In MacKinnon's view, all social conditions are rooted in the expression that accompanies them. "Pornography can invent women because it has the power to make its vision into reality, which then passes, objectively, for truth."[190] MacKinnon's theory proceeds only after removing pornography from its social context. Pornography does not service appetites produced by an unequal society, according to MacKinnon, it actually creates the unequal society. Pornography is the first cause, the prime mover, of all sexual inequality.

As with other aspects of her thought, MacKinnon views this as a unique and progressive critique of the status quo. She is fond of contrasting this critique with the standard "liberal" legal theory that created the obscenity doctrine she finds so entirely inadequate to the task

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188. *See* Abrams v. United States, 250 U.S. 616 (1919).

189. I recognize that this rigid dichotomy somewhat caricatures both MacKinnon and Marx. Both the MacKinnonite and Marxist theories recognize some dialectical relationship between objective reality and subjective representations of reality. But there are pervasive differences between the two theories' treatment of reality and representation. As MacKinnon says, "feminism turns marxism inside out and on its head." MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory,* 7 SIGNS: J. WOMEN CULTURE & SOCY. 515, 544 (1982) [hereinafter cited as MacKinnon, SIGNS I]. More specifically, this is how MacKinnon describes the differences between her theory and Marxism:

> As marxist method is dialectical materialism, feminist method is consciousness raising: the collective critical reconstitution of the meaning of women's social experience, as women live through it. Marxism and feminism on this level posit a different relation between thought and thing, both in terms of the relationship of the analysis itself to the social life it captures and in terms of the participation of thought in the social life it analyzes. To the extent that materialism is scientific it posits and refers to a reality outside thought which it considers to have an objective — that is, truly nonsocially perspectival — content. Consciousness raising, by contrast, inquires into an intrinsically social situation, into that mixture of thought and materiality which is women's sexuality in the most generic sense.

Id. at 543. Through the theory of praxis, Marxist theory of human behavior incorporates some elements of consciousness similar to those discussed by MacKinnon. But unlike MacKinnon, the element of consciousness in Marxist theory is inextricable from the underlying social and economic conditions that give rise to consciousness. Individual consciousness advances only insofar as the general level of social organization dictates. As Marx put it, mankind sets itself only such tasks as it can solve. Marx, *A Contribution to the Critique of Political Economy,* in THE MARX-ENGELS READER 5 (R. Tucker 2d ed. 1978). Although twentieth century Marxist theorists ranging from Georg Lukacs to Jean-Paul Sartre to Antonio Gramsci have sought to infuse the theory of praxis with greater significance, no Marxist has abandoned Marx's central focus on evolving economic conditions (and the human response they engender) as the primary factor in historical change. MacKinnon's desire to elevate the importance of subjective consciousness, thought, and expression to a plane level with — or even higher than — socioeconomic arrangements denies this central focus and reveals the roots of her theory in philosophical idealism. *See* note 194 *infra.*

190. MacKinnon, *supra* note 149, at 337.

of controlling pornography.[191] MacKinnon proposes to go beyond "liberal" theory.[192] Like every progressive critique, MacKinnon's theory is intended to absorb whatever is worthwhile about its intellectual

191. *See, e.g., id.* 325-29, 336-40. The term "liberal" is for MacKinnon more an epithet than a concept subject to precise definition. The term is used so loosely it is perhaps best understood simply as a surrogate for "the ACLU position." MacKinnon never attempts to distinguish between the divergent philosophical bases underlying the anti-censorship position taken by the ACLU and similar organizations. Libertarians are thus lumped with traditional FDR liberals, who are in turn treated in tandem with feminist organizations such as the Feminist Anti-Censorship Taskforce, which opposes the MacKinnon approach. The political biases of the "liberals" who have criticized MacKinnon's censorship proposals range from the far right, represented by Judge Frank Easterbrook, *see* American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), to the avowedly Marxist, *see* A. SOBLE, PORNOGRAPHY: MARXISM, FEMINISM, AND THE FUTURE OF SEXUALITY (1986). For MacKinnon's purposes, they are all the opposition.

The inability to distinguish between distinct ideas or propositions is a persistent characteristic of MacKinnon's work. This trait is especially noticeable in her explanations of the evolution of obscenity law. MacKinnon has written that "[d]ifferences in the law over time — such as the liberalization of obscenity doctrine — reflect either changes in which group of men have power or shifts in perceptions of the best strategy for maintaining male supremacy . . . ." MacKinnon, *supra* note 149, at 331. She goes so far as to maintain that the goals of all nine members of the Court are exactly identical. "What this obscures, because the fought-over are invisible in it, is that the fight over a definition of obscenity is a fight among men over the best means to guarantee male power as a system." *Id.* at 333. This radically reductivist view of the Court refuses even to acknowledge the existence of conflicting views among the Justices. In fact, it masks the very differences that should most concern someone interested in furthering the legal interests of women. The Justices who best represent the male-dominated economic, political, and social status quo are the selfsame Justices who *concur* with MacKinnon's position on suppressing pornography. MacKinnon's *bête noire* among the present Justices is presumably the person who writes most forcefully to oppose the censorship of sexually explicit expression, in other words Justice Brennan. Yet it is also Justice Brennan who can be counted upon to articulate most strongly constitutional principles justifying the judicial elimination of barriers to the empowerment of women. *See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); Frontiero v. Richardson, 411 U.S. 677 (1973).

MacKinnon's poor judgment regarding the conflicting currents on the Court is also evident in her tendentious treatment of individual cases. One of the recurring themes of MacKinnon's work is that the modern Court's obscenity decisions are not really intended to regulate pornography, but rather are an effort to maintain male supremacy. MacKinnon, *supra* note 149, at 331. This view leads MacKinnon to assert that the Court has been willing to recognize exploitation in the context of obscenity litigation only when the person exploited is male. *Id.* at 333 n.38. She actually goes so far as to suggest that the Court would have decided New York v. Ferber differently if the child pornography at issue in that case had depicted female 12-year-olds instead of male 12-year-olds. *Id.* at 333 n.38 & 334 n.42. *See* New York v. Ferber, 458 U.S. 747 (1982) (upholding conviction for the sale of a film depicting two 12-year-old boys masturbating). Analysis of this sort strains MacKinnon's credibility to the breaking point.

Unlike MacKinnon, most observers are unable to avoid the obvious fact that the Justices on opposing sides of the debate over the regulation of pornography also have far different views on broader questions; for example the nature of power and the role of dissent by those standing outside the political mainstream. Ironically, in the end it is MacKinnon who checks in on the side of those pursuing "the best means to guarantee male power as a system," since she proposes to establish a mechanism by which the present political and economic power structure can cultivate and enforce certain attitudes among the populace. Only an alchemist of extraordinary expertise could transmute a theory that increases the power of the status quo into one that challenges the status quo.

192. I use the term "liberal" here to denote those theories of social organization generated by or derived from the works of John Locke and Thomas Hobbes. Although this particular definition of the term is not specifically discussed by MacKinnon, I think it is fair to assert that the particular meaning is subsumed in her all-encompassing and very general usage of the term. *See* note 191 *supra.*

precursors into a new synthesis that also incorporates knowledge, insights, and attitudes that were not available to her intellectual predecessors.

Yet in her attempt to supercede both Lockean liberalism and critiques of that doctrine, MacKinnon produces a theory that is actually pre-liberal. Her theory, and indeed her entire view of the world, has much more in common with the philosophical perspective that prevailed before the Enlightenment. In contrast with the emphasis that post-Enlightenment political theory places on temporality and change, MacKinnon produces a theory that revolves around a few preordained certainties. Her political conclusions follow deductively from unchanging original premises. She replaces dynamism with stasis. She describes the world in absolute terms, with no gray areas and no possibility of mistake. She sees objectivity as a characteristically male perspective, and so replaces it with a radically subjective attitude.[193] But the radical subjectivity she proposes does not concern itself with external factors; it is predetermined, unchanging, and unchallengeable.[194] It also lacks the elements of existential freedom and mutability that usually characterize such theories. It is, in essence, a religious point of view, a view of perfectability and utopia.[195]

This religious aspect of MacKinnon's thought explains why she is

193. *See* MacKinnon, SIGNS I, *supra* note 189, at 535-36; MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence,* 8 SIGNS: J. WOMEN CULTURE & SOCY. 635, 638-39, 644-45 (1983) [hereinafter MacKinnon, SIGNS II].

194. It also has all the basic components of philosophical idealism, although MacKinnon denies this. "It [MacKinnon's theory] is neither materialist nor idealist; it is feminist." MacKinnon, SIGNS II, *supra* note 193, at 639. This is equivalent to the assertion that a particular substance under discussion is neither liquid nor solid; it is a turnip. MacKinnon criticizes the work of another feminist as idealist in nature because it asserts that "the subordination of women is an idea such that to think differently is to change it . . . ." *Id.* at 639 n.8. Yet this is a pretty good précis of MacKinnon's own theory. "Where liberal feminism sees sexism primarily as an illusion or myth to be dispelled, an inaccuracy to be corrected, true feminism sees the male point of view as fundamental to the male power to create the world in its own image, the image of its desires, not just as its delusory end product." *Id.* at 640. If anything, according to MacKinnon the problem with liberal feminism is that it is not sufficiently idealist. MacKinnon does not dispute the primacy of the idea over the physical world; rather she views the idea as "fundamental" to the creation and exercise of power over physical circumstances. However much MacKinnon may deny it, this is archetypal idealism.

195. This accounts for MacKinnon's attack on concepts of objectivity and causation, *supra* note 180, as well as her absolutist moral tone. *See* W. JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE (1936).

> [I]n the metaphysical and religious sphere, articulate reasons are cogent for us only when our inarticulate feelings of reality have already been impressed in favor of the same conclusion. . . . Our impulsive belief is here always what sets up the original body of truth, and our articulately verbalized philosophy is but its showy translation into formulas. The unreasoned and immediate assurance is the deep thing in us, the reasoned argument is but a surface exhibition. Instinct leads, intelligence does but follow. If a person feels the presence of a living God . . . your critical arguments, be they never so superior, will vainly set themselves to change his faith.

Id. at 73-74.

uncomfortable with Marx (though less so with Marx's more sentimental progeny).[196] Marx had little patience with theories of morality or moral critiques of history. Marx viewed history as decidedly amoral, which led him to conclude that the moral concerns of individuals operating within history are supremely irrelevant.[197] MacKinnon, on the other hand, is concerned almost exclusively with her moral vision. Thought, rather than action, is her main concern because "thought and thing are inextricable."[198] In the context of such a theory the morality principle is not merely one facet of a more diverse agenda (as it is with the conservative censors); in the MacKinnon system the enforcement of the morality principle is the agenda.

Although the feminist and conservative censors both rely on the morality principle to justify their treatment of sexually explicit expression, the feminist position is ultimately far more misguided than that of its conservative counterpart. The conservative censors are at least politically consistent; given the presently existing conditions, it is probable that enforcement of the morality principle will lead to a society largely to their liking. The same cannot be said of the feminist censors. Their support for the censorship of pornography is likely to lead to the further reinforcement of almost all the values they profess a desire to change. Feminist censors such as MacKinnon give courts the explicit authority to define ideological values.[199] Such authority presents no problem for conservative censors, since they presumably can expect to incorporate large portions of their social theory into law. The feminist censors, however, are faced with the insurmountable dilemma presented by judicial demographics. The judiciary is an overwhelmingly male enclave. Moreover, the mores of judges are not likely to be very hospitable to the feminist critique of society in general. Quite the contrary, permitting greater censorship of pornography reinforces paternalistic attitudes that have only recently been identified as constitutionally suspect in the equal protection area.[200]

196. *See* MacKinnon, SIGNS I, *supra* note 193, at 527 n.23.

197. Such concerns are irrelevant not in that they do not matter, but because they cannot be disjoined from the material conditions that create them — *i.e.*, the system of economic relations.

198. MacKinnon, SIGNS I, *supra* note 193, at 543.

199. This is illustrated by MacKinnon's civil rights statute, which provides courts broad discretion to determine civil actions based upon the ad hoc definition of broad, value-laden terms such as "dehumanization" and "degradation." *See* note 172 *supra*.

200. *See* Califano v. Goldfarb, 430 U.S. 199 (1977) (unconstitutional to assume widow, but not widower, dependent on deceased spouse for purpose of Social Security survivor's benefits); Craig v. Boren, 429 U.S. 190 (1976) (sale of 3.2% beer to females, but not males, ages 18-20, discrimination violating Equal Protection Clause); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (unconstitutional for Social Security to provide female wage earners less protection for survivors, than male wage earners).

The notion that women must be protected from visual or aural representations of male sexual dominance ironically allows the (usually male) judge to play the far more insidious role of father-figure, protecting his weak charge from the hostile environment of the outside world. The institutionalization of the concept of judge-as-father-figure (and woman-as-victim) may be profoundly harmful to women seeking to obtain from the courts protection of equal opportunities historically denied on the basis of the male notion that women cannot withstand the pressure of the workaday world.

Permitting courts to serve an explicitly ideological function in the course of suppressing pornography also would have a more immediate effect on the feminist cause. Feminism is justly concerned with protecting female sexuality from inordinate pressures exerted by a sexist society that views women from its own missionary-position perspective. However, by making common cause with those who would outlaw pornography in order to preserve "traditional values" or some analog thereof, feminist censors are providing support for the further entrenchment of the same social institutions, arrangements, and mores that created the atmosphere in which pornography proliferates.

The pornographic perspective to which feminists object is the perspective of the unreconstructed heterosexual male, who defines society's sexual mores in light of his own limited point of view and absolutely proscribes any deviation from his rigid moral standards. As indicated in Part I above, the morality principle allows courts to turn such perspectives into legal fact. By relying so strongly upon the constitutive powers of ideas — and demanding the right to regulate such ideas through law — MacKinnon implicitly approves the very mechanism that has regularly been used against the interests of women (and all political outsiders) in the past. The framework of absolute moral certainty employed by the present status quo is not fundamentally different from that articulated by feminist censors such as MacKinnon. All such systems express a need to identify and eliminate the expression of deviant tendencies.[201] The enforcers of morality will always find some expression that "disgust[s] and sicken[s]."[202] The problem with systems based on the morality principle is that they can never justify judicial disgust on grounds that do not relate to the tenets of the judge's (or the dominant community's) own moral scheme. The system is circular, and its conclusions are self-justifying. MacKinnon is

201. This trait is clearly evident in the existing case law. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986); Mishkin v. New York, 383 U.S. 502 (1966).

202. *Mishkin,* 383 U.S. at 508.

therefore wrong to distinguish between morality and power:[203] the two concepts cannot be segregated. The true question is that of power over morality. From that basic issue, as I will argue in the next section, all things relevant to the first amendment follow.

IV. The Case for Abandoning the Morality Principle in First Amendment Litigation

The previous sections of this article are devoted to examining the pervasive but often unstated reliance on the morality principle by those seeking to regulate sexually explicit expression. My own unstated (but surely perceptible) bias is that reliance on this principle is unjustified. This section is intended to give substance to, and, it is hoped, will fully justify, that bias.

My position is based on two primary tenets, one theoretical and one practical in nature. The theoretical tenet is that the first amendment should be deemed to incorporate an epistemological stance of radical skepticism, which by definition vitiates the morality principle.[204] The practical implication of this theory is that pornography cannot be regulated without substantially diminishing the theoretical appeal of arguments advocating the protection of other forms of expression.[205] The latter proposition is not at all original.[206] However, the proponents of this position seem to have lost control of the ongoing debate over the regulation of pornography. Their response to the advocates of suppression thus has been largely defensive in nature.[207] They have come to be concerned primarily with protecting a body of precedent that, as the analysis above indicates,[208] was not inherently hospitable to the anti-censorship position to begin with.

It is necessary, therefore, to reexamine and recast first amendment theory as it applies to sexually explicit expression. The first step in such a reexamination is to dispense with the framework established by censorship advocates. The efforts by the advocates of censorship to establish artificial categories of expression and then to use those cate-

203. MacKinnon, *supra* note 149, at 323.

204. *See* notes 249-63 *infra* and accompanying text.

205. *See* notes 264-81 *infra* and accompanying text.

206. For example, this proposition was one aspect of the Black/Douglas "absolutist" position, and has likewise long been a mainstay of the civil liberties tradition represented by advocates such as Thomas Emerson. *See* T. Emerson, The System of Freedom of Expression 495-503 (1970).

207. *See, e.g.*, Lynn, *"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 Harv. C.R.-C.L. L. Rev. 27 (1986); Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 Yale L. & Poly. Rev. 130 (1984).

208. See notes 19-76 *supra* and accompanying text.

gories to justify suppression must be viewed as tactical evasions that are intended to shift the focus away from the real point of the debate. The battle to suppress pornography is not, finally, about sex; it is about deviance. The efforts to control pornography are equally efforts to stake out an area of impermissible thought, a sort of intellectual no-man's-land, which by its very existence delegitimizes everything that crops up within the forbidden territory. Unfortunately, expression can never be so clearly defined. Expression — even pornographic expression — carries multiple messages. From the perspective of the first amendment, pornography's implicit endorsement of social deviance and moral nonconformity should be just as important as the more explicit references to sexual activity. If the mechanisms proposed by the censorship advocates are adopted, the facial message of pornography becomes the sole concern, and censorship becomes a self-fulfilling proposition.

A. *The Tolerance Model of First Amendment Adjudication*

From a theoretical standpoint, the drive to suppress pornography is flawed in one key respect: it permits the state to certify a realm of moral certainty in the face of a constitutional structure that denies the state that very power. This point can be clarified by viewing it in the context of several recent proposals arguing that a tolerance model, rather than a skepticism model, should govern constitutional theory.[209] Although there are significant differences among the various proponents of a tolerance rationale, they are joined in asserting some variation on the theme that "even if governmental infallibility is assumed, the expression of false beliefs should nevertheless be tolerated."[210] The support offered for such a toleration model varies widely. David Richards, for example, relies on the premises of traditional Lockean individualism and moral autonomy, described by Richards as "the inalienable right to conscience."[211] Steven Smith couples another version of the Lockean argument with a more practical rationale for the tolerance principle. According to Smith, tolerance simply provides the most commonsensical and coherent explanation for rules favoring broad protections for speech.[212] Lee Bollinger and Suzanna Sherry advocate a regime of tolerance in order

209. *See* L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression,* 60 S. CAL. L. REV. 649 (1987); Sherry, *An Essay Concerning Toleration,* 71 MINN. L. REV. 963 (1987).

210. Smith, *supra* note 209, at 700.

211. *See* D. RICHARDS, *supra* note 209, at 68.

212. Smith, *supra* note 209.

to advance a particular form of civic virtue. In their view, the state must practice tolerance in order to inculcate tolerant attitudes among its citizens.[213]

All four examples of the tolerance rationale are compatible with the morality principle. This follows from the very nature of the concept of tolerance. By definition, the theory of "tolerance" has meaning only if it permits the continued existence of something the governing agent finds unpalatable. Thus, Professor Smith recognizes, "tolerance is compatible with subjective certainty regarding one's own beliefs, or even with outright prejudice."[214] In other words, there must be a baseline from which to determine what must be tolerated. Among other things, that baseline consists of a particular ethical scheme embodied in the morality principle. As with the morality principle itself, the tolerance rationale is consistent with both narrow and fairly broad conceptions of the general scope of first amendment protection.[215] However, it will not ultimately support the strong pro-speech position taken by each of my four tolerance rationale examples.

As noted above, all tolerance models are based on some form of moral certainty. The moral certainty is embodied in a set of principles that define the status quo, referred to above as the "baseline" from which the level of tolerance is to be determined. Tolerance theorists are therefore wholly opposed to skepticism and/or moral relativism as the conceptual basis for the first amendment protections of expression.[216] The tolerance rationale is integrated into the status quo in order to bolster and protect some or all aspects of the status quo.

This can be illustrated by considering the tolerance rationale (and the first amendment itself) in the context of the larger political organ-

213. *See* L. BOLLINGER, *supra* note 209, at 237-48; Sherry, *supra* note 209, at 983-89.

214. Smith, *supra* note 209, at 700 n.155.

215. Even Robert Bork's extremely limited interpretation of the first amendment is based on the assumptions of the tolerance model. *See* Bork, *supra* note 85. The only distinguishing characteristic is that Bork does not believe that the state may be forced to tolerate any but the most rudimentary forms of political expression. Bork's work provides a good example of the primary theoretical flaw in the tolerance model. Bork explicitly recognizes what the latter-day tolerance theorists acknowledge only obliquely, that the existence of the state in its present form is the *sine qua non* of all tolerance model first amendment theory. Therefore, protection of expression must rely in the final analysis on the willingness of the existing regime to defer to its opponents. *See* notes 216-17 *infra* and accompanying text.

216. A primary purpose of the Smith article is to rebut both "strong" and "weak" skepticism rationales for first amendment protection. *See* Smith, *supra* note 209, at 663-99. Sherry links moral relativism with liberal legal theory, to which she is opposed. Sherry, *supra* note 209, at 971. Bollinger's book contains a sensitive, but ultimately disapproving review of Oliver Wendell Holmes's skepticism. L. BOLLINGER, *supra* note 209, at 158-74. Richards is, at least on the surface, more congenial to skepticism arguments. But Richards's good intentions cannot overcome his reliance upon Lockean liberalism, whose theoretical underpinnings justify suppression of skeptical thought directed at the political status quo. *See* note 247 *infra*.

ism of which it is a part. In all of its variants, tolerance is recognized as one value among many to be adopted and enforced by the state's legal apparatus. The state, which has the power to declare its allegiance to a disparate group of precepts and principles, can always decide to elevate the importance of some values and devalue others. Tolerance, in other words, can always be subordinated to other goals. It is true that the tolerance theorists insist this will never happen, since they declare that the tolerance rationale is first among equals. But by ascribing to the existing political structure the power to certify social values (including, but not limited to, tolerance), this theory undercuts the logic by which the state's power over expression may be limited. A first amendment theory based on a notion of radical skepticism encourages the populace to cast a doubtful eye on everything, including the present composition of the state itself. In contrast, the political infrastructure that embodies and enforces the value of tolerance necessarily assumes its own continued existence. No variation of tolerance is so extreme as to tolerate its own demise. Thus, when the structure that originally endorsed tolerance is itself threatened, the tolerance theory falls away and the needs of survival (*i.e.*, governmental survival) become supreme. The tolerance rationale is self-limiting and therefore cannot provide the theoretical basis for strong protection of expression.

1. *Communitarian Tolerance*

It is significant that the tolerance rationale is frequently considered in the context of extreme political speech, because this provides the tolerance theorists the opportunity to articulate the practical limitations of their theory. Bollinger, for example, generally supports the basic scope of present law regarding free expression. Thus, he seems to endorse the incitement test that the modern Court has adopted from Learned Hand.[217] Under this standard, extreme political speech is protected until such time as it incites harmful conduct, of which the forceful overthrow of the government is a prime example. Bollinger does not apply his version of the tolerance rationale to limit other forms of speech, but the tolerance rationale he proposes does contain the seed of further limitations.

Professor Sherry provides one example of the form those limita-

217. *See* L. BOLLINGER, *supra* note 209, at 194-200. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (violation of first and fourteenth amendments to impose criminal sanction for mere advocation of illegal action); Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *revd.*, 246 F. 24 (2d Cir. 1917) (upholding Postmaster General's determination under Espionage Act that magazine nonmailable because it willfully obstructs recruitment into military service by publication of certain cartoons).

tions might take. Sherry, whose theory is presented as "variations on [Bollinger's] theme,"[218] takes the tolerance rationale one step further than the theory's progenitor. Tolerance, she notes, is merely one aspect of a larger social ethos.[219] The role of the state, she asserts, is to cultivate that ethos.[220] Sherry "envisions a more active role for government" than the liberal "rights model" of first amendment jurisprudence that presently dominates both the courts and law schools.[221] The "activist" role she proposes is largely educational in nature. However, in pursuing its educational role, the state must often choose between the virtues it is trying to cultivate among its citizens. There are, therefore, inherent limits on what the state must tolerate.

Sherry is hesitant to press these limits very far, and indeed she does not specifically permit the state to outlaw any presently permitted forms of speech. But she does allow the state to take an active role in discouraging speech with which the dominant political forces disagree. She uses pornography as an example. Although the state may not proscribe this form of expression, she contends, the government is perfectly free to identify pornographic speech as abhorrent. The government is evidently free to use any means at its disposal short of absolute prohibition in order to cultivate a disapproving attitude toward pornography among its citizens.[222] In other words, the government may simultaneously exercise tolerance and intolerance. Paradoxically, there seems to be an intolerance exception to the tolerance rationale. "[T]here is no reason for the government to remain neutral; it need only permit the speech, not condone it through silence."[223]

The most obvious flaw in this argument is its inability to justify any limitation on the exercise of state regulatory power over expression. If government may base legislation on non-neutral grounds (*i.e.*, on something akin to the morality principle), why may it not use all the power within its means to enforce that legislation? Sherry's answer would seem to be that the government may not use all its enforcement power because to do so would foster intolerant attitudes. But if the government may seek to "educate" its population by engaging in "principled defenses of the reasons for intolerance,"[224] Sherry

218. Sherry, *supra* note 209, at 989.

219. *Id.* at 984.

220. *Id.* at 985.

221. *Id.* at 989.

222. *Id.* at 988.

223. *Id.* at 988-89.

224. *Id.* at 988.

has already acknowledged that the government is allowed to subordinate the virtue of tolerance to other virtues the state deems preferable. If this educational campaign is conducted properly, the targets of the campaign (the citizens) could logically question the consistency of their rulers, who simultaneously tolerate something and assert that it should not be tolerated.

Sherry's system of tolerable intolerance is also difficult to apply. It is unclear how Sherry would distinguish between impermissible governmental sanctions and permissible governmental disapproval. She never identifies the exact level of governmental action that would be sufficient to constitute impermissible governmental sanctions. Her examples all imply that the tolerance rationale prohibits only absolute proscription of the offending material.[225] However, she also mentions the dispute that arose when the Pornography Commission allegedly pressured corporations that operated retail magazine outlets to cease the sale of *Playboy* and *Penthouse* in their stores.[226] Although a federal district court enjoined the Commission from following through on its threat to publish the names of stores that continued to sell the magazines, the stores removed the magazines anyway.[227]

Sherry implies that the identification of offending corporations by the Pornography Commission would have been an impermissible governmental sanction under her version of the tolerance rationale. She suggests that the fact that the stores removed the magazines after the injunction issued reflects a "change in attitude" on the part of the corporations, rather than a response to governmental pressure.[228] If in fact the mere mention of governmental disapproval in a commission report is sufficient to constitute impermissible governmental sanction, then Sherry's theory is indeed fairly limited, and does not pose a great threat to free speech. However, such a limited construction of "sanction" also seems inconsistent with Sherry's insistence that the government not be forced to "condone [speech] through silence."[229] In fact, action such as that threatened by the Pornography Commission seems to be precisely what Sherry has in mind as a proper governmental reaction to unsavory expression. A government agency — the Pornography Commission — did nothing more than identify expression that the government did not want to condone.

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225. *See id.* at 987-89.

226. *See id.* at 988 n.115. *See also* Playboy Enters. v. Meese, 639 F. Supp. 581 (D.D.C. 1986).

227. 639 F. Supp. at 588.

228. Sherry, *supra* note 209, at 988 n.115.

229. *Id.* at 989.

If, as I suggest, the action of the Pornography Commission is indeed compatible with Sherry's tolerance rationale, then her theory is actually quite radical, for it allows the government to engage in a form of subtle official blackmail. As the *Playboy* case indicates, governmental pressure of this sort is an effective limit on expression, even when countered with a quick and hostile judicial reaction.[230] Furthermore, if official action of this kind may be based on little more than a majority decision to advocate one set of moral principles over another, then the intolerance exception begins to swallow the tolerance rationale. It also provides a justification for the application of the morality principle that is almost as broad as those considered in the preceding sections.

2. *Individualist Tolerance*

Unlike the communitarian orientation of Bollinger and Sherry, which envisions an activist state with a mandate to cultivate certain virtues in its citizens, Richards and Smith exhibit a more traditional reliance on individualism and limited government to justify their version of the tolerance rationale. This version of the tolerance rationale is intended to protect the interests of morally autonomous individuals.[231] Richards and Smith acknowledge their heavy debt to John Locke.[232] I have criticized elsewhere the notion that Lockean individualism should continue to serve as the philosophical basis for modern constitutional interpretation.[233] It is not necessary to repeat those criticisms here, for the limitations inherent in the individualist version of the tolerance rationale are evident in Professor Smith's own detailed application of that theory.

The lodestar of Professor Smith's theory of tolerance is the notion that truth can be definitively determined and used as the basis of social policy. Smith concurs with Locke's belief in the "potential certainty of moral knowledge."[234] However, as Smith acknowledges, at first

230. I therefore disagree with Sherry's contention that the removal of magazines by the corporations originally identified by the Pornography Commission represented a "change in attitude" on the part of the companies that was unrelated to the threatened governmental action. As Sherry herself recognized, the initial threat was widely publicized and immediately had the intended effect of forcing the removal of the magazines. *See* N.Y. Times, July 4, 1986, at A6, col. 1. The companies involved quite naturally were disinclined to reverse their decision on the magazines once the injunction issued, since a decision of that nature would have drawn further attention to them and perhaps instigated private action of the sort the Commission later endorsed. PORNOGRAPHY COMMN. REP., *supra* note 102, at 419-29 (recommending private protests, boycotts, and related activities at stores selling offending material).

231. *See generally* D. RICHARDS, *supra* note 209, at 67-102; Smith, *supra* note 209, at 703-07.

232. *See, e.g.*, Richards, *supra* note 209, at 89-102; Smith, *supra* note 209, at 701-07.

233. *See* Gey, *supra* note 113, at 624-32.

234. Smith, *supra* note 209, at 702.

glance the notion of moral certainty provides a logical rationale for intolerance rather than tolerance.[235] After all, if one can know the truth, what point is there in allowing falsehood to survive? Smith answers this dilemma by divining two aspects of communication in every instance of expression. The first aspect is the "propositional" component of expression.[236] In this first sense, "the world is flat" may be described as false. The second aspect of communication, however, is the "biographical" component of expression. In the second sense, therefore, "the world is flat" may be true if it accurately reflects the pre-Columbian views of the speaker. Smith thus claims to have surmounted the obstacle that his moral certainty poses, because even propositionally false statements may have some first amendment value if they are biographically true.[237]

There are two fatal flaws in this analysis. The first is a consequence of Smith's refusal to distinguish between moral and political certainty and factual certainty.[238] When Smith claims the capability to ascertain the propositional certainty of the statement "the world is flat," one is tempted to give him the benefit of the doubt. But it is a fundamentally different affair when Smith goes on to claim that statements such as " 'Slavery is evil,' 'Honesty is good,' or 'Chastity is a virtue,' " are "descriptive and objective," and therefore "capable of being and, at least in principle, of being known to be, true or false."[239] The meaning of "truth" itself is subtly altered when Smith moves from the area of scientific verifiability to moral certainty. The definition of truth in the area of politics or morality is "deliberately a loose one," and, in effect, renders as "objective truth" anything that corresponds to present political and ethical arrangements.[240] The moral certainty that informs Smith's tolerance rationale is therefore revealed as a form of epistemological hubris, which assumes that the world as we know it has reached the apogee of moral and political knowledge.[241]

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235. *Id.* at 657.

236. *Id.* at 712.

237. *Id.* at 713-15.

238. *See id.* at 679.

239. *Id.* at 680.

240. *See id.* at 659 n.33: "The criteria for accepting an idea or proposition might be framed in terms of the idea's 'correspondence' with an external reality, the idea's 'coherence' with other propositions, facts, or ideas believed to be true, or perhaps even in terms of the objectively determinable, pragmatic value of the idea." In other words, one belief can serve as the basis for a second, which in turn can justify a third. "Pragmatic value" then comes into play in order to assess the best means available to achieve a subjectively determined end. The system is closed and impregnable.

241. Theories based on skepticism are faulty, Smith asserts, because they are incapable of recognizing the exalted state of current knowledge. "The democracy theory of free expression seems most cogent . . . when it assumes the existence of knowable political truths and contends

This hubris would be harmless if it could not be enforced on those possessing a more skeptical nature. But, as noted above, tolerance theory breaks down once it accepts that the state can identify and protect a set of essential moral verities. It is inevitable that a state in that situation will abandon the tolerance theory when its moral essence is threatened. Smith seeks to avoid this result with his bifurcated propositional/biographical theory of expression. He contends that the state will tolerate propositionally untrue statements in order to protect the biographically true component of such statements.[242] However, this conclusion simply does not follow from Smith's strong belief in moral certainty. For example, Smith seems to consider revolutionary Marxism the political equivalent of the factual assertion "the world is flat." Although Smith recognizes that the subject of fundamental political change is indeed significant, he also notes that one could conclude that "the [endorsement of revolution] itself is simply wrong, and thus without substantial value."[243] Smith nevertheless contends that the state should permit the expression of these political inaccuracies in order to protect the biographical truth they reveal about those individuals who believe in Marxism.[244]

But if moral and political ideas can be definitively identified as false, the biographical truth such falsehoods reflect seems to be a thin reed on which to build a system protecting free speech. This is especially true if "false" ideas are perceived as threatening the structure that protects "true" political ideas. This can be demonstrated by applying the same logic to inaccuracies of fact. For example, although "the world is flat" is generally a harmless statement, no one would expect a naval academy to allow its navigation instructors to base their lectures on such an idea. It would threaten serious damage to the preservation of truths necessary to the continued existence of the institution. Likewise, if revolutionary Marxism is an equally "false" idea, the state should not be expected to allow the idea to be propagated by anyone with influence. A poor and puny anonymity may be allowed to preach it on the street corner, but an economics or history professor advocating such theories should be arrested (or at least fired) posthaste. Likewise, if "chastity is a virtue" is determined to be a verifiable moral truth, then *Lady Chatterley's Lover* is once again in great

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that a democratic government is best able to apprehend and act upon such truths. Skepticism does not strengthen, but rather weakens the democratic rationale for freedom of expression." *Id.* at 675 (footnotes omitted).

242. *Id.* at 723-29.

243. *Id.* at 729.

244. *Id.*

danger.[245]

The intolerant nature of the tolerance theory should be evident to anyone familiar with Smith's hero John Locke. As Smith himself recognizes, Locke's tolerance wore thin when he confronted ideas that truly offended his own moral and political sensibilities.[246] Thus, Lockean tolerance did not extend to Catholics, Moslems, or atheists.[247] Smith's development of the tolerance theory is no less selective than is Locke's, but it is a great deal less coherent. Locke at least operated within the framework of a stable moral universe. Locke could advance a theory based on moral certainty because he assumed the existence of an unquestioned external reference point — God — by which all earthly matters could be judged. Smith, bereft of Locke's religious lodestar, is precluded from basing his assertion of moral truth on anything beyond "human belief in truth."[248] Smith's moral certainty therefore amounts to an ethical tautology, and the tolerance rationale he derives from it is merely a cloak to conceal the circularity of the system.

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245. *See* Kingsley Intl. Pictures, Corp. v. Regents of Univ. of N.Y., 360 U.S. 684 (1959).

246. *See* Smith, note 209 *supra,* at 701 n.157. Although Smith recognizes this inconsistency, he does not attempt to explain or critique it.

247. *See* J. Locke, *A Letter Concerning Toleration,* in THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 155-56 (J. Gough ed. 1947) (1st ed. 1689). While Smith merely ignores Locke's intolerance, Richards's more philosophical discussion attempts to explain it away. Richards views Locke's advocacy of intolerance toward, for example, atheism as an aspect of "moral-sense theory" rather than theological protectionism. Richards views Lockean tolerance as intended to protect the moral autonomy of individuals, and "[f]or Locke, ethical experience, as such, depended on the concept of an omnipotent and ethical creator God." D. RICHARDS, *supra* note 209, at 107 n.15. Thus, in Locke's day, protecting the moral autonomy of individuals did not require protection for the amorality of atheists. Today, however, "[c]ontemporary moral theory . . . analyzes ethical reasoning independently of religious reasoning or belief in an afterlife." *Id.* at 125. Therefore, the sectarian limitations Locke placed on tolerance are no longer necessary.

Although Richards makes a noble attempt to salvage a form of Lockean tolerance that will be acceptable in our secular age, that effort must be regarded as a failure. Locke's own stated reasons for excluding certain groups from the ambit of his theory were, after all, decidedly less abstract than those emphasized by Richards. The Moslem and Catholic faiths were excluded not because their adherents were incapable of developing a systematic moral framework, but rather because they were inherently treasonous. These faiths cast doubt on the moral authority of the state, and therefore could not be tolerated. *See id.* at 95-96; J. LOCKE, *supra. See also* C. HILL, MILTON AND THE ENGLISH REVOLUTION 155-57 (1977) (discussing the related tolerance theories of John Milton, who considered Catholicism " 'a priestly despotism under the cloak of religion,' which 'extirpates all religious and civil supremacies' "). Atheism was excluded from Locke's tolerance theory not because it was amoral, but because "it undermined the sanctity of promises." Smith, *supra* note 209, at 701 n.157. This, in turn, endangered the contractual relations necessary to sustain the economic structure of incipient capitalism, which was the driving force behind Locke's theory. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962). In other words, Locke's philosophical justification was intertwined with, and limited by, the political and economic context in which it was developed. Like all tolerance theories, Lockean tolerance tolerates only that which does not truly threaten the existing order.

248. Smith, *supra* note 209, at 704 (emphasis omitted).

B. *The Skepticism Model of First Amendment Adjudication*

The tolerance model and the morality principle are both unacceptable under the first amendment because they are based on an outmoded notion of moral and political certainty. This notion embodies a pre-Enlightenment view of humankind. It proposes that we are at the center of a simple and ordered universe, whose mysteries can be known and understood. This is an inappropriate and ultimately counterproductive model for first amendment jurisprudence. It exalts the status quo. What is inevitably becomes what should be. The first amendment ceases to function as a mechanism intended to foster natural political evolution, and becomes instead another prop for the existing political and social order.

The first amendment can be rescued from this reactionary role only if tolerance models of interpretation are replaced with a theoretical framework characterized by radical skepticism. What I call "radical" skepticism is equivalent in most respects to what Professor Smith terms "strong" skepticism. Smith is extremely critical of this intellectual stance, which "professes deeper doubts — sometimes amounting to complete despair — about the possibility of human knowledge."[249] Despite the seemingly unattractive traits of this theory, Smith acknowledges that "strong" skepticism is a familiar phenomenon in first amendment jurisprudence, for it is in all key respects the position taken in the later free speech opinions of Justice Holmes.[250]

But contrary to Smith's view, this position is neither despairing nor intellectually insupportable. It is not despairing merely to recognize that political change is inevitable, and that we do not necessarily live in the best of all possible worlds. Nor is it intellectually indefensible to assert that moral and political skepticism should not be treated identically with other forms of skepticism.[251] The skepticism that is the subject of the following discussion is not contradicted by the existence of reliable and consistent empirical judgments about the physical world. The radical skepticism discussed below asserts simply that absolute political knowledge is unknowable because those seeking such knowledge are self-interested and therefore incapable of making objective judgments. Treatment of other forms of philosophical skepticism is both beyond the scope of this article and unnecessary for the conclusions that follow. With that distinction in mind, the contours of the

249. Smith, *supra* note 209, at 664 (footnote omitted).

250. *See* Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

251. *See* notes 238-41 *supra* and accompanying text.

argument for radical skepticism can be clarified by way of rebutting Smith's criticisms of the skeptical approach.

The starting point of Smith's analysis is his belief that skepticism is logically insupportable. In the course of critiquing the skepticism theories of C. Edwin Baker,[252] Smith reduces the skepticism argument to its most basic form. Baker argues at one point that truth does not exist, but is chosen.[253] This argument, says Smith, "collapses upon itself. The contention that beliefs are chosen, and thus not objectively true, must itself be seen as chosen and thus not objectively true."[254] Baker would not propose his theory, Smith notes, unless Baker thought it had some value. "[Baker] assumes, in other words, that his argument that 'truth is not objective' is true in some objective sense. Thus, if Baker is right, then Baker is wrong."[255] Smith has discovered a frailty in one particular presentation of skepticism, but not in the theory itself. The problem can be corrected simply by casting the theory in the affirmative. The theory of skepticism asserts that all statements of truth are hypothetical and transitory. That is not to say that one can never find reasons for adopting one theory and rejecting another, but rather that all theories are susceptible to constant modification and periodic rejection. This statement of the position refutes Smith's allegation of self-contradiction. After all, I may be wrong.

Tolerance theories of first amendment interpretation are all characterized by persistent optimism concerning the possibility of moral knowledge, coupled with a fear of the wages of uncertainty. Skepticism rejects definitive assertions of morality and accepts political and ethical uncertainty as an inevitable consequence of historical development. The tolerance proponents' Panglossian bent leads them to interpret history as a *cul-de-sac.* Once the historical destination is reached, one cannot proceed any further. Political mutation continues only until it hits its natural end point. Skepticism, on the other hand, views all life as a constantly evolving series of experiments. It is, in the purely scientific sense, Darwinian.[256]

Smith, who in this respect is the consummate tolerance theorist, views political history just as he views scientific history. The fact that fighting faiths have been overturned with regularity since human life began does not cause Smith to question his optimism. "[I]t is not

252. *See* Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. REV. 964 (1978).

253. *See id.* at 975.

254. Smith, *supra* note 209, at 671.

255. *Id.*

256. *See id.* at 668.

merely their lack of present acceptance that justifies the conclusion that erstwhile faiths are false. Rather, it is the fact that we have now discovered more reliable methods of ascertaining truth — the scientific method, for instance — and that such methods have disconfirmed former beliefs."[257] But in fact, to amend Holmes only slightly, the life of politics (and thus the law) has not been logic, it has been power.[258] The present arrangements seem fairly benign to those of us in the social strata that contributes to the law reviews, but we should not confuse our own satisfaction with everlasting truth.

The presumptuous parochialism evident in Smith's contention that we (that is, late twentieth-century middle-class Americans) have now "discovered more reliable methods of ascertaining [political] truth" indicates another fundamental difference between the tolerant and the skeptical world views. Tolerance theory treats the state as if it is a direct manifestation of perfected human knowledge. Furthermore, the tolerance model treats the state as a creation of individuals fully capable of identifying and realizing their interests by freely engaging in collective action. In other words, individuals create history, history does not create individuals. Skepticism proposes that just the opposite is true. The collective precedes the individual, according to the skepticism model, and thus the individual is always defined by and subject to the historical circumstances into which he or she is born. This is perhaps the single most important distinction between the tolerance and skepticism models of the first amendment.

The emphasis placed by the skepticism model on collective entities, rather than individuals, explains the theory's deep suspicion of state-endorsed certainty as the basis for regulating expression. Whatever the possibility that an individual may obtain certain moral knowledge, the skepticism model emphasizes that collective entities will always be

257. *Id.* at 666. Smith's faith in the objectivity of the scientific method ignores the human biases that are incorporated in that method, and which often dictate the results of scientific investigation. One recent study has commented upon the influence of scientific models focusing on conditions of "[s]tability, balance, equilibrium, and continuity" and the role these same intellectual models play in perpetuating the political status quo. R. LEVINS & R. LEWONTIN, THE DIALECTICAL BIOLOGIST 275 (1985). Moreover, Smith's view of the scientific method as a "method of ascertaining truth" subtly misconstrues the nature of the scientific method itself. The method (if it is to be helpful at all) does seek to ascertain truth, but it does so ironically by seeking to undermine (or, to put it more positively, transcend) the accepted truths of the moment. Science is the process by which imperfect governing paradigms are constantly superseded by new, but equally imperfect, ways of describing reality. Thomas Kuhn likened scientific paradigms to "judicial decision[s] in the common law . . . an object for further articulation and specification under new or more stringent conditions." T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23 (1962). This incessant dialectical process of contradiction and resolution is far more compatible with a regime of radical skepticism than with a theory positing the definitive ascertainment of objective truth.

258. *See* O. HOLMES, THE COMMON LAW 1 (1881).

driven by an independent and amoral dynamic that is incompatible with moral knowledge of any sort. Regulations enforcing state-determined principles of personal or political morality are intended to support the primary goal of institutional self-perpetuation, rather than protect "true" ideas against the onslaught of the "false." Falsehood of this sort can be proved only by comparison to contrary principles established in advance. If one stipulates at the outset that true precepts are set forth in *The Wealth of Nations,* then Marxism is therefore untrue. This may be logical (at least in the sense that logic demands the recognition that capitalism is not socialism), but it is hardly a definitive and objective statement of moral truth.

What Smith describes as the "Darwinian" nature of Justice Holmes's skepticism[259] reflects Holmes's strong identification with the implications of the philosophical materialism I have just described. Holmes believed that moral truths are the creation of historical necessity, that constant conflict between competing interests is inevitable, and that political change is a given.[260] In this raucous atmosphere, free speech is a natural phenomenon. The inclusion of the first amendment in the Constitution should therefore be interpreted in light of the ephemeral nature of all human enterprises. No government can prevent the inexorable development of historical forces. If Smith is wrong, and the ideas of Marxists turn out to be "true" after all, then "the only meaning of free speech is that they be given their chance and have their way."[261]

The irony of this position is that it posits a strong protection of expression not because free expression is one of the most significant aspects of political activity and psychological well-being, but rather because expression is basically insignificant, a mere shadow of the historical forces that give it content. That is not to say that expression has no value whatsoever. If political change is inevitable, then it is reasonable to provide an avenue for change to occur peacefully. The requirement that expression of radical political ideas be permitted can

259. Smith, *supra* note 209, at 668.

260. I don't believe that it is an absolute principle or even a human ultimate that man always is an end in himself — that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it. Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough.

Letter from Oliver Wendell Holmes to Dr. Wu (Aug. 26, 1926), *reprinted in* THE MIND AND FAITH OF JUSTICE HOLMES 431 (M. Lerner ed. 1943). *See* Rogat & O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion — The Speech Case,* 36 STAN. L. REV. 1349, 1361-68 (1984); Laski, *The Political Philosophy of Mr. Justice Holmes,* 40 YALE L.J. 683 (1931).

261. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

serve this function. As Holmes said, "[e]loquence may set fire to reason."[262] Of course, evolutionary change will not always supplant violent revolution, and no theory of the first amendment will prevent the state from acting like a state in the end. We can force the state to allow Thoreau to speak on behalf of John Brown, but nothing will prevent the state from executing John Brown.[263] Nevertheless, the possibility of peaceful change is always present, and the first amendment should be interpreted in a way that fosters that possibility.

In any event, the primary argument skepticism offers in favor of protecting free expression is epistemological, not practical. If the characterization of the state offered above is correct, then every reason the state offers for suppressing expression can be reduced to a self-serving argument that the status quo should be perpetuated. The state certainly has the means for enforcing its view, but its arguments are hardly compelling on their own merits. Marxism is "false" because it is contrary to the interests of the present power structure. Sexually explicit expression is "bad" because it deviates from the norm defined by the existing hierarchy of social relations. The first amendment, if it means anything, requires that arguments of this nature be rejected. If push comes to shove, the state will prevail anyway, but short of the paroxysm of revolution the first amendment should be read as broadly as possible.

C. *Skepticism, Social Deviance, and the Regulation of Pornography*

The skepticism model presented above undercuts the modern Court's obscenity jurisprudence, as well as the various forms of academic support recently offered for regulating pornography. The morality principle on which the judicial and academic support for suppression is based cannot be squared with a first amendment interpreted through the prism of radical skepticism. Under the skepticism model, the state may not suppress expression on the basis of the morality principle because it cannot offer nontendentious justifications for this action. Any given political organization represents a range of dominant values, all of which are subject to the skepticism critique. Because some of these values relate to sexual morality, the regulation of pornography cannot be treated differently from the regulation of any other form of expression. The moral or aesthetic status quo is no more objectively "true" than any other component of the current

262. 268 U.S. at 673.

263. *See* H. THOREAU, *A Plea for Captain John Brown,* in REFORM PAPERS (W. Glick ed. 1973) (1st ed. 1860).

political order. Therefore, verbal attacks on any aspect of the status quo cannot be suppressed without resorting to the circular argument that the status quo should be preserved.

Furthermore, the process by which the advocates of suppression attempt to single out sexually explicit speech for special treatment is also vulnerable under the skepticism model. Those advocating the suppression of pornography attempt to divide expression into neat compartments, preserving strong first amendment protection for expression fitting into the "political" compartment while limiting (or eliminating) first amendment protection for expression in other, "nonpolitical" compartments. From this perspective, all expression can be reduced to one predominant dimension, which can be definitively ascertained and used to determine the level of protection that will be afforded under the first amendment.

The contrary perspective offered by the skepticism model views expression as containing multiple dimensions, all of which are pertinent to the first amendment, and none of which can be used to justify lessened constitutional protection. Viewed in this way, sexually explicit material is properly understood as representing (among other things) the human tendency to engage in socially deviant behavior, a tendency that is also expressed variously as renegade art and anti-establishment politics. There is no logically consistent way to attack pornography without also seeking to constrain other expressions of social deviance, because the anti-porn cause is rooted in a more pervasive concern with the deviance itself.

A passage from the Pornography Commission Report is illuminating:

> [W]e find it difficult to understand how much of the material we have seen can be considered to be even remotely related to an exchange of views in the marketplace of ideas, to an attempt to articulate a point of view, to an attempt to persuade, or to an attempt seriously to convey through literary or artistic means a different vision of humanity or of the world.[264]

This passage implicitly refers to Frederick Schauer's notion that pornography is not "speech" for the purposes of the first amendment,[265] but it also hints at the Commissioners' more basic reaction to pornography. The anti-porn crusaders dislike pornography because it speaks to the dark, antisocial, irrational side of the reader (or viewer). Porn has a purely visceral appeal. It proposes no ideas because the intellect is not its province. It does not articulate a set of constructive social

264. PORNOGRAPHY COMMN. REP., *supra* note 102, at 265.

265. *See* notes 113-48 *supra* and accompanying text.

values because it is inherently narcissistic and libidinous. It does not seek to persuade because those partaking of porn are already convinced of its desirability.

But it cannot be said that porn does not represent "a different vision of humanity or the world." The rejection of the very concept of social worth is a fundamental characteristic of the vision porn expresses. Indeed, one measure of the pornographic content of an item is the extent to which it attacks the most sacred aspects of the majority ethic. Pornography seeks out society's rawest nerve, and then presses on it. The violation of social proscription is the basis for pornography's appeal. Furthermore, the same pervasive negativity that infuses pornography also characterizes much of modern art, literature, and radical political expression. This is significant, because all of the judicial opinions discussed above and all but one of the academic advocates of censorship[266] profess a desire to protect salacious expression if it can be shoehorned into one of these categories of social respectability. Unfortunately, at the outer boundaries it is frequently difficult to distinguish between an artistic leer and a pornographic one. It does not diminish the value of art to suggest that many modern artists are driven by indecent impulses indistinguishable from those that motivate the purchasers and purveyors of porn.[267] Indeed, the popular press

266. The exception is Catharine MacKinnon. *See* notes 182-85 *supra* and accompanying text.

267. Lustful obsession in art sometimes takes a very personalized form. For example, Oskar Kokoschka commissioned a dollmaker to make a life-sized doll of his estranged lover Alma Mahler. The doll later turned up in an oppressive painting called "Self-Portrait with Doll," in which "Kokoschka portrays himself also looking dumb and doll-like as he points ruefully in the direction of the reclining creature's belly and genitalia." Bass, *A New View of Kokoschka,* ARTNEWS, Feb. 1987, at 111. Egon Schiele's favorite subject was himself, usually unclothed, and often captured in the act of making some masturbatory gesture. *See* S. WILSON, EGON SCHIELE 21-32 (1980). *Tropic of Cancer* contains a great deal of explicit material relating to the author's infatuation and exploits with French prostitutes. H. MILLER, TROPIC OF CANCER (1961). And then there is Brando and the butter dish. *See Last Tango in Paris* (United Artists 1973). The more popular forms of artistic expression are equally obsessed with the forbidden "alternative sexual visions." For example, before he became a megastar the rock singer Prince was best known for his odes to incest.

The fact is that artists are frequently inspired (whether consciously or subconsciously) as much by their lewd subject matter as by the loftier questions of form and composition. Arthur C. Danto, art critic for *The Nation,* recently described the artist Eric Fischl as "a relentless holder of an ethical mirror in which are reflected, as images, our weak and sleazy moral profiles." Danto, *Eric Fischl,* THE NATION, Mar. 31, 1986, at 769. Viewed literally, however, Fischl's paintings contain little more than distilled representations of bored but well-fed Americans striking vaguely-threatening sexual poses. Danto properly defends the presentation of sleaze as necessary to communicate Fischl's artistic and political points. As Danto says, Fischl's conscious attitude is almost certainly one of moral approbation; his subjects' "puffy breasts and sagging bellies and empty looks" are undoubtedly "a metaphor for the decay of meaning in their lives." *Id.* at 771. Even so, does the moralist Fischl not linger a bit too long on the dissolute fleshiness of his scenes? Isn't it possible that Fischl finds the total degradation of the society he depicts just a tad enticing? Don't we all? How else can one explain the persistent attraction in artistic representation of Caligula's Rome, Isherwood's Berlin, and fin-de-siecle Vienna? It is not easy for an

revels in the scabrous underpinnings of art. Would the recent controversy over Andrew Wyeth's Helga paintings and drawings have been half as heated without the intimations of lust and adultery that lurked just beneath the surface?[268]

Much of twentieth-century art has been informed by the same acidic ethos on which pornography is founded. Yet most advocates of censorship would permit the continued distribution of artistic materials that have lewd subjects because the real message of those pieces can be ignored. The certification of an object as Art greatly reduces the object's ability to communicate anti-social ideas. By branding something worthwhile, society can permit itself to relax. There is anaesthesia in aesthetics. Society operates on the assumption that Luis Buñuel was not really a razor-happy sadist,[269] Egon Schiele was not really obsessed with auto-eroticism,[270] and Henry Miller was not unnaturally preoccupied with the sexual faculties of French prostitutes.[271] Society's formalist aesthetic ideal asserts that each of these artists was concerned mainly with the creation of High Art, itself a noble social goal.[272] The certification of sexually explicit expression as art thus permits the absorption and nullification of whatever hostile messages the art was intended to convey. The expression is denatured, and the threat originally posed by an antagonistic author is removed.[273]

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artist such as Fischl to "say something disturbing about masturbation, molestation, loneliness, incest, bestiality, lust, sloth, intemperance, vanity, cupidity, selfishness and loss," *id.*, at 772, without understanding, and perhaps experiencing, their appeal.

268. Note, for example, the following excerpt from a review of Wyeth's "Helga Pictures" when they were shown at the National Gallery of Art.

> Just about every desire and feeling that the artist seems to have about woman is projected onto her. Helga appears as an embodiment of nature and a force of dark and mysterious sexuality. She is presented as page boy and Prussian, vulnerable as a sleeping child and hard and punitive as a military official. In the naked kneeling position in which Mr. Wyeth occasionally places her, and in the way some brush strokes lash and bind her, there are clear hints of sadomasochistic fantasies, but they are expressed without the humor or passion that offer the possibility of artistic resolution or growth.

Brenson, *Art: "The Helga Pictures" by Wyeth,* N.Y. Times, May 24, 1987, § 1, pt. 2, at 49, col. 1.

The objectification of women that Catharine MacKinnon views as the single most destructive aspect of pornography (which, indeed, she views as the defining characteristic of pornography, *see* MacKinnon, *Civil Rights, supra* note 154, at 18-20) is also a basic element of Wyeth's paintings and drawings. "It is not that there is too much of Helga but rather that there is too little. Throughout this suite she exists almost totally as an object of the artist's desire." Brenson, *supra.*

269. In *Un Chien Andalou* (L. Buñuel & S. Dali, France 1928), a woman's eyeball is sliced in half with a razor. Buñuel himself played the impassive man slicing the eyeball. *See* Mellon, *An Overview of Buñuel's Career* in THE WORLD OF LUIS BUÑUEL 17 (J. Mellon, ed. 1978).

270. *See* note 267 *supra.*

271. H. MILLER, *supra* note 267.

272. For a critical analysis of the aesthetic perspective that seeks to deny art's dissenting force and use art to affirm existing social and political arrangements, *see* Marcuse, *The Affirmative Character of Culture,* in NEGATIONS: ESSAYS IN CRITICAL THEORY 88 (1968).

273. This is demonstrated very clearly in John Finnis' discussion of aesthetic theory. *See*

The problem with pornography is that it can never be sanitized. Its hostile message cannot be diluted or ignored. Its single-mindedly antisocial character will remain regardless of society's efforts to explain it away. Porn exposes a rot in the framework of society, and the great popularity of porn makes the burghers uneasily suspicious that the surface rot may evidence a more deeply rooted degeneration of their moral and political primacy. Thus, the imperative to suppress pornography reveals a much deeper and more insidious insecurity than the *moralists* will ever acknowledge.

This insecurity is reflected in the Supreme Court's recent tendency to use the predetermined worthlessness of sexually oriented speech to justify suppression of deviant expression generally. The case of *Bethel School District v. Fraser* illustrates this point.[274] In *Bethel* a high school senior was suspended for three days as punishment for a speech he gave in support of a student candidate for school office. A majority of the Court upheld this punishment and rejected the student's first amendment claim.[275]

Finnis, *supra* note 100, at 231-37. The reader will recall that Finnis contends that the first amendment protects only reasoned discourse, and does not apply at all to communication in the "realm of passion, desires, cravings, and titillation." *Id.* at 227. *See* notes 100-13 *supra* and accompanying text. Finnis recognizes that his theory threatens the constitutional protection of art, because "art in all its forms neither derives from, nor appeals to, pure reason alone or even primarily." Finnis, *supra* note 100, at 231. Finnis solves this dilemma by looking beyond the art itself to the idea that art embodies. "What makes art art is not that it stimulates feelings, which any family picture album can do, but that it expresses them symbolically. To be more precise, art expresses *ideas* of feeling . . . ." *Id.* at 232-33 (footnote omitted; emphasis in original).

The artist, then, is analogized to a journalist or historian, objectively communicating factual ideas and concepts in the medium of art. "[T]he creative artist is not so much venting his own emotions, as imagining and conceiving emotions and feelings in such fashion that his understanding of them can be communicated through the symbolic form of his chosen art." *Id.* at 233. This conception of the artist thus requires that art be viewed from a respectful distance in order to appreciate properly the information it communicates. "Only when we hold the work of art at arm's length is it artistic at all. The work brings emotions to mind or presents them for contemplation. When they are actually felt, we have overstepped the bounds of art." *Id.* at 234 n.78, *quoting* Kaplan, *Obscenity as an Aesthetic Category,* 20 LAW & CONTEMP. PROBS. 544, 548 (1955).

This theory expresses the ultimate denigration of art: it transforms art into a decorative distraction for the educated classes. Furthermore, the theory patronizes and insults the artist. Artists may only present safe ideas for the viewer's detached contemplation. The artist may not incite or anger, for when emotions are felt "we have overstepped the bounds of art." *Id.* This aesthetic theory does, however, say a great deal about the psychology of censorship. Proponents of censorship, such as Finnis, view art as dangerous when its latent implications are unconstrained. There is much in art that attacks, corrodes, and ultimately undermines altogether the legitimacy of the status quo. Goya's dark paintings, Leon Golub's depiction of officially endorsed torture, and Brecht's didactic theater are all intended both to outrage and to motivate conduct. These artists did not intend their work to be rationally contemplated from a comfortable distance, nor did they intend their work to be ineffectual. The pornographer, says Finnis, "calculat[es] to avoid all the 'special precautions' with which art must handle certain topics." *Id.* at 235. If the *engagé* art produced in the modern era is any indication, so does the artist.

274. Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1986).

275. It is worth reprinting the speech that got Fraser into trouble:

The majority's view of Fraser's speech implies that the case represents a proper limitation on the demented rantings of a corrupt youth. The Court paints the picture of a wild-eyed unnaturally randy eighteen-year-old standing before an unsuspecting audience, clutching his crotch, and moaning. But by emphasizing the implicitly "obscene," "vulgar," "sexually explicit," and "offensively lewd" nature of Fraser's speech,[276] the Court obscured the real point the student intended to convey. The context of Fraser's speech makes it clear that he had no intention of arousing his audience sexually. The double entendre was aimed as much at the authority figures in the auditorium as it was at the students in the audience. The speech was a gentle swipe at the high school's ruling class, and it obviously hit its mark. Yet because the speech contained sexual innuendo, the Supreme Court confidently approved the suppression of its content and the punishment of the speaker.

The *Bethel* case is a logical outgrowth of the idea that expression concerning sex is by its nature entitled to less rigorous protection under the first amendment than other subjects of discourse. This view, which must form the premise of all proposals to suppress pornography, fundamentally misconstrues the manner in which sexual speech is used in our society. As Fraser's speech demonstrates, sexually oriented expression is often used as a vehicle for a broader range of anti-authoritarian notions.[277] And anti-authoritarianism is a category of expression that should head the list of subject matter entitled to protection by the first amendment. The ability to tweak the nose of the

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"I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most . . . of all, his belief in you, the students of Bethel, is firm.

"Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.

"Jeff is a man who will go to the very end — even the climax, for each and every one of you.

"So vote for Jeff for A.S.B. vice-president — he'll never come between you and the best our high school can be." 106 S. Ct. at 3167 (Brennan, J., concurring in the judgment).

276. *See* 106 S. Ct. at 3163, 3165-66.

277. The Court has in one instance responded to this point by asserting that the form of a message can be divorced from the content of that message. *See*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (permitting the FCC to restrict public broadcast of the infamous "seven dirty words"). The Court held that the government regulation upheld in Pacifica "will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. at 743 n.18. In other words, the Constitution protects only the pure essence of expression — *i.e.*, its content — and not the particular words with which that essence is communicated. But if the form of communication is now a dispensable element of expression, the Court has rendered "To be or not to be?" the constitutional equivalent of "Shall I kill myself or what?" Robbing words of their power is one of the surest ways to rob expression of its content.

king and his minions without legal retribution should be the starting point of any democratic theory.

The flaunting of nontraditional sexuality is one of the most iconoclastic gestures one can make in this country.[278] More often than not, deviant sexual expression is merely the focal point for a more comprehensive rejection of bourgeois morality writ large. It is a means of expressing that rejection in terms that are often calculated to offend the comfortable, the self-satisfied, and the squeamish. It exhibits a willingness to go beyond the parameters set by polite society. It intentionally spits in the face of those representing the status quo. Most importantly, having rejected the received notions of proper behavior dictated by society regarding sexual matters, the sexual deviant is perhaps also less likely to march in lock step in response to other, traditionally political mandates as well. Iconoclasm has a political value independent of the particular context.[279] The Marquis de Sade is only the most colorful embodiment of the principle that sexually, aesthetically, and politically deviant expression often issue from the same source.

If censorship of pornographic materials increases, judges will inevitably come to serve not only as art critics, separating the Schieles from the schlock, but as political censors as well, protecting the community's staid and politically conservative values from unwanted interference by the outlandish and the unworthy. The notion that some expression is not worth protecting is a dangerous one, and the impulse to censor is not easily contained. For example, I doubt that the average citizen (nor, for that matter, the average judge) intuitively finds much more enduring social value in the Spartacist League's *Workers Vanguard* than in *Debbie Does Dallas.* The morality principle is unac-

278. Indeed, this is probably true of every country. As Friedrich Engels once observed, "[i]t is a curious fact that with every great revolutionary movement the question of 'free love' comes into the foreground." F. Engels, *The Book of Revelation,* in 2 PROGRESS (1883), *quoted in* C. HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION 247 (1972). For example, the historian Christopher Hill has noted that the principles of radical groups spawned during the English Revolution, such as the Ranters, included various theories of sexual liberation. *See* C. HILL, *supra,* at 306-23. These ideas complemented other tenets of the radical cause, such as the radicals' attack upon ecclesiastical authority and support for the emancipation of women. *Id.*

279. *See, e.g.,* Jerrold Seigel's analysis of the connections between Parisian Bohemians and the Paris Commune of 1871. J. SEIGEL, BOHEMIAN PARIS: CULTURE, POLITICS, AND THE BOUNDARIES OF BOURGEOIS LIFE, 1830-1930, 181-212 (1986). The social iconoclasts of the period were drawn to the political radicalism of the Commune because of their hostility to established institutions, ordinary society, and the very idea of placid normality. Although generally drawn from the ranks of the bourgeoisie, the Bohemians also experienced "a contrary consciousness of exclusion and hostility that could not be firmly attached to any other class identity." *Id.* at 212. These recalcitrant Bohemian attitudes have obvious political connotations, but they have little in common with the rational and moderate political discourse that is often presented as the first amendment ideal. *See, e.g.,* notes 85-148 *supra* and accompanying text.

ceptable because it confirms this intuition, and provides a reasoned analysis by which censorship can be justified. Pornography may be the immediate target of this analysis, but deviant expression of every sort will be the ultimate casualty.

CONCLUSION

Judicial regulation of obscenity has developed historically in conjunction with the judicial enforcement of morality. The morality principle encapsulates the justification for this activity. The principle asserts, as Judge Bork recently put it, that the legal enforcement of majoritarian morality is "the very predicate of democratic government."[280] The Supreme Court has never expressed support for the morality principle quite as openly as Judge Bork, and has therefore left a legacy of piecemeal obscenity rulings that lack any clear theoretical foundation. The academic proponents of censoring pornography have attempted to rectify this unsatisfactory situation by offering a series of highly amorphous and deeply flawed theoretical justifications for suppression. These academic proposals also skirt the real issue of enforcing morality, but they introduce morality through the back door, smuggled in under the guise of philosophical or sociological absolutes. The most recent of these theories (Catharine MacKinnon's) is politically ironic as well. It would establish a system of regulation that could logically lead (in the service of the present power structure) to the censorship of MacKinnon's own work and the work of those who follow her lead. The incorporation of the morality principle into the first amendment necessarily entails that the state's franchise to censor pornographic expression is coextensive with its authority to censor other forms of speech that deviate from established norms.

The disparate apologists of suppression considered in this article are united by a few common intellectual characteristics: belief in the discernibility of good, a corresponding belief in the discernibility of evil, and a deep-seated fear of what might occur to their respective moral (or philosophical or sociological) absolutes if contrary expression were not regulated. Theirs is to a large degree a religious mind-set, a mind-set bent on protecting established verities, cultivating influence, and eliminating heresy. The disposition they share reveres certainty and cannot accommodate the skepticism that distinguishes modernism in all its forms. In the end, however, the proponents of censorship will never achieve a world to their liking. The expression they seek to suppress is merely a reflection of an uncomely world.

280. Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

Collective determinations that the world should be otherwise will not make it so. Louis Henkin distilled the essence of the present debate nearly a quarter-century ago, and in so doing identified the primary reason why the efforts to censor pornography will never solve the real problem. "Obscenity, at bottom, is not crime," Henkin observed. "Obscenity is sin."[281]

281. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963).